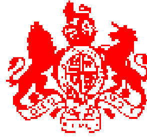

The Court of Appeal for Bermuda

CIVIL APPEAL No. 7 of 2013

IN THE MATTER OF THE COMPANIES ACT 1981
AND IN RE SAAD INVESTMENTS COMPANY LIMITED (in official liquidation)

IN THE MATTER OF THE COMPANIES ACT 1981
AND IN RE SINGULARIS HOLDINGS LTD (in official liquidation)

Between:

PRICEWATERHOUSECOOPERS
(exempted partnership No. 7420)

Appellant

-v-

(1) SAAD INVESTMENTS COMPANY LIMITED
(in official liquidation)

(2) SINGULARIS HOLDINGS LTD
(in official liquidation)

Respondents

Before: **Zacca, P**
Auld, J.A.
Bell, A.J.A.

Appearances: Mr. David Chivers, QC and Mr. Paul Smith, Conyers, Dill & Pearman Limited, for the Appellant
Mr. Rod Attride-Stirling and Ms. Kehinde George, Attride-Stirling & Woloniecki, for the Respondents

Date of Hearing: **13, 14 & 18 June 2013**
Date of Judgment: **18 November 2013**

JUDGMENT

BELL, Acting J.A:

Introduction

1. The appellant in this case is PricewaterhouseCoopers, an exempted partnership registered in Bermuda under registration number 7420 ("PwC Exempted"). Through its branch office in Dubai, PwC Exempted was at the material times the auditor of the two Respondent companies, which are now in liquidation. The first of these ("SICL") was organised and incorporated pursuant to the Companies Law of the Cayman Islands, and a winding-up order in respect of SICL was made by the Grand Court of the Cayman Islands on 18 September 2009; Official Liquidators were appointed on the same date. On 17 August 2012, SICL presented a petition for its winding-up to the Supreme Court of Bermuda. Joint Provisional Liquidators were appointed, and on 14 September 2012, SICL was the subject of a winding-up order by the Supreme Court of Bermuda, and the Joint Provisional Liquidators were appointed as Joint Liquidators. On 13 February 2013, the Joint Liquidators applied by ex parte summons for an order under section 195 of the Companies Act 1981 ("the 1981 Act") requiring, inter alia, the production of documents in relation to SICL and certain of its subsidiary companies.

2. The second of the Respondent companies ("SHL"), also a company incorporated in the Cayman Islands, was placed in voluntary liquidation on 20 August 2009, and on 18 September 2009, the Grand Court of the Cayman Islands made an order that the winding-up of SHL should continue under its supervision, and Joint Official Liquidators were appointed.

3. By summons dated 12 February 2013, the Joint Official Liquidators of SHL applied to the Supreme Court of Bermuda for recognition and assistance at

common law, and for corresponding relief to that sought by SICL under section 195 of the 1981 Act. That application was made pursuant to the Court's inherent jurisdiction, under common law and/or pursuant to section 195 of the 1981 Act. Its application was heard as the same time as the application made on behalf of SICL, and on 4 March 2013, Kawaley CJ made orders under section 195 of the 1981 Act in relation to SICL, and under the inherent jurisdiction of the Court and/or at common law and/or under section 195 of the 1981 Act in relation to SHL (respectively "the SICL Order" and the "SHL Order"). PwC Exempted applied to set aside those orders, and that application was refused by the Chief Justice in a ruling dated 15 April 2013.

Grounds of Appeal

4. PwC Exempted founds its appeal on four grounds. First, it contends that the Supreme Court had no jurisdiction to make the SICL Order in circumstances where there was, it contends, no jurisdiction to make a winding-up order against SICL. Secondly, it contends that the Supreme Court had no jurisdiction to make the SHL Order, either at common law or on grounds analogous to section 195 of the 1981 Act. Further, PwC Exempted contends that if the common law power to grant orders analogous to section 195 does exist, that power does not extend beyond the power available to a liquidator in his home jurisdiction. It is common ground that the Cayman Islands equivalent of section 195 of the 1981 Act does not extend to documents relating to the subject company, as provided for in section 195(3) of the 1981 Act, as opposed to documents which are the property of the company. The distinction is significant in this case because the former provision extends to audit working papers, which are the property of the auditor, not the company.

5. Before the Chief Justice, PwC Exempted accepted that it was not open to it to challenge the making of the SICL Order on the basis that the Court had no jurisdiction to make a winding-up order in relation to SICL. PwC Exempted had

not made a timely objection to the making of the SICL winding-up order because it was said to have been unaware of the making of such order. Consequently, it had needed an extension of time within which to appeal the winding-up order, and its application to the Court of Appeal for such extension had been refused. Hence there was a valid winding-up order against SICL. PwC Exempted's position changed before this Court, and I will come in due course to the manner in which the matter is now put on behalf of PwC Exempted.

6. The second ground of appeal is directed at the SHL Order. PwC Exempted contends that the Court had no jurisdiction at common law to make an order analogous to an order under section 195 of the 1981 Act, in circumstances where the Court lacked statutory jurisdiction to make a section 195 order as such. The grounds of appeal under this head included the contention that the Chief Justice was wrong to find that the UK Supreme Court case of *Rubin v Eurofinance; New Cap Reinsurance* [2012] UKSC 46 did not apply to the totality of the decision of *Cambridge Gas v Committee of Navigator Holdings* [2007] 1 AC 508. *Cambridge Gas,* being a decision of the Privy Council would normally be binding on this Court, but the argument put forward on behalf of PwC Exempted was that where there are inconsistent decisions in the Privy Council (here, between the decision in *Cambridge Gas* and the earlier decision of the Privy Council in *Al Sabah v GrupoTorras* [2005] 2 AC 333), then where the later Privy Council decision has been disapproved by a subsequent decision of the UK Supreme Court, the Bermuda Court should follow the earlier decision, in this case *Al Sabah.* Express complaint was also made of the Chief Justice's reliance on three cases (*Re African Farms* [1906] TS 373, *Frank Schmitt v Henning Deichmann* [2012] EWHC 62 (Ch), and *Picard/Madoff v Primeo Fund* (No. FSD 275 of 2010 Ruling on Preliminary Issues – Dated 14 January 2013). The Chief Justice had held that there was common law power to make an order analogous to one under section 195 of the 1981 Act, in relation to companies to which the section would not otherwise apply, following those decisions. PwC

Exempted submitted that the Chief Justice should have followed the decision of the Privy Council in *Al Sabah* and the decision of the UK Supreme Court in *Rubin*.

7. The third ground of appeal related to the scope of the SICL and SHL Orders. PwC Exempted contends that the Chief Justice erred in holding that the Court was able at common law to grant foreign liquidators powers in Bermuda which were wider than the powers actually possessed by those liquidators in their home jurisdiction. This ground is of course aimed at the order that PwC Exempted should disclose its audit working papers, and there was an alternative plea that if the Court had jurisdiction to order such disclosure, it erred in the exercise of its discretion in doing so. Finally in regard to this ground, complaint is made that the Chief Justice should not have imposed a requirement that the relevant partners and officers of PwC Exempted should confirm on oath that all relevant documents had been produced, and should not have included a penal notice in the relevant orders.

8. Finally in regard to the grounds of appeal, PwC Exempted complained that the Joint Liquidators of SICL, and the Joint Official Liquidators of SHL, had failed to give an undertaking that they would meet the costs of PwC Exempted in complying with the orders made. The grounds of appeal referred to the costs of compliance with the orders made in the Cayman Islands, as well as the costs which would need to be incurred in complying with the Bermuda orders, and contend that PwC Exempted would have to spend "in excess of $500,000" in complying with the orders. I will come in due course to the lack of evidence to support this or any figure for the cost of compliance.

Overview

9. It is important to consider this appeal in the context of the breadth of the liquidations. Various affidavits have been filed, primarily by Hugh Dickson, one

of the Joint Liquidators of SICL and one of the Joint Official Liquidators of SHL (for ease of reference I will refer to them as the Joint Liquidators hereafter), and Trent Lyndon, general counsel for PwC Exempted. Mr. Dickson's first affidavit sworn in the Bermuda proceedings is dated 17 August 2012 and set out in considerable detail the background to SICL. His third affidavit sworn on 7 February 2013, set out similar detail in regard to SHL. To put the application and the orders made by the Chief Justice in context, it is necessary to set out some of the detail to which Mr. Dickson deposed.

10. The authorised capital of SICL is US $4 billion and its stated purpose according to its 2008 audited financial statements was said to have been to hold and manage some of the offshore assets of one Maan Al-Sanea and his immediate family. SICL was described as one of the main holding companies of the Saad Group Limited, which had been formed in 1980 by Maan Al-Sanea, and which was headquartered in the kingdom of Saudi Arabia. SICL's principal activities according to its 2008 audited financial statements were "money market operations and investments in marketable securities and real estate".

11. In August 2007, SICL as borrower entered into a facility agreement with a syndicate of bank lenders for an aggregate amount in excess of US $2.8 billion. In consequence of a downgrade (and subsequent rating withdrawal) by two of the major rating agencies of the credit ratings given to certain Saad Group entities, including SICL, SICL was obliged to notify the agent for the facility agreement of an event of default. This led to a notice accelerating payment of all sums due under the facility agreement, without response from SICL. Within weeks, on the application of Ahmad Hamad Algosaibi and Brothers Company ("AHAB"), the Grand Court made a worldwide freezing order in respect of SICL, among others, in an amount of $9.2 billion. A writ was issued by AHAB within days thereafter.

12. In relation to SHL, Mr. Dickson set out the appropriate detail in his third affidavit. He indicated that SHL was also a defendant in the proceedings taken by AHAB, that AHAB had asserted a proprietary claim over the assets of SHL, and that SHL had made a counterclaim in those proceedings. He put the estimated value of unsecured claims (excluding AHAB's claim) against SHL as US $864 million.

13. In his first affidavit, Mr. Dickson set out considerable detail of the events which followed, which included the order to wind-up SICL in the Cayman Islands, and a recognition order made in the High Court of England and Wales. Mr. Dickson advised that in breach of the orders of the Grand Court of the Cayman Islands, Maan Al-Sanea had failed to

    (i) prepare and submit a statement of affairs for, amongst others, SICL,
    (ii) deliver up property belonging to SICL in his possession custody or control, and,
    (iii) attend for oral examination in Saudi Arabia.

14. Mr. Dickson opined that the outcome of the liquidation was subject to a significant amount of uncertainty, due in part to the complexity of its affairs, the position of the wider Saad Group, and the litigation which had been commenced by AHAB, which made complaints of fraudulent conduct and breach of fiduciary duty against Maan Al-Sanea. Those claims by AHAB are disputed by SICL. Mr. Dickson said that it was impossible at that stage to provide a realistic estimated outcome of the liquidation, but that there was in any event a very significant deficiency, running into billions of US dollars, as regards creditors in the winding-up of SICL (see paragraph 28 of his first affidavit). Mr. Dickson indicated that the investigations undertaken by the liquidators had revealed substantial inter-company transfers, and that a detailed forensic exercise was being undertaken to understand which entity

had claims to which assets in consequence of these transactions, and to determine whether there were claims against third parties. He then opined that it was critical for the liquidators' continued investigations to obtain access to the files kept by SICL's former auditors.

15. Mr. Dickson then set out considerable detail regarding the attempts which the liquidators had made to obtain information and documents relating to the affairs of SICL, SHL and certain related subsidiaries, from PwC Exempted. He stated that the original document request had been made in August 2009, and that in the absence of cooperation, an order pursuant to section 103 of the Companies Law of the Cayman Islands had been obtained on 7 September 2010. He set out a litany of complaints in relation to the delay in complying with the Cayman Islands order, the ultimate production of only a fraction of the thousands of documents that PwC Exempted had advised they had in their possession, and heavy redaction in relation to certain of those documents. Mr. Lyndon dealt with these complaints in relatively broad terms. He maintained that the scope of production sought was "very broad indeed", and required consideration to be given to documents held in relation to work on a number of associated companies. He set out some detail of the large number of documents covered by the orders. The delay was not disputed, but in relation to the extent of compliance, Mr. Lyndon complained that it was unsatisfactory that the liquidators were arguing these points before the Bermuda Court rather than the Cayman Court, and he sought to justify the redaction. He described the auditors' concerns that the Joint Liquidators were attempting to engage in a form of pre-action discovery.

16. It is of course neither necessary nor appropriate to seek to resolve those issues in the context of this appeal. However, what is clear is that the liquidations of SICL and SHL are both highly complex, as well as substantial in terms of dollar amounts. Further, it would be surprising if the task of the liquidators has not been hampered by the refusal of the beneficial owner to provide a statement of

affairs, to deliver the books and records of the companies to the liquidators, or to attend for oral examination in Saudi Arabia.

SICL's Liquidation and the SICL Order

17. Subject to the issue of scope, to which I will turn in due course, the first ground of appeal turns on whether the decision of this Court in *PWC Bermuda v Kingate Global Fund Ltd* (Ct of Appl) [2011] Bda LR 32 can be distinguished. If the validity of the winding-up order as against SICL is conceded, then there was jurisdiction to make the SICL Order, and the only question is whether, in the exercise of his discretion, the Chief Justice should have made the order. The grounds of appeal indicate that *Kingate* "appears to decide that the Court's jurisdiction to make an order under section 195 of the Companies Act 1981 cannot be challenged on the basis that the Court had no jurisdiction to make a winding-up order". In fact, that wording is someone disingenuous. Before the Chief Justice, PwC Exempted accepted "that it is not open to it to challenge the jurisdiction of this Court to make an ancillary winding-up Order in respect of SICL because the Court of Appeal refused to grant it an extension of time within which to appeal the winding-up Order"- see paragraph 4 of the Chief Justice's Ruling. And it is not surprising that there should have been such a concession before the Chief Justice, because Evans JA in *Kingate* put the matter in the following terms:-

> "We prefer to base our conclusion, that PwC is not entitled to question the validity of the winding-up orders in the present case, on a somewhat wider ground. The Liquidators' applications under section 195 are made in the course of the winding-up, and the principle as stated in *Re Mid East Trading Ltd.* with which we respectfully agree is that "a winding-up order cannot be impeached in the context of an application made under it.""

This Court is bound by that judgment, with which I would respectfully agree in any event. So the question is only whether the judgment in *Kingate* can be distinguished.

18. For PwC Exempted, Mr. Chivers sought to distinguish *Kingate* on two grounds. The first was that the Court had no jurisdiction to make the ancillary winding-up order, because it was said that SICL was not a company falling within section 4 of the 1981 Act.

19. Before considering whether this contention on behalf of PwC is made out, and, if so, how far the point goes, it is necessary to look at the basis upon which it is contended for PwC Exempted that the provisions of *Re Mid East Trading Ltd.*, upon which Evans JA relied in *Kingate*, should not apply. It is no doubt helpful to start with the general proposition enunciated by Chadwick LJ in *Re Mid East Trading Ltd.* at page 746, in the following terms:-

> "The principle that a winding-up order cannot be impeached in the context of an application made under it is founded on obvious good sense. A winding-up order affects not only the petitioner, the company and the person by or against whom any application is made in the course of the winding-up, but also other creditors and contributories. It could not be acceptable for a court dealing with an application between the liquidator and a particular respondent – whether creditor, debtor, contributory, officer or third party (such as the Lehman companies) – to treat the winding-up order as of no effect while the liquidation continues as between the liquidator and others interested in the winding-up. Either there is a valid liquidation or there is not; the liquidation cannot be effective in relation to some and ineffective in relation to others. If it is to be held ineffective in relation to all that decision must made be in proceedings – whether on an application to rescind the winding-up order or on an appeal from it – in which all those affected have an opportunity to be heard."

20. Chadwick LJ finished that section of the judgment of the Court by adding the following:-

> "By way of completeness, we should make it plain that the order of 8 November 1995 is not an order which can be seen, on the face of the documents which were before the court at the time that it was made, to be irregular. There is nothing in the petition or in the order which suggests that the order ought not to have been made. It is unnecessary to consider whether the position would be different if there were a patent irregularity."

21. Mr. Chivers referred to this as the "patent irregularity" exception. With respect, that overstates the words of Chadwick LJ. He did no more than leave the position open, but it is nevertheless necessary to consider whether a patent irregularity did exist on the face of the document before the Court, namely the petition.

22. The petition to wind-up SICL is headed "In the Matter of the Companies Act 1981". However, nowhere in the petition is it suggested that SICL is a company to which section 4 of the 1981 Act applies. The company's history is set out, and paragraphs 24 – 28 of the petition set out SICL's connection to Bermuda. The winding-up order sought is stated in terms to be ancillary to the winding-up of the company by the Cayman Islands Court, and for the Joint Liquidators, Mr. Attride-Stirling submitted that the references to the 1981 Act were necessary because the 1981 Act provides the only mechanism for winding-up companies in Bermuda.

23. The depth and complexity of the argument on both sides in relation to this issue virtually answers the question whether there is or is not a patent irregularity on the face of the petition. Arguments arise in regard to the construction of section 1 of the External Companies (Jurisdiction In Actions) Act 1885, and the effect of section 4(1)(d) of the 1981 Act. To my mind the complexity of those arguments takes the issue outside the terms of the "patent

irregularity" exception, if such there is. I cannot envisage how it can possibly be right to conduct the necessary analysis of the competing provisions in the context of an application made under section 195 of the 1981 Act. The argument remains an attempt to impeach the winding-up order in the context of an application made under it, and for my part I would not entertain the argument in this case.

24. That leaves the argument that PwC Exempted was a stranger to the liquidation, such that reliance could be based on the case of *In re Bowling and Welby's Contract* [1895] 1 Ch 663 CA. Mr. Chivers made the point that *Bowling and Welby's Contract* was not cited in *Mid East Trading*, but it was of course considered by Evans JA in *Kingate,* where he dealt with the argument in the following terms:-

> "In our judgment, the Judge was certainly correct to hold that PwC is not a "stranger" to the liquidation as the purchaser was in *In re Bowling and Welby.* In addition to being a contingent creditor and a contingent debtor, the firm was the auditor of the Funds and therefore was in a statutory relationship with them, for the whole of the period from 1994 until 2008 during which they carried on their business in Bermuda. On that basis alone, the judgment in *In re Bowling and Welby* does not provide any justification for holding that the rule established in *In re Padstow* and *Re Mid East Trading Ltd* does not apply in the present case."

25. I appreciate that there are arguments that PwC Exempted was not a contingent creditor, as the different PwC entity in the *Kingate* case was said to be. But that is a minor matter, and the important factor to my mind is PwC Exempted's status as auditor. The notion that in these circumstances it should be treated as a stranger to the liquidation is not credible and is rejected.

26. It was also submitted by Mr. Chivers that PwC Exempted was in a different position than the PwC entity in *Kingate,* insofar as PwC Exempted maintained that it was unaware of the winding-up order until section 195 orders were served on it. That seems to me to have relevance only to the application to extend time within which to appeal the winding-up order, which has already been dealt with, and has no relevance to this Court in relation to the section 195 orders.

27. It follows that in my view there are no grounds for distinguishing *Kingate,* and since this Court is bound by that case, the principle that a winding-up order should not be impeached in the context of an application made under it applies in this case, and I would therefore hold that PwC Exempted is not at liberty to challenge the SICL winding-up order in this appeal. Accordingly, the attack on the SICL Order on the ground that there was no jurisdiction to make a winding-up order against SICL must fail.

The SHL Order and the Relevant Authorities

28. I summarised the grounds of appeal advanced by PwC Exempted in relation to the making of the SHL order in paragraph 6 above, and will not repeat that summary. In essence, the point turns on whether *Cambridge Gas* continues to have binding authority on this Court, or whether, in the light of the UK Supreme Court decision in *Rubin*, this Court should regard itself bound by the earlier decision in *Al Sabah.* There is one other decision which I should mention which was referred to in argument, namely the decision in *In re HIH Casualty and General Insurance Ltd.* [2008] 1 WLR 852. *HIH* was no doubt cited because the decision of the House of Lords in that case included a judgment of Lord Hoffmann. But *HIH* was concerned with the distribution of assets in a liquidation, rather than judicial assistance in the earlier stages of the liquidation. And the only reference to *Cambridge Gas* came in the judgment of Lord Hoffmann, when he referred to universality of bankruptcy as having long

been an aspiration of United Kingdom law. There is nothing further in the judgments in *HIH* which seem to me to assist in the resolution of the conflict between the three cases to which I have referred.

29. *Al Sabah* was a judgment of the Privy Council in which the judgment of their Lordships (who included Lord Hoffmann) was delivered by Lord Walker. It was therefore, as Mr. Chivers submitted, as much the judgment of Lord Hoffmann as it was of Lord Walker.

30. *Al Sabah* was a case where the trustee in bankruptcy of a debtor in the Bahamas secured from the Bahamian Court a letter of request direct to the Grand Court of the Cayman Islands, seeking its aid in setting aside two Cayman Islands trusts established by the debtor. The Grand Court held that it had jurisdiction to provide such assistance, both under statute and under the court's inherent jurisdiction, and held that as a matter of discretion it should grant the Bahamian trustee powers to enable him to set aside the trusts. An appeal to the Court of Appeal of the Cayman Islands was dismissed, and the Privy Council similarly dismissed the appeal pursued by beneficiaries under the trusts.

31. The judgment of the Privy Council was based on the terms of the relevant statutes, and the position in regard to the inherent power of the Grand Court to act in aid of a foreign bankruptcy was dealt with in relatively limited terms, in paragraph 35 of the judgment, which is in the following terms: -

> "The respondents relied in the alternative, on the second issue, on the inherent jurisdiction of the Grand Court. This point was not much developed in argument and their Lordships can deal with it quite shortly. If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in

> circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope (see *Dicey & Morris, Conflict of Laws, 13th* ed (2000), vol 2, pp 1181-2, 1186-3) and the inherent jurisdiction of the Grand Court cannot be wider."

If one were to paraphrase the above passage with reference to the facts underlying this appeal, it would read: -

> "If the Supreme Court had no statutory jurisdiction to act in favour of a foreign liquidator, it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 195 of the 1981 Act in circumstances not falling within the terms of that section."

This is of course the argument of PwC Exempted in a nutshell.

32. The case of *Cambridge Gas* concerned a failed shipping venture. Each of five ships was registered in Liberia, owned and managed by a group of Manx companies, with each ship owned by a separate subsidiary of a management company, and all the shares in the management company held by a holding company, Navigator, which was in turn held through a web of offshore companies which included the appellant, a Cayman-registered company which owned 70% of the issued share capital of Navigator. The investors petitioned for relief under Chapter 11 of the United States Bankruptcy Code, and the Federal Bankruptcy Court for the Southern District of New York confirmed a plan for the assets to be taken over by the creditors, ordered that it be carried into effect, and sent a letter of request to the High Court of Justice of the Isle of Man asking for assistance in giving effect to the plan. The respondents petitioned the Manx High Court for an order vesting the shares in their representatives, and the appellants cross-petitioned, asking the Manx High Court not to recognise or enforce the terms of the plan, on the basis that it was a separate

legal entity registered in the Cayman Islands which had never submitted to the jurisdiction of the Federal Bankruptcy Court, and that no order of that court could affect its rights of property in the Isle of Man. The Deemster at first instance held that the relevant clause of the plan was a judgment in rem purporting to change the title to property outside the jurisdiction and could not be recognised. The appellate court, reversing the Deemster, held that the bankruptcy court's order was not a judgment in rem, but a judgment in personam, in proceedings in which Navigator had submitted to its jurisdiction. Lord Hoffmann, delivering the judgment of the Privy Council, held that bankruptcy proceedings were neither judgments in rem nor judgments in personam and that rules of private international law concerning the recognition and enforcement of judgments did not apply. He held that the Manx High Court had jurisdiction to assist the first respondent, as appointed representatives under an order made pursuant to Chapter 11, and that in the circumstances it would not be unfair for effect to be given to the plan.

33. In his judgment, Lord Hoffmann noted that the basis of the argument made by Cambridge (that it had never submitted to the jurisdiction of the New York court and that an order of that court could therefore not affect its rights of property and shares in the Isle of Man), bore little relation to economic reality. Cambridge's parent had participated in the Chapter 11 proceedings, and it was not surprising that the New York court had not troubled to ask whether the voluntary petition presented by Navigator had the formal consent of its own stockholder. Lord Hoffmann also pointed out the other remarkable feature about the position taken by Cambridge, namely that the shares in Navigator which it complained had been confiscated by the exorbitant extra-territorial reach of the U.S. Bankruptcy Court were completely and utterly worthless.

34. In relation to the argument concerning the recognition and enforcement of judgments in remand in personam, Lord Hoffmann indicated that the purpose of bankruptcy proceedings was not to determine or establish the existence of

rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. He then moved on to consider the common law position, starting with the case of *Re African Farms Ltd.* [1906] TS 373. He set out the following passage from the judgment of Innes CJ as to what the active assistance of the court could include, being:-

> "A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the court may impose for the protection of local creditors, or in recognition of the requirements of our local laws."

35. Mr. Chivers submitted that *African Farms* was a case which simply enforced the powers of the English court in the Transvaal. Particularly, he pointed out that *African Farms* does not say that the Transvaal court would give the English liquidator powers that he would only have had in a Transvaal liquidation. Nevertheless, Lord Hoffmann carried on at paragraph 22 of his judgment to set out the following proposition: -

> "At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

36. This is the passage upon which the joint liquidators rely, although in his analysis of the interplay between *Al Sabah, Cambridge Gas* and *Rubin,* the Chief Justice did not set out paragraph 22 of Lord Hoffmann's judgment in *Cambridge Gas*. Nevertheless, the Chief Justice concluded (paragraph 35 of

the Ruling) that there was "little room for serious doubt that the Court possessed the jurisdictional competence to grant the relief sought by the SHL JOLs, although there remains a need for further analysis of the precise basis of that jurisdiction." I will come to the Chief Justice's analysis of the basis for jurisdiction in due course, but would first deal with the judgment of Lord Collins in *Rubin*, and its effect, if any, on *Cambridge Gas*.

37. In *Rubin*, a company had settled a trust under English law to hold funds for consumers who successfully participated in sales promotions organised by it in the United States. A successful challenge under U.S. consumer protection legislation led to the trust having to pay a substantial sum by way of settlement. The company secured an order from the English High Court appointing the applicants as receivers of the trust's property. The applicants then filed for Chapter 11 protection before the bankruptcy court in New York, were appointed as legal representatives of the trust, as debtor, with authority to prosecute all causes of action against potential defendants, and commenced adversary proceedings in New York, which were the equivalent of undervalue transaction and preference claims under English legislation, against the defendants. Those defendants were not present in New York at the relevant time, did not submit to the court's jurisdiction and did not defend the proceedings. Default and summary judgment was entered, and the applicants applied to the High Court for enforcement of those orders in England against the defendants. The judge at first instance refused to recognise the New York court's judgment at common law on the ground that it was an in personam judgment which could not be enforced where the defendants had neither been present nor submitted to the New York court's jurisdiction. The Court of Appeal held that the New York court's judgments, despite having the indicia of judgments in personam, were nonetheless judgments in and for the purposes of the collective enforcement regime of the bankruptcy proceedings, that the ordinary rule on the enforcement of a foreign judgment in personam did not apply to such proceedings and that since there should be a unitary

bankruptcy proceeding in the court of the bankrupt's domicile which received worldwide recognition, the judgment of the New York court could be enforced against the defendants at common law. So it can be seen that the primary issue before the United Kingdom Supreme Court was a conflict of laws one.

38. Lord Collins delivered the leading judgment in the Supreme Court and held, allowing the appeal, that the common law would only enforce a foreign judgment in personam if the judgment debtors had been present or, where the 1993 Act was applicable, resident in the foreign country when the proceedings had been commenced, or if they had submitted to its jurisdiction. He held that as a matter of policy, the court would not adopt a more liberal ruling in respect of enforcement of judgments in the interests of the universality of bankruptcy and that any change in the settled law of the recognition and the enforcement of judgments was a matter for the legislature. So essentially, the appeal succeeded on conflict of laws grounds.

39. Lord Walker and Lord Sumption agreed with the judgment of Lord Collins. Lord Mance wrote a short judgment agreeing with Lord Collins, but without subscribing to what he described as Lord Collins' "incidental observation" that the Privy Council decision in *Cambridge Gas* was necessarily wrongly decided. Lord Mance added (paragraph 178):-

> "This was not argued before the Supreme Court, and I would wish to reserve my opinion upon it. *Cambridge Gas* is, on any view, distinguishable."

40. Later in his judgment (paragraph 188), Lord Mance said: -

> "Whatever view may be taken as to the validity of the Board's reasoning in *Cambridge Gas,* it is clear that it does not cover or control the present appeal."

41. Finally, in a dissenting judgment, Lord Clarke purported to agree both with Lord Collins and Lord Mance that the decision of the Privy Council in *Cambridge Gas* was distinguishable, carrying on to say:-

> "However, in so far as it is suggested that *Cambridge Gas* was wrongly decided, I do not agree. Moreover, I do not think that it would be appropriate so to hold because it was not submitted to be wrong in the course of the argument."

42. Even in regard to paragraph 132 of Lord Collins' judgment, the first sentence of which forms the only basis for disregarding *Cambridge Gas*, the balance of the paragraph makes it clear that Lord Collins was, not surprisingly, looking at matters from a conflict of laws perspective, and appears to be holding that it was in relation to that perspective that *Cambridge Gas* was wrongly decided.

43. That would be consistent with two other comments made by Lord Collins in the course of his judgment. First, in paragraph 33, Lord Collins referred to the case of *Re Impex Services Worldwide* [2004] BPIR 564, one of three first instance judgments analysed by the Chief Justice, to which I will come. Lord Collins referred to *Impex* as being a case of "judicial assistance in the traditional sense." It seems hardly likely that Lord Collins would have so referred to *Impex* had he believed it to have been wrongly decided. Secondly, in paragraph 92, Lord Collins referred to the derivation of Ward LJ's conclusion in the Court of Appeal, referring to "Lord Hoffmann's brilliantly expressed opinion in *Cambridge Gas*." Again it seems unlikely that Lord Collins would have used such language if he took the view that Lord Hoffmann had overstated the nature of the inherent power at common law to provide assistance to a foreign liquidator in terms wider than might have been available to him in the domestic liquidation.

44. As previously stated, the argument for PwC Exempted was that because *Rubin* had disapproved *Cambridge Gas*, this Court should not follow *Cambridge Gas*

but, should instead follow *Al Sabah*. For the Joint Liquidators the argument was summarised by the Chief Justice in paragraph 24 of his Ruling.

45. Mr. Chivers submitted that if what Lord Hoffmann had said in paragraph 22 of his judgment was the ratio of *Cambridge Gas*, then *Rubin* disapproved it. If it was not the ratio, it did not bind this Court. In regard to the first alternative, it seems to me highly doubtful that Lord Collins (and Lords Walker and Sumption by agreeing with him) did in fact disapprove what Lord Hoffmann had said in relation to the extent of the Court's power at common law to afford judicial assistance to a foreign liquidator. This must particularly be the case when there appears to be real doubt, by reason of the comments made by Lords Mance and Clarke, whether the question of *Cambridge Gas* having been wrongly decided was in fact argued before the Supreme Court. However, for reasons which I will come to, I do not believe that Lord Hoffmann's comments in paragraph 22 of his judgment can properly be said to be the ratio of the case, and thus bind this Court.

46. It is to be noted that there is relatively little assistance to be found in the cases to which we were referred in relation to the doctrine of judicial precedent. Perhaps the most helpful passage comes from the case of *Baker v R* [1975] AC 774, which contains the following passage on page 788, from the judgment of Lord Diplock:-

> "Although the Judicial Committee is not itself strictly bound by the ratio decidendi of its own previous decisions, courts in Jamaica are bound as a general rule to follow every part of the ratio decidendi of a decision of this Board in an appeal from Jamaica that bears the authority of the Board itself. To this general rule there is an obvious exception, viz. where the rationes decidendi of two decisions of the Board conflict with one another and the later decision does not purport to overrule the earlier. Here the Jamaican courts may choose which ratio decidendi they will follow and in doing so they may act on their own opinion as to which is the more convincing."

47. Obviously, *Baker* deals with the position of two conflicting Privy Council decisions, without the added complication of a conflicting Supreme Court judgment. The other passage to which we were referred, in the case of *De Lasala v De Lasala* [1980] AC 546, does not cover a conflict between Supreme Court and Privy Council decisions.

48. But at the end of the day, it seems to me that this is not so much a case of conflict between Supreme Court and Privy Council decisions as it is a case of the need to consider the context in which Lord Hoffmann made the comments he did in paragraph 22 of his judgment in *Cambridge Gas*. The principles derived from the case of *African Farms* found the statement made by Lord Hoffmann in paragraph 21 of his judgment, to the effect that those principles are sufficient to confer upon the Manx Court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan which had been approved in the Federal Bankruptcy Court. The underlying factual background in *Cambridge Gas* was very different from that in the case before us, and *Cambridge Gas* was, essentially, a conflict of laws case. The passage upon which the Joint Liquidators rely in paragraph 22 of Lord Hoffmann's judgment follows the question at the start of the paragraph as to the limits of the assistance which the court can give. Lord Hoffmann starts his answer with reference to statutory authority, and then moves on to the position at common law. Even in that regard, Lord Hoffmann refers in the last sentence of that paragraph to the purpose of recognition being "to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings". As Mr. Chivers pointed out, this was not the position of SHL, which was not able to start parallel insolvency proceedings in Bermuda, as had been done in the case of SICL.

49. Neither does it seem to me that the extract from *Al Sabah* on which PWC Exempted relies is the ratio of that case. As appears in the extract quoted in paragraph 31 above, the point was “not much developed in argument”, and concerned the inherent jurisdiction of the court to set aside the trust in question, rather than the grant of assistance to a liquidator of the sort in issue in the case before us.

50. One therefore has to ask for the basis upon which it can be maintained that the statutory assistance obtainable pursuant to section 195 of the 1981 Act can be applied in circumstances where the 1981 Act itself has no application. And the notion that in the absence of such application the provisions of Section 195 can be applied to SHL by way of analogy does not appear to have any basis at common law. In fact, the Chief Justice regarded the direct deployment of the statutory power as the “more principled” basis for assistance, and analysed the first instance cases of *Schmitt* and *Primeo* in reaching that view. With all respect to the Chief Justice in relation to this analysis, I do view it as an academic exercise, the resolution of which is not necessary or indeed helpful for the determination of this appeal. The same may be said for his review of *Impex,* which preceded *Cambridge Gas.* Those cases do not assist in determining the common law of Bermuda.

51. So by way of summary in relation to the issue whether the SHL Order was properly made by the Chief Justice, I start from the premise that the passage relied upon by counsel for the Joint Liquidators from *Cambridge Gas* does not represent the ratio of that case, and is not binding on this Court.

52. It is instructive to look at the position regarding SHL quite separately from the position of its related company SICL. One is then looking at a winding-up order made in the Cayman Islands of a Caymanian company with only the most tenuous of links to Bermuda; that it was audited by the Dubai office of a Bermuda exempted partnership. Such a connection would not found

jurisdiction for proceedings in Bermuda against SHL, and it does not seem to me that it should lead to the making of an order either under or analogous to section 195 of the 1981 Act by way of cross-border insolvency assistance, in circumstances where the Joint Liquidators are unable to secure an equivalent order in the Cayman Islands. To make such an order on the basis of the auditors' connection to Bermuda seems to me to represent unjustifiable forum-shopping, and I would therefore allow the appeal as against the SHL Order.

The Scope of the SICL Order

53. On the basis of my finding above in relation to the SHL Order, this section is concerned only with the issue of the scope of the SICL Order. The ground of appeal is founded on the contention that the Bermuda Court cannot grant foreign liquidators powers in Bermuda at common law that are broader than the powers actually possessed by those liquidators in their home jurisdiction. The argument is made on behalf of both SHL and SICL, and in the case of the latter is presumably made on the basis of the argument that the SICL winding-up order should be set aside. Once that argument has been rejected, the distinction to be drawn between the disclosure of documents belonging to SICL, and those belonging to PwC Exempted, in the form of the latter's audit working papers falls away. There is an alternative plea relating to the exercise of the Chief Justice's discretion in ordering disclosure of the audit working papers, and complaint regarding the requirement imposed by the Chief Justice that the relevant partners and officers of PwC Exempted should confirm on oath that all relevant documents had been produced, and the imposition of a penal notice on the order.

54. The skeleton argument for PwC Exempted concentrated on the proper test for making the orders, in relation to both SHL and SICL, and contended that the Chief Justice had erred in law by misdirecting himself as to the proper test.

PwC Exempted relied upon the judgment of Lord Slynn in *British & Commonwealth v. Spicer and Oppenheim* [1993] AC 426, and the judgment of the Court of Appeal in *Shierson v Rastogi* [2003] 1 WLR 586 CA, with regard to the balancing exercise to be conducted before the section 195 order should be made.

55. PwC Exempted went so far as to say that the Joint Liquidators had not demonstrated a need for any non-company documents (although it conceded that a reasonable need for documents belonging to the companies had been demonstrated). PwC Exempted carried on to describe the benefits to be gained from production of non-company documents as being "at best hypothetical."

56. I do find that an extraordinary contention, given the size and complexity of the liquidations, as to which there is ample evidence, coupled with the obvious difficulty which will have been caused to the Joint Liquidators by the beneficial owner's complete lack of cooperation. Indeed, the Chief Justice said as much in paragraph 83 of his Ruling, when he put the position as follows:-

> "The facts of the present case make it clear beyond serious argument that there is an objectively identifiable need to obtain as much information as possible about the Companies' affairs from their former auditors as the main corporate records have been taken by the former management (or key players in the former management team) beyond the reach of the JOLs."

57. Criticism was made by PwC Exempted of the phrase used by the Chief Justice in describing the general policy emphasis by which the Court ought to be guided, saying it was "to err in favour of assisting" the liquidators provided that no substantial prejudice was caused to the former auditors. PwC Exempted submitted that the use of the word "err" suggests that the Chief Justice ignored the balancing exercise. In my view the Chief Justice was doing no more than indicating a preference, in accordance with the balancing

exercise. I do not think he was using the word "err" in the context of knowingly making an error.

58. There is one paragraph of the Chief Justice's Ruling, paragraph 90, which came in for particular criticism, because the Chief Justice appeared to have accepted that there was "some merit" in the challenge to document production which he then ordered, choosing to deal with the complaint by granting PwC Exempted more time within which to comply, rather than excising the particular request from the scope of the order. That said, the Chief Justice went on in paragraph 92 of his Ruling to find that there was no or no credible basis upon which he should modify the scope of the orders which had been made on an ex parte basis, and he continued that he was satisfied that all the documents sought were genuinely required and sufficiently relevant to the affairs of SICL and SHL. Somewhat surprisingly, the Chief Justice then added the words "even though the case for seeking information about documents relied upon for audit purposes has not been clearly spelt out." This short passage seems to be in conflict with what the Chief Justice said in paragraph 83 of his Ruling, and it is clear from many passages in the Ruling that the Chief Justice was well aware of the distinction to be drawn between documents belonging to the companies, and the audit working papers which are the property of PwC Exempted. He no doubt had regard to the evidence of Mr Dickson, who in paragraph 32 of his first affidavit had described the Joint Liquidators' need to obtain access to PwC Exempted's files as "critical." Looking at matters as the Chief Justice did, in the round, I am satisfied that all of the documents sought are genuinely required and sufficiently relevant to the affairs of the companies that the Chief Justice's Ruling in regard to scope should not be modified.

59. I would add one caveat to that, and that is in relation to the timeline for production. The Joint Liquidators had, on the day of the inter partes hearing, suggested that there should be staged production of documents. The Chief

Justice said that he did not feel confident that he had a sufficient grasp of the practical implications of the proposal to fairly conclude that such a proposal was just. The Chief Justice did make a significant variation to his ex parte order in terms of the time for compliance, and gave liberty to apply to both sides to seek directions regarding any issues which might arise in relation to the implementation of the orders as varied. That provision to apply to the Chief Justice should remain in effect.

60. Before leaving the question of scope, I need to refer to the complaint that the Chief Justice should not have imposed a requirement that the relevant partners and officers of PwC Exempted should confirm on oath that all relevant documents had been produced, and the imposition of a penal notice as part of the SICL and SHL Orders.

61. I cannot ignore the fact that the affidavits on both sides went into considerable detail in relation to the alleged failure on the part of PwC Exempted to comply with the orders made by the Cayman court, which had led to adverse comment on the part of the Cayman Islands judiciary in relation to both the speed and completeness of compliance with the orders of the Grand Court. This no doubt had led to the imposition of penal notices in that jurisdiction. Given the background to this matter, it cannot be said that the Chief Justice erred in the exercise of his discretion in making those orders.

The Cost of Compliance

62. As I indicated, the grounds of appeal referred to a figure “in excess of $500,000” as the cost of complying with the orders made in both Cayman and Bermuda. In its skeleton argument, PwC Exempted indicated that the Chief Justice had been asked to determine this point and had not done so, and asked the Joint Liquidators to give an undertaking in regard to costs rather than have the matter remitted to the Supreme Court. The evidence of Mr

Lyndon was that the Joint Liquidators had required PwC Exempted to spend 1,500 hours and incur over $250,000 in costs, but it appears that those figures related to the cost of compliance with the Cayman orders, and presumably the figure of $500,000 appearing in the grounds of appeal was reached simply by doubling that figure. Certainly, we were shown no evidence as to how this figure was reached. Mr Attride-Stirling submitted there was no authority for the Court to make an order which recovered management time spent in compliance, which presumably would constitute the lion's share of the cost in this case. Mr. Chivers for his part accepted that the figure for costs had not been broken down, and did not provide authority for the undertaking or order which he sought.

63. In the absence of authority, I would not make an order that the Joint Liquidators either be responsible for or give an undertaking in relation to the cost of compliance with the orders made by the Chief Justice, particularly in circumstances where the cost of compliance is far from clear.

Conclusion

64. For the reasons given above, I would therefore dismiss the appeal against the SICL Order, but allow the appeal against the SHL Order. In regard to costs, I would expect that these would follow the event in each case, but will defer making any order in the absence of submissions by counsel.

Signed

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Bell, Acting JA

PRESIDENT:

1. I have had the opportunity to read the judgments of Auld J.A. and Bell J.A. ag. For the reasons given by Bell J.A. ag, I agree that the appeal against the SICL Order should be dismissed. In my view the Kingate Judgment is binding on this Court and cannot be distinguished. PWC Exempted cannot now challenge that winding up order.
2. I agree that the appeal against the SHL Order should be allowed.

Signed

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Zacca, P

AULD J.A.

Introduction

The primary issues in the appeal

1. I acknowledge and adopt with my thanks Bell J.A ag.'s summary in his judgment of the facts giving rise to all the issues in this appeal. There are two primary issues on which the Court has heard argument and one alternative issue on which the Court has yet to hear argument should it be necessary.

2. All three issues arise out of the Chief Justice's grant to Joint Liquidators of SICL and SHL, both Cayman companies, against PWC, their former joint auditors, of a joint production order, to enforce:

   a) purportedly, a Bermudian *ex parte* winding-up order granted by the Chief Justice in respect of SICL, ancillary to a Cayman winding-up order, and – it is not clear - possibly also to enforce the Cayman winding-up order; and

   b) a Cayman winding-up order of SHL, an associated or "related", company of SICL.

   The two primary issues, properly analysed, are:

   1) whether in relation to SICL, the Chief Justice was bound by a decision of this Court in *PWC (a Firm) Kingate Global Fund Ltd (in Liquidation)* [2011] Bda LR 31, (*Kingate CA*) to reject a challenge by PWC, former auditors of SICL in respect of the joint production order affecting it, as an impermissible attempt to impeach one or both of the winding-up orders of SICL; and

   2) whether, in relation to SICL and SHL, the Chief Justice would have had power at common law to make the joint production order against PWC in respect of SICL and/or did have such power in respect of SHL, under or by analogy with the provisions of section 195 in respect of documents in their

respective "custody or power relating to" either company where, a) as in Bermuda, he had no such statutory jurisdiction, and b) it would greatly exceed corresponding provisions in the Cayman legislation. The extent of that excess over Cayman winding-up jurisdiction is well illustrated by the remarkable reach of the following provisions of the joint production order as to production of information and documents in the possession or control of PWC of information or documents common to SICL and SHL and other related companies:

> 1.e) "respecting the affairs of SICL, SHL and other related companies and … to produce all information concerning the promotion, formation, trade, dealings, affairs or property of SICL, SHL and the other related companies, including but not limited to all books, papers, writings, documents and electronic information relating to the Company [*i.e.* SICL] and the Related Companies [including SHL] …"; and
>
> "2… includ[ing] any books and papers relating to SICL and the Related Companies [including SHL]… … includ[ing] that provided by third parties to the related companies, or to PWC .. in the knowledge that it would be utilised for purposes of an audit or other services – or was already in possession of a related company and had been provided to PWC by them … including, but not limited to:
>
> > i) audit working papers, including, but without limitation to, copies of SICL and Related Companies' records that contain workings, comments or markings created by PWC … as part of the audit process;
> > ii) third party confirmations, ["typically", as described in affidavit in support of the Joint Liquidators in support of their application for the joint production against SICL and SHL, "of sums due to or from SICL, SHL and Related Companies, or of assets held on their behalf"] ;
> > iii) all correspondence with SICL, SHL and the Related Companies; and
> > iv) all documentation relating to any non-audit work that was performed"

Relevant Bermudian Statutory Provisions

3. The jurisdiction of the Bermuda Court to wind-up companies and to assist liquidators in enforcing such orders is entirely statutory. It is contained in Part XIII of and Schedule 8 to the *1981 Act,* both dealing with and limited to liquidation of Bermudian "compan..[ies]" as defined in the *1981 Act.* By virtue of sections 2, and 4(1)(d) and 1A, 133 and 134. A "company" includes an "overseas company", but only when, pursuant to a permit granted by a Minister, it is engaged in or carrying on a trade or business, and with a place of business, in Bermuda. At all material times SICL and SHL were overseas companies, but not as defined in the *Act*, for they were not engaged in or carrying on a trade or business, or with a place of business, in Bermuda, permitted or otherwise. Therefore, regardless of the - as yet - un-argued alternative issue in respect of SICL as to the validity of the Bermuda ancillary winding-up order[1] (and, *quaere,* the Cayman winding-up order), neither SICL nor SHL was a "company" in respect of which the Chief Justice, notwithstanding his *ex parte* winding-up order of SICL, had jurisdiction to make either a winding-up order or a section 195 production order.

4. Section 195 of the *1981 Act* empowers the Court to make a production order only in respect of Bermudian companies and "overseas companies" as defined in the *Act*. It provides that the Court may:

> "(1) … summon before it "any officer of the *company* or persons known or suspected to have in his possession any property of the *company* … or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealing, affairs or property of the *company*; (2) examine such person on oath, concerning" … those matters; and "(3) require such person to produce any books and papers *in his custody or power relating to the company* …" [my italics]

[1] See paras. 5 – 11 below. The winding-up petition in the *ex parte* proceeding before the Chief Justice when he made the winding-up order, did not address the*1981 Act's* jurisdictional requirements for it, asserting merely in para. 24 "The Company is linked to the Bermudian jurisdiction by virtue of the fact that it holds assets in the Bermudian jurisdiction. Furthermore, in respect of these assets, the Company did business in Bermuda."

Relevantly to the second primary issue as to private international/common law jurisdiction, this power, is far wider than that available to liquidators under the corresponding Cayman statutory provision,[2] which does not extend to working papers of the sort (see paragraph 2 above) the subject of the joint production order in question here– thus a lack of comity and an encouragement to *forum*-shopping.

The *Kingate CA Argument*

5. Before examining the two primary issues, I should return briefly to the potential alternative issue of the validity of the Bermudian winding-up order of SICL and (arguably also to the Cayman orders in respect of both SICL and SHL). PWC introduced this new and alternative issue in its Notice of Appeal lest it fail in its challenge under the first primary issue to that part of the joint production order relating to SICL. If and in the event of failure of that challenge it would seek to undermine the SICL production order by attacking the validity of the Bermudian winding-up under which the Chief Justice made it.

6. The Joint Liquidators responded to PWC's proposed new and alternative ground of appeal with a Notice of Preliminary Objection. They sought to have it struck out as an abuse of process and contempt of an earlier refusal of this Court to grant leave to appeal raising the same issue. They relied, in any event, on *Kingate CA* as a binding authority in their favour on the basis that it binds this Court to reject any such challenge as in itself an impermissible attempt to impeach the winding-up order in support of which it was made. Mr Rod Attride-Sirling, Leading Counsel for the Joint Liquidators, indicated at the opening of the hearing of the appeal before us that consideration by the Court of that issue alone could well take up all or most of the time allotted for the hearing of the primary two issues.

[2] S. 103, Cayman *Companies Law,*

7. Whether the Court would need to determine that issue would depend on the outcome of the Court's ruling on the validity of the joint production order. The Court, therefore, decided and indicated to the parties that it would postpone argument on that matter until after consideration *and determination* of the PWC's direct challenge to the joint production order.

8. The *Kingate CA* judgment has no bearing on the validity of the SICL production order, as distinct from that as to the validity of either of the winding-up orders in support of which they were respectively made. In *Kingate CA* the Court rejected challenges to section 195 production orders by two companies registered and subject to winding-up orders in the British Virgin Islands and in Bermuda, and carrying on business in Bermuda - thus potentially within the provisions of section 195. The rejected challenges were, *inter alia,* to the Chief Justice's exercise of discretion in making and/or as to the scope of the production orders. The Court did not rule in *Kingate CA* that the challenge to the production orders would amount in themselves to impermissible challenges of or an attempt to impeach the winding-up orders pursuant to which they were made.

9. The Court, in paragraph 23 of its ruling, acknowledged the well-established principle "that a winding-up order … cannot be impeached *in the context* of an application made under it" [my italics]. It did not hold that a challenge of an enforcement order made in support of a winding-up order amounts in itself to such impeachment. Indeed, in paragraphs 7 and 8 of its judgment, the Court expressly declined to express a view on the Chief Justice's consideration and rejection at first instance of a common law or "general jurisdictional" power of the Court to make a production order in supplementation of or substitution for the statutory power of section 195.[3] The Court limited itself, in paragraphs 41 – 53 of its judgment, to examining and affirming the discretionary propriety of the section 195 enforcement orders that the Chief Justice had made. It need

[3] *Kingate Global Fund Ltd (in Liquidation)* [2010] Bda LR, 57 (a decision that he later recanted in *Re Founding Partners Global Fund Ltd.* [2011] Bda LR 2)

not have done that if it had ruled that the challenges to the production orders were in themselves impermissible challenges to or impeachment of the winding-up orders.

10. It follows that the *Kingate CA* ruling has no bearing on the validity of the joint production order here. I, therefore, respectfully disagree agree with Bell J.A. ag.'s statement in paragraph 17 of his judgment that, [s]ubject to the issue of scope, … the first ground of appeal [*i.e.* as to the validity of the SICL production order] turns on whether the decision of this Court in … [*Kingate CA*] can be distinguished". Such an issue, if and to the extent it might concern the jurisdictional validity of the Bermudian and/or Cayman winding-up orders, only falls to be argued if PWC fail on the first primary issue as to the validity of the SICL production order. I return now to that issue.

Primary Issue 1) – Validity of the SICL Production Order as a means of enforcement of the SICL Bermudian and/or Cayman winding-up Orders

11. The Chief Justice noted in paragraphs 4 and 5 of his judgment that - for want of timely appeal by PWC against the Bermuda SICL winding-up order - there was no issue before him as to the validity of that winding-up order, which incidentally, he had granted *ex parte*. Therefore, there was no need for him to consider the well-established general principle that a winding-up order cannot be challenged – *impeached* – save by way of challenge in the winding-up proceedings themselves or by timely appeal from them – and the Chief Justice did not do so, as is plain from his observations in paragraph 28 of his judgment.

12. The primary complaint of PWC in their Notice of Appeal, and as developed by Mr. David Chivers QC , Leading Counsel for PWC, in argument before the Court, is that the Chief Justice, when considering the SICL challenge to the production order, and seemingly, summarily rejecting it by recourse to the

Kingate CA judgment, wrongly elided the quite separate issues of validity of a winding-up order and validity of a production made to enforce it, albeit that the jurisdictional basis for each, as here, may be the same.[4] This is how the Chief Justice put the matter in paragraphs 4 and 5 of his judgment, but without expressly considering or ruling one way or another on the effect, if any, of *Kingate CA* on the validity of the SICL production order:

> "4. The grounds of the challenge before this Court in relation to the SICL Order are limited to whether or not the Order ought to have been made and/or the scope of the Order. PWC … accepts that it is not open to it to challenge the jurisdiction of this court to make an ancillary *winding-up* Order in respect of SICL because the Court of Appeal refused to grant it an extension of time within which to appeal the *winding-up order*. This Court is bound by the Court of Appeal's decision in … [*Kingate* CA] to the effect that a *winding-up order* may not be challenged to [*sic*] an application made by liquidators … under section 195 of the *Act.* [my italics]
>
> 5. An identical challenge is made in respect of the propriety of granting and/or the scope of the SHL Order. However, because the SHL Order was not made in the context of ancillary winding-up proceedings to which section 195 unarguably applies (nice questions about this court's jurisdiction to wind-up overseas companies apart) another jurisdictional challenge is raised ….the Court's power to assist at common law .."

Mr Rod Attride-Stirling, for Joint Liquidators, adopted the Chief Justice's approach, so far as it went, of regarding PWC's complaint about the SICL production order as bound-in inextricably with the inviolability of the Bermudian winding-up order for want of timely challenge and/or appeal. His argument, which in the light of the majority judgment on this appeal, may yet have to be developed, is that irrespective of its jurisdictional validity or invalidity, does not permit challenge to the production order. He relied on *Kingate CA* as binding on the Court in that respect.

13. In my view, Mr. Chivers' contention in support of PWC's challenge to the validity of the SICL production order as, in itself, *ultra vires* is sound. The

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[4] See Notice of Appeal, para. 3B, and PWC's Skeleton Argument, para. 10 a and b and also paras 4- 6 (responding to the Joint Liquidators' contention that the ruling in *Kingate CA* barred any challenge of thejoint production order. And see paras. 17 – 75 of PWC's Written Submissions -

Chief Justice, in the above passages from his judgment, elided or failed to distinguish between the winding-up order and the joint production order. More particularly, he failed to consider the separate and independent impact of section 195 on the SICL production order rendering it *ultra vires,* from that on the SICL Bermudian winding-up order (also *ultra vires* for the very same reason) and not rescued by his incorrect view that he was bound by *Kingate CA* on procedural grounds to treat it as valid. In the result:

1) the Chief Justice did not rule at all on *Primary Issue 1,* as to his jurisdiction, if any, to make the section 195 SICL production order; and

2) he wrongly excluded the SICL production order from his examination of *Primary Issue 2,* the role of private international/common law where there is conflict with Bermudian law, clearly applicable to SICL as well as to SHL in respect of Bermudian enforcement of their respective Cayman winding-up orders, logically also subject to Mr Attride-Striling's *Kingate CA* objection. (It is noteworthy that later, in paragraphs 36 and 54 of his judgment, the Chief Justice appears to have shifted ground somewhat on this aspect).

14. If, as is contended by PWC in the appeal and as is the case, SICL was not an "overseas company" permitted to trade or carry on business in Bermuda, it was not a "company" within the meaning of section 195 in respect of which a statutory *production order* could have been made, regardless of the status of the SICL winding-up order. It would also follow that the private international/common law issue, as far as it goes, is relevant to SICL as well as SHL, subject to the further issue as to the effect, as here, of conflict with local law. Accordingly, I would allow PWC's appeal on this issue.

Primary Issue 2 - Validity of the SICL and SHL joint production order as a means of private international/common law enforcement of the Cayman winding-up orders

15. This issue is not as to recognition of or challenge to any of the winding-up orders, but as to the mechanism, if any, for their enforcement in Bermuda. It is whether, in the case of both SICL and SHL, the Bermuda Court had a power and duty at "common law" to assist Cayman liquidators to enforce Cayman winding-up orders by means of the joint production order.

16. Whilst the general policy of the Bermuda Court is to recognise and assist the enforcement of overseas liquidations as far as it can pursuant and subject to the statutory confines of the *1981 Act,* it has no statutory jurisdiction or duty to do so. In particular, there is no Bermudian provision for mutual recognition of the sort provided to "designated countries" by section 426(4) & (5)[5] of the United Kingdom *Insolvency Act 1986*, or by EU legislation and implementing regulations.[6] The only other candidate as a possible source of a legal power and duty to recognise and assist overseas liquidators would be discretionary application of such common law principle or principles, if any, as may be applicable in the circumstances.

The leading four authorities on common law recognition of and active assistance in enforcing foreign insolvency orders

17. I set the scene by identifying the context, issues and *ratio* of each of the four most recent leading cases - variously in the Privy Council, House of Lords and

[5] ("4) the courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory. (5) For the purpose of subsection (4) a request made to a court in any part of the United Kingdom in any other part of the United Kingdom, or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matter specified in the request, the insolvency law which is applicable by either court in relation comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard particular to the rules of private international law."

[6] See the *European Council Regulation on Insolvency Proceedings* (1346/2000/EC) or the *Cross-Border Insolvency Regulations 2006,* SI 2006/1030, giving effect to the *UNCITRAL Model Law on Cross- Border Insolvency*

United Kingdom Supreme Court – as to common law assistance to foreign liquidators where it potentially conflicts with local statutory or other law. The Chief Justice, and Counsel before him and on this appeal, have devoted much time and attention to those authorities and to a number of others referred to in them, identifying what they variously perceive as supporting or conflicting *dicta* on the issue. In my view, none save *Al-Sabah v Grupo Torras SA* [2005] 333 2 AC, PC[7] is on its facts, legal context or issues determined, close to those in this case. None of them provides an "all-purpose" or readily applicable test as to what should prevail where, as here, there is conflict or dissonance between locally applicable statute law and a putative common law implant.

18. I, therefore, treat with caution propositions that *dicta* in the authorities summarised here and/or others on which the parties respectively rely in this appeal reflect the *ratio* of the case in question or that they are binding on this court, or more or less persuasive than *dicta* in others. *Dicta* only constitute the *ratio decidendi* of an authority where they enunciate or apply principles and/or rulings on material facts and issues the same as or close to those of the case under consideration. Observations of judges, however eminent, on issues not calling for decision in the case before them do not bind and are of variable persuasiveness.

19. The tide of authority in the UK seems to be running against the aspirational notion of an "inherent", "general" or "common law" principle or rule of private international law of reciprocity with other jurisdictions for assisting local enforcement of foreign liquidations. Even if there is some such principle or rule, the more immediately determinative question would be whether a local court could give effect to it where, as here, it would conflict with or operate outside local statutory provisions such as those in the highly prescriptive insolvency provisions of Part XIII of the *1981 Act.*

[7] Infra, paras. 22 and 23

20. Minimal and highly generalised qualifications of the sort vouchsafed so far in some United Kingdom and other authorities as to where local law or public policy might or might not prevail are of little help. As recent leading jurisprudence in this area of international insolvency jurisdictional disputes shows, there has been a dispiriting disarray at the highest levels of the United Kingdom judiciary. Pending urgently needed extension of international treaty and local statutory regulation of cross-border insolvency issues, the practical and just answer may be to focus on what, if any, room local statutory law and/or clearly established local common law and/or public policy leaves for recourse to the private international law principle of reciprocity.

21. An apt illustration of the need for some clear and practical test of that sort is the following exchange between Lords Mance and Clarke in *Rubin v Eurofinance SA* [2012] 3 WLR 1019, SC – where the issue arose in avoidance proceedings:[8]

> "189 [per Lord Mance] Lord Clarke takes a different view from Lord Collins, but does not define either the circumstances in which a foreign court should, under English private international law rules, be recognised as having 'jurisdiction to entertain' bankruptcy proceedings or, if one were (wrongly in my view), to treat the whole area as one of discretion, the factors which might make it either unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings. …"

> "201. [per Lord Clarke] Lord Mance notes … that I do not define either the circumstances in which a foreign court should be recognised as having jurisdiction to entertain bankruptcy proceedings or the factors which would make it unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings. As I see it, these are matters which would be worked out on a case-by-case basis in (as Lord Hoffmann put it in *HIH*[9] at para. 30) co-operating with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. … All would depend upon the particular circumstances of the case, including the reasons why the debtor had not submitted."

[8] Infra, paras. 36 - 38
[9] Infra paras. 27 - 33

Al-Sabah - 2005

22. The earliest of the four recent leading cases is *Al-Sabah v Grupo Torras SA* [2005] 333 2 AC PC. One of a number of issues under consideration before the Board was much the same as that for decision here. There was a limiting provision in the local country's statute (restricting its application to "traders" as defined in the statute) not in the corresponding provision of the foreign country's statute. But, unlike here, there was also a statutory provision in essentially the same terms as section 426 of the UK *Bankruptcy Act 1985,* conferring on the local court the jurisdiction of the foreign court in regard to similar matters within their respective jurisdictions.[10]

23. Lord Walker, speaking for the Board (of which Lord Hoffmann was a member) stated, albeit *obiter*:

> "35. If the …[local country's court] had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. *But it cannot have had some limited inherent power to exercise the extraordinary powers conferred by … [the foreign country's] Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope … and the inherent jurisdiction of the … [local court] cannot be wider.*"[11] [my italics]

Thus, the unanimous view of the Board was that a local court has no "inherent" jurisdiction to give assistance where local statute or other local law does not, on the facts, apply, but that it could - and did in that case - have local statutory jurisdiction to do so. As will be seen, that approach does not necessarily conflict with the approach of Lord Hoffmann for the Board in the next case, *Cambridge Gas,* a year or so later.

[10] Supra, para. 16, fn 5

[11] See also paras. 10 and 36 of the judgment

Cambridge Gas - 2006

24. The issue in *Cambridge Gas Transportation Corp. v. Official Committee of Unsecured Creditors of Navigator Holdings plc & Ors* [2007] 1 AC 508 PC was whether creditors could enforce a New York bankruptcy order in the Isle of Man, which had a domestic jurisdiction enabling it to achieve, as Lord Hoffmann noted,[12] "exactly the same result" as in New York - and without any section 426 type of "assistance". The Board upheld an order of the Manx Court of Appeal acceding to a request from the New York Court to give effect to its order. It did so by recourse to what Lord Hoffmann described, in para 17 of his judgment for the Board, as a "doctrine" of "universality of bankruptcy law" "… long …an aspiration, if not always fully achieved, of United Kingdom law …" and applied by "many other countries". However, he took care to flag, *obiter,* in paragraph 22, possible limits to the doctrine where, as was not the case in *Cambridge Gas,* there is conflict between the two jurisdictions:

> "What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, s. 426(5) of the 1986 Act[13] provides that a request from a foreign court shall be authority for an English Court to apply 'the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction'. *At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency*. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings *and to give them remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum*." [my italics]

25. This aspirational call of Lord Hoffmann for "universalism" is the high point of the Joint Liquidators' case on appeal that this Court should treat *Cambridge Gas* as binding or at least highly persuasive in their favour. The call disregards

[12] Paras. 21 and 22 of the judgment
[13] Supra para.16, fn 5

his broad reservation in the same passage as to its applicability where there is no equivalence between local and foreign jurisdiction as to proceedings and/or remedies available. Given the exact parity in *Cambridge Gas* between the relevant provisions of the local and foreign courts as to what could be achieved, it is difficult to see how his general proposition in paragraph 22 could be part of the *ratio*, still less as binding or persuasive one way or another, for the Bermuda Court on the specific issue here. If anything Lord Hoffmann's broad, tentative and *obiter,* reservation is more of a piece with PWC's case than that of the Joint Liquidators.

26. It follows, as I have mentioned, that there is no conflict between the respective approaches of the Board in *Al-Sabah* and *Cambridge Gas,* certainly none on the critical issue for decision here as to the effect of the conflict between Cayman and Bermuda law on the reach of the joint production order and/or consequent lack of comity with Cayman law that it engendered.

HIH – 2008

27. In *HIH* [2008] 1 WLR 853, HL, the liquidators of a company in liquidation in Australia, also registered and conducting business and in ancillary liquidation in England, sought an order in the English court for remission to Australia of the Company's English assets for *pari passu distribution.* Australian statutory law, unlike that in England, gave preference to insurance creditors to the prejudice of other creditors. Australia was and is a "designated country under section 426 the English *Insolvency Act 1986.*[14] The question for the Judicial Committee was, therefore, whether the English court had power to assist the Australian court in the distribution of *HIH's* assets in a manner that did not accord with English law.

28. The Judicial Committee (of which both Lords Hoffmann and Walker were members) ruled unanimously that the English court, through the medium of

[14] Supra para. 16, fn 5

the "assistance" provisions of section 426, had a discretionary jurisdiction to dis-apply or disregard the English statutory provision for distribution of assets, but declined to exercise the jurisdiction in the circumstances of the case.

29. For Lords Hoffmann and Walker this was a return to the issue before them in *Al-Sabah,* where there had been conflict between local and foreign law, for which section 426 had been applicable and dispositive, and for Lord Hoffmann also to that in *Cambridge Gas,* where there had been no conflict. Notwithstanding the Board's unanimous view that it had a statutory discretionary jurisdiction under section 426 to dis-apply or disregard the English law provision, there was a division between Lords Hoffmann and Walker on the one hand and Lords Scott and Neuberger on the other as to whether, absent that provision, it could have done so in reliance on Lord Hoffmann's doctrine of "universalism".

30. Lord Hoffmann (with whom Lord Walker agreed) re-visited and elaborated on the concept of inherent jurisdiction based on what he now described as "the golden thread" of "(modified) universalism" in "cross-border insolvency law since the 18th century". The principle, he said:

> "30. … requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

On the question of conflict, where it exists, between that broad principle and local law Lord Hoffmann had stated earlier in his judgment:

> "19. The whole doctrine of ancillary winding-up is based upon the premise that in such cases the English court may "dis-apply" parts of the statutory scheme by authorising the English liquidator to allow actions which he is obliged by statute to perform according to English law to be performed instead by the foreign liquidator according to foreign law (including its rules of the conflict of laws). These may or may not be the same as English law. Thus, the ancillary liquidator is invariably authorised to leave the collection and distribution of foreign assets to the principal liquidator,

> notwithstanding that the statute requires him to perform these functions. Furthermore, the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme."

> "21. It would … make no sense to confine the power to direct remittal in cases to which the foreign law of distribution coincided with English law. … *The fact that the differences were minor might be relevant to the question of whether a court should exercise its discretion to order remittal.* …." [My italics]

31. Lords Scott and Neuberger took the view that the matter was governed solely by section 426. The result, Lord Neuberger added was of "tremendous importance" and "tremendous confusion", where there is:

> "… no majority in the House of Lords sanctioning the application of the ancillary liquidation in a case where the remission is to a non-section 426 country and the distribution is not substantially in accordance with English law priorities … but nor is there any majority in the House denying that the ancillary liquidation can apply to such cases."

He also commented that "to involve the inherent jurisdiction would amount almost to "thwarting the statutory purpose".[15]

32. Lord Phillips went with Lords Scott and Neuberger in holding that section 426 was sufficient for the purpose, expressing no view as to whether the remittal order was also capable of being upheld as a matter of inherent jurisdiction derived from Lord Hoffman's doctrine of "(modified) universalism".[16]

33. I do not read Lord Hoffmann's general statements, reproduced in paragraph 30 above, as a withdrawal from his more general acknowledgment in paragraph 22 of his judgment in *Cambridge Gas* that there may be circumstances of conflict with local law where the local law should prevail. Where there is conflict, the critical question, as I have said, is how to resolve it. Absent some section 426-type provision or implemented treaty provisions in a cross-border insolvency

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[15] Para. 76

[16] See Gabriel Moss QC, *Modified Universalism" and the* Quests for the Golden Thread, 22 Insolvency Intelligence (Nov/December 2008 (10) 145 at 145

case, judges need more constitutionally respectable, clearer and speedier tools for choice between conflicting foreign and local jurisdictions. The least complicated and most principled and practicable, in my view, is respect for local parliamentary supremacy - which seems also to have been Lord Neuberger's instinct in his above comment in *HIH.*

34. Before moving on to the judgments of the Supreme Court in *Rubin,* the last of the four leading cases, I should refer to that of Proudman J, given shortly before the *Rubin* decision, in *Frank Schmitt v Hennin Deichman* [2012] EWCH 62, Ch. With respect, I consider that Proudman J erroneously took as a premise that there is conflict as to *ratio* between *Al-Sabah* and *Cambridge Gas,* an analysis mirrored by the Chief Justice in his judgment in this case.[17] The issue in both *Al-Sabah* and Schmitt, and as here, was "whether the common law power to assist an office-holder permits him to establish and exercise statutory powers not falling within their express scope".[18] Proudman J held, in para. 64 of her judgment, that she had such power. She did so on the basis of her perceived conflict between the Board in paragraph 35 of its opinion in *Al-Sabah*[19] and what she described as the broad brush approach of *Cambridge Gas*[20] and *HIH",*[21] opting in para. 64 of her judgment, for Lord Hoffmann's repetition of his *Cambridge Gas* formula in *HIH*:

> "In the absence of a determinative decision explaining the apparent conflict between the statement in [35] of *Al*-Sabah and the broad brush approach of *Cambridge Gas* and *HIH,* it seems to me that I should take the later and more considered views of Lord Hoffmann and approved by Lord Walker in *HIH.* If there is a conflict in a case of this sort between the application of black letter law and a broad commercial support of international comity there can only be one answer. … the Court had jurisdiction to grant recognition and assistance."

[17] See paras. 50-53,73, 75-77
[18] Proudman J in Schmitt at para. 10
[19] Supra, para. 23
[20] Supra, para.24
[21] Supra, para. 30

35. That proposition, which the Chief Justice characterised, in paragraph 53 of his judgment as a "crucial finding", was, with respect, little more than a "throw of the dice" on Proudman J's mis-reading of the authorities before her. I have much sympathy for her dilemma, faced as she was with a body of loosely expressed and indeterminate, jurisprudence and without the benefit of Lord Collins' analysis in the imminent majority Supreme Court ruling in *Rubin.* For the reasons I have given, there was no such conflict between the ratios, properly analysed, in *Al-Sabah* on the one hand, and in *Cambridge Gas,* on the other. Any that there may have been in this context were not, in any event, about restrictive "black letter law"- construction of a statutory or other instrument's ambiguous terms, but about an ill-defined insinuation into local statutory law of assumptive power that, as here, local law statutory law excluded – in plain language an assault on local parliamentary supremacy.

Rubin - 2012.

36. In the UK Supreme Court decision in *Rubin v Eurofinance SA* and New Cap *Reinsurance* [2012] UKSC 46 the issues in two sets of avoidance proceedings, one in New York and the other in Australia, were variously whether and in what circumstances an order or a judgment of a foreign court could be recognised and enforced in England at common law or, *inter alia,* through the international assistance provisions of the UNCITRAL *Model Law,* or under statutory powers similar to the assistance provisions in section 426 of the English *Insolvency Act 1986.* Lord Collins (with whom Lords Walker, Mance and Sumption agreed) held [22] that the New York and Australian courts had no entitlement to recognition and enforcement by the English courts in overseas avoidance proceedings, whether at common law or under any of those provisions, as none of them provided for reciprocal enforcement of judgments in insolvency matters.

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[22] Para. 132

37. In a lengthy and detailed analysis of the authorities on those issues, Lord Collins acknowledged the existence of a common law power to recognise and grant assistance to foreign insolvency proceedings[23] and the existence of a trend, "but only a trend", toward "modified universalism" in the form of "administration of multinational insolvencies by a leading court applying single bankruptcy law".[24] Whilst applauding what he called the brilliance of Lord Hoffmann's proposition in *Cambridge Gas*,[25] he nevertheless criticised his reasoning and concluded, relevantly, to the common law issue: [26]

> "there is no international unanimity or significant harmonisation on the details of insolvency law, because to a large extent insolvency law reflects national public policy, for example as regards priorities or as regards the conditions for the application of avoidance provisions …, which may differ considerably from those in the English statutory scheme".

In addition, he rejected the proposition, implicit in Lord Hoffmann's "universality" doctrine for cross-border insolvency proceedings, of any special rule for foreign insolvency proceedings more expansive and, more favourable to liquidators, trustees in bankruptcy and other office-holders than the traditional common law rule embodied in the *Dicey Rule* 43.[27] Such provision, he said, should be left to legislation preceded by any necessary consultation.[28]

38. Lord Mance, in common with Lords Walker and Sumption, agreed with Lord Collins' reasoning and conclusions as summarised above, but did not subscribe to his additional finding[29] that *Cambridge Gas* had necessarily been wrongly decided. Importantly, he held, that it was, in any event, distinguishable on its special facts and issues.[30]

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[23] Paras. 29 -34
[24] Para. 16
[25] Para. 92,
[26] Para. 15
[27] Set out in para. 7 and commented on in paras. 88 and 91 of his judgment
[28] Paras 105, 106, 115 – 117, 126 – 131; and *Dicey, Morris & Collins, Conflict of Laws,* 15th ed. 2012, para 14R-054
[29] Para. 132
[30] Paras. 187 and 188

The Chief Justice's Ruling on the validity/ enforceability of the SHL production order at common law

39. The Chief Justice rightly acknowledged, in paragraphs 36 and 54 of his judgment, that he had no *statutory* jurisdiction under the *1981 Act* to uphold the section 195 order against SHL because the statutory regime did not apply to it. I should interpolate that it did not apply because SHL was not a "company within the meaning of the *Act,* nor, for the same reason, was it subject to any of the enforcement powers provided by Part XIII of the *Act*, starting with an including a winding-up order. However, he held, having regard to "the distinctive nature of the recognition proceedings"[31] before him, that he had a separate route to enforcement by way of "analogy with section 195 rather than by reference to the statute itself."[32] In so holding, he was, he said, guided by many authorities at all levels in various common law jurisdictions, but in particular, the well-known and broadly expressed observations of Lord Hoffmann in paragraphs 19, 20 and 22 in his judgment in the Privy Council in *Cambridge Gas*.

40. The critical question for the Chief Justice, as he acknowledged in paragraphs 45 and 46 of his judgment, was the basis on which, if at all, he could exercise his discretion so as to "shape" (tailor?) local insolvency law - not on its terms applicable to SHL on the facts before him – and apply it as if the facts did fit those terms – a question equally applicable, as I have said, to SICL in respect of the Cayman winding-up order to which it was also and primarily subject. His answer, in paragraph 46, was that "the Court's general jurisdiction can be deployed towards that end, and may include making a production order similar to those which could be granted in a local liquidation. …" – again, I interpolate, not so here on the provisions of the *1981 Act* as applicable to the facts here.

[31] Para. 40
[32] Para. 42

41. The Chief Justice went on to consider in the light of the many available authorities at various levels and in a number of jurisdictions how, if at all, he could apply that formula to the facts of and issues in this case. He did so only in relation to SHL, not SICL still seemingly because, contrary to the facts and his proposition in paragraph 36, he regarded the unlawful SICL production order to be outside his remit in respect of the Cayman winding-up order because of the *Kingate CA* ruling. He considered that his first task was to determine whether he had jurisdiction to uphold the SHL production order by dis-applying provisions in the *1981 Act* that restrict or confine their application and notwithstanding the wider reach of the joint production order than that possible under the corresponding Cayman legislation. He had rightly observed earlier, in paragraph 18 of his judgment:

> "….If this Court is competent to make an Order in relation to a company to which the *Companies Act* does not apply by analogy in the exercise of some common law power, the source and limits of that power must be capable of clear and coherent definition."

42. The Chief Justice's valiant attempt to find such definition in the common law required him to make sense, if he could, of the extensive and indeterminate jurisprudence that I have summarised. He did not find any "clear" or "coherent" definition there, but concluded nevertheless that the common law was a suitable vehicle for the purpose by tailoring the provisions of section 195 to the facts in this case. He did that, notwithstanding the *1981 Act's* exclusion of its application to "overseas companies" unless they were trading and/or carrying on business in Bermuda with ministerial permission, requirements that - I do not apologise for repeating -neither SICL nor SHL satisfied. However, he did so with clear unease and through a series of refinements and restatements, culminating in the following propositions in paragraphs 68 and 73:

> "68. … the recognition order itself may be viewed as the trigger which brings into play not simply the general law of Bermuda but its statutory insolvency regime as well, to such extent as the foreign representative (or

> any other person affected by the recognition order) may reasonably seek to rely upon it, being a way which neither: (a) distorts the original statutory purpose of the provisions involved; nor (b) conflicts with local public policy interests."
>
> "73 I am bound to conclude, not without some degree of caution but with greater confidence than when the *inter partes* hearing began, that Bermuda's statutory insolvency regime is potentially brought into play by the recognition at common law of the liquidator of a foreign company, which this Court has no jurisdiction to wind-up [*As here in the case of both SICL and SHL albeit that the SICL winding-up order, on the Chief Justice's ruling, was unchallengeable for want of timely challenge or appeal*] The effect of recognition is to permit the foreign liquidator to seek relief by way of assistance for the foreign insolvency proceeding and *the scope or relief which may be granted is governed by local law (statutory or otherwise)* under the governing rules of private international law. It is these rules which trigger the availability of local statutory insolvency law along with any other … legal rules which are pertinent to the scope of the relief afforded by the Court. And this is why the English common law scope of assistance to a foreign liquidator embraces [in the words of Lord Collins and Clarke in *Rubin]* '*doing whatever the English court could do in the case of a domestic insolvency*'. This conclusion finds only indirect and implicit support in many of the general judicial pronouncements about the close connection between recognition and active assistance in the field of the common law recognition of foreign insolvency orders made in the domicile of the insolvent debtor. …" [my parentheses and italics]

43. The Chief Justice had earlier, in paragraph 71, expressed unease about, and tentativeness in, reaching that conclusion, with clear reference to the conflict with section 195:

> "… if the purpose of enforcing foreign judgments generally is to convert them into local judgments to facilitate the exploitation of local law, it accords with both principle and pragmatism that the 'domestication' of an order appointing a liquidator in the insolvent company's place of incorporation should qualify the foreign office holder to take advantage of local insolvency law as well as general local law. Where the local court has no jurisdiction to wind-up the foreign debtor, it may well be a bridge too far or 'legislating from the bench" … to apply the insolvency regime in such a comprehensive way as to create in substance an ancillary common law winding-up proceeding. …"

44. The focus of those observations had as their premise that, where there is no local winding-up order (as in the case of SHL), the local court should as a

matter of reciprocity, respond to a request from a foreign liquidator for recognition of and assistance in enforcing the foreign winding-up order by resort to and perhaps some modification of the local country's *lex fori.*

45. The Chief Justice added, in paragraph 73 of his judgment, that he regarded this conclusion "as wholly consistent with the explicit conclusions reached on this specific topic" in three cases, one of the Transvaal Supreme Court in 2006[33] and two recent first instance judgments, one in the Cayman Grand Court[34] and the other in England, namely that of Proudman J in *Schmitt.*[35] The Supreme Court's recent ruling in *Rubin* has overtaken all three cases, and all of them are, in any event, clearly distinguishable on their issues, relevant law and facts from those in this case.

46. It is plain from Lord Collins' majority ruling in *Rubin,* in paragraphs 125 – 128 in particular, that there is no such principle of reciprocity in international insolvency proceedings, and that the *dicta* in *Cambridge Gas and HIH* do not warrant it where it would conflict with or disregard statutory or other established local law.[36] In my view, it follows, and accords with the Chief Justice's above expression of concern, that a local court's jurisdiction in its enforcement mechanisms in relation to a foreign insolvent company not carrying on business locally - as here under the *1981 Act* - is outside the local jurisdictional limits. That is so, whether or not the overseas winding-up order is supported by a local ancillary winding-up order. For a Bermudian judge to disregard those limits in the case of both SICL and SHL would, in the Chief Justice's words in paragraph 71 of his judgment, also be "a bridge too far" and amount to "legislating from the Bench".

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[33] *Re African Farms Ltd* [1906] Transvaal LR 373

[34] *Picard v. Primeo Fund* 2013 *Cayman Grand Court, FSD 275 of 2010;* see also *In re Impex Services Worldwide Ltd* [2004] BPIR 564

[35] Supra, paras. 34 and 35

[36] paras 106 -131; see also per Lord Mance in paras. 179 – 190 – in particular para 186,

47. However, the Chief Justice held on the facts before him, and in the exercise of his discretion, that the Joint Liquidators of SHL – and by implication SICL - were entitled to the joint production order sought - and notwithstanding the far more limited right of enforcement available to them under corresponding legislation in the Cayman Islands. In the last sentence of his judgment he reiterated his unease about his conclusion, implicitly inviting "more authoritative consideration at an appellate level".

The respective cases of the parties on the hearing on the issue of validity of the SHL production order

48. PWC's case, as developed and refined in Mr Chivers' oral submissions,[37] is that the Chief Justice wrongly held he had a power and, in the exercise of his discretion, a duty at common law under or analogous to that provided in section 195, to uphold the SHL production order. Relying in particular on *Al Sabah,* and on the House of Lords' majority judgment in *Rubin* critical of Lord Hoffmann's "universalist" approach in *Cambridge Gas,* he submitted that:

1) there is no "general" or common law power in Bermuda to make an order under or analogous to section 195 of the *1981 Act* in respect of an entity excluded by Parliament from the definition of a "company" within section 4 of that Act, as in the case of the SHL production order and also in the case of the SICL production order;

2) none of the authorities upon which either of the parties relied before the Chief Justice – all of which are distinguishable - was binding or otherwise authoritative as to the existence or extent in Bermuda of some local "general" or common law of assistance to do what a Bermudian court could do in the case of a domestic insolvency;

[37] App Sk paras 16 - 37

3) to uphold the joint production order would have the effect of dis-applying or disregarding local statutory law, that is, to enable the Bermuda Court to do "what it could *not* have done in the case of either a SHL or SICL production order in a domestic insolvency";

4) in addition, the joint production order sought in Bermuda was far more extensive than available to the Joint Liquidators under corresponding legislation in Cayman, and consequently were not consistent with the private international law principle of comity;

5) Lord Hoffmann's reference to the doctrine of "universalism" in paragraph 22 of his judgment in *Cambridge Gas* - where there was no conflict between local and foreign law – were not, in any event, part of any *ratio* referable to this case where there is such conflict; and

6) *Cambridge Gas* has been disapproved and widely criticised, in particular by Lord Collins, speaking for the majority, in *Rubin.*

49. Mr. Attride-Stirling, for the Joint Liquidators, submitted in relation to the SHL production order that:

1) Lord Hoffmann's reference in *Cambridge Gas* to the principle of "universalism" and later in *HIH* to "(modified) universalism" is part of the binding *ratio* in each case so as to entitle and require the Court, in the exercise of its discretion, to have recourse to some general or common law jurisdiction to enforce the Cayman winding-up order;

2) there is wide authority including observations of Lord Collins in *Rubin,*[38] binding on, or highly persuasive for, this Court as to the existence of a common law jurisdiction to provide assistance in local courts to overseas

[38] also on other non-binding and clearly distinguishable authorities considered by the Chief Justice

liquidators and to do so in this case to give effect to section 195 even where it would not apply to SHL in a local winding-up;

3) Lord Hoffmann's observations in paragraph 22 of his judgment in *Cambridge Gas* constitute a *ratio* applicable to the facts and issues on this appeal, notwithstanding his allowance for possible primacy of local law where "foreign insolvency law forms no part of the domestic system"; and

4) Lord Hoffmann's approach in *Cambridge Gas* and in *HIH* is applicable and binding on this Court, notwithstanding the different legal context, facts and issues in those cases, including the conflict here between Bermudian and the putative common law and the absence of parity with Cayman law or of any section 426-type provision.

Conclusions

50. In my view, it is not necessary for the Court's disposal of this second *Primary Issue* in the appeal[39] to form a view whether private international law principles, through the medium of "universalism" or otherwise, may be a vehicle for a common law implant of foreign insolvency law into Bermuda's law. The more readily determinable issue for the Court is, as I have said, both narrower and broader. Assuming such a common law implant is possible, the question is whether it can prevail over conflicting Bermudian statutory insolvency law so as to enforce any of the three winding-up orders here on facts that would have deprived a Bermudian court of such jurisdiction in local domestic proceedings. My answer to that question would be "No".

51. In my view, in the absence of some overriding constitutional provision in Bermuda's common law tradition, there is no room in this case for a common law power, however derived, to override or disregard its primary legislation. Any conflict or dissonance between the two is a matter for parliamentary

[39] Supra, paras. 5 - 11

legislation not judicial fine-tuning, as Lord Collins pointed out in paragraphs 128 and 129 of his judgment in *Rubin*:

> "128. In my judgment, the *dicta* in *Cambridge Gas* and *HIH* do not justify the result which the Court of Appeal [*i.e.* in *Rubin*] reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the *Dicey Rule*[40] and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model [UNCITRAL] LAW were the product of lengthy negotiation and consultation."

> "129. A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of a competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection) has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it .... 'if the law is now in need of reform, it is for the legislature, not the judiciary to effect it': *Owens Bank Ltd. v Bracco* [1992] 2 AC 443, 489."

52. Neither SHL nor SICL is a "company" as defined in section 4 of the *1981 Act,* and neither of them is subject to the enforcement provisions, including section 195, or indeed to any of its winding-up provisions, in Part XIII of and Schedule 8 to the *1981 Act.* The determinative question for the Court is whether the Chief Justice, by recourse to the private international law doctrine or notion of "universalism" and with due regard to the confines of those statutory provisions, - had power at common law to make the joint production order with respect to SICL or SHL, or the other "related" companies referred to it under or by analogy with the provisions of section 195.

[40] Set out in para. 7, and commented on in paras. 88 and 91 of his judgment

53. My reasons for rejecting any such common law or other non-statutory power in the case of both SHL and SICL are as follows. In a common law jurisdiction like Bermuda, without entrenched constitutional provisions for overriding primary legislation, there can be no recourse to the common law, however derived, to dis-apply, disregard or dispense with such legislation. That is especially so where to do so would conflict with or extend a statutory provision designedly and clearly drawn, as here, to regulate and restrict its domestic application. Such a step, whether made in support of a private international law principle or otherwise, would be an unconstitutional assault on Parliamentary supremacy. The authoritative analysis of Lord Collins in his majority judgment in *Rubin* is powerful reasoning to that end. If further support in the pre-*Rubin* insolvency jurisprudence were needed, it is to be seen in the judgments of Lord Walker, speaking for the Board (including Lord Hoffmann), in *Al-Sabah*[41] - the closest on its facts and issues to this case of all the authorities cited to the Court (save possibly *Schmitt*)[42] – and of Lord Neuberger in *HIH.*[43]

54. The clear conflict between the highly prescriptive enforcement provisions of the *1981 Act* and the notion of "universalism" giving rise to a putative common law power leaves no room for construction of those provisions shorn of their restrictions applicable to domestic insolvencies. The exercise is not a choice between "black letter law" or purposive construction of an ambiguous or loosely drafted statutory provision, as Proudman J appears to have regarded the matter in *Schmitt,*[44] when opting, in paragraph 64 of her judgment, for the "broad commercial support of international comity".

55. It follows, in my respectful opinion, that the Chief Justice's analysis to like effect in his judgment, taking as his starting point Lord Hoffmann's reference

[41] Supra, paras. 22 & 23
[42] Supra, paras. 34 & 35
[43] Supra, para,31
[44] Supra paras 34 and 35

in *Cambridge Gas* to a private international law doctrine of "universalism", contained two clear and overlapping errors quite apart from the questionable premise that there is such a doctrine and that it is widely and well established, namely:

> 1) the doctrine would entitle him to disregard in the circumstances before him clearly identified statutory limits to or restrictions on the enforceability in Bermuda of domestic winding-up orders; and - put another way
>
> 2) the proposition that a local court should assist a foreign court by doing whatever it can do in the case of a domestic insolvency means that it can also do whatever it could *not* do in the case of a domestic insolvency - namely apply the winding-up or enforcement provisions of Part XIII of the *1981 Act* to entities that are not "companies", including "overseas companies", carrying on business within Bermuda and, in any event, without ministerial permission to do so.

56. The Chief Justice correctly identified, in paragraph 54 of his judgment in words applicable to the joint SICL and SHL production order, the problem posed for him by Lord Hoffmann in paragraph 22 of his judgment in *Cambridge Gas*:

> "The proposition that domestic insolvency law provisions could be deployed was asserted in a legal context in which it was assumed those provisions would in any event apply. It requires very generous reading indeed to extract from this passage authority to deploy *local insolvency provisions which do not apply* and in a case where an ancillary winding-up is not an inconvenience *but a legal impossibility*. For my part a more clearly articulated basis for the application of local statutory provisions which do not otherwise apply must be found." [my italics]

To which I say *Amen.*

57. I conclude by echoing the views of many others, more knowledgeable and experienced than I am in cross-border insolvency proceedings. There is an

urgent need for an internationally coherent and readily identifiable set of legal norms and forensic tools in this field to provide a speedy, practical and inexpensive service to the commercial community for resolution of jurisdictional disputes and other enforcement issues. With respect to the many and distinguished judges who, individually, have had to grapple with the problem on a case-by-case basis over many years, the *collective* product of their endeavours is a poor service to creditors and debtors alike in coping with the serious, urgent and costly pressures of insolvency. As Lord Collins[45] and many others highly experienced in the field of insolvency law have demonstrated and urged, international agreement and statutory implementation is the way to go about it, not piecemeal judicial "legislation".

58. For the above reasons, I would hold:

1) in respect of SICL, that PWC are entitled to challenge the joint production order in respect of it, and to succeed in that challenge. The Court is not bound to the contrary by its ruling in *Kingate CA*: 1) because that ruling is not an authority for the proposition that a challenge to a *production order* made purportedly pursuant to a Bermudian or overseas winding-up order amounts in itself to an impermissible challenge to either winding-up order; and 2) in any event, because the relevant facts and issues in that case are clearly distinguishable.

2). In respect of both SICL and SHL, and without ruling on the possibility of some private international/common law or inherent jurisdiction to enforce the Bermudian ancillary winding-up order against SICL or the Cayman winding-up orders in respect of SICL or SHL, such jurisdiction, if it exists, cannot prevail where, as here:

[45] In *Rubin,* paras. 133 to 155

a) it would conflict with and/or disregard applicable restrictions imposed by the *1981 Act* on the Court's jurisdiction to enforce Bermudian winding-up orders against Bermudian companies, and/or

b) it would offend the private international law principle of comity by vastly exceeding powers in corresponding provisions in the overseas country, Cayman, where the principal and/or sole winding-up orders were made.

59. Accordingly, I would hold that the Chief Justice had no common law or other jurisdiction to make the joint production order in respect of either SICL or SHL and would, therefore, allow the appeal of PWC against that order in respect of both.

60. I reserve my conclusions on the issue of the *scope* of the joint production order under challenge until the resumption, if any, and outcome of PWC's appeal on the third and alternative issue, stemming from the Joint Liquidators' Notice of Preliminary Objection to that part of PWC's Notice of Appeal. (see paragraphs 2, 6 and 7 above).

61. In the meantime, there is an inevitable and absurd consequence of this Court's majority ruling upholding the joint production order in respect of SICL, alongside their participation in the Court's unanimous ruling setting aside the part of the order in respect of SHL. Given the identical and heavily overlapping reach of the order as between SICL and SHL (see paragraph 2 above,) SHL's documentation in original and/or copy form will remain subject to all or much of the order, regardless of the unanimous ruling of the Court that SHL documentation is not subject to it.

Signed

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Auld, JA