In The Supreme Court of Bermuda

COMMERCIAL COURT
COMPANIES (WINDING UP)
2016: No. 136

IN THE MATTER OF ENERGY XXI LTD ("the Company")

AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS FOR DECISION

(in Chambers)

Parallel restructuring proceedings for Bermuda company-Bermuda provisional liquidation and Chapter 11 proceedings in US -US COMI-application by provisional liquidator for prospective recognition order in relation to US plan confirmation order-opposition to recognition order by Equity Committee appointed by US Court-jurisdiction to recognise restructuring orders made by foreign courts in relation to local companies- conflict of law rules applicable to recognition of foreign judgments-jurisdiction to grant stay in support of recognition order

Date of Decision: August 15, 2016
Date of Judgment: August 18, 2016

Mr Steven White, Cox Hallett Wilkinson Limited, for the Provisional Liquidator ("the PL")
Ms Robin Mayor, Conyers Dill & Pearman Limited, for the Company
Mr Delroy Duncan, Trott & Duncan Limited, for the Official Committee of Equity Security Holders of the Company ("the Equity Committee")

Background

1. On April 14, 2016 at 8.13 am, the Company presented a Petition for its own winding-up. The Petition averred that the Company's ability to operate had been impaired by "liquidity issues". With a view to implementing an April 11, 2016 Restructuring Support Agreement ("RSA") with a representative group of noteholders, at 2.01am

that same day the Company and 25 other Group members had commenced a Chapter 11 of the United States Bankruptcy Court proceeding in the Southern District of Texas, Houston Division (the "Texas Court").

2. On the same date that the Petition was filed, the Company issued an Ex Parte Summons for the appointment of John McKenna of Finance and Risk Services Ltd as PL. That application was heard on April 15, 2016, the following day when I made an Order appointing John McKenna as PL with, *inter alia*, the following powers under paragraph 1:

> "*(a) to review the financial position of the Company;*
>
> *(b) to monitor the continuation of the business of the Company under the control of the Company's Board of Directors and under the supervision of this Court and the US Court;*
>
> *(c) to oversee and otherwise liaise with the existing board of directors of the Company (the 'Board') and the creditors and [shareholder[s]] of the Company in determining the most appropriate manner of effecting a reorganization and/or refinancing of the Company in conjunction with proceedings commenced (a) in this Court, and (b) under the Provisions of Chapter 11 of the United States Bankruptcy Court for the Southern District f Texas, Houston Division or (c) such other proceeding as deemed appropriate by the Company after consultation with the PL;*
>
> *(d) to consult with and assist the Company as a debtor in possession in the chapter 11 case regarding the strategy of the chapter 11 reorganisation;*
>
> *(e) to receive notice of hearings and, if thought appropriate by the Company and the PL, to appear and to be heard in the chapter 11 case*…"

3. The first return date of the Petition was June 3, 2016 when it was adjourned by Hellman J to November 4, 2016 at 9.30 am. The PL submitted his First Confidential Report to the Court which I ordered to be sealed on June 15, 2016 at a private hearing at which I also approved both the steps taken by the PL to date and the steps proposed to be taken by him. Accordingly, before the present application was issued, I had not once but twice made Orders approving the Company's pursuit of a restructuring:

    (a) with the creditors' interests protected through the appointment of the PL with what are commonly referred to by practitioners as 'soft-touch' powers;

(b) on terms that the Texas Court would be the primary restructuring forum and this Court the ancillary forum; and

(c) against the background of the proposed Chapter 11 Plan being the product of an RSA between the Company as part of larger corporate Group and key creditor stakeholders.

4. Thereafter, on June 24, 2016, the PL issued the Inter Partes Summons to which the present Judgment relates seeking:

> "*an Order that recognition of a Plan of Reorganization of the Company under Chapter 11 of the US Bankruptcy Code be granted by this Court by permanently staying all claims of creditors and shareholders brought in this jurisdiction against the Company such recognition to be effective upon the confirmation of the Plan by the US Bankruptcy Court sitting in the Southern District of Texas, Houston Division*…"

5. The PL's Summons came on for effective hearing on August 8, 2016 when I acceded in part to an application by the recently instructed counsel for the Equity Committee for an adjournment by granting a seven day adjournment to enable any reasons why the PL's application for a Recognition Order should not be granted to be identified. From a Bermudian law perspective, the Equity Committee appeared to have no tangible economic interest in the Company. However the Committee had been established by the Texas Court which had also authorised the retention of Bermudian counsel to advise the Committee on Bermudian law issues. It appeared to me that the goal of cross-border cooperation which underpinned the present proceedings warranted some deference to be shown to the Committee's concerns.

6. However, having reviewed the relevant[1] evidence and written skeleton arguments in advance of the resumed hearing and heard further oral argument, on August 15, 2016 I granted the Recognition Order sought.

7. I now give reasons for that decision.

Jurisdiction to restructure an insolvent Bermudian company through provisional liquidation proceedings running in tandem with foreign restructuring proceedings to which the Bermudian company is a party

8. The Court's jurisdiction to entertain a winding-up petition which has been presented by an insolvent company which proposes to pursue a restructuring through parallel

[1] I did not consider it necessary to further adjourn to consider a voluminous exhibit attached to the First Affidavit of Deirdre Carey-Brown, an Exhibit which was only delivered to Court at the end of the hearing, having perused an electronic copy of the Affidavit itself.

'soft-touch' provisional liquidation proceedings here and Chapter 11 proceedings in the US Bankruptcy Court, on the explicit basis that the US proceeding will be the primary proceeding and the Bermudian proceeding an ancillary one, has not been seriously questioned in this Court for more than 15 years. In *Re ICO Global Communications (Holdings) Limited* [1999] Bda LR 69, L.A. Ward CJ dealing with broadly similar facts held as follows:

> "*5. A look at the background to the application may be instructive. On 27th August 1999 a Petition was filed by the company which was insolvent seeking the appointment of joint provisional liquidators. There was no prayer that the company be wound up immediately. On the same date the company filed for protection under Chapter 11 of the US Federal Bankruptcy Code to allow it to consider a re-financing/re-organisation which, if successful, would result in the company continuing business.*
>
> *6. An Order was made that Messrs Wallace and Butterfield be appointed joint provisional liquidators. I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court.*
>
> *7. I do not accept that because the company is a Bermuda registered company therefore the Bermuda Court should claim primacy in the winding-up proceedings and deny the joint provisional liquidators the opportunity of implementing a US Chapter 11 re-organisation. Nor do I accept that a Chapter 11 re-organisation will, of its very nature, destroy the rights of creditors and contributories under the regime being established. Such an approach would be to deny the realities of international liquidations where action must be taken in many jurisdictions simultaneously. In this case proceedings are being conducted in the USA and in the Cayman Islands as well as in Bermuda. The aim of the proceedings is to enable the company to re-finance in the sum of $1.2 billion or to re-organise so as to continue in operation. Under such circumstances this Court should co-operate with Courts in other jurisdictions which have the same aim in relation to the affairs of the company. It is not a question of surrendering jurisdiction so much as harmonisation of effort. Moreover, the joint provisional liquidators are officers of this Court who submit Confidential Reports informing the Court of progress being made in the liquidation from time to time. I am satisfied that proceedings in many jurisdictions relating to the same subject matter may properly be conducted at the same time where there is a connecting factor. (Barclays Bank plc v Homan and others [1993] BCLC 680).*"

9. Mr White for the PL aptly relied upon this authority, and subsequent practice based on it, for the broad proposition that the jurisdiction clearly existed for this Court to (a)

recognise a foreign restructuring court as the COMI (centre of main interests) of a Bermudian company, and to (b) recognise a Plan approved by the foreign court without implementing a local scheme of arrangement.

10. There is always a risk that a creditor or shareholder who is not party to or otherwise bound by the foreign restructuring proceeding might, absent a Bermudian parallel scheme, having standing to contend that the foreign court's order approving the foreign plan or scheme of arrangement ought not to be recognised as binding on the dissenting party under Bermudian law. The Equity Committee, however, clearly did not represent parties not bound by the Texas Court's orders: it was a creature of the Texas Court itself.

Alleged abuse of process

11. However, Mr Duncan effectively sought to characterise the orthodox view of the legal position set out above as heresy. In his Skeleton Argument, the following arguments were advanced:

> "*53.5 As the Supreme Court's jurisdiction to make a winding up order is wholly statutory in nature, it follows that the Petition has been presented outside the categories provided for by statute, and is therefore an abuse of process and ought to be struck out.*
>
> *53.6 In any event, as the Court will be well aware, the purpose of any liquidation (whether compulsory or voluntary) is to realise assets, pay-off creditors, and distribute any remaining assets to the shareholders, with a view to the company being dissolved and ceasing to exist. However, it is clear from the face of the Petition that this is <u>not</u> the reason why the Petition has being presented. The only reason why the Petition has been presented is in order to enable the Company to apply for the appointment of a provisional liquidator, and thereby obtain a stay of proceedings in Bermuda. This is why, rather than seeking a winding up order at the first hearing, the Company instead sought an adjournment of the Petition to permit the restructuring proceedings to be concluded.*
>
> *53.7 It is submitted that, whatever the local practice has been hitherto, this (ab)use of the winding up jurisdiction, in circumstances which*

are not provided for by the Companies Act 1981, is unlawful. The Court cannot attempt to achieve a result (a stay of proceedings in Bermuda) by (i) permitting an applicant to present a winding up petition when the Companies Act does not permit the presentation or prosecution of a winding up petition in those circumstances; and/or (ii) granting the appointment of a PL. This would constitute precisely the kind of overreaching which the Privy Council in ***Singularis Holdings Ltd v PricewaterhouseCoopers [2015] A.C. 1675*** *held was impermissible (see below).*

53.8 *Even if the Petition was otherwise properly presented, the appointment of a PL solely in order to obtain to obtain a stay of proceedings is also objectionable. In circumstances where the company's management remain in control, and the PL is merely "taking on an oversight role", it is unclear why a company (which might be in financial difficulty) ought to be subject to the additional expense that this would entail. This is all the more so when the proposed restructuring is objected to by the company's unsecured creditors and shareholders.*

53.9 *Furthermore, parties who contract with, or invest in, Bermuda companies are entitled to assume that the law of Bermuda will be applied to inter alia their winding up. The misuse of the winding up and/or provisional liquidator jurisdiction in this manner is something which runs wholly contrary to that reasonable commercial assumption.*

54. *In the premises, therefore, the Equity Committee consider that the Petition is an abuse of process and ought to be struck out and/or the appointment of the PL ought to be discharged. The Equity Committee will consider, subject to funding and the adjournment requested, making an application to that effect. If the Petition is struck out and/the PL is discharged, as the PL is the applicant*

seeking the Recognition Order, it follows that that application would also fall away."

12. In my judgment, the use of provisional liquidation proceedings in aid of an insolvent restructuring is far too well established for a first instance Bermudian court to question its propriety. I have always regarded the terms upon which provisional liquidators are appointed in such circumstances as authorised, by necessary implication, by the following provisions of the Companies Act 1981:

> "***Power of Court to appoint liquidators***
> *170.(1) For the purpose of conducting proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.*
>
> *(2)The Court may on the presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person.*
>
> *(3)When the Court appoints a provisional liquidator, the Court may limit his powers by the order appointing him.*"[Emphasis added]

13. It is part of the genius of the scheme of Part V of the 1948 UK Companies Act, upon which Part XIII of our own Act is substantially based, that the Court is given free rein to shape a provisional liquidation to meet the commercial needs of every case. The only clear parameters within which the course of the provisional liquidation must run is that, where the company is actually or potentially insolvent, the provisional liquidator must have primary regard to the best interests of the general body of unsecured creditors. In *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] A.C. 1675, the Privy Council made various pronouncements about the limitations on the forms of assistance which this Court could proffer at common law to the liquidators of a Caymanian company. The basis on which the Court could shape a provisional liquidation under Bermuda statute law in relation to a Bermudian company did not fall for determination.

14. Similar restructurings involving liabilities worth many billions of dollars utilising similar Bermudian provisional liquidation proceedings in a subservient role to dominant US Chapter 11 proceedings have taken place without any or any serious objection since 1999. The suggestion that the present proceedings run counter to the reasonable expectations of the Company's investors seemed on its face to be incredible. Extra-judicially, I have explained this longstanding practice as follows:

> "*One important, usually unarticulated, legal factor which implicitly justifies the Bermuda court ceding primacy to the US Bankruptcy Court, in such cases, is the common scenario that the majority of unsecured creditors of the company involved in the restructuring are bondholders or noteholders under instruments governed by New York law. Under Bermuda conflict of law rules, the validity and enforceability of the creditors' claims in a traditional liquidation would be governed by New York law as the proper law of the relevant contracts. In such a case, it is not incongruous for the US Bankruptcy Court to play a leading role in adjusting the creditors' rights, all other factors being equal. The creditors' expectations when contracting with the Bermudian company would have been that in the event of the company's insolvency, their contractual rights would fall to be determined under New York law, even if they were merely claimants in a Bermudian liquidation. This approach might not be followed where the US connecting factors are not so strong.*"[2]

15. Not only did the Committee, appointed by the Texas Court, have no actual or apparent authority to challenge the primacy of the proceedings before the Texas Court, the Equity Holders had no arguable standing to impugn the propriety of the provisional liquidation proceedings at all. In all insolvency scenarios shareholders are understandably aggrieved by the potential extinguishment of their economic interests in the debtor company. They have every right to scrutinize the proposed restructuring and, indeed, to ensure that their investment has genuinely been lost. In the present case, the PL and the Company relied on the following averment found in the First Affidavit of the Company's New York Attorney David S. Meyer, in answer to the complaint that the Company's valuation is flawed:

> "*13. …Based on the PJT Valuation, holders of equity interests are not entitled to a recovery on account of their interests. Indeed, the PJT valuation would need to be wrong by more than $2.2 billion (based on the midpoint in the PJT Valuation) for holders of equity interests to be entitled to any recovery on account of their equity interests under the Plan.*"

16. For the reasons, I had little difficulty in rejecting the Committee's abuse of process arguments.

The alleged defects with the winding-up Petition and its presentation

[2] Ian R.C. Kawaley, Andrew J. Bolton and Robin J. Major (eds.), '*Judicial Cooperation in Offshore Litigation: the British Offshore World*', 2nd edition (Wildy, Simmonds & Hill: London, 2016), page 229. In the present case I assumed that the relevant Notes were also governed by US law, although this was not a material consideration for the present decision.

17. Mr Duncan complained that the Petition was defective because although it contained a prayer for a winding-up order there was no averment that the ground relied upon was a valid one, namely insolvency. It is true that the word "insolvent" does not appear in the Petition. However, the only way in which the Petition as a whole could be sensibly read was in terms that the Company was insolvent on a cash-flow basis, the management was accordingly required to have primary regard to the interests of unsecured creditors and that the goal of the proposed restructuring was to preserve most value for the creditors by enabling the business to be preserved rather than liquidated.

18. Ms Mayor for the Company submitted that the directors had the power to authorise the presentation of the Petition because the Bye-laws did not mandate shareholder approval for an insolvent winding-up: *Re First Virginia* [2003] Bda LR 47. Mr Duncan at the end of the day merely queried whether the requisite authority to present the Petition existed and did not positively assert a lack of authority. It is questionable whether a company can lawfully contract with its shareholders to deprive management of the power to take steps to protect the interests of third-party creditors[3] when the shareholders' economic interest has been extinguished by insolvency. Such an agreement would to my mind be contrary to public policy as well as an impermissible procedural restriction of the constitutional right of access to the Court in circumstances where shareholders would have no legitimate substantive right to approve or veto the presentation of a petition.

19. Although this liberal view of the directors' competence to authorise the presentation of a petition on grounds of insolvency is only based on first instance decisions, this view of the law was too well established in this jurisdiction[4] for it to be open to challenge save at the appellate level. I was prepared in all the circumstances to assume that the presentation of the Petition had been duly authorised by the Company's Board of Directors.

The Jurisdiction of the Court to (Prospectively) Recognise the United States Bankruptcy Court's Order Confirming the Plan

20. The Equity Committee advanced the argument that this Court had no jurisdiction to make the Recognition Order sought for the following principal reasons:

[3] The position may well be different as a matter of principle in the case of a mutual fund or similar company as regards the ability to limit the right of the Board to petition in respect of sums owing to shareholder/creditors.
[4] The Cayman Islands Grand Court had, I was aware, recently adopted the contrary position on the directors' authority to authorise winding-up proceedings: *China Shanshui Cement Group Limited* [2015] 2 CILR 255 (Mangatal, J).

"*58. In* ***Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2007] 1 A.C. 508****, the Privy Council held that the court could give effect to a Chapter 11 plan "as if" a scheme of arrangement had been entered into. However, this decision has been roundly rejected by both the Supreme Court in* ***Rubin v Eurofinance SA [2013] 1 A.C. 236*** *and the Privy Council in* ***Singularis****…*

60.1. In Bermuda, a stay of proceedings arises by operation of law upon (i) a winding up order being made; or (ii) the appointment of a provisional liquidator. For the reasons set out above, the Equity Committee considers that the PL should not have been appointed. But, even if his appointment was proper, there is no statutory or common law basis on which this Court can: (i) permanently stay all claims by creditors and shareholders; (ii) prohibit the commencement of any claim even with the Court's leave (a carve out which is explicitly recognised under s.167(4) of the Companies Act) and/or (iii) order that "no debts may be proved by creditors and no claims may be brought by shareholders/contributories, within these proceedings". Even if this court could apply Bermuda legislation by analogy (which, in the light of ***Singularis*** *it cannot), making the orders sought would put shareholders and creditors in a* <u>worse</u> *position than they would otherwise be under an ordinary Bermuda winding up or scheme of arrangement. The Court does not have the power to do this, whether under statute or common law."*

21. The facts in *Cambridge Gas* were different to the present case in the following material respects. Firstly, there were no parallel provisional liquidation proceedings in the Isle of Man at all so the Manx Court was not invited to consider recognising the plan or the primacy of the Chapter 11 proceedings until after the relevant plan had been approved. Secondly, and more significantly still, the main basis of the shareholder's objection to the plan being recognised in that case was that it was a Caymanian company which had never submitted to the jurisdiction of the US Bankruptcy Court and, accordingly, could not be bound by the US Bankruptcy Court's order under applicable rules of private international law. Crucially, the plan

transferred the shares of Cambridge Gas, while only its parent was party to the proceedings in the US Court. The true nature of the point decided in *Cambridge Gas* may best be illustrated by reference to the following passages in Lord Hoffman's judgment on behalf of the Privy Council:

> "***10*** *Before the High Court, Cambridge's objection succeeded. The deemster found as a fact that although Vela had participated in the bankruptcy proceedings in New York, its subsidiary Cambridge had not submitted to the New York jurisdiction. This finding is somewhat surprising but was upheld by the Court of Appeal and the creditors' committee, faced with concurrent findings of fact, have not appealed against it. So the New York court had no personal jurisdiction over Cambridge. The deemster then held that clause 22 of the plan, as confirmed by the court's order, was a judgment in rem purporting to change the title to property outside the jurisdiction. According to general principles of private international law, judgments in rem can affect only property within the court's territorial jurisdiction. The judgment could therefore not be recognised.*
>
> ***11*** *The Court of Appeal, reversing the deemster, held that upon its true construction, the New York order was not a judgment in rem. It was a judgment in personam in proceedings in which Navigator, by its voluntary petition, had submitted to jurisdiction of the New York court. At common law, the Manx court has a broad discretionary jurisdiction to assist a foreign court dealing with the bankruptcy of a company over which that court had jurisdiction. It could and should assist by vesting the Navigator shares in the creditors' committee to enable the implementation of the plan.*
>
> ***12*** *Mr Howe's argument for Cambridge was straightforward. The New York order was either a judgment in rem or in personam. If it was in rem, then as everyone agrees, it could not affect the title to shares in the Isle of Man. On the other hand, if it was in personam, it was only binding upon persons over whom the New York court had jurisdiction. The fact that Navigator had submitted to the jurisdiction was irrelevant. The Court of Appeal, having found that the judgment was in personam, then proceeded to enforce it against the wrong persona. Cambridge was the relevant persona because the order purported to deprive Cambridge of its property. On the finding that Cambridge did not submit to the jurisdiction, there was no basis upon which the order of the New York court could bind it. Cambridge was a Cayman company whose sole business was to own shares in the Isle of Man. It had nothing whatever to do with New York.*
>
> ***13*** *Mr Howe's submissions as to the rules of private international law concerning the recognition and enforcement of judgments in rem and in personam are of course correct. If the New York order and plan had to be*

classified as falling within one category or the other, the appeal would have to be allowed. But their Lordships consider that bankruptcy proceedings do not fall into either category." [Emphasis added]

22. It was the legal finding in the last sentence of paragraph 13 in *Cambridge Gas* that was subsequently disapproved by the UK Supreme Court in *Rubin-v-Eurofinance SA* [2013] 1 A.C. 236 and by the Judicial Committee of the Privy Council in *Singularis Holdings Ltd-v-PricewaterhouseCoopers* [2015] A.C. 1675. Neither of the two aforesaid cases directly considered recognition of an order approving a plan.

23. *Rubin* concerned the enforcement at common law of a US$10 million default judgment obtained in the US Bankruptcy Court against a defendant who did not participate in the proceedings and who it was agreed did not submit to the jurisdiction of the US Court. This was, the UK Supreme Court held, a personal judgment and so the defendant needed to be either present in the US or to have submitted to the jurisdiction of the US Court for the default judgment to be enforceable against it in the UK. The fact that the judgment was made in relation to claims arising in insolvency proceedings provided no grounds for displacing the normal conflict of laws rules. Lord Collins, the *eminence grise* on conflict of laws, made the following observations in passing about the corresponding conclusions reached on the recognition of judgments issue in *Cambridge Gas*:

    (a) "*103. There is no doubt that the order of the US Bankruptcy Court in Cambridge Gas did not fall into the category of an in personam order. Even though the question whether a foreign judgment is in personam or in rem is sometimes a difficult one (Dicey, 15th ed, para 14-109), that was not a personal order against its shareholders, including Cambridge Gas. The order vested the shares in Navigator in the creditors' committee. It did not declare existing property rights. Indeed the whole purpose of what was the functional equivalent of a scheme of arrangement was to alter property rights. But it is not easy to see why it was not an in rem order in relation to property in the Isle of Man in the sense of deciding the status of a thing and purporting to bind the world: see Jowitt's Dictionary of English Law, 3rd ed (2010) (ed Greenberg), p 1249*";

    (b) "*132. It follows that, in my judgment, Cambridge Gas was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US*

Bankruptcy Court. The property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man."

24. Lord Clarke and Lord Mance both declined to agree that *Cambridge Gas* was wrongly decided, in large part because the relevant point did not directly arise for consideration. But the crucial legal reasoning of Lord Collins on the topic of present concern in *Rubin*, which I have always found compelling, was that if a plan is confirmed by the US Bankruptcy Court which purports to transfer shares in a foreign company which has not itself submitted to the personal jurisdiction of the US Court, English conflict of law rules do not justify recognition of the confirmation order where:

    (1) the US Court lacks personal jurisdiction over the shareholders who rights are being extinguished and/or 'confiscated'; and

    (2) the US Court lacks *in rem* jurisdiction to transfer title to the shares themselves, being shares which are located in another forum and the title to which is accordingly governed by another *lex situs*[5].

25. In *Singularis*, Lord Collins himself described the majority decision in *Rubin* on this issue more concisely as follows:

    "*[93]… The majority of the UK Supreme Court decided in Rubin v Eurofinance that Cambridge Gas was wrongly decided on the ground that the New York court did not have jurisdiction over title to shares in a Manx company."*

26. Accepting entirely the principles upon which Mr Duncan relied, it was impossible to see how they supported the contention that this Court had no jurisdiction to make the Recognition Order in circumstances where:

    (a) the Equity Committee represents shareholders who have submitted to the jurisdiction of the Texas Court and has been appointed not to challenge the jurisdiction of that Court, but rather to fully participate on the merits in the Chapter 11 proceedings;

[5] Although the analysis is framed with reference to a Us Chapter 11 plan, the reasoning would appear to apply with equal force to a Bermudian company which is in provisional liquidation and subject to a foreign scheme of arrangement.

(b) the Company in relation to which the Equity Committee hold shares is itself a party to the US restructuring proceedings; and

(c) accordingly the Texas Court unarguably had personal jurisdiction over both the Company and the relevant objecting shareholders, it being in these circumstances irrelevant that, absent such personal jurisdiction, no in rem jurisdiction over shares located in Bermuda could be said to exist.

27. The Recognition Order was not being used to cut through the recognised private international law rules on recognition of judgments deploying 'woolly' common law cooperation notions to fill gaping statutory chasms. The Equity Committee, unlike the shareholder in *Cambridge Gas*, was not able to complain that recognition entails permitting the enforcement of a foreign judgment (the anticipated Confirmation Order) in circumstances which traditional conflict of law rules do not permit. Rather, the Recognition Order was being sought on the basis of traditional recognition principles against a background of parallel insolvency proceedings in which there was no or no serious challenge to the proposition that the US proceedings should be regarded as the primary proceedings. This jurisdictional argument was, despite its superficial complexity and admitted novelty, sufficiently clearly unmeritorious to enable the Court to firmly reject the plea for yet a further adjournment to enable these points to be argued more fully over two to three days.

Jurisdiction to grant permanent stays sought by the PL

28. The PL sought the following primary relief:

> "*an Order that recognition of a Plan of Reorganization of the Company under Chapter 11 of the US Bankruptcy Code be granted by this Court by permanently staying all claims of creditors and shareholders brought in this jurisdiction against the Company such recognition to be effective upon the confirmation of the Plan by the US Bankruptcy Court sitting in the Southern District of Texas, Houston Division*…"

29. The Second Affidavit of John C. McKenna sworn in support of the present application concluded as follows:

> "*7. Having regard to the financial circumstances of the Company and the rigorous examination the Plan will have undergone in the Bankruptcy Court I have no reason to believe the Plan of Reorganization as confirmed by the Bankruptcy Court will not offer the only reasonable*

chance of preserving some value for some creditors of the Company and enable it to continue as a going concern. A recognition order of this Court permanently staying all proceedings by creditors and shareholders against the Company upon the Plan becoming effective would save the Company the unnecessary expense of a parallel proceeding in Bermuda by way of a creditors' scheme of arrangement. It is anticipated that the Company will eventually be dissolved following the effectiveness of the Plan in the US Chapter 11 Proceedings."

30. Mr Duncan on behalf of the Equity Committee raised the following objections to the propriety of the Court ordering the stays sought:

> "60.3 *Even if the Court had the power to grant these orders (which it does not), these orders appear to be aimed at protecting the Company's current management from actions against them by shareholders. This is the same management who (on their own case as to the Company's value) must have made serious misrepresentations about the Company's financial position to investors and the market and/or have subjected the Company to possible SEC sanctions. It is unclear why it is necessary, in order to "give effect to the Plan in Bermuda", for all shareholder claims to be stayed permanently. The shareholders ought to be able to retain their right to, for example: (i) commence a derivative claim on behalf of the Company against the relevant directors; (ii) invite the Court to make an award for damages against a delinquent director in the context of a winding up (s.247(1) of the Companies Act); or (iii) convene a meeting, or cause a meeting to be convened (with the assistance of the Court if necessary) to remove the Board. This Court should not lend its assistance to orders whose purpose is to let the current management off the hook and/or continue to feather its nest by the equity interest it is set to receive.*"

31. This complaint at first blush lent some weight to the general complaint that it was undesirable and unnecessary to make the Recognition Order prospectively when it was as yet unclear precisely what causes of action would be extinguished or preserved by the Plan. However the practical answer to this point was as follows. The Recognition Order is sought (a) on the explicit basis that the Order lapses altogether if no plan is confirmed, and (b) on the implicit basis that the stays sought will

correspond to stays granted by the Texas Court. In this regard, a perfected version of the Order not having yet been signed, it may well on reflection be that the language in the final Order would merit from some further review with a view to making explicit the implicit basis on which I found that the PL was entitled to an Order in terms of the Inter Partes Summons.

32. The merits of what claims should or should not be released is, of course, entirely a matter for the Texas Court and, as I indicated from time to time in the course of the hearing, this Court's acceding to the PL's application at this stage in no way reflects the views of this Court on the merits of the contentious aspects of the restructuring process. What this Court has substantively determined is that the Company appears to be insolvent and that Group restructuring process supervised primarily by the Texas Court appears to be consistent with the best interests of the Company's creditors, it being unclear what lingering economic stake the equity holders continue to enjoy in Bermudian law terms. Mr White and Ms Mayor were both keen to point out that I granted similar prospective relief in the *MPF* case[6] in which Mr Duncan appeared for the recognition applicant.

33. The main Plan concept is a debt for equity swap with the assets of the debtors being transferred to a restructured entity whose shares would be issued (primarily if not exclusively) to the Company's current creditors. The Company would be an empty shell which would be wound up and dissolved. The First Day Pleadings filed in the Texas Court contemplated releases of claims and a related permanent injunction restraining the pursuit of released claims: -Disclosure Statement, Article VIII Section H.

34. If causes of action against officers and directors were to be preserved by the Plan, against present expectations, any party prejudiced by the Recognition Order could seek to have it varied on the grounds of a material change in circumstances. It would be inherently inconsistent for a 'Recognition Order' to seek to achieve any more than that which the recognised order seeks to achieve, apart from the obvious intent to extend of the territorial scope of the original order's operation. Again, it must be remembered that the dominant purpose of the Recognition Order sought was not to bind strangers with no notice of either the present proceedings or the proceedings before the Texas Court. The main function of the Order is to restrain parties who have submitted to the jurisdiction of the Texas Court and/or who are otherwise bound by any confirmation order from seeking to pursue claims that they have either affirmatively waived or passively lost under US Bankruptcy law.

35. The stay aspect of the Recognition Order was clearly intended to be supplemental to the primary aspect: by granting the Order this Court was signifying that any

[6] Discussed briefly in Kawaley (ed.), '*Offshore Commercial Law*' (Wildy, Simmonds & Hill: London, 2013) at paragraph 17.41.

confirmation order made in Houston should not be subject to re-litigation in Hamilton. Having appointing the PL and approving in principle the pursuit of the US restructuring on the basis that the Texas Court would be the primary restructuring court, it would make no sense to leave open the possibility for parties involved in the US proceedings to re-litigate issues before this Court. Any such re-litigation would be a manifest abuse of process.

36. Granting the stay can be justified by reference to the doctrine of modified universalism and may be seen as an aspect of common law cooperation with a foreign insolvency court in relation to a Bermuda company in provisional liquidation here. As Lord Sumption noted in *Singularis* with reference to the high level principles correctly identified in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 A.C. 508:

> "[16] *Reviewing the English case law, Lord Hoffmann discerned in it a 'golden thread running through English cross-border insolvency law since the 18th century' which, adopting a label devised by Professor Jay Westbrook, he called the 'principle of (modified) universalism' (at [30]):*
>
> > *'That principle requires that English courts should, so far as is consistent with justice and United Kingdom 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.'*"

37. However, more prosaically, the granting of the stays sought may be viewed as an incident of this Court's general jurisdiction to restrain abuses of process and/or to manage the processes of the Court in relation to the cases before it. Regard must also be had to the Court's implied statutory power to stay proceedings brought against a company in liquidation, which is necessarily incidental to the express power to lift the statutory stay, as read with its power to sanction a liquidator's conduct of legal proceedings and entry into arrangements with creditors:

    (a) The Supreme Court Act 1905 is the main statutory source of this general jurisdiction:

    > "*18 In every civil cause or matter which is pending in the Supreme Court law and equity shall be administered concurrently; and the Court, in the exercise of the jurisdiction vested in it by virtue of this Act, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as seems just, all such remedies or relief whatsoever, whether interlocutory or final, as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which appears in such cause or matter, so that as far*

as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail.

19…(c) An injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just; and if any injunction is asked for either before, at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim the right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable.";

(b) the Companies Act 1981 provides:

"167…(4)When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose….

175(1) The liquidator in a winding-up by the Court shall have power, with the sanction of… the Court…—

(a)to bring or defend any action or other legal proceeding in the name and on behalf of the company;…

(e) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent ascertained or sounding only in damages against the company, or whereby the company may be rendered liable…"

38. The submission that this Court had no jurisdiction to grant the stays sought as an ancillary aspect of the Recognition Order could only be rejected.

Discretion to grant further adjournment

39. In terms of the case management question of deciding whether or not to grant the adjournment to allow these improbable arguments to be canvassed further, I was also tacitly guided by the overriding objective in Order1A of this Court's Rules. Order

1A/4 (2) requires the Court to actively manage cases which includes *"(b) identifying the issues at an early stage*" and "*(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*". I did not consider it necessary to entertain arguments about the merits of the restructuring proposals as those matters were quite plainly within the jurisdictional competence of the Texas Court. The evidence which supported this finding may be summarised as follows.

40. The First Affidavit of David S. Meyer explained the rationale for seeking a prospective Recognition Order in the following way:

> "*The Debtors have been advised that a recognition order at this stage, conditional on the confirmation of the Plan, would be beneficial to the reorganization process as the appeal period against such an Order (six weeks) will have expired prior to the target effective date of the Plan and therefore the likelihood of post-confirmation litigation outside the Bankruptcy Court may be minimized. The Debtors have also been advised that, as a conditional order, the recognition order will not affect the chapter 11 proceeding and will have no effect until the Bankruptcy Court confirms the Plan.*"

41. From the perspective of seeking to ensure the fruitful progress of the Bermudian and Texas proceedings, as opposed to the standpoint of a disgruntled party with a commercial interest in obstructing a restructuring which presently promises them no investment return, it made no commercial sense to postpone recognition until after any plan is confirmed. The PL and/or Company could waste considerable costs pursuing a restructuring in the Texas Court only to have a belated challenge to the fundamental principle of the Company being involved in the Chapter 11 proceeding at all. This could, in a case where the Equity Committee has questioned the validity of the present provisional liquidation proceedings, undermine the commercial efficacy of the Chapter 11 proceedings as well.

42. The July 28, 2016 version of the Disclosure Statement filed in the Chapter 11 proceedings strongly supported the characterisation of the Equity Committee as party with interests adverse to the restructuring as it is presently conceived by the Debtors in the Texas Proceeding. Footnote 4 on page 6 states:

> "*EXXI will be wound up under Bermuda law by the Supreme Court of Bermuda. Bermuda law provides that equity interests will only receive payment in the event of all creditors having been paid in full, including interest. As there will be no surplus remaining at EXXI, there will be no payment on equity Interests which will effectively be extinguished upon dissolution of the Company.*"

43. This note also signifies that far from subjecting investors in a Bermudian company to prejudicial elements of US law, what is proposed is to accord equity holders a dispensation which is consistent with their rights under Bermudian law. This recent

document further demonstrates that it is still envisaged that releases will be given and the Texas Court will grant conforming injunctive relief. However, from the Equity Committee's perspective, it seemed obvious that the Chapter 11 regime accords them rights which they would not have under Bermudian law. Their right to be heard appeared to me to be more ample than their corresponding rights in a Bermudian provisional liquidation, as the Committee's very existence is based on a statutory provision.

44. As a result the Committee apparently receives funding support from the Company's estate in respect of legal representation approved by the Texas Court. It was clear beyond serious argument that, consistent with their right to do so under US Bankruptcy law, the Equity Committee would be able to challenge prejudicial aspects of the Plan. The First Affidavit of Deirdre Carey Brown suggests that the main function of the Committee is to ensure that the Debtors fully discharge "*duty to maximize recovery for the unsecured creditors and equity*". It is a credit to the sophistication of the Chapter 11 system as a whole that the Committee is afforded this role even where it appears unlikely that they will be entitled to vote on the proposed Plan. Equity interests would ordinarily have no formal role to play in a Bermudian insolvent restructuring where the best view was that their economic interest in the company had been extinguished altogether.

45. It also seemed obvious, though, that the Equity Committee's role within the Texas Proceedings had been carefully circumscribed by the Texas Court (Hon. David R. Jones, Order dated July 6, 2016), which authorised the retention of Hoover Slovacek LLP to perform services relating to:

    (1) ensuring that equity holders claims against non-debtor parties are not released without their consent;

    (2) ensuring a management incentive plan does not discriminate against equity holders;

    (3) obtaining information from the Official Unsecured Creditors Committee which would not otherwise reasonably be available; and

    (4) valuation related work.

46. Messrs Trott and Duncan Limited were unarguably retained as Bermudian counsel to support the Equity Committee's position in the Chapter 11 proceedings by advising on Bermudian law issues, not to undermine the restructuring as regards the Company altogether. The Committee abandoned seeking approval for a more aggressive stance in the present proceedings at a hearing on August 4, 2016. The Texas Court (Hon. Judge David R. Jones, Order dated August 4, 2016) eventually ordered as follows in relation to the August 8, 2016 hearing of the JPL's Interlocutory Summons:

    "*7. The debtors shall request that the provisional liquidator seek an adjournment of the hearing to consider the recognition order currently set for August 8, 2016 for seven 97) days, or to the first available court date*

thereafter ('the Recognition Hearing'). At the Recognition hearing, the Equity Committee is not prohibited from seeking an order from the Bermuda court for a further adjournment."

47. The Equity Committee succeeded in persuading the Court on August 8, 2016 that, in deference to the August 4, 2016 order of the Texas Court, a short adjournment should be given to enable any seriously arguable challenges to the proposed Recognition Order to be mounted. Although I felt bound seven days later to reject the jurisdictional challenges raised as not seriously arguable having regard to the weight of first instance authority to the contrary, it was in my judgment reasonable for the Committee's counsel to 'test the waters', as it were, bearing in mind that applications such as this have not been recently contested and have never received the benefit of appellate judicial consideration in this forum.

Conclusion

48. For the above reasons on August 15, 2016 I granted the PL's application for a Recognition Order.

Dated this 18th day of August, 2016 _____
IAN RC KAWALEY CJ