In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2009: No. 190

IN THE MATTER OF THE LIQUIDATION OF FOUNDING PARTNERS GLOBAL FUND LTD

AND IN THE MATTER OF A LETTER OF REQUEST OF THE GRAND COURT OF CAYMAN DATED 16 JUNE 2009

JUDGMENT
(In Court)

Date of Hearing: March 28, 2011
Date of Judgment: April 8 , 2011

Mr. Jeffrey Elkinson & Mr. Ben Adamson, Conyers Dill & Pearman,
for the Caymanian Joint Official Liquidators and Hibistar Pte Ltd.

Mr. Jan W. Woloniecki & Ms. Kehinde George, Attride-Stirling & Woloniecki,
for the Receiver

Introductory

1. The present proceedings were commenced by an Originating Summons dated June 23, 2009 pursuant to a Letter of Request issued by the Grand Court of the Cayman Islands to this Court. The Letter of Request dated June 11, 2009 asked this Court to (a) recognise the appointment on June 11, 2009 by the Caymanian Court of David Walker and Ian Stokoe of PricewaterhouseCoopers as provisional liquidators of the Company, and (b) to direct that the provisional liquidators would have such powers as if they had been

appointed by this Court. This relief was granted ex parte on June 29, 2009. Reasons were given on July 29, 2009[1].

2. On July 10, 2009, the joint provisional liquidators ("the JPLs") issued a Summons returnable for July 16, 2009 seeking primarily to compel the Bank of Bermuda to pay over funds standing the account of the Company to the JPLs. However, on July 16, 2009, Mr. Daniel Newman, the Receiver appointed by Order of the US District Court for Florida ("the Receiver") issued a Summons for the same date seeking leave to intervene with a view to determining "*whether or not the Applicant or the JPLs are entitled to control and take possession of the assets of the Company in Bermuda*". By consent, The Chief Justice gave leave to intervene for the purposes of determining this question on July, 16, 2009. By Summons dated September 15, 2009, the Receiver issued a Summons seeking to set aside the June 29, 2009 Order and to obtain assistance pursuant to a contemplated Letter of Request from the US District Court. This application was never heard because on January 6, 2010, the Chief Justice by consent (a) set aside the June 29, 2009 recognition Order, and (b) adjourned the Receiver's application for relief pursuant to an anticipated letter of request *sine die*.

3. The present applications arose in a somewhat convoluted way, although they were set down for hearing in open Court as if the Court was in effect hearing the Originating Summons which commenced the present action on a final or "trial" basis. By an undated Summons filed on or about January 4, 2010, Hibistar Pte Ltd. ("Hibistar") sought directions in respect of its proprietary claim to monies in the Company's accounts in Bermuda. Although this was a dispute between Hibistar and the Company, the Receiver appeared on the first return date of this Summons. Directions were ordered for the exchange of pleadings by the Company and Hibistar, but this application was effectively aborted when the two parties agreed to refer this dispute to the Caymanian Court for adjudication. On September 21, 2010, Justice Angus Foster of the Caymanian Court ordered in salient part as follows:

> "*1. That the Class E assets of Founding Partners Global Fund Ltd. (the 'Master Fund') are solely attributable to and only available to the Class E shareholder of the Master Fund, namely Founding Partners Global Fund Inc. (the 'Feeder Fund').*
>
> *2. That the Class E Shareholding in the Master Fund which is held by the Feeder Fund is solely attributable to and only available to the sole Class E shareholder of the Feeder Fund, namely Hibistar.*
>
> *3.That the Joint Official Liquidators of the Master Fund and the Feeder Fund do distribute and transfer the entirety of the Class E assets to Hibistar, subject to the apportionment of the payment of monies due to third party creditors and the expenses of the liquidation being agreed, or, failing agreement, being determined by the court…*"

[1] *Re Founding Partners Global Fund Ltd.* [2009] Bda LR 35.

4. Before turning to the applications which fall for consideration in this Ruling, two incidental matters must be mentioned. Firstly, on December 29, 2009, Justice Steel of the United States District Court for the Middle District of Florida, Fort Myers Division ("the US Court"), refused the Receiver's application for a letter of request to this Court on the grounds that the US Court only possessed the statutory jurisdiction to issue such requests in connection with the obtaining of evidence abroad. Secondly, the Receiver obtained permission from the US Court (on April 21, 2010) and the now permanent Joint Official Liquidators obtained permission from the Caymanian Court (on April 22, 2010) to enter into a protocol with the Receiver (apparently pursuant to the suggestion of the Chief Justice on behalf of this Court on January 6, 2010). Before the draft protocol approved by the respective courts could be signed, on August 4, 2010 the JOLs advised the Receiver by email that the Company's Committee of Inspection had withdrawn its support for the protocol. On February 10, 2010, the Caymanian Court directed that the JOLs need not enter into the protocol they were previously authorised to consummate.

5. The first application which falls for determination is Hibistar's undated Summons issued on or about January 5, 2011 seeking an Order that:

> "*1. The Class E monies held by the HSBC Bank Bermuda Limited be paid over to the Caymanian Joint Official Liquidators of the Company for distribution in accordance with the directions of the Cayman Courts.*
>
> *2. The appointment of David Walker and Ian Stokoe as Joint Official Liquidators of the Company be recognised by this Court for this purpose and generally.*
>
> *3. Further or other relief.*"

6. This application was supported by the JOLs, who instructed the same counsel as Hibistar. The second application which falls for determination is the Receiver's application for an Order that:

> "*1. Directions be given regarding the approval and enforcement of the protocol agreed between the Joint Official Liquidators of the Company (appointed by the Grand Court of the Cayman Islands) (the 'Liquidators') and the Receiver in relation to their respective entitlements to funds of the Company held by HSBC Bank Bermuda Ltd in the Class A and B accounts and co-operation between the Liquidators and the Receiver.*
>
> *2. Further and/or alternatively such directions be given as just and appropriate in relation to: (a) the application of all funds of the Company held by HSBC Bank Bermuda Limited in the Class A, Class B and Class E accounts, and (b) co-operation between the Liquidators and the Receiver.*"

Factual findings

The Company's business and its jurisdictional ties

7. The Company invested into a Master Fund based in the US, but its investors were all non-US residents for tax purposes. They invested in the Company through the Caymanian incorporated Feeder Fund. The Company has the following offshore managerial and operational links:

    (a) registered office in Cayman;

    (b) administrator initially in Cayman and post-2004 in Bermuda;

    (c) auditors in Cayman;

    (d) Caymanian lawyers (as well as US lawyers);

    (e) one director in Bermuda and one in the US (the late Gordon Howard and Michael Gunlicks, respectively);

    (f) a Caymanian exclusive jurisdiction clause was included in the subscription agreement;

    (g) the Company is now in liquidation in the Cayman Islands with the JOLs resident in Cayman and a Liquidation Committee appointed by the Cayman Grand Court. The principal activity of the Company is now collecting assets and making distributions to third-party creditors and investors.

8. There are also significant US jurisdictional ties. The Investment Manager, whose principal was director Michael Gunlicks, is resident in Florida. The Investment Manager appointed a sub-advisor for the Class E share series which is resident in Illinois. The principal assets of the Company are located in the US and the important task of collecting assets due to the Company is being carried out by the Receiver there, albeit for the benefit of the Company and other members of the wider group of which it forms part. However, the Receiver does not appear to have been clothed with authority to act for the Company generally under US law; nor has the Company itself submitted to the jurisdiction of the US Court.

The US Receivership

9. The Receiver relied on the expert report Professor Jay Westbrook, an eminent and internationally renowned US bankruptcy law expert with a special interest in transnational or cross-border insolvency, to characterise the status of the Company's receivership under US law. His crucial conclusion, which I accept, was as follows:

> "*The Receivership is of a type in which receivers are regularly authorized to acquire and liquidate assets, to resolve claims, and to distribute assets much as they would be distributed in United States bankruptcy proceedings. The order is generally consistent with that course of action in this case.*"

10. Based on a review of the Securities and Exchange Commission ("SEC") Complaint and the May 20, 2009 Order appointing the Receiver, Professor Westbrook opined that (a) the jurisdiction to appoint receivers arises under principles of common law and equity as read with Federal Rules of Procedure; and (b) the Receivership order "*generally authorizes the appointee to obtain possession and control over all of the debtor's property…under the supervision and control of the court*" (paragraphs 15-16). I accept that this function is analogous to one of the two main phases of the liquidation process. However, it is apparent from the expert's report that it is presently unclear precisely how the Receiver will distribute any assets he collects; what distribution rules will apply will only likely be determined after the collection stage has been completed :

> "*18. Thereafter, distribution may be through the existing receivership or within a bankruptcy proceeding, whichever is found to be most advantageous to investors. Thus, for example, it is sometimes faster and less expensive to distribute property and dividends through a receiver rather than through a bankruptcy trustee. On the other hand, should a bankruptcy filing be helpful to the creditors and investors, the Receiver may be authorized by the court to file a bankruptcy petition.*"

11. It is therefore neither possible nor necessary to carry out any comparative assessment as to the implications of choosing between leaving the Company's creditors to their distribution rights under Caymanian law or subjecting such rights to the distribution rules of US receivership or bankruptcy law. The fact that the Receiver is at this stage merely engaged in an asset collection exercise and that the precise distribution rules which will be engaged are presently unclear in my judgment weakens the analogy with an insolvency proceeding even further. It is clear from a review of the Receivership Order that while the Receiver is explicitly authorised to act on behalf of the Company in the asset collection exercise unimpeded by the Company and its officers, the Order does not purport to deprive such officers of all authority to act as agents of the Company.

12. It is also clear from the action heading in the Florida proceedings, that the Company is merely one of six Relief Defendants, the others appearing to be all US-based entities: Sun Capital, Inc., Sun Capital Healthcare, Inc., Founding Partners Stable-Value Fund II, LP and Founding Partners Hybrid-Value Fund, LP. There is no obvious reason why the Receiver, assuming that he alone is competent to bring proceedings on behalf of the Company under US law, cannot in due course remit any net funds collected to the JOLs to be distributed in accordance with Caymanian law. The group nature of the Receivership casts further doubt on precisely how the Company's creditors' rights may be impacted by characterising the US proceedings as the main insolvency proceeding. The narrow view taken by the US Court of its jurisdiction to request assistance from a foreign court suggests that, understandably, the Receivership has a more local than international focus[2].

13. While I accept that the JOLs cannot presently take steps to recover the US assets, I do not rule out the possibility that they might if necessary be able to obtain recognition for the Caymanian proceedings as either a foreign main or non-main proceeding under Chapter 15 of the US Bankruptcy Code. I am unable to accept the contrary opinion of Professor Westbrook, expressed as at October 13, 2009, based on *In re Bear Stearns (*Lifland, J*)*, a 2007, case which generated considerable controversy in the insolvency law world. Judge Burton Lifland himself has since made it clear that the US Bankruptcy Court's approach under Chapter 15 to recognition of offshore insolvency proceedings is ultimately a fact-specific exercise: *In re Fairfield Sentry Limited, et al 440 B.R. 60; 2010 Bankr. LEXIS 3789*.

The Bermuda assets

14. It is common ground that the monies attributable to Class E and Hibistar's claim have been kept separately from the Company's other assets. All the deposits are held in accounts bearing the Company's names and although the Receiver asserts that commingling has taken place in relation to the assets of the various companies in the group, this bare allegation is disputed.

15. For the purposes of the present application, I assume that the monies held by HSBC Bank Bermuda belong solely to the Company, without prejudice to any claim which may at some future date be made by or on behalf of the Company's affiliates.

The aborted Protocol

16. The terms of the aborted Protocol require consideration because the Receiver's counsel invited the Court to enforce them in the exercise of the Court's common law discretion to assist a foreign insolvency court. This submission was made against the background of

[2] As Ms. George rightly recalled, I observed at the directions stage that the absence of a letter of request from the foreign court itself is no impediment to this Court acceding to a request for assistance made by an officer of the foreign court.

the Receiver and the JOLs having not only agreed the terms of the draft Protocol but sought and obtained approval from their respective courts for entering into the cooperation agreement.

17. The Recitals to the draft Protocol acknowledge that the Company has the following accounts with the Bank of Bermuda in Bermuda: (a) the Class A Account (US$44,306.24); (b) the Class B Account (US$ 3,959,807.99); (c) the Class E Account (US$ 7,567,979.89); the Class E Euro Account (EUR 1,745,822.99). The Recitals also acknowledge that the Protocol is intended to resolve partially the disputes which have arisen as to the Receiver's and the JOLs' entitlement to the Bermuda monies. The essence of the compromise is set out in clause 3 and provides for (a) the JOLs to receive $614,000 and the Receiver the balance of the Class A and B Accounts (less $91,000), and (b) determination of the entitlement to the Class E Accounts to be deferred pending further investigations.

18. However, the draft Protocol made further detailed provision for cooperation between the JOLs and the Receiver as well. As far as distribution of assets recovered is concerned, clause 9 contemplates that (a) a first distribution shall, if possible, be made to the Company by the Receiver, for the JOLs to distribute in accordance with Caymanian law to the Caymanian creditors (and contributories), and (b) any subsequent distributions shall be made in accordance with US law. The terms of the draft Protocol clearly represent the product of a carefully negotiated compromise tailored to meet the unique circumstances of the present case and its consummation must have consumed a considerable amount of time and expense. Also noteworthy is the fact that clause 2.1 contemplated that it would not become effective until it was approved by this Court, as well as the Caymanian and US Courts.

19. The Third Caymanian Affidavit of Ian Stokoe was sworn in support of the JOLs application to that Court for leave not to enter into the Protocol and explains from their perspective the change of position. The Liquidator explains that because of amendments made to the version of the Protocol approved by the US Court on April 21, 2010, the Receiver needed to seek approval to enter into the revised version. In addition the Receiver on May 25, 2010 proposed an additional change to the version already approved by the Caymanian Court on April 22. By mid-July, this comparatively minor dispute remained unresolved.

20. Meanwhile, a Steering Committee had been formed by various investors (both US and non-US) dissatisfied with the Receiver's conduct of the US litigation against Sun Capital and this Committee commenced direct negotiations with Sun Capital, obtaining a 60 day stay of the Receiver's action on or about July 8, 2010. Members of this Steering Committee included Evatt Tamine, a member of the Company's Liquidation Committee and the largest single shareholder of the Company, representing 32.5% of the Cayman Feeder Fund, also in liquidation under the management of the JOLs. On July 16, Tamine asked Stokoe to convene a Liquidation Committee meeting to discuss concerns about the draft Protocol. On July 30, 2010, the Committee unanimously withdrew its support for

the Protocol, while expressing the desire to meet the outstanding costs of the Receiver and the JOLs.

21. With a view to breaking the deadlock, the JOLs convened a further meeting of the Liquidation Committee which the Receiver was invited to attend. The September 13, 2010 meeting did not resolve the Committee's concerns. The Minutes of this meeting suggest that the fundamental difference between the two sides is that the Committee considers that it is better equipped than the Receiver to pursue actions on behalf of the investors. The Stokoe Affidavit of February 4, 2011 in the Caymanian proceedings concluded as follows:

> " *46. The Liquidators therefore find themselves in a position whereby the basis upon which they originally sought the sanction of the court has materially changed. The Committee have unanimously withdrawn their approval for the Protocol for the reasons set out above and have advised the Liquidators that they no longer wish them to execute the Protocol. In the circumstances the Liquidators seek further directions from the Court as to whether,* [sic] *it remains appropriate for the Liquidators to enter into the Protocol.*"

22. Based on what in my judgment was a substantially neutral application for directions from the Caymanian Court, Foster J ordered on February 15, 2010 as follows:

> "*FOR THE AVOIDANCE OF DOUBT and having regard to the circumstances set out in the Third Affidavit of Mr. Ian Stokoe sworn on 4 February 2011 and the exhibit thereto it is ordered that:*
>
> *1.The Joint Official Liquidators ("JOLs") are at liberty not to enter into the protocol referred to at paragraph 1 of and attached to the order dated 22 April 2010 should they consider it inappropriate to do so.*
>
> *2.The JOLs' costs of and incidental to this application shall be costs in the liquidation.*
>
> *3.A copy of this order and the said Third Affidavit of Mr. Stokoe and the exhibit thereto shall be sent as soon as possible by the JOLs to the United States Receiver for his information.*"

23. The effect of this Order appears to be (a) to give effect to the wishes of the Liquidation Committee (paragraph 1); and (b) encourage the JOLs to continue to cooperate with the Receiver as best as they can in the circumstances (paragraph 3). As is clear from an authority on which the JOLs' Bermuda counsel relied, the governing principles of Bermudian and Caymanian insolvency law are substantially the same[3]. There is nothing

[3] '*The Shared Legal Heritage*', in Kawaley, Bolton & Mayor (eds.), '*Cross-Border Judicial Cooperation in Offshore Litigation*' (Wildy, Simmonds & Hill: London, 2009) at paragraph 16.2.

remarkable about an insolvency Court directing liquidators it has appointed to carry out their duties in a lawful manner which conforms to the wishes of the majority of creditors. It must also be noted that both the Receiver and the JOLs elected not to sign the draft Protocol first and then obtain approval for having executed it; rather they choose to only execute it after they had obtained Court approval. The February 15, 2010 Order was clearly made on the basis that the draft Protocol did not evidence a legally binding contract.

24. There is no apparent or compelling reason for this Court to seek to override the judgment of the Caymanian Court in supervising the conduct of the JOLs which that Court appointed and is properly charged with supervising. Nor is it immediately obviously that it would be appropriate for this Court to second-guess the judgment of the Company's own principal investors as to where their best interests lie, particularly since this Court has a peripheral role in the worldwide liquidation process.

The arguments of counsel

25. Mr. Woloniecki for the Receiver fairly conceded that in seeking more generous recognition and assistance to be accorded to his client than should be afforded to liquidators appointed in the Company's place of incorporation, this Court was being invited to develop the existing law. However, he sought to blunt the sharp edges of this invitation to judicial trailblazing by submitting that it was supported by the key elements of the UNCITRAL Model Law which had been adopted by the UK, USA and EU countries. Turning over the Class A and B assets to the Receiver, along the lines contemplated by the draft Protocol, would not only properly give effect to the commercial reality that the Company's centre of main interests (COMI) was in the US. It would give effect to what the JOLs and the Receiver considered as fair and reasonable as well.

26. In their Written Submissions, Mr. Woloniecki and Ms. George rightly contend that exercising its common law powers of cooperating in cross-border insolvency cases this Court has often given effect to the COMI concept. The pivotal case in establishing this judicial approach was a decision of L.A Ward CJ: *In re ICO Global Communications (Holdings) Limited* [1999] Bda LR 69. This Court has both recognised an overseas COMI in respect of locally-incorporated companies[4] and asserted primary insolvency jurisdiction over overseas companies with strong local ties[5]. In the present case it was submitted that the Company's assets were mainly located in the US where its business was controlled so it was consistent with these cases to conclude that the US Receivership should play the dominant role.

27. Reference was made to persuasive English authority dealing with competing common law recognition claims asserted by a US Receiver appointed by the SEC and a liquidator

[4] *Re Shanghai Merchants Holdings, Ltd.* [2004] Bda L.R. 33 (parallel receivership proceedings in Hong Kong and Bermuda); *Re Dickson Group Holdings Limited* [2008] Bda L.R. 34.
[5] *Informission Group Inc –v- Convertix Corporation Ltd.* [2000] Bda LR 75 (a British Virgin Islands company managed from Bermuda).

appointed in the place of incorporation. It was submitted that the US Receiver was not recognised at common law because Antigua was found to be the COMI in *In the Matter of Stanford International Bank Limited et al* [2010] EWCA Civ 137, where the primary finding was that the receivership proceedings did not qualify for recognition under UNCITRAL Model Law as implemented in the UK by the Cross Border Regulations. Moreover, even in those circumstances, Lewison J's finding (at paragraph 104) was expressed subject to the *caveat* "*barring exceptional circumstances*". The exceptional circumstances for not affording deference to the JOLs in the present case flowed from the fact that any single universal proceeding would logically be in the US. This was demonstrated in part by the fact that the Company's investors had formed common cause with US investors in seeking to resolve the Sun Capital litigation.

28. The Receiver's counsel correctly submitted that recognition of a foreign receiver's international competence should not depend on satisfying all of the factors identified as relevant for establishing a sufficient connection by Goulding J in *Schemmer and others-v- Property Resources Ltd.* [1975] 1 Ch 273. Those factors were informed by the facts of that case. It was also convincingly submitted that the finding in that case that a receiver appointed by the SEC was appointed under a penal law which could not as a matter of general principle be enforced ought not to be followed, in the light of subsequent and more persuasive authority.

29. The case for holding the JOLs to their "promise" to execute the draft Protocol was advanced in reliance on two limbs. Firstly, it was submitted that the reasons for the JOLs' decision to resile from the Protocol were factually spurious. Secondly, it was submitted that the Court had legal competence to hold the JOLs to their "promise", on the basis that such office holders were meant to adhere to higher standards than ordinary litigants: *Ex Parte James* (1874) 9 LR Ch App 609; *Re Wyvern Developments Ltd.* [1974] 1 WLR 1097; McPherson's '*Law of Company Liquidation*' (2001 edition), paragraph 9.65. The legal limb of this argument at first blush seemed sound; the crucial question was whether the relevant principles were properly engaged by the facts of the present case.

30. As Mr. Woloniecki aptly observed in the course of his oral submissions on behalf of the Receiver, the respective cases in this matter were like ships passing in the night. The joint submissions advanced on behalf of Hibistar and the JOLs may broadly be characterised as reflecting the orthodox view of the relevant principles of cross-border insolvency which fall to be applied in relation to the present applications. The cogent Submissions of Mr. Elkinson and Mr. Adamson firstly cited the following passage from Lord Hoffman's speech in the House of Lords case of *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852:

> "*30...The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle 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. That is the purpose of the power to direct remittal."

31. Reliance was then placed on passages from Lord Hoffman's judgment on behalf of the Judicial Committee of the Privy Council in *Cambridge Gas Transportation Corpn-v-Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 AC 508, including the following:

> "***16*** *The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated. For example, in Solomons v Ross (1764) 1 H Bl 131n a firm in Amsterdam was declared bankrupt and assignees were appointed. An English creditor brought garnishee proceedings in London to attach £1,200 owing to the Dutch firm but Bathurst J, sitting for the Lord Chancellor, decreed that the bankruptcy had vested all the firm's moveable assets, including debts owed by English debtors, in the Dutch assignees. The English creditor had to surrender the fruits of the garnishee proceedings and prove in the Dutch bankruptcy.*"

32. Reference is then made to the distinctive approach taken by the English common law to the recognition of foreign court-appointed receivers. The following passage from '*Dicey Morris and Collins on the Conflict of Laws*', 14th edition, Volume 2 (Sweet & Maxwell: London, 2006) at paragraph 30-127 is cited:

> "*...first it seems that an appointment in a country where the company is incorporated will be recognised. Secondly, it is also likely that an appointment will be recognised if the defendant submitted to the jurisdiction of the court by whose order the appointment was made, although such a submission by a subsidiary of the defendant company is likely to be regarded as an insufficient basis for such recognition. Thirdly, it is possible (but no higher than that) that an English court would recognise the order of the foreign court if that order would be recognised by the law of the place where the defendant company was incorporated. Fourthly, there is something to be said for recognising an appointment made by a court in a country where the central management and control of the company is exercised. particularly, perhaps, if there is no likelihood of intervention from the courts of the place of incorporation. Similarly, the relevant connection may be found to exist if the appointment is made by the court of the country where the company carries on business, particularly if that is the only country where business is carried on.*"

33. It was submitted that applying these principles, the Receiver's appointment should not be recognised. Moreover, it was further contended that the need to identify and give deference to the COMI forum only arose in the context of resolving disputes between rival liquidators. Lewison J's Judgment in *In the Matter of Stanford International Bank Limited et al* [2010] EWCA Civ 137 demonstrated that a receiver would not be recognised if this would interfere with a liquidation in the company's place of incorporation. There were no exceptional circumstances justifying the Court's exercising its discretion otherwise than in favour of the JOLs.

34. Mr. Elkinson concluded with the argument that this Court ought to be slow to adopt a narrow view of what, in the offshore fund context, was required to establish the existence of a COMI in the place of incorporation. He also made it clear that, in response to the Receiver's application, the JOLs asserted the right to take control of all the Bermuda assets, not simply the Class E Accounts.

Legal findings

Overview

35. The present applications require the Court to apply the rules of private international law applicable to the recognition of foreign judgments to the question of which of two competing claimants are entitled to control assets held in a Bermudian bank for the account of a Caymanian company.

36. The Company has been wound-up in its place of incorporation and the JOLs appointed to wind-up its affairs. The Receiver has also been appointed in the US by the US District Court at the instance of the SEC charged with collecting the worldwide assets of the Company and certain affiliates, which are "relief defendants" in the US proceedings. In effect the Court is being asked to choose between recognising and enforcing locally the Caymanian or the US Orders. The common law principles which govern the recognition of foreign insolvency proceedings may lack the precision found in modern statutory insolvency law codes such as legislation based upon or heavily influenced by the UNCITRAL Model Law. However, the applicable principles have the solidity of experience built up over more than 200 years, initially in the context of personal bankruptcies with cross-border elements. They also enjoy the wider credibility that derives from the fact that although these rules of private international law flowered in common law soil, the seminal ideas were germinated in the civil law world[6].

Common law rules governing the recognition of foreign insolvency proceedings

37. The common law rules relating to the recognition and treatment of foreign corporate insolvency proceedings cannot be clearly understood without reference to the related private international law rules relating to corporations generally. It appears to be settled law that (1) a company's domicile is located in the country where it is incorporated, and

[6] Fletcher, '*Insolvency in Private International Law*', 2nd edition (Oxford University Press: Oxford, 2005) paragraph 1.20 et seq.

(2) a corporation which has central management and control in more than one jurisdiction may be regarded as resident in each jurisdiction concerned: Lawrence Collins (ed.), '*Dicey & Morris on the Conflict of Laws*', 12th edition, Rule 154. Equally uncontroversial appears to be Rule 156(2) in the same text, from which the learned authors conclude that: "*The cases at least establish that the law of place of incorporation determines who are the corporation's officials authorised to act on its behalf*" (at page 1113). The place of incorporation of the Company is significant in conflict of law terms because the laws of this forum govern matters concerning its constitution and internal management. Where a company is resident may be important for a variety of jurisdictional considerations, but its domicile has a comparatively fundamental and defined significance.

38. The competition between the JOLs and the Receiver over the Bermuda assets does not raise the same issues as arose in the House of Lords in the *HIH* case. There the question was whether assets under the control of liquidators appointed in ancillary liquidation proceedings should, instead of distributing the assets in the local ancillary proceedings, remit the assets to the primary Australian liquidation Court instead. Here the true controversy turns, in the first instance at least, on competing claims to control assets belonging to the foreign insolvent company which are located in a jurisdiction where no ancillary liquidation proceedings have been commenced. The dispute centres, in effect, on the more fundamental question of who has the best claim to be recognised as agents or representatives of the Company. Dicey & Morris' Rule 160 in the present context is in my judgment brought into play: "*The authority of a liquidator appointed under the law of the place of incorporation is recognised in England*". This rule is, according to the learned authors, "*justified because the law of the place of incorporation determines who is entitled to act on behalf a corporation. If under that law a liquidator is appointed to act then his authority should be recognised here*" (Dicey & Morris, 12th edition, page 1137). Liquidators appointed in other jurisdictions will generally only be recognised as competent to act on behalf of the foreign company in circumstances where such authority will likely be recognised under its domiciliary law.

Who has primary right to control the Bermuda assets?

39. Applying the above settled principles to the present facts, the JOLs must clearly be recognised as the primary representatives of the Company with authority to control the Bermuda assets. This Court has a positive duty to both recognise the Caymanian winding-up order and the orders appointing the JOLs (both provisionally and permanently), which orders clothe them with authority to represent the Company and control its assets. As Professor Fletcher has fairly pointed out[7], it is a deficiency of corporate insolvency law (as contrasted with personal bankruptcy law) that the appointment of liquidators does not without more vest all of the insolvent company's assets in the liquidator.

40. Be that as it may, this Court has previously, albeit on an ex parte basis, on June 11, 2009 authorised the JOLs to, *inter alia*, "*locate, protect, secure and to take into their possession all assets and property within the jurisdiction of the Supreme Court to which*

[7] '*Insolvency in Private International Law*', 2nd edition, paragraph 3.96.

the Company appears to be entitled." In my Reasons for this decision[8], I stated as follows:

> "*9. The common law discretionary power to recognise foreign winding-up proceedings and foreign liquidators appointed in the company's place of incorporation has been described in Fletcher, 'Insolvency in Private International Law', 2nd edition (Oxford University Press: Oxford, 2005) pages 2001-202, as follows:*
>
> > '*3.91. The case law concerning the recognition in England of foreign liquidations has been strongly influenced by the principles applied in the parallel situation of bankruptcy. However, due to the different structures of bankruptcy and winding-up procedures under our domestic law, English courts have adopted a modified position towards certain important matters. The most significant modification is with regard to the effect of a foreign liquidation upon the company's English assets, as discussed below. In the first place, however, we may note the strong parallel with bankruptcy in the general approach to recognition of foreign insolvency proceedings relating to companies. Just as the country of an individual's domicile has been traditionally regarded by our law as the 'natural' forum for proceedings having a bearing upon that person's civil status and capacity, including bankruptcy proceedings, so in the case of companies much importance is attached to the law of the country of incorporation in determining the essential qualities concerning the company's birth, its life, and also its demise. This philosophical leaning towards the State of incorporation ensures that the English recognition rule looks primarily to the courts of that country to supply the forum for winding up. This approach also reflects the view of English law that the domicile of a corporation is located, possibly immutably, in its country of formation.*
> >
> > *3.92 It follows therefore that winding-up proceedings that have commenced in the country under whose laws the company was originally incorporated will be recognized in England. This would appear to hold true even in cases where the company's central management and control are shown to be located in some other jurisdiction: the analogy with the statutory precept whereby the English court retains the competence to wind up any company registered in England and Wales is likely to provide a powerful argument for accepting the competence of the foreign court in a like situation, although the point appears never to have arisen in a reported case. An important aspect of the recognition accorded to proceedings conducted under the law of the company's country of incorporation- also constituting the corporate domicile- is that the office holder appointed under those proceedings will be accepted in England as the person with standing to represent the collective*

[8] [2009] Bda LR 35 at paragraphs 9-10.

interests of creditors and to invoke the assistance of the courts here. The office holder's eligibility to maintain any claim to the company's English assets is subject, however, to there being confirmation that he is clothed with the requisite rights and powers over the company's property by the law under which his appointment has originated, and that his powers conferred by that law are intended to be exercisable over property situated beyond the frontiers of that country."

10. This accurately reflects the position under Bermudian common law…"

41. I expressly found that the fact that the Company might be considered to be resident in the US had no relevance to the issue of whether the JOLs should be recognised as competent to collect the Bermuda assets. The initial *ex parte* recognition order was seemingly set aside as part of a cost-saving compromise in the hope that a protocol would resolve the present dispute.

42. Mr. Woloniecki observed (without elaboration) that the order (or perhaps those parts of it which conferred on the JOLs the same powers a liquidator appointed under Part XIII of the Companies Act 1981 would enjoy) was generally regarded by the Bermuda insolvency Bar as legally flawed. However, he did not advance any formal submission capable of displacing the well settled rule of private international law that liquidators validly appointed in a foreign company's domicile should be recognised as competent to act on behalf of the Company within the jurisdiction of this Court.

43. Accordingly, I find that the JOLs are primarily entitled to take control of the Bermuda assets. It remains to consider whether there is any valid legal and/or factual basis for interfering with the JOLs' dealings with the assets which appear to belong to the Company within the jurisdiction of this Court, in particular, by directing that all or some of the Class A and B Accounts should be remitted by the JOLs to the Receiver for the benefit of the US Receivership.

Should the US Receivership proceedings be regarded as the main insolvency proceedings and the US as the COMI for cross-border recognition purposes?

44. Mr. Woloniecki invited the Court to recognise the US as the COMI and the Receivership proceedings as the main insolvency proceedings, adopting a modern 21 century internationalist approach rather than rigidly applying outmoded 19th – 20th century conflicts rules. This Court must reject counsel's siren call to indulge in what would amount to almost an orgy of ground-breaking judicial activism.

45. There is no doubt that the Receiver's appointment has been and should be recognised to the extent that, for the purposes of US law, he is duly appointed and authorised to collect the assets of the Company (in the sense of assets held by the Company's debtors) located in the US and quite possibly abroad as well. But this does not justify the secondary conclusion that the Receiver should be recognised as the representative of the Company for all purposes, including exercising control over assets already held in the Company's

name. There is no credible evidence that the Receivership Order according to its terms was intended to have this effect. The evidence of Professor Westbrook merely shows that the Receivership proceedings may at some future date mature into proceedings which are analogous to insolvency proceedings because either (a) distribution rules analogous to the US bankruptcy rules will be deployed by the Receiver, or (b) the Receiver himself will commence bankruptcy proceedings in relation to the Company. The Florida District Court is not at this juncture a foreign insolvency court, either formally or substantively.

46. It may fairly be contended that this Court's common law discretion to cooperate with foreign insolvency courts should be informed by the UNCITRAL Model Law as evidence of the rules of international best practice in this regard. Mr. Woloniecki characterised the Model Law's principles as reflecting "customary rules of private international law". But Article 2(a) of the Model Law on Cross-border Insolvency makes it clear that the Model Law's principles are concerned with cooperation between insolvency courts:

> "*'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation…*"

47. This largely explains why a similar SEC Receivership was found by the English High Court (and Court of Appeal) not to be a foreign insolvency proceeding which qualified for recognition as a foreign "main proceeding" pursuant to the UK implemented version of the Model Law in *In the Matter of Stanford International Bank Limited et al* [2010] EWCA Civ 137. As to the common law position, I adopt the following *dictum* of Lewison J in the latter case upon which Mr. Elkinson relied:

> "*105. If it is established (as here) that a liquidator has been properly appointed in the place of incorporation of a corporation, with the power and a duty to collect assets on behalf of all creditors, then barring exceptional circumstances, the liquidator should be left to get on with his job without outside interference from others. That would promote the general policy of universalism; namely that there should be one collective proceeding in which all creditors are entitled to participate, irrespective of where they are located: Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, #16.*"

48. In my judgment no exceptional circumstances exist to justify interfering with the JOLs' right to take possession of the Bermuda assets. In the absence of any competing insolvency proceedings in the US, no need to characterise the Caymanian proceedings as the main or non-main proceedings arises. Even if the Receivership proceedings did qualify as insolvency proceedings, it is far from obvious that the COMI should inevitably be regarded as being the US merely because the Company invested on behalf of non-US shareholders in the US in circumstances where (a) the Company was incorporated in and regulated in Cayman, and (b) its administrators (initially) and auditors were based there,

while (c) one of two directors and various bank accounts were located in Bermuda. Moreover, unlike cases where the principal creditors are bondholders whose claims against the debtor fall in any event to be determined by US law (typically New York law), in the offshore hedge fund context the investor/creditors' rights arise as shareholders under instruments governed by the offshore debtor's domiciliary law.

49. The nearly consummated draft Protocol is, perhaps, the best evidence of the fact that Cayman presently has at least an arguable case on the merits to be regarded as the primary liquidation Court. It contemplated not that the Bermuda assets would be remitted to the US to be distributed in the Receivership; rather it envisaged that the Bermuda assets would be remitted to the Receiver to fund recoveries from the Company's debtors, which net recoveries would (in the first instance at least) be remitted to the JOLs for distribution in accordance with Caymanian law. However, I accept that if a US bankruptcy was at some future date commenced such US insolvency proceeding might very well qualify as a foreign main proceeding in relation to the Company. The most important point is that there is at present only one liquidation proceeding pending in relation to the Company; and that is before the Caymanian Court.

50. Accordingly, there are no credible legal or factual grounds for declining to recognise the JOLs as the duly appointed representatives of the Company entitled to exercise control over the Bermuda assets.

Should the Court enforce the terms of the draft Protocol?

51. The Caymanian Court which appointed the JOLs has determined that they need not enter into the Protocol. In my judgment there is no credible legal basis on which this Court may properly decline to recognise and give effect to the Order of the Caymanian Court in this regard. The position might be different if the JOLs had been appointed as liquidators in an ancillary liquidation by this Court or, perhaps, if this Court had already approved the Protocol. In either of such cases the Caymanian Court would have expressly ceded parallel competence in respect of the liquidation (as regards to the Bermuda assets) to this Court. But the mere fact that this Court might take a different view of the merits of the complaints made by the Committee about the way in which the Receiver has been prosecuting litigation on the Company's behalf cannot override the fundamental principles of private international law which require this Court to recognise and show deference to the competence of the Caymanian Court over the Company. That Court is (a) the liquidation court in the Company's place of incorporation; and (b) the court overseeing the only liquidation proceeding pending in relation to the Company.

52. It may be right, for instance, that a criticism levied at the contingency fee arrangements negotiated by the Receiver and the litigation lawyer he engaged was misconceived. But the fundamental reason why the draft Protocol has not been consummated is that the Liquidation Committee unanimously withdrew its support from the proposed agreement and the Caymanian Court, following an apparently neutral request by the JOLs for directions, has effectively affirmed the stance of the Committee by directing on February 15, 2011 that they "*are at liberty not to enter into the protocol ...should they consider it*

inappropriate to do so". This appears to adroitly leave the way clear for the JOLs to change course, with the assent of the Liquidation Committee. This Court's own experience in supervising liquidators appointed together with a committee of inspection is that liquidators tend to show considerable deference to the commercial judgment of the committee as to where the best interests of the creditors (whose interests insolvency proceedings are primarily intended to serve) lie. I have never known an instance of liquidators positively seeking to pursue a course inconsistent with a unanimous stance taken by a creditors' committee.

53. '*McPherson's Law of Company Liquidation*', upon which the Receiver's counsel relied in support of the application of the rule in *Ex Parte James* to the present case, describes the basis of the original rule in bankruptcy as follows: "*the trustee is an officer of the court and, as such, will not be permitted to do anything which would be regarded as dishonourable or unconscionable for an ordinary person to do*"[9]. The Receiver's application for this Court to enforce the Protocol on the grounds that the JOLs have acted improperly in failing to honour its terms is unsustainable in light of the applicable factual circumstances of the present case.

54. If as Mr. Woloniecki contended, and as appears indeed to be the case, the Company's creditors' vital interests depend on achieving recoveries through litigation against Sun Capital in the US, it is ultimately for the JOLs, the Liquidation Committee and the Caymanian Court to determine (1) the best mechanism to achieve the desired recoveries, and (2) the precise nature and scope of any further cooperation with the Receiver. I have no reason to doubt based on the text authority placed before this Court that the Caymanian Court will have regard to international best practice in terms of cross-border insolvency practice in its supervision of the Company's liquidation case. In addition, Caymanian Chief Justice Anthony Smellie has recently observed, albeit writing extra-judicially:

> "*In the now commonplace context of the master/feeder hedge fund structure, corporate operations take place in different jurisdictions. Often, in the Cayman context, the structure involves investors investing in the fund through Cayman Islands entities which are either the feeder or master fund administered in the Cayman Islands, but where the investment management takes place elsewhere in an onshore jurisdiction.*
>
> *Such was the case with the Lancelot Investment Fund Limited ("Lancelot"), a Cayman Islands domiciled open-ended investment fund through which investors provided funds, of over USD1 billion, for investment in specified United States securities to be managed by a United States investment manager. When allegations of fraudulent misappropriation of its assets were raised by the investment manager against a borrowing syndicate to which all the assets had been loaned, a Trustee-in- Bankruptcy was appointed by the U.S. Court under*

[9] 1st England & Wales Edition (Sweet & Maxwell: London, 2009), at pages 484-485.

Chapter 7 of the US Bankruptcy Code and he took control of the known assets, all of which were located in the United States.

Nonetheless, some investors – a major international bank and a third party investment fund, to the combined value of more than USD80 million – petitioned the Cayman Court for the winding up of Lancelot in the Cayman Islands; on the basis that they had made their investments through Lancelot as a Cayman Islands entity governed by Cayman Islands law and as the substratum had failed amidst the allegations of fraud, they were entitled to a winding up on the "just and equitable basis", so that their interests may be protected by the involvement of a liquidator acting under the aegis of the Cayman Court. A particular concern was that it was the investment manager responsible for placing the loans with the syndicate, which had itself petitioned the U.S Court after the allegations of fraud had come to light.

In what may be described as an approach that understands that there can indeed be a '(modified) universalism', Quin J. of the Grand Court made the order for winding up over the objection (raised by letter but without formal appearance) of the Chapter 7 Trustee and the majority of investors (who formally appeared); as he was satisfied that the petitioners should have someone to represent their particular concerns to both the U.S. Court and the Cayman Court. Even though the judge recognized the United States as the principal place for the liquidation of Lancelot, as its incorporation and many of the arrangements for the investments were governed by Cayman Islands law and would therefore have to be examined and assessed against that law; he resolved to appoint only a single liquidator, mindful that the Chapter 7 Trustee may wish and should be free to apply for the recognition of his appointment in the Cayman Islands. Furthermore, the Cayman winding up order was stayed, in keeping with the principles of comity and universality in corporate insolvency. This approach would give both the Cayman Liquidator and the Chapter 7 Trustee an opportunity to discuss their respective roles and attempt to reach an agreed protocol for the efficient liquidation of Lancelot, thus avoiding multiple proceedings and duplication of costs. Further, the Court was keen to encourage co-operation with the US Court, both in recognizing the Cayman Liquidator in the US Court, with the Chapter 7 Trustee reconsidering his stated intention to oppose, and in the Trustee similarly being encouraged to apply to the Cayman Court for recognition of his appointment.

The wisdom and efficacy of this approach has been borne out by the fact that a protocol was entered into between the two Court-appointed office holders and has been successfully implemented. In practice, the minimal costs – of having a Cayman liquidator who can liaise with his U.S. counter-part and the U.S Court and report to the Cayman Court, with an eye to the Cayman public interests in the proper investigation and resolution of allegations of fraud for the protection of

investors in a Cayman Fund company and for the protection of investors as a whole – is likely to prove a small price to pay."[10]

55. The quoted remarks lucidly illustrate that, in the offshore hedge fund insolvency context, the Caymanian Court has in the past adopted a positive stance to cross-border cooperation with US-appointed office-holders in circumstances where the COMI was acknowledged to be located in the US. But such positive stance has been without prejudice to the right of investors in a Caymanian company to utilize the insolvency law of the place of the company's incorporation to advance their commercial interests.

Scope of this Court's common law powers to assist a foreign insolvency court absent the commencement of ancillary liquidation proceedings here

56. The precise parameters of this Court's common law jurisdiction to assist the JOLs as foreign liquidators who have been recognised as the duly appointed representatives of the Company in Caymanian liquidation does not strictly arise for determination at the present time. It was, unsurprisingly, not submitted on behalf of the Receiver that this Court lacked the jurisdiction to merely declare that the JOLs are as a matter of Bermuda law authorised to take control of assets held in a local bank in the company's own accounts. Nevertheless, in light of the doubt delicately cast on legal validity of the June 29, 2009 Recognition Order by counsel for the Receiver combined with the fact that it was subsequently set aside, it seems appropriate to make a few observations in this regard. The observations which follow will hopefully further elucidate the basis on which the conclusions set about have been reached.

57. In my original judgment in the present case[11], I held on an *ex parte* basis that the appropriate assistance which could be afforded to the then joint provisional liquidators was to empower them (without the commencement of ancillary liquidation proceedings) to exercise all the powers conferred on liquidators under Part XIII of the Companies Act 1981. This was based on the now famous- but for me overly compressed- *dictum* of Lord Hoffman in *Cambridge Gas Transportation Corpn -v- Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 AC 508 at 518 where he observed on behalf of the Judicial Committee:

> "***22*** *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, section 426(5) of the Insolvency Act 1986 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*

[10] '*A Cayman Islands Perspective on Trans-border Insolvencies*', Paper presented at Ninth Joint UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium on Insolvency', Singapore, March 13, 2011, at pages 24-27. This paper was only circulated by INSOL International on March 31, 2011.
[11] [2009] Bda LR 35.

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."

58. This reasoning, which is binding on the Bermudian courts, provides explicit authority for allowing a foreign liquidator, once recognised, to both (a) rely upon provisions of the applicable foreign insolvency law, assuming there are comparable local rules, and (b) obtain remedies available under local law. This analysis seems almost magical and somewhat radical, if one fails to apprehend the implicitly applicable rules of private international law. Firstly, it is trite law that when a local court entertains a cause of action governed by foreign law, the claimant is only entitled to such remedies as are available under local law. *Lex causae* governs the cause of action/claim/issue or matter with a foreign element which the court must decide; *lex fori* governs matters of procedure, including relief or remedies[12]. It follows that if the local court has recognised a foreign winding-up (or restructuring) proceeding and determined that the relevant foreign law governs the company's liquidation (or restructuring), foreign law will be given effect to in relation to the issue before the local court. The scope of relief which can be granted, like the procedure which will be followed, will be governed by local law.

59. In the cross-border insolvency context therefore, the effects of foreign law in either (a) the company's place of incorporation, or (b) a foreign main proceeding in the company's COMI may, if recognised, be applied assuming that (1) the contents of the relevant foreign rules are similar to the equivalent local substantive law, and (2) the remedies sought are available under local law. Thus in *Cambridge Gas*, the US Chapter 11 proceeding was recognised as a foreign main proceeding involving a local company. The crucial question was whether a plan approved by the US Bankruptcy Court could validly extinguish the appellant's shareholding rights which were prima facie governed by Manx law. As the substantive foreign law result could have been achieved through a scheme of arrangement under local law, the foreign law was recognised and applied and a local vesting order was the local relief, giving effect to the Chapter 11 plan. A similar approach can seemingly be taken in relation to adversary litigation forming part of foreign main proceedings whereby the more generous insolvency judgment recognition rules will be applied instead of the narrower conflicts rules applicable to the enforcement of personal or *in personam* judgments: *Re Eurofinance SA* [2010] EWCA Civ 895 (per Ward LJ at paragraphs 61-62). Conversely, the United States Court of Appeals for the Fifth Circuit recently held (*In the Matter of Condor Insurance Limited* 601 F.3d 319; 2010 U.S. App. LEXIS 5635) that where a Nevis winding-up proceeding in relation to a Nevisian company had been recognised under Chapter 15 of the US Bankruptcy Code as a foreign main proceeding, the foreign liquidators could pursue in the US courts a substantive claim based on a Nevis avoidance provision.

[12] *Dicey & Morris*, 14th edition, pages 30-31 and 168-265 (Rule 17). How the stated rule applies in practice may be subject to controversy depending on the facts involved.

60. To my mind this Court, applying these principles, could validly recognise the JOLs and empower them to assert in Bermuda whatever claims are available to them under Caymanian law, provided that (a) the foreign substantive law to be applied is broadly similar to local insolvency law, and (b) the specific relief which is sought is available under local law. Without in anyway prejudging the application of these broad-brush assertions in relation to any future applications for assistance, it is at the very least arguable that foreign liquidators from jurisdictions with similar insolvency law frameworks can at common law seek to deploy all of the remedial powers conferred on liquidators under Part XIII of our Companies Act without commencing ancillary winding-up proceedings here. The original recognition Order of June 19, 2009 was on this basis probably formulated in somewhat crude and simplistic terms, justifying (at least in part) the doubts about its validity which were helpfully drawn to the Court's attention to by Mr. Woloniecki.

61. On this analysis, it is wholly irrelevant for the purposes of recognition at common law whether or not this Court could (if needed) wind-up the Company. This question has been a vexed question under Bermuda law because the Companies Act 1981 (unlike the British legislation from which it is otherwise derived[13]) only expressly empowers this Court to wind-up companies operating in Bermuda with a permit under Part XI of the Act. Where Part XI does not apply, winding-up jurisdiction has in previous cases been placed on a somewhat awkward construction of the External Companies (Jurisdiction in Actions) Act 1885. I have previously ruled (in January this year) that if no statutory jurisdiction to wind-up an overseas company exists, at common law the remedies available to liquidators under the Companies Act cannot be made available to the foreign liquidators[14]. The conclusion reached in that case was heavily influenced by the fact that (a) no case was placed before the Court in which common law assistance had been afforded to a company which the local court could not wind-up; (b) the issue was argued on a hypothetical basis only; and (c) I was simply unable to apprehend the implicit conceptual underpinnings of Lord Hoffman's tight reasoning in the portion of the Judicial Committee's advice in the *Cambridge Gas* case which was quoted above. The reasoning which led Lord Hoffman to his crucial conclusion included citation of a South African case which is published in a somewhat inaccessible law report and was not available to counsel or the Court for the purposes of my January 17 2011 Ruling in *Kingate*. In *Cambridge Gas*, Lord Hoffman summarised the import of this case as follows:

> "20... *In addition, as Innes CJ said in the Transvaal case of In re African Farms Ltd [1906] TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, 'recognition which carries*

[13] The Companies Act 1948 (UK), section 399.

[14] *Re Kingate Global Fund, Ltd (in liquidation) et al* [2011] SC (Bda) 2 Com (17 January 2011). This case was argued on a hypothetical factual basis to cover the eventuality that an appeal might be allowed against this Court's earlier decision in *Re Kingate Global Fund, Ltd (in liquidation) et al* [2010] SC (Bda) Com (20 August 2010); {2010] Bda LR 57. The appeal against the latter decision was dismissed by the Court of Appeal for Bermuda in mid-March 2011 but reasons have yet to be given. It is presently unclear whether, if statutory jurisdiction to wind-up an overseas company is a pre-requisite for common law assistance, the requisite jurisdiction would exist in relation to the Company, which is believed to be an overseas company which conducting business in Bermuda without a permit under Part XI of the Companies Act 1981.

with it the active assistance of the court'. He went on to say that active assistance could include:

> *'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.'*

62. Having since had the opportunity of reviewing the report of the Transvaal Supreme Court judgment delivered over 100 years ago (which I made available to counsel at the beginning of the hearing of the present applications), it is clear that *In Re African Farms* was precisely a case where no jurisdiction to wind-up the English company (already in liquidation in England) existed under Transvaal law and assistance was provided purely on a common law basis. That assistance entailed recognising the status of the liquidator under the law of the company's place of incorporation and his right 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.*" The Transvaal Court reached its conclusion on the basis of a review of both English cross-border personal bankruptcy cases and Roman-Dutch jurisprudence.

63. In effect, the local court decided, absent the statutory power to commence an ancillary winding-up proceeding, to both recognize and give effect to the foreign insolvency law by permitting the liquidator to deal with the company's local assets *as if they were in the company's domiciliary jurisdiction*, subject (a) to complying with local procedural rules and (b) any protections the local court saw fit to impose for local creditors. Although the significance of (b) is arguably significantly diminished if one adheres to the universalist approach adopted by the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, the broad approach adopted in *In re African Farms* [1906] TS 373 was clearly endorsed by the Privy Council in the *Cambridge Gas* case, a decision which is binding on this Court.

64. For these further reasons, this Court is competent in the exercise of its common law discretionary powers and (in the circumstances) obliged to declare that the JOLs are empowered to deal with the Bermuda assets based on their status acquired under Caymanian law, absent an ancillary winding-up and irrespective of whether or not jurisdiction to commence such a proceeding exists.

Conclusion

65. For the above reasons, the Receiver's Summons is dismissed. The relief sought in the Hibistar/JOLs' Summons is granted. However, equivalent relief is granted (under the further and other relief head of that Summons) with respect to the Class A and B Accounts, in addition to the Class E Accounts.

66. The JOLs having been duly appointed in the Company's place of incorporation as its sole representatives and the Company having being wound-up there, this Court under the applicable common law rules of private international law ought properly to (a) recognise those and the related Orders made by the Caymanian Court in the winding-up proceedings there; and accordingly (b) declare that the JOLs are entitled to control all monies held locally at HSBC Bank Bermuda Limited accounts belonging to the Company. My provisional view is that the JOLs should undertake to pay all reasonable legal fees owing on a preferred basis to their former Bermudian attorneys in whose interests this Court is interested in their capacity as officers of this Court. The Receiver's application for this Court to enforce the terms of the draft Protocol is refused on the basis that the Caymanian Court's competence to supervise the conduct of its officers should be recognised and given effect to having regard to the same common law cross-border judicial cooperation rules. However, because it is not possible to presently determine whether or not the Liquidation Committee's change of position (which led to the need for the present contested hearing) was either justified or capricious, my provisional view is that costs should be reserved. As events unfold it is to be hoped that the issue of costs can be resolved in a spirit of cross-border cooperation.

67. There is some suggestion in the evidence filed on behalf of the Receiver that commingling may have occurred in respect of the assets of the Company and the other affiliated US Receivership Relief Defendants. In my judgment the starting assumption is that all assets held in accounts belonging to the Company are Company assets. Any claim to such assets can most appropriately be determined in the primary (and currently sole) liquidation forum, broadly following the approach adopted to the question of which court is most competent to resolve adversary claims involving companies in liquidation abroad in *Re Eurofinance SA* [2010] EWCA Civ 895. Further, there is no reason why this Court should not recognise and give effect to the JOLs' fundamental duty (consequent upon the making of the Caymanian winding-up order) to "*to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it*"[15]. Under Bermuda law the corresponding primary duty of liquidators consequent upon a winding-up order is to take into their control "*all the property and things in action to which the company is or appears to be entitled*"[16].

[15] Companies Law (2009 Revision), section 110(1) (Cayman Islands).
[16] Companies Act 1981, section 174(1).

68. Subject to hearing counsel as the form of order required to give effect to this Judgment (and the appropriateness of requiring the JOLs to give the above-mentioned undertaking), it appears that the JOLs and/or Hibistar are entitled to an Order along the following lines:

> "*1. The monies held by the HSBC Bank Bermuda Limited for the account of the Company shall be paid over to the Caymanian Joint Official Liquidators of the Company for distribution in accordance with the directions of the Cayman Courts.*
>
> *2.Paragraph 1 is without prejudice to the Receiver's right to assert any claim to an interest in the monies held in the Class A and B Accounts (but not the Class E Accounts) in the Caymanian Court.*
>
> *3. The appointment of David Walker and Ian Stokoe as Joint Official Liquidators of the Company is hereby recognised by this Court for this purpose and generally."*

Dated this 8th day of April, 2011

KAWALEY J