In The Supreme Court of Bermuda

(COMMERCIAL COURT)

COMPANIES (WINDING-UP)
2012: 284

IN THE MATTER OF THE COMPANIES ACT 1981
SAAD INVESTMENTS COMPANY LIMITED – IN OFFICIAL LIQUIDATION

AND

COMPANIES (WINDING-UP)
2013: 38

IN THE MATTER OF THE COMPANIES ACT 1981
SINGULARIS HOLDINGS LTD – IN OFFICIAL LIQUIDATION

RULING ON APPLICATION TO SET ASIDE EX PARTE ORDERS UNDER SECTION 195 OF THE COMPANIES ACT 1981

(in Chambers)

Date of hearing: April 5, 2013
Date of Ruling: April 15, 2013

Mr. Rod Attride-Stirling and Ms. Kehinde George, Attride-Stirling & Woloniecki, for the Joint Liquidators of Saad Investments Company Ltd (in [Bermuda ancillary] Liquidation) ("SICL") and the Joint Official Liquidators of Singularis Holdings Ltd (in Official Liquidation) ("SHL") (collectively, the "JOLS")

Mr. Paul Smith and Mr. Scott Pearman, Conyers Dill & Pearman, for PricewaterhouseCoopers, an exempted partnership ("PWC Exempted")

Introductory

1. On August 17, 2012, SICL acting by its Caymanian Joint Official Liquidators presented a Petition for its winding-up in Bermuda. On August 20, 2012, Stephen Akers, Mark Byers and John McKenna were appointed as Joint Provisional Liquidators in the local ancillary liquidation. On September 14, 2012 SICL was wound-up by this Court and the Joint Provisional Liquidators were appointed as Joint Liquidators. The usual first statutory meetings were dispensed with due to the ancillary character of the liquidation proceedings. On February 13, 2013, the Joint Liquidators applied by Ex Parte Summons for an Order under section 195 of the Companies Act 1981 for the examination of and production of documents by its former auditors, PWC Exempted, a Bermuda exempted partnership acting through its Dubai Branch.

2. By Ex Parte Originating Summons dated February 12, 2013, the Joint Official Liquidators of SHL, also in Caymanian liquidation, applied for recognition and assistance at common law and, further, for corresponding relief to that sought by SICL under section 195. However, this specific information obtaining relief was sought pursuant to the Court's inherent jurisdiction, under common law and/or pursuant to section 195 of the 1981 Act. The two applications were heard together for convenience and were granted in respect of the companies, each of which was incorporated in and in liquidation in the Cayman Islands (together, "the Companies").

3. PWC Exempted now applies to set aside two ex parte Orders granted to the JOLs. The Orders were made on March 4, 2013 for the production of documents by and examination of former auditor of the Companies (PWC Exempted and Paul Suddaby):

    (a) under section 195 of the Companies Act 1981 in relation to SICL, which is in liquidation in Bermuda;

    (b) under the inherent jurisdiction of the Court and/or at common law and/or under section 195 of the Companies Act 1981 in relation to SHL. Sensibly, no challenge was made to paragraph 1 of the SHL Order which declared that the JOLs Caymanian appointment was recognised with a view to furnishing assistance to the Caymanian liquidation.

4. The grounds of the challenge before this Court in relation to the SICL Order are limited to whether or not the Order ought to have been made and/or the scope of the Order. PWC Exempted accepts that it is not open to it to challenge the jurisdiction of this Court to make an ancillary winding-up Order in respect of SICL because the Court of Appeal refused to grant it an extension of time within which to appeal the winding-up Order. This Court is bound by the Court of Appeal's decision in *PwC (a Firm)-v- Kingate Global Fund Ltd; Kingate Euro Fund Ltd.* [2011] Bda LR 31 to the effect that a winding-up order may not by challenged by the respondent to an application made by liquidators in the liquidation under section 195 of the Act.

5. An identical challenge is made in respect of the propriety of granting and/or the scope of the SHL Order. However, because the SHL Order was not made in the context of ancillary winding–up proceedings to which section 195 unarguably applies (nice questions about this court's jurisdiction to wind-up overseas companies apart), another jurisdictional challenge is raised. It is contended that this Court's power to assist at common law does not extend to making orders either under section 195 or by way of analogy with section 195. This jurisdictional challenge raises points of law which have vexed insolvency judges and practitioners throughout the common law world relating to the precise parameters of the common law discretion to assist foreign insolvency representatives.

6. This is an area of the law that in recent times has often been dominated by commercial pragmatism combined with an almost deification of the goal of promoting cross-border co-operation in insolvency cases with an international element, unwittingly no doubt, at the expense of the development of a set of coherent principles. One reason for this trend may be the fact that statutory cross-border cooperation frameworks are now the norm rather than the exception in most large common law jurisdictions. The opportunity to consider common law cooperation thus only occurs in fits and starts and then often in offshore jurisdictions with no local legal academy to stoke the fires of the theoretical debate. Moreover, in Bermuda at least, these questions have almost exclusively been considered at the first instance level.

7. In respect of both Orders, however, narrower but important points of practice and principle have been raised. Should this Court grant relief which is more generous in terms of the scope of production than the scope permitted by the law of the principal liquidation or are the applications impermissible "forum-shopping"? Is the "usual" practice to make section 195 Orders ex parte, or ought the JLs to justify the need for ex parte relief? To what extent should the Court scrutinise the details of the production requests to ensure that they are not abusive in terms of the scope of documents requested and/or the time within which production is required? This Court must be mindful of the need to balance the competing interests of justice for international creditors and justice for their potential debtors (be they former auditors, directors or other managers) who do business here.

8. Taking these considerations into account together with the evidence and the submissions of counsel, I have reached the following broad conclusions:

    (a) **<u>scope of common law discretion to assist foreign liquidators</u>**:

        (i) this Court may validly recognise the SHL JOLs' appointment in the place of the companies' incorporation (together with the Caymanian winding-up order) and assist them at common law by analogy with the statutory powers contained in section 195 of the Companies Act by ordering them to produce the same documents which could be ordered under the local statute in the case of a domestic or ancillary liquidation;

(ii) Lord Hoffman's exposition on the breadth and flexibility of the common law judicial assistance jurisdiction in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26;[2007] 1 AC 508, as applied to the specific context of the recognition of winding-up orders made in and liquidators appointed in insolvent companies' place of incorporation, has not been diminished in any way by the United Kingdom Supreme Court majority's recent holding in *Rubin v. Eurofinance; and New Cap Re v. AE Grant* [2012] UKSC 46;[2013]1 AC 236 that *Cambridge Gas* was wrongly decided;

(iii) the parameters of common law assistance which can be provided appear to be demarcated most conservatively by the inherent jurisdiction of the Court and the extent of common law or equitable powers which may be deployed under the general law of Bermuda without recourse to statutes of particular application such as the Companies Act 1981. However, what could be done in a local liquidation will generally delineate the course of the common law assistance journey;

(iv) alternatively, and at first blush far more radically, the scope of assistance which can be provided at common law is delineated by both the general law (including the Court's inherent powers) and the statutory insolvency regime which would apply in a local primary or ancillary liquidation. This is, ultimately, my preferred jurisdictional basis for the assistance granted. Although this conclusion seems less straightforward to justify, it appears to be supported by Lord Hoffman's landmark *dictum* in the *Cambridge Gas* case which broadly approved the Transvaal Supreme Court decision in *Re African Farms Ltd*. [1906] Transvaal Law Reports 373. This proposition has been positively and most explicitly affirmed in the two most recent cases to consider this topic, *Frank Schmitt v. Hennin Deichman* [2012] EWCH 62 (Ch); [2013] Ch 61 (Proudman J) and *Picard (as Trustee for the liquidation of the Business of Bernard L. Madoff Investment Securities LLC) et al-v- Primeo Fund (In Official Liquidation)*, Cayman Grand Court FSD 275 of 2010, Judgment dated January 14, 2013 (Andrew Jones J);

(b) merits/scope of production/examination Orders:

(i) where foreign liquidators genuinely need documents relating to the affairs of an insolvent company or group of companies from persons or entities resident in Bermuda which they cannot obtain in the primary liquidation, this Court can in an ancillary liquidation or by

way of common law assistance order the production of documents liable to be produced in a local liquidation;

(ii) save where a statute or rules of court expressly provide that an application may be made ex parte, the applicant for an ex parte order must justify proceeding without notice. In the present case it was assumed that the usual practice was to proceed ex parte and the case for proceeding ex parte in the first instance was not made out;

(iii) there was no material non-disclosure nor any other considerations which undermined the decision to grant the Orders or justified setting them aside;

(iv) the Court should scrutinize the scope of the order to avoid abusive requests, especially as regards the period of time mandated for compliance with the order. In the present case the JOLs were forced to concede before the *inter partes* hearing that the time initially ordered (14 days) was too short. Accordingly, the Orders should be varied to give the former auditors until August 1, 2013 to fully comply with the various production requests, without prejudice to their ability to provide earlier staged discovery voluntarily or by agreement.

Legal findings: scope of common law discretionary power to assist the SHL JOLs

9. The Cayman Islands Grand Court on September 18, 2009 made an Order appointing Hugh Dickson, Mark Byers and Stephen Akers as JOLs of SHL and directing that the voluntary liquidation commenced on August 20, 2009 should continue as a winding-up under the supervision of the Grand Court. The High Court of England and Wales on September 25, 2009 recognised the Caymanian liquidation proceedings as a foreign main proceeding under the Cross Border Insolvency Regulations 2006.

10. By an Ex Parte Originating Summons issued on February 12, 2013, the JOLs of SHL sought the following threshold relief, namely an Order:

> "*1. That the appointment of …*[the JOLs]*…, by order of the Grand Court of the Cayman Islands on 18 September 2009, be recognised by this Court, for the purpose of rendering them every assistance possible for them to carry out their duties as liquidators of the Company.*"

11. The Summons by paragraph 2 then sought an Order that the JOLs "*shall have certain powers…which are available under the Companies Act 1981*", specifying the general powers to locate, secure and take into their possession assets and books and records, to demand information about the foregoing and the power to employ agents. Paragraph 3

sought the production of specific information and documents from PWC Exempted and the examination of Paul Suddaby:

> "*…pursuant to the inherent jurisdiction of this Court; and/or the Common Law; and/or section 195 of The Companies Act 1981…*"

12. An Order was made by me on March 4, 2013 substantially in terms of the Ex Parte Originating Summons. By Summons dated March 25, 2013, PwC Exempted applied to set aside or vary the Ex Parte March 4 Order.

The submissions of counsel

13. Counsel for PwC Exempted did not challenge the jurisdiction of this Court under longstanding rules of private international law to recognise the Order made by the Cayman Islands Grand Court on September 18, 2009. In fact, the March 4 Order while expressly only recognising the appointment of the JOLs effected by that Order also necessarily entailed the recognition of the winding-up proceedings in which the Order was made. Nor was the jurisdiction of this Court to assist the JOLs by conferring upon them the general powers conferred by paragraph 2 of the March 4 Order explicitly challenged.

14. Their Skeleton Argument summarised two arguments central to the challenge to the Order made against PWC Exempted:

> "*a. First, that in light of the UK Supreme Court's decision in Rubin, the Court does not have the jurisdiction to make orders at common law equivalent to s.195 orders in aid of foreign liquidators…*
>
> *b. Second, that even if the Court could make such orders….it should not do so if the Cayman court could not make such orders.*"

15. The first of these arguments was the most important and involved the analysis of relevant authorities. In terms of local cases, I was invited to follow my own refusal to grant equivalent assistance at common law by analogy with section 195 of the Companies Act to liquidators of an overseas company to which the Companies Act did not apply: *In the Matter of Kingate Global Fund Ltd. (in liquidation) et al* [2011] Bda LR 2. It was contended that my decision to recant from that decision, albeit in a case not directly concerned with an examination/production order, *Re Founding Partners Global Fund Ltd* [2011] Bda LR 22, was now undermined by the UK Supreme Court's disapproval in *Rubin* of the *Cambridge Gas* decision upon which my reasoning in *Founding Partners* relied. I was urged to follow the "more orthodox" approach of the Judicial Committee in *Al Sabah-v-Grupo Torras SA* [2005] 2 AC 333 at 351.

16. Messrs. Smith and Pearman in their Skeleton Argument made two submissions which were emblematic of the policy stance they contended for. Firstly, in attacking the broad-brush approach to the scope of assistance contended for by Lord Hoffman in *Cambridge Gas*, they submitted:

> "18.*There is tremendous uncertainty in this area. In particular, the reasoning of Lord Hoffman, however compelling, that the principles of universalism trump other common law principles, has hit a brick wall. The approach of the Privy Council in Al Sabah is, it is submitted, the more orthodox. It is for Parliament, not the common law, to extend s. 195 (if at all) to foreign companies. The court cannot pull itself up by universalist bootstraps.*"

17. Secondly, in attacking the reasoning underpinning the making of an examination order under the Manx Court's inherent jurisdiction in relation to a company to which the statutory power did not apply in *Re Impex Services Worldwide Ltd* [2004] BPIR 564 (Deemster Doyle), counsel submitted:

> "*22. Indeed, the confusion which results from attempting to follow Cambridge Gas is displayed by the reasoning in Impex. In that case, the learned Deemster held that the Manx Court could not make orders pursuant to the relevant statutory provision in the Isle of Man since Impex Ltd. (like Singularis) fell outside the definition of a company for those purposes. The judge therefore refused to make an order pursuant s.206 since the Court had no jurisdiction to do so, but then ruled that the Court could provide assistance by making an order at common law identical to the statutory provision which he had just ruled he had no jurisdiction to apply. Such gymnastics are admirable but they amount to legislating from the bench.*"

18. The rather polemical tone of these arguments, and the fact that I consider the attempts to undermine the foundations of the common law power to assist liquidators appointed in an overseas company's place of incorporation to be obviously misconceived, ought not to be permitted to serve as a distraction from an important consideration. If this Court is competent to make an Order in relation to a company to which the Companies Act does not apply by analogy in the exercise of some common law power, the source and limits of that power must be capable of clear and coherent definition.

19. Mr. Smith referred the Court to two passages from judgments in the Court of Appeal for Bermuda which were helpful in clarifying the status of strictly non-binding decisions of the UK Supreme Court (formerly the Judicial Committee of the House of Lords). Both came from *Crockwell-v- Haley and Haley* [1993] Bda LR 7. The first passage came from the Judgment of da Costa JA (Acting President) at page 5:

> "*In short, whatever may be the orthodox theory of the doctrine of precedents, any decision of the House of Lords will be treated with the greatest respect having regard to the reputation and distinction of that august body as the highest legal tribunal of the United Kingdom, and will as a general rule be followed by a court in*

Bermuda. Should the rare occasion arise where it is thought that local conditions dictate a path different from that charted by the House of Lords, then the local court must be at liberty to adopt such a course leaving it to the Judicial Committee to decide as ultimate arbiter whether such a course was justified."

20. The second passage made a distinct but essentially complementary point. Georges JA stated (at pages 25-26):

> "*It must be conceded that the common law of Bermuda now being applied in the courts of Bermuda derives from the common law of England. The ultimate authority for the declaration of that law is the House of Lords. In that sense even though the courts of Bermuda are not hierarchically subordinate to the House of Lords as they are to the Judicial Committee of the Privy Council, there exists compelling reason to accept declarations of the common law by the House of Lords as binding. Further, in practical terms as Lord Diplock has pointed out in de Lasala v de Lasala [1980] A.C.546 at p.538 since the Judicial Committee of the Privy Council shares a common membership with the Appellate Committee of the House of Lords it is to be expected that the Judicial Committee sitting as the final appellate tribunal for any particular Commonwealth Country is hardly likely to disagree with views which its members have expressed as the Appellate Committee of the House of Lords.*"

21. In reply Mr. Attride-Stirling for the JOLs made some helpful background submissions. Firstly he submitted that decisions of the Judicial Committee of the Privy Council are binding on the Bermudian courts irrespective of the particular jurisdiction the appeal comes from: *Halsbury's Laws*, 4th ed Volume 10, paragraph 404; *Fautama Binti-v-Mohamed Bin Salim Bakshuwen* [1952] AC 1 at 14.

22. Secondly he submitted that if there was any conflict between two Privy Council decisions, *Al Sabah-v-Grupo Torras SA* [2005] 2 AC 333 and *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, the later case should be followed. This was the approach taken by the English High Court in *Frank Schmitt v. Hennin Deichman* [2012] EWCH 62 (Ch); [2013] Ch 61 (Mrs Justice Proudman). In this case the English Court expressly held that a statutory provision (section 423 of the Insolvency Act 1986) which did not otherwise apply to a German company could be applied as a matter of common law to assist the German administrator. Proudman J observed:

> "*64. In the absence of a determinative decision explaining the apparent conflict between the statement in [35] of Al Sabah and the broad brush approach of Cambridge Gas and HIH, it seems to me that I should take the later and more considered views expressed by Lord Hoffmann and approved by Lord Walker in HIH. If there is a conflict in a case of this sort between the*

application of black letter law and a broad commercial support of international comity there can be only one answer. I therefore agree with the learned Registrar below that the Court had jurisdiction to grant recognition and assistance."

23. Thirdly, but in one respect more controversially, the JOLs' counsel submitted that just as PWC Exempted had no standing to challenge the making of an ancillary winding-up order, it had no standing to challenge the jurisdiction of the Court to recognise and assist the JOLs at common law. To the extent that this suggests that no attack can be launched on the validity of paragraphs 1-2 of the March 4 Order, the submission seems obviously sound. To the extent that it implies that PWC Exempted cannot challenge the jurisdiction of the Court to make an order which affects its interests on any arguable grounds, the submission seemed to me at the outset to be doubtful.

24. The attack on *Cambridge Gas* was refuted with the following powerful analysis in the JOLs' Skeleton Argument:

"*27.In the recent decision of Rubin v. Eurofinance; And New Cap Re v. AE Grant (2012) UKSC 46 (Tab 27), handed down on 24 Oct 2012, the UK Supreme Court 'UKSC', in an unusual majority decision (written by Lord Collins), also ruled, inter alia, that the Privy Council decision of Cambridge Gas was wrongly decided.*

28. It is important to note the following:

a. Two of the five UKSC judges disagreed with this conclusion regarding Cambridge Gas.

i. One of those two (Lord Clarke) disagreed on substantive grounds and also because during the course of argument, it was never submitted that the case was wrongly decided.

ii. Lord Mance, who agreed with Lord Collins' reasoning and conclusion on the appeals in question, nevertheless disagreed with the statement that Cambridge Gas was wrongly decided. He made it clear that this was never argued before the UKSC and in any event, Cambridge Gas was distinguishable (as Lord Collins himself agreed, see para 178).

b. The decision of the UKSC in Rubin/New Cap is not binding on the Supreme Court of Bermuda. On the other hand, the decision of the Privy Council in Cambridge Gas is binding on the Bermuda Court, which is therefore compelled to follow it. (see Crockwell v. Haley, per Telford Georges JA [1993] Bda LR 7, Reminton v. Remington, per Hogan P, Bda Civ App 1/1977; De Lasala v. De Lasala [1980] AC 546, 558, Privy Council).

c. It is submitted that the statement that Cambridge Gas was wrongly decided was obiter dicta. Further that even if certain conclusions drawn by Cambridge Gas are said by the UKSC in Rubin to be wrongly decided, the UKSC did not say which aspects were wrongly decided. It is observed that in relation to relevant aspects of the Cambridge Gas, Lord Collins remarked that Lord Hoffman's analysis in Cambridge Gas was 'brilliant' (as was his speech in HIH).

d. In any event, Lord Collins did not disapprove of the statements Lord Hoffman made in relation to the common law power to render assistance to foreign courts. In fact the opposite is true and Lord Collins recognized and affirmed that there was such a common law power to recognize and render assistance to foreign liquidators (see UKSC Rubin para 29 – 32) including to get '…orders for examination in support of foreign proceedings...' [See also the article by Barry Isaacs QC, Feb 2013 South Square Digest (Tab 24) ('… international co-operation remains intact…').

e. At para 29 Lord Collins effectively affirmed the aforementioned decision in African Farms (1906) (infra) as such, SHL's case stands firmly even without Cambridge Gas to buttress it.

f. Furthermore, at para 33 in Rubin, Lord Collins effectively affirms the decision of Deemster Doyle In re Impex Services (supra). As such, it is submitted that this is of strong persuasive authority that the common law power exists, to recognize and assist foreign liquidators, as requested in the present matter."

25. The JOLs' Counsel also relied upon the decision of Andrew Jones J in *Picard (as Trustee for the liquidation of the Business of Bernard L. Madoff Investment Securities LLC) et al-v- Primeo Fund (In Official Liquidation),* Cayman Grand Court FSD 275 of 2010, Judgment dated January 14, 2013. In one of the first cases to consider the implications of the Supreme Court's decision in *Rubin* for common law judicial assistance based on the Privy Council decision in *Cambridge Gas*, the Caymanian Court essentially held that this area of the law remained intact as regards "traditional" forms of judicial assistance. Jones J cited the following passage in *Rubin* as illustrative of the traditional forms of assistance which Lord Collins did not appear to question in any way:

> "*29… at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element. The underlying principle has been stated in different ways: 'recognition … carries with it the active assistance of the court': In re African Farms Ltd [1906] TS 373, 377; 'This court … will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under ch 11': Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112, 117…*
>
> *32. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there.*"

26. Mr Attride-Stirling further relied upon the *Primeo* case, which substantively held that Caymanian avoidance provisions could be deployed by the Trustee at common law even though the foreign company was not otherwise subject to the winding-up jurisdiction of the local court. Andrew Jones J approved both *Re Impex Services Worldwide Ltd* [2004] BPIR 564 and *Frank Schmitt v. Hennin Deichman* [2012] EWCH 62 (Ch); [2013] Ch 61. On this basis he submitted that it was clear that this Court could either apply section 195

of the Companies Act or make an equivalent order as the statute permitted in the exercise of its common law power to assist the JOLs.

Findings: preliminary issues

27. For the reasons stated by da Costa JA and Georges JA in *Crockwell-v- Haley and Haley* [1993] Bda LR 7 and to which Mr. Smith referred, this Court will ordinarily be guided by pronouncements by the UK Supreme Court on common law issues which are not materially impacted by local considerations, even though such decisions are not strictly binding. However, decisions of the Judicial Committee of the Privy Council are binding on the Bermudian courts, irrespective of the jurisdiction from which the appeal emanates, and any conflict between two Privy Council decisions should ordinarily be resolved in favour of the later decision as Mr. Attride-Stirling contended.

28. I find that it is open to PWC Exempted to challenge the jurisdiction of the Court to make paragraph 3 of the March 4, 2013 Order which clearly affects its legal interests. While it may not challenge the Court's jurisdiction to recognise the JOLs of SHL and assist them in general terms, the former auditors do have sufficient interest to challenge on any tenable ground the making of that part of the Order which engages their legal rights. One such ground is the complaint that the common law power of assistance does not extend to granting the relief set out in paragraph 3 of the Order.

Findings: impact of Rubin on Cambridge Gas

29. The primary significance of the UK Supreme Court decision in *Rubin* is to caution judges invited to furnish common law assistance to foreign insolvency courts to keep their feet firmly planted on the ground and to avoid sacrificing established conflict of law rules on an altar erected in honour of judicial cooperation.

30. The validity of the narrow finding in *Cambridge Gas,* that a US Plan could validly extinguish share rights in an Isle of Man company to the (notional) prejudice of a shareholder who never submitted to the jurisdiction of the US Court, is now in doubt although this finding has always been coloured by the unusual facts of the case[1]. Having regard to the starkly different facts in *Rubin*, and Lord Mance's observation that its correctness was not even addressed in argument, the majority disapproval of *Cambridge Gas* (with Lord Sumption not delivering a separate judgment of his own) is very slender indeed. Post-*Rubin*, nevertheless, the best practice may once again come to require a parallel proceeding in Bermuda where it is desired to alter shareholder or creditor rights governed by Bermudian law in a foreign "main" proceeding by which all key stakeholders are not clearly bound.

31. The better view may also be that a winding-up order and similar orders made in insolvency proceedings are properly classified as *in rem* orders rather than as *sui generis*

[1] The Judicial Committee understandably considered there was something perverse about a shareholder which had no substantial interest in the Plan and which could have participated in the Plan confirmation process raising a rear-guard challenge in the Isle of Man.

as Lord Hoffman hypothesised. As Lord Clarke observed on this topic in his dissenting Judgment in *Rubin*:

> "*196. I agree with Lord Collins at para 103 that it is not easy to see why the order of the US Bankruptcy Court in Cambridge Gas was not an order in rem. However, that does not to my mind show that Cambridge Gas was wrongly decided but demonstrates that it is possible to have an in rem order which is made as incidental to bankruptcy proceedings but which is enforceable at common law, provided that the bankruptcy court has jurisdiction in the bankruptcy.*"

32. But these issues have no real bearing on present concerns. I find that reading *Rubin* in a straightforward common sense way makes it impossible to conclude that Lord Hoffman's observations in *Cambridge Gas* about the scope of common law judicial assistance generally are in any way of diminished binding and/or persuasive force. The present application for an examination/production order is made in aid of an application for recognition of winding-up proceedings commenced in and liquidators appointed in the place of the foreign debtor's incorporation. I am accordingly still guided by the following observations of Lord Hoffman in *Cambridge Gas*:

> "***18*** *As Professor Fletcher points out (*Insolvency in Private International Law*, 1st ed (1999), p 93) the common law on cross-border insolvency has for some time been 'in a state of arrested development', partly no doubt because in England a good deal of the ground has been occupied by statutory provisions such as section 426 of the Insolvency Act 1986, the European Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160, p 1) and the Cross-Border Insolvency Regulations 2006 (SI 2006/1030), giving effect to the UNCITRAL Model Law. In the present case, however, we are concerned solely with the common law.*
>
> ***19*** *The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English moveables vest automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in* Solomons v Ross*, or in which he submitted to the jurisdiction:* *In re Davidson's Settlement Trusts* *(1873) LR 15 Eq 383. It may be that the criteria for recognition should be wider, but that question does not arise in this case. Submission to the jurisdiction is enough. In the case of immovable property belonging to a foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property.*
>
> ***20*** *Corporate insolvency is different in that, even in the case of moveables, there is no question of recognising a vesting of the company's assets in some other*

person. They remain the assets of the company. But the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. 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 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.'"*

33. As Mr. Attride-Stirling correctly submitted, Lord Collins in *Rubin* approved these general principles in the portions of his Judgment set out above. More pertinently, Lord Collins' review of cases where judicial assistance at common law has been furnished included the following highly pertinent observation:

> "*33. Cases of judicial assistance in the traditional sense include In re Impex Services Worldwide Ltd [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company.*"

34. The present application by liquidators appointed by the insolvent company's domiciliary court for assistance in the form of an order for the examination and production of documents in aid of the primary liquidation falls into the "traditional" category common law judicial assistance according to the leading judgment in the UK Supreme Court's most recent consideration of the topic in *Rubin v. Eurofinance; and New Cap Re v. AE Grant* [2012] UKSC 46; [2013] 1 AC 236.

35. There is in light of the authorities little room for serious doubt that the Court possessed the jurisdictional competence to grant the relief sought by the SHL JOLs, although there remains a need for further analysis of the precise basis of that jurisdiction. Is it assistance by way of applying a statutory provision which does not otherwise apply or assistance under the Court's inherent jurisdiction, or common law powers exercised in a way that is consistent with the statutory rules which would apply in a local primary or ancillary liquidation?

Findings: the Court's power to make the examination/production Order is by analogy with section 195 of the Companies Act rather than by direct deployment of the statutory power

36. My primary finding is that the Court's power to make the examination/production Order is by analogy with section 195 of the Companies Act 1981 rather than by reference to the statute itself. This is because the Companies Act 1981 does not form part of the general law of Bermuda but applies to the particular companies that Parliament contemplated it would apply to when enacting the legislation. Part XIII applies to companies which can be wound-up under the Act. This might be described as a more cautious "black letter law" approach and is, ultimately, not my preferred conceptual basis for granting the assistance sought.

37. In *Re Kingate* [2011] Bda LR 2, which was argued on a hypothetical basis after I had earlier found that the relevant companies were subject to the winding-up jurisdiction under the Act, I concluded:

> "*22. .. I find that assuming Part XIII the Companies Act 1981 does not apply to the applicant BVI companies, the production of documents order sought can only be made by reference to the general jurisdiction and powers of this Court...*"

38. I concluded that no general power existed to afford pre-trial discovery akin to the scope of discovery available under section 195. In *Re Founding Partners Global Fund Ltd.* [2011] Bda LR, a case which concerned the foreign liquidators' attempts to collect assets in Bermuda, I recanted from part of my reasoning in *Kingate* to the extent that I concluded as follows:

> "*64...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.*"

39. I had no reason to re-visit the narrower issue of whether or not disclosure could be ordered in circumstances contemplated by section 195 of the Act under the general jurisdiction of the Court in *Re Founding Partners Ltd.* It is now necessary to do so, however. The starting point is to identify the nature of the proceedings commenced by the JOLs and the character of the relief sought. The proceedings are obviously civil in nature and designed to obtain firstly recognition of foreign insolvency orders (namely the winding-up of SHL under the supervision of the Court and the appointment of the JOLs) and secondly such assistance as this Court can provide having recognised the foreign proceedings and the debtor's insolvency representatives.

40. It is straightforward to deploy the Court's general common law powers, albeit supplemented by statutory procedural rules, in aid of efforts by the foreign liquidators to

gain control of assets belonging to the foreign debtor. A variety of restitutionary claims can be deployed without recourse to the statutory insolvency regime, and the Court's power to grant declaratory and /or injunctive relief is based on rules of common law and equity of general application. It is at first blush more complicated to decipher how the Court's general jurisdiction and common law powers can be deployed to obtain somewhat extraordinary discovery of documents not simply belonging to the debtor but merely relating to the debtor's affairs. However, the complication only arises if one fails to keep in the forefront of one's mind the distinctive nature of the recognition proceedings which the foreign liquidator seeking common law assistance has commenced.

41. A request for discovery made by foreign liquidators ought not to be equated to "pre-trial discovery" as the "action" is commenced with the filing of the application for recognition and assistance in relation to the insolvent company and the "trial" is the hearing of the application for recognition and assistance itself. The "trial", for present purposes, is not some subsequent action which may or may not be commenced against the party from whom the foreign liquidators seek disclosure. Accordingly, this Court is competent to order disclosure under the following general power conferred by the Rules:

> "***24/12 Order for production to Court***
> *12 At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.*"

42. The Court may also order interrogatories under Order 26. The Court further has the power to order that specific issues be tried, that evidence of particular issues be given in a particular manner, that this evidence be given at the trial or trial of a preliminary issue and has the power to issue subpoenas: Order 33 rule 3; Order 38 rule 3; Order 38 rule 8; Order 38 rule 12-18. If the recognition action is properly viewed as akin to an application by trustees (or indeed a beneficiary) for directions or other relief in relation to a trust or other estate, then it my judgment it becomes clear that the Court's general powers under the law applicable to civil proceedings in Bermuda are flexible enough to provide assistance by analogy with section 195 of the Companies Act 1981.

43. This statutory liquidation power is of course the best analogy; because the foreign representatives once recognised stand before the local court seeking assistance in aid of a foreign insolvency proceeding in relation to assets and/or information within the jurisdiction of the assisting court. The reference to other similar forms of what may perhaps best now be described as *in rem* proceedings potentially engaging broad and flexible discovery powers under the Rules of this Court only serves to demonstrate how pliable those discovery powers really are. My contrary finding in *Re Kingate* [2011] Bda LR 2 (i.e. that the Court's non-insolvency powers were unable to support relief equivalent to section 195 relief) resulted from viewing these powers imperfectly by using the wrong lens.

44. All section 195 essentially does is to empower the Court to order any person believed to be in possession of assets or documents or information relating to an insolvent company to produce such documents and/or give evidence about them. Section 195 provides as follows:

> "*195 (1) The Court may, at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer of the company or persons known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.*
>
> *(2) The Court may examine such person on oath, concerning the matters aforesaid, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.*
>
> *(3) The Court may require such person to produce any books and papers in his custody or power relating to the company, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien.*
>
> *(4) If any person so summoned, after being tendered a reasonable sum for his expenses, refuses to come before the Court at the time appointed, not having a lawful excuse, made known to the Court at the time of its sitting and allowed by it, the Court may cause him to be apprehended and brought before the Court for examination.*"

45. These powers cannot be deployed in an ordinary civil action commenced by writ and so are regarded as extraordinary and only available in the liquidation context. A common law recognition action is a quasi-liquidation proceeding, where the local court having recognised the foreign main proceeding will assist the foreign representative to discharge his duties to the primary insolvency court to the extent permitted by applicable local law within the jurisdiction of the assisting court. If assistance is sought with respect to obtaining information from persons likely to have information relevant to the insolvent estate, the procedural remedies available under the law of the local forum may properly be deployed by the assisting court. If the local insolvency statute does not directly apply, the Court's discretion to assist under the generally applicable law can still be shaped by the way the relevant local insolvency provisions would be applied.

46. In summary, the substantive cause of action properly asserted by the JOLs of SHL is a claim to have their appointment and the insolvency proceeding in which it was made recognised and to obtain such assistance as this Court is minded to afford them in discharging their duties within Bermuda. The Court's general jurisdiction can be deployed towards this end and may include making examination/production orders

similar to those which could be granted in a local liquidation. This was the pioneering reasoning of Deemster Doyle in *In re Impex Services Worldwide Ltd* [2004] BPIR 564; in this case it was quite clear that the Manx equivalent of our section 195 could not be deployed to assist a company to which the insolvency legislation did not apply. He rejected as too nebulous the notion that the Court's inherent jurisdiction could be resorted to. Instead he found, based on an analysis of the English common law prior to section 426 of the Insolvency Act 1986 (UK), that there as a flexible common law discretion to both recognise and provide assistance:

"*106. In my judgment the position in Manx common law is as follows:-*

(1) This court should recognise the appointment by the English High Court of the Petitioner as provisional liquidator of the Company, a company incorporated under the laws of England. Indeed this court has already done so without any opposition from Aidre and no appeal was lodged against the 16th September 2003 Manx Order.

(2) The judicial recognition is not simply a bare acknowledgement that the Petitioner has been appointed provisional liquidator of the Company. With that recognition comes a discretion to provide active assistance and this court should, in principle, always wish to co-operate in every proper way with an order or a letter of request from the English High Court in relation to corporate insolvency matters.

(3) The jurisdiction at Manx common law permits this court to co-operate with and assist other courts including the English High Court in relation to insolvency matters. The jurisdiction is a wide and discretionary jurisdiction. It will be for the court to decide whether in any given set of circumstances the jurisdiction should be exercised and if so what safeguards or protections need to be put in place in respect of orders which are made when giving such co-operation and assistance to the foreign court.

(4) The jurisdiction at Manx common law enables this court to co-operate with and to assist courts of other jurisdictions in respect of insolvency matters. In exercising its discretion the court would have regard to various matters and in particular to the rules of private international law. The court should also endeavour to ensure that its orders do not operate oppressively or unfairly upon the examinee. The court needs to balance the Petitioner's reasonable requirement to obtain the information and the importance of that information against the possible oppression and unfairness to the proposed examinee.

(5) In dealing with applications for examination and production of information the courts will have to balance the need of those seeking such information and the importance of the information on the one hand and any issues of confidentiality and the private affairs of third parties on the other. For my part I have to say that

in cases of prima facie wrongdoing issues of confidentiality and privacy will frequently take second place to the public interest in obtaining the information and documentation to enable a liquidator to get a full picture of the company's affairs and in order that wrongdoers are brought to justice.

(6) The courts' discretion to co-operate and assist must be exercised cautiously and judicially taking into account all relevant factors and concerns. Suitable safeguards and protections may also have to be imposed in appropriate cases. If there are particular questions or areas of inquiry which it is felt objection could be taken these matters can be raised and debated at the examination itself or if more convenient at a preliminary hearing (See Jeeves v Official Receiver [2003] BCC 912 - an English Court of Appeal decision on a public examination under section 133 of the Insolvency Act 1986).

(7) The way in which the court chooses to co-operate with and assist foreign courts, including the English High Court, on matters of insolvency will depend on the facts and circumstances of each individual case and each individual request for co-operation and assistance.

(8) The jurisdiction at Manx common law enables this court to assist the Petitioner, if it thinks fit, by making an order summoning before it any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings and affairs or property of the Company.

(9) The jurisdiction at Manx common law also enables this court to assist the Petitioner, if it thinks fit, by examining such witnesses on oath and requiring such witnesses to produce any books and papers in their custody or power relating to the Company and to sign and approve a transcript of such examination."

47. The only gloss which I seek to add to this analysis is that the procedural tools which are deployed in support of the common law "cause of action" cannot be conjured out of thin air. They must and may be found in the general law of Bermuda, which includes the inherent powers of the old common law and equitable courts preserved in statutory form in section 12 of the Supreme Court Act 1905. In the instant case the procedural powers primarily lie within the Rules of the Supreme Court; however the conditions for the exercise of these discretionary powers (i.e. the substantive principles which inform the purpose for which the procedural tools are utilised) can, as a matter of common law, best be borrowed from cases considering the exercise of the statutory powers which would apply in the context of a local liquidation and, it seems to me, the terms of the statutory provisions themselves. Under settled conflict of law rules, the status of the liquidator and the company in liquidation derives from the company's domiciliary law. But local law (*lex fori*) governs both the procedure and remedies which the assisting court provides; this point will be returned to below when considering the alternative theory that this Court may directly apply statutory insolvency law.

48. This approach seems more straightforward and conservative than the alternative approach, entailing the assumption that either (a) the common law discretion to cooperate embodies the power to apply statutory provisions to foreign companies to which they do not otherwise apply, or (b) that the substantive and/or procedural rules which may be deployed to assist a foreign representative who has been recognised are derived wholly from the common law itself and may be defined by the courts on a case by case basis. However, alternative (a) is a serious contender for the most principled legal basis for exercising this discretionary common law jurisdiction.

Findings: the common law power to apply statutory winding-up provisions to overseas companies to which they do not otherwise apply

49. The more principled alternative basis for assistance is to directly apply the provisions of section 195 instead. Support for such an approach is found, in particular, in two recent cases upon which Mr. Attride-Stirling aptly relied. This basis for making the examination/production order seems at first blush a more radical and convoluted analytical option. But the strength of this basis for the assistance jurisdiction gathers steam, as it were, as the analysis runs along. And in the final analysis it is to my mind the most conceptually clear and simple basis for granting the relief sought by SHL's JOLs in this case.

50. The first case is *Frank Schmitt v. Hennin Deichman* [2012] EWCH 62 (Ch); [2013] Ch 61 (Mrs Justice Proudman), where judgment was delivered on October 10, 2012 two weeks before the judgments in *Rubin* were handed down. The application before the English High Court was an appeal against Registrar Jaque's ex parte order recognising the administrator of a German company at common law. Pursuant to that recognition, the administrator commenced proceedings against the appellants under section 423 of the Insolvency Act 1986 ("*Transactions defrauding creditors*"). Proudman J noted the following crucial legal consideration at the beginning of her Judgment:

> "*4. It is common ground that the Council Regulation (EC) No 1346/2000 on Insolvency Proceedings does not apply because the company was an investment undertaking. Again, it is common ground that the UNCITRAL Model Law (the Legislative Guide on Insolvency Law (2005) as reflected in the Cross-Border Insolvency Regulations 2006 SI 2006/1030 could not be invoked because of the date when it was incorporated into English law. As a result the administrator's only recourse in this court is to common law principles…*
>
> *10. The primary issue before me is the question whether the common law power to assist an office-holder permits him to establish and exercise statutory powers in circumstances not falling within their express scope.*"

51. In the present case it is common ground that SHL cannot be wound-up under the Companies Act 1981 and that the JOLs' "*only recourse in this court is to common law principles.*" For present purposes, the primary issue before the Court also is whether the provisions of the section 195 of the Act can be invoked by the JOLs "*in circumstances not falling within their express scope.*" Coincidentally, Proudman J in Schmitt considered that this Court's Judgment in *Kingate* was the only case to which she was referred which dealt directly with these issues. She was also referred to *Re Founding Partners Ltd*. In this regard she concluded as follows:

> "*41. Kawaley J decided that a statutory power could not be deployed in aid of foreign liquidation proceedings unless the company could demonstrate that the relevant statutory provisions applied to it. He declined to follow the decision of Deemster Doyle in the Isle of Man in* ***Re Impex Services Worldwide Ltd*** *[2004] BPIR 564 and held that the common law power did not enable him to make pre-litigation discovery orders.*
>
> *42. Of course the decision in* ***Kingate*** *is not binding on me and Mr Marks QC invited me to ignore it on the basis that it is, as Kawaley J himself seems to have later thought, simply wrong.*"

52. The following findings were then made to the effect that the local statutory insolvency provisions which did not otherwise apply to the German company could be made available by way of common law assistance to the foreign office holder:

> "60. *Mr Wolfson QC is right in saying that the law so far has only either (i) recognised the foreign office-holder's ability to maintain actions to enforce pre-existing rights (see e.g.* ***Copin v. Adamson*** *1 Ex D 17,* ***Re Davidson's Settlement Trusts*** *(1873) LR 15 Eq 383 and* ***Bank of Credit & Commerce Hong Kong Ltd v. Sonali Bank*** *[1994] CLC 1171,* ***Alivon v. Furnival*** *(1834) 1 Cr M & R 27 and* ***Macauley v. Guaranty Trust Co of New York*** *[1927] 44 TLR 99) or (ii) (as in* ***Cambridge Gas*** *and* ***Rubin****) recognised and enforced rights deriving from a foreign judgment. Strictly speaking, in* ***Cambridge Gas*** *all the court did was enforce a plan confirmed by a foreign bankruptcy court requiring shares in a holding company to be transferred to the creditors' representative. Again, strictly speaking, all the Court in* ***Rubin*** *did was enforce a judgment given by a foreign court setting aside transactions at an undervalue pursuant to powers similar to those available under English law.*
>
> *61. Neither case is authority for the proposition that the Court can, pursuant to common law powers, treat Germany (which has not been designated as such by the Secretary of State) as if it were a relevant country or territory under s. 426(11).*

> *62. However it does not necessarily follow that deployment of the common law powers has this effect. Reading together* ***Cambridge Gas****,* ***HIH****,* ***New Cap*** *and* ***Rubin****, I derive the following propositions: (i) there is power to use the common law to recognise and assist an administrator appointed overseas, (ii) assistance includes doing whatever the English court could have done in the case of a domestic insolvency, (iii) bankruptcy proceedings are collective proceedings for the enforcement (not establishment) of rights for the benefit of all creditors, even when those proceedings include proceedings to set aside antecedent transactions, (iv) proceedings to set aside antecedent transactions are central to the purpose of the insolvency.*
>
> *63. I am however faced with Lord Walker's remarks at [35] of* ***Al Sabah****, suggesting that to deploy the common law to allow (for present purposes) a foreign administrator to sue under s. 423 could be said (to use Lord Neuberger's words in* ***HIH*** *at [76]),*
>
> > *'to involve the inherent jurisdiction almost thwarting the statutory purpose.'*
>
> *64. In the absence of a determinative decision explaining the apparent conflict between the statement in [35] of* ***Al Sabah*** *and the broad brush approach of* ***Cambridge Gas*** *and* ***HIH****, it seems to me that I should take the later and more considered views expressed by Lord Hoffmann and approved by Lord Walker in* ***HIH****. If there is a conflict in a case of this sort between the application of black letter law and a broad commercial support of international comity there can be only one answer. I therefore agree with the learned Registrar below that the Court had jurisdiction to grant recognition and assistance.*"

53. The crucial finding appears to me to be the following conclusion set out in paragraph 62: "*assistance includes doing whatever the English court could have done in the case of a domestic insolvency*". This conclusion is based on the following observations of Lord Hoffman in *Cambridge Gas* which, as a simple offshore trial judge working at the legal coalface, I have always found beguiling:

> "*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 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." [emphasis added]

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

55. The second case is the even more recent decision in *Picard (as Trustee for the liquidation of the Business of Bernard L. Madoff Investment Securities LLC) et al-v-Primeo Fund (In Official Liquidation),* Cayman Grand Court FSD 275 of 2010, Judgment dated January 14, 2013 (Mr. Justice Andrew Jones). In this case the Trustee was recognised although it was accepted that the debtor he represented ("BLMIS") could not be wound–up under the Caymanian Companies Law. As in *Schmitt*, the question was whether statutory avoidance provision could found the basis for a claim and, in particular, could be made available to the foreign representative by way of common law assistance.

56. Andrew Jones J had the benefit of considering both *Schmitt* and the UK Supreme Court's decision in *Rubin*. With considerable dexterity, he grappled with the conundrum of justifying the application of statutory provisions which did not otherwise apply in a highly persuasive way. His conclusions on this topic (at paragraphs 39-41) merit reproduction in full:

> *"39. It may be said that orders vesting local assets in a foreign representative or declaring his right to deal with such assets are not dependent upon the exercise of a statutory power available only to official liquidators appointed by this Court. Similarly, the grant of a stay of proceedings or a stay execution upon the application of a foreign representative merely involves the exercise of a general power in a manner which recognizes the existence of the foreign insolvency proceeding. Traditional assistance of this sort does not depend upon conferring a course of action upon the foreign representative or giving him access to a remedy under the domestic insolvency law which would not otherwise exist, absent a winding up order. The argument is that traditional assistance is*

dependent upon recognition alone. Non-traditional assistance is dependent upon the application of an additional 'sufficient connection test' to determine whether or not there is a jurisdiction to make a winding up order, without which the local court cannot properly treat the foreign representative as having any of the rights and remedies available only to a locally appointed official liquidator. Mr. Crystal's argument has a compelling logic, but it is not actually consistent with the approach which appears to have been approved by Lord Collins in Rubin. He stated (at paragraph 33) that 'Cases of judicial assistance in the traditional sense include In re Impex Services Worldwide Ltd [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England or an English company.' In this case a foreign liquidator made an application to the Manx court for an order for the examination of an individual in aid of the foreign liquidation proceeding. The application was made under section 206 of the Companies Act (Isle of Man) 1931 which is the equivalent of section 103 of the Companies Law. It was held that the statutory jurisdiction was not available because Impex was not a 'company' within the meaning of the Act. Nevertheless, the Manx court held that it had power at common law to make an order for examination in exactly the same terms as the statutory power even though the statutory power did not apply. This decision, which is described by Lord Collins as an example of traditional common law assistance, is inconsistent with Mr. Crystal's analysis and suggests that recognition is sufficient for granting assistance, even when it involves treating the foreign representative as having rights and remedies otherwise available only to official liquidators appointed by this Court.

40. It might be said that this approach conflicts with the general principal that this Court has no inherent jurisdiction to exercise a statutory power in circumstances not falling within the provision of the Law in question. This point was addressed in the decision of the Privy Council in Al Sabah -v- Grupo Torras SA [2005] 2 AC 333. The case concerned an individual who was subject to a personal bankruptcy proceeding in the Bahamas. The trustee in bankruptcy obtained a letter of request from the Bahamas court seeking the aid of this Court in setting aside two trust settled by the debtor under Cayman Islands law pursuant to section 107 of the Bankruptcy Law (1997 Revision). It was held that this Court had a statutory jurisdiction under section 156 of the Cayman Islands Law and/or under section 122 of the UK Bankruptcy Act 1914.[9] *However, in giving judgment Lord Walker made the following observation (at paragraph 35)-*

> *'The respondents relied in the alternative, on the second issue, on the inherent jurisdiction of the Grand Court. This point was not much developed in argument and their Lordships can deal with it quite shortly. If the Grand Court had no statutory jurisdiction to act in aid or a foreign bankruptcy it might have had some limited inherent power to do so. But is cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognized foreign Bankruptcy jurisdiction are more limited in their scope . . . and the inherent Jurisdiction of the Grand Court cannot be wider.'*

41. What this means is that the common law cannot bring into play a statutory provision to achieve a purpose which is different from the object of the statute. The object of section 107 of the Bankruptcy Law (1997 Revision) is to confer jurisdiction on the court to set aside voluntary settlements only in connection with personal bankruptcy proceedings. The Law has no application to corporate insolvency proceedings. Lord Walker's point is that the common law cannot be invoked to apply provisions of the Bankruptcy Law to achieve an objective outside the scope of the statute. To put the point another way, as Lord Neuberger did in HIH (supra) (at paragraph 76), the common law cannot be used to thwart a statutory purpose. However, bringing the preference claim provisions of section 145 into play in respect of BLMIS in the circumstances of this case does not, in my view, depart from or thwart the statutory objective of the Companies Law in the way contemplated by Lord Walker and Lord Neuberger. Treating BLMIS as being the subject of a liquidation proceeding under Cayman Islands law as at the date of the foreign bankruptcy proceeding (15 December 2008) even though there was no jurisdiction to make a winding up order, is consistent with the general principal of modified universalism and does not, in my view, involve applying the statute for an unintended purpose or tend to thwart its intended purpose. Indeed, the very concept of recognizing a foreign bankruptcy proceeding, involves recognizing that certain legal consequences have occurred from a specific date. The effect of the Recognition Order in this case is, inter alia, that the Trustee is recognized as having authority to act for BLMIS with effect from the date upon which the New York Court made its order, namely 15 December 2008. This Court has recognized that BLMIS has been in bankruptcy since that date. Applying the provisions of section 145 in this way is an incidence of

recognition and it is consistent with the statutory objective. For these reasons I have come to the conclusion, not without some hesitation, that this court does have jurisdiction at common law to apply the avoidance provisions of Cayman Islands insolvency law in aid of the BLMIS liquidation whether it would have had jurisdiction to make a winding up order."

57. His crucial findings, similar to those of Proudman J in *Schmitt*, are that applying the local avoidance provisions "*is an incidence of recognition and it is consistent with the statutory objective*". Being guided by those persuasive judgments which apply with greater force in the context of a "traditional" sphere of common law assistance, the making of an examination and production order, I find that I may properly grant relief under section 195 of the Companies Act 1981 in common law aid of the JOLs of a company to which those provisions would not otherwise apply. However, I would like to add a gloss of my own by way of further explanation of this not uncomplicated conclusion.

58. As Lord Collins' illuminating leading judgment in *Rubin* explains, rules of private international law regulate how this process takes place at common law. There are different rules in relation to personal judgments or judgments *in personam* and judgments *in rem*. It is necessary to remember that in expressly recognising the appointment of a foreign liquidator in the forum of the foreign debtor's domicile (thus implicitly recognising the foreign insolvency proceedings themselves) and offering assistance, the assisting court is engaged in the process of recognising and enforcing a foreign judgment. It is usually self-evident that the applicant in seeking recognition wishes to avail himself of whatever remedies are available under the law of the local forum. This is why assistance is an integral part of recognition itself.

59. One of the fullest judicial explorations of the theory underlying the recognition of a foreign liquidator which I have seen may be found in the judgments of Innis CJ and Smith J in *Re African Farms Ltd*. [1906] Transvaal Law Reports 373 (also cited as [1906] TS 373), a case upon which counsel for the JOLs also relied. Although the judgments did not explicitly consider the specific topic of whether or not local insolvency rules which did not apply to the foreign company could be deployed in aid of the foreign liquidator, they did consider head on the question of whether or not at common law a foreign liquidator could be recognised and assisted even though the insolvent company could not be wound up under local law. It could not be wound-up under Transvaal law because it was being voluntarily and not compulsorily wound-up in England. However, the final Order made by the three-member Court was clearly premised on the application of the local insolvency statute, as will be seen below.

60. Reading the report of this highly persuasive case for the first time before delivering my own Judgment in *Re Founding Partners Ltd.* [2011] Bda LR 22 formed the basis of my rapid retreat in that case from my holding, less than three months previously in *Re Kingate* [2011] Bda LR 2, that the jurisdiction to wind-up the overseas debtor was a

precondition for applying provisions of the local insolvency statute in the course of assisting a foreign liquidator.

61. In reaching the conclusion that recognition and assistance could be rendered, the Court grappled with the fundamental purpose of recognition at a time when there was even less judicial guidance than there is today. Innis CJ opened his consideration of this topic (at page 377) as follows:

> "*It only remains to consider whether we are justified in recognising the position of the English liquidator. And by that expression I do not mean a recognition which consists in a mere acknowledgement of the fact that the liquidator has been appointed in England, and that he is a representative of the company here; I mean a recognition which carries with it the active assistance of the Court. A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were in the jurisdiction of the English courts, subject only to such conditions as the Court may impose for the protection of local creditors, or in the recognition of the requirements of our local laws.*"

62. The theoretical underpinning for recognition which Innis CJ derived from the analogous context of personal bankruptcy was "*the wider principle that the right of administration conferred upon the trustee by a foreign law might, with propriety, be recognised and enforced by this Court on grounds of comity. And it is on this principle, it seems to me, that our recognition of the foreign liquidator is founded*" (at page 378). He expressly rejected the notion that foreign laws could not be recognised or given effect to because local law was not identical. He concluded (at 381-382):

> "*…I see no reason in principle why the position and rights of the liquidator of a foreign company, should not, in respect of property locally situated, be also recognised here. On grounds of comity for purposes of convenience, this Court ought in such a case to have the power to recognise the operation of the foreign liquidation over company's property in this country, subject to the rights of local creditors and the operation of local laws.*
>
> *The true test appears to me to be not whether we have the power to order a similar liquidation here, but whether our recognising the foreign liquidator is actually prohibited by any local rules; whether it is against the policy of our local laws, or whether its consequences would be unfair to local creditors, or on other grounds undesirable.*"

63. Smith J concurred with this result after considering the topic of foreign representatives generally, including both bankruptcy trustees and guardians. The learned judge observed (at page 389):

> "*I find it very difficult in going through the works of the various text-writers, and the decisions of the English courts on the question, to arrive at any clear*

conception of the principles on which the courts of one country will recognise and enforce rights or recognise a status acquired under the law of another. I gather the tendency of modern opinion is in favour of the courts recognising and enforcing such rights unless they conflict with the law of the country in which they are sought to be enforced; but the English decisions are by no means harmonious, and the question seems to be one largely of discretion."

64. These words, written over 100 years ago, still have resonance for me today. Smith J concluded that principle and convenience justified recognition of the foreign liquidator by way of analogy with not just the recognition of a foreign bankruptcy order but foreign judgments generally. He noted (at 391-392):

> "*In the case of a foreign judgment this Court would not , in the absence of an allegation of fraud, reinvestigate the cause of action here if the judgment had been pronounced by a competent tribunal having jurisdiction over the litigating parties; the judgment would be treated as a new and independent obligation which it is just and expedient to recognise and enforce (In Re Henderson, 37 Ch. D. 244 the procedure by which these rights must be enforced, e.g. by action, is of course different to that to be taken in the case of a trustee in insolvency or a liquidator, but the principle deciding what rights should be recognised appears to me to be the same.*"

65. Stepping back from the particular context of common law recognition of foreign insolvency orders therefore, it is instructive to consider the elements of common law enforcement of personal money judgments. Ground J (as he then was) summarised the Bermudian law position in *Muhl-v-Ardra* [1997] Bda LR 36 as follows:

> "*There was no real dispute as to the law concerning the enforcement at Common Law of a foreign judgment, although there was a great deal of dispute as to its application to the facts of this case. I summarised the relevant law in my judgment in Ellefsen -v- Ellefsen. Civil Jurisdiction 1993, No. 202 (22nd October 1993), and I consider that that statement of it still represents the law of Bermuda. I will, therefore, simply set it out:*
>
> > *'The legal position as to the enforcement of foreign judgments is set out in Dicey & Morris on the Conflict of Law, 11th ed. p. 421—*
> >
> > > *"A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution of the judgment. He must bring an action on the foreign judgment. But he can apply for summary judgment under Order 14 of the Rules of the Supreme Court on the ground that the defendant has no defence to the claim; and*

> > > *if his application is successful, the defendant will not be allowed to defend at all."*
>
> *There is no statutory mechanism here for enforcing American judgments by means of registration and execution by the local Court, and so this statement of the common law represents the normal method for enforcing such judgments in Bermuda, and there is no dispute about that.*
>
> *A final judgment* in personam *given by a court of a foreign country with jurisdiction to give it may be enforced by an action for the amount due under it if it is for a debt or a definite sum of money (not being a sum payable in respect of taxes or in respect of a fine or other penalty). The only grounds for resisting the enforcement of such a judgment at common law are: (1) want of jurisdiction in the foreign court, according to the view of the English Law; (2) that the judgment was obtained by fraud; (3) that its enforcement would be contrary to public policy; and (4) that the proceedings in which the judgment was obtained were contrary to Natural Justice (or the English idea of 'substantial justice,' as it was put in the leading case). Unless the judgment can be impeached on one of those four grounds, the court asked to enforce it will not conduct a rehearing of the foreign judgment or look behind it in any way: see Dicey & Morris. Ibid., p. 420—*
>
> > *"Rule 42—A foreign judgment which is final and conclusive on the merits and not impeachable under any of rules 43 to 46 [which are the four grounds I have set out above] is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either*
> >
> > *(1) of fact; or*
> >
> > *(2) of law."*
>
> *The commentary states that this has not been questioned since 1870.'*
>
> *In fact, in Ellefsen I enforced a judgment of the Superior Court of New Hampshire by summary judgment here. I therefore cite that case not just for the statement of principle, but to make it quite clear that the Courts of Bermuda stand ready to enforce a foreign judgment if it does not fall within the excluded categories.*"

66. The last quoted words, in the ears of a cross-border common law judicial cooperation lawyer, have a distinctly familiar ring. The aim of common law proceedings to enforce a

foreign money judgment is fundamentally to achieve recognition of such judgment on a summary basis without a full trial in the form of a final local judgment which can then be enforced utilising all of the procedural mechanisms available under local law. In my judgment the aim and function of common law enforcement of a foreign winding-up order and/or order appointing foreign liquidators is broadly similar.

67. Because of the *in rem* nature of the insolvency orders, the procedure for obtaining a local order granting recognition is somewhat different. But the incidental consequences which flow from the making of a local order recognising a foreign liquidator are perhaps substantially similar. In declaring in a common law "action" that the foreign office holders are recognised as liquidators validly appointed in respect of a foreign company (which can or cannot be wound-up by the assisting court), is the assisting court not effectively "domesticating" the foreign appointment order? Is the main purport of the recognition order not to declare that the foreign liquidator is recognised under local law as having the same status as he enjoys under the law of the primary liquidation under the relevant conflict of law rules? Is the main function of seeking recognition not to enable the foreign liquidator to act <u>as a liquidator</u> within the jurisdiction of the assisting court?

68. If all these question are answered in the affirmative, as in my judgment they ought to be, then the recognition order itself may be viewed as the trigger which brings into play not simply the general law of Bermuda but its statutory insolvency regime as well, to such extent as the foreign representative (or any other person affected by the recognition order) may reasonably seek to rely upon it, being a way which neither:

    (a) distorts the original statutory purpose of the provisions invoked; nor

    (b) conflicts with local public policy interests.

69. It would be somewhat odd if the effect of recognising a foreign liquidator by order of this Court did not have the result of making all relevant Bermuda law available to him, including Bermuda insolvency law. An analogy would be if common law enforcement of a foreign money judgment entitled the foreign judgment creditor to obtain a local judgment but not to be able to deploy the local enforcement rules. The dominant impulse of the common law is a results-oriented pragmatism, primarily driven by lawyers and judges who are former lawyers, practitioners who are often more motivated towards achieving a just result in a particular case than in developing the sort of coherent theoretical frameworks championed by the Civil Law tradition and common law academicians. This may explain the somewhat clipped practical terms in which the scope of the discretionary assistance jurisdiction has so often been expressed.

70. In *Rubin*, both Lord Collins (without any apparent dissent at paragraph 89(m)) and Lord Clarke (with positive approval at paragraph 202(m)) cited the Court of Appeal's reference to the principle that "*recognition carried with it the active assistance of the court which included assistance by doing whatever the English court could do in the case of a domestic insolvency*". This concise formulation tantalisingly hints at being high

authority for the proposition that the local insolvency rules can be deployed as instruments of common law assistance in relation to foreign companies to which the relevant statutory rules would not otherwise apply, without explicitly supporting this proposition.

71. Be that as it may, if the purpose of enforcing foreign judgments generally is to convert them into local judgments to facilitate the exploitation of local law, it accords with both principle and pragmatism that the "domestication" of an order appointing a liquidator in the insolvent company's place of incorporation should qualify the foreign office-holder to take advantage of local insolvency law as well as general local law. Where the local court has no jurisdiction to wind-up the foreign debtor, it may well be a bridge too far or "legislating from the bench" (as Messrs Smith and Pearman colourfully put it) to apply the insolvency regime in such a comprehensive way as to create in substance an ancillary common law winding-up proceeding. But even this limiting proposition must be in doubt having regard to the flexible nature of the common law process of recognising and assisting a foreign liquidator, as demonstrated by cases such as *Re African Farms*, which in general terms at least has been approved by both the Judicial Committee of the Privy Council in *Cambridge Gas* and the UK Supreme Court in *Rubin* as well. The answer to how this Court can apply local statutory insolvency provisions in the course of furnishing common law assistance to a foreign liquidator who has been recognised is probably best provided by a simple and well settled common law rule of private international law which is applied so routinely that the need for conscious or explicit regard to it rarely arises. *Lex fori* governs both the procedure and remedies which may be deployed in respect of a cause of action (here the claim to have the Caymanian liquidator appointment order recognised) which is governed by foreign law. According to '*Dicey and Morris The Conflict of Laws*', 12th edition (Laurence Collins, ed.) at pages 171-172 (Rule 17):

> "*The nature of the Plaintiff's remedy is a matter of procedure to be determined by the lex fori…the matter of enforcing a judgment is a matter of procedure. The lex fori determines what property of the defendant is available to satisfy the judgment and in what order…*"

72. In discussing *Re African Farms Ltd*. [1906] Transvaal Law Reports 373 above, I stated that the Transvaal Supreme Court did not explicitly consider the question of whether local insolvency law could be deployed in aid of a foreign liquidator of a foreign company in liquidation which could not be wound-up by the assisting court. However, perhaps the proper question to ask is not whether the local statute can be deployed in aid of the foreign liquidator (i.e. at his request), but whether or not once a foreign liquidator is recognised the local statutory insolvency regime is potentially engaged depending on the precise nature and implications of the form of assistance which is sought? This wider question was directly answered in the affirmative in *Re African Farms Ltd*. In essence, the Court applied local law in defining the scope of relief which the foreign liquidator could obtain in compliance with the applicable conflict of law rule. Paragraph 1 of the Order made in that case (set out at page 384 of the report of the case) was in the following relevant terms:

"*(1)…that Alexander Davidson be recognised as the liquidator of the African Farms, Ltd., by virtue of his appointment as such in England, and that he be entitled to the sole administration of all the assets of the said company in the Transvaal, both moveable and immoveable, subject to the following conditions:-*

… *(d) That he shall recognise the right of all creditors in this colony to prove their claims against the company before the Master; and that the admission or rejection of such claims, the liability of the company therefor to the extent of its assets in the Transvaal, and all questions of mortgage or preference in respect of such assets, shall be regulated by the laws of this colony, as if the company had been placed in liquidation here*…" [emphasis added]

73. I am bound to conclude, not without some degree of caution but with greater confidence than when the *inter partes* hearing began, that Bermuda's statutory insolvency regime is potentially brought into play by the recognition at common law of the liquidator of a foreign company which this Court has no jurisdiction to wind-up. The effect of recognition is to permit the foreign liquidator to seek relief by way of assistance for the foreign insolvency proceeding and the scope of relief which may be granted is governed by local law (statutory or otherwise) under the governing rules of private international law. It is these rules which trigger the availability of local statutory insolvency law along with any other pertinent legal rules which are pertinent to the scope of the relief afforded by this Court. And this is why the English common law scope of assistance to a foreign liquidator embraces (in the words of Lord Collins and Clarke in *Rubin*) "*doing whatever the English court could do in the case of a domestic insolvency*". This conclusion finds only indirect and implicit support in many of the general judicial pronouncements about the close connection between recognition and active assistance in the field of the common law recognition of foreign insolvency orders made in the domicile of the insolvent debtor. But this finding is in the final analysis wholly consistent with the explicit conclusions reached on this specific topic in the two most recent cases to have considered this topic, and by one of the first to do so as well:

(a) *Frank Schmitt v. Hennin Deichman* [2012] EWCH 62 (Ch); [2013] Ch 61 (Proudman J);

(b) *Picard (as Trustee for the liquidation of the Business of Bernard L. Madoff Investment Securities LLC) et al-v- Primeo Fund (In Official Liquidation)*, Cayman Grand Court FSD 275 of 2010, Judgment dated January 14, 2013 (Andrew Jones J); and

(c) *Re African Farms Ltd*. [1906] Transvaal Law Reports 373 (Innis CJ, Smith J and Curlewis J).

74. For the avoidance of doubt, however, my own findings place no reliance on the analysis in the two recent cases on the distinctive implications of the potentially more controversial "non-traditional" assistance remedy of applying local avoidance provisions

in aid of a foreign liquidator. That remedy has layers of complexity which are not present in the case of a foreign liquidator seeking information from persons subject to the jurisdiction of the assisting court.

Findings: can the JOLs properly seek assistance beyond the scope of relief to which they would be entitled under Caymanian law?

75. PWC Exempted sought to persuade the Court that it was impermissible for the JOLs to seek by way of common law assistance a scope of discovery which was broader than that available under the law of the liquidation court. That argument might have had greater force if the JOLs were seeking to enforce a Caymanian cause of action which was *prima facie* defined by Caymanian law. There is no conflict with the universalist goal of having all rights and liabilities in relation to an insolvent company determined, so far as is possible, in a single proceeding for the JOLs to exploit procedural advantages available in a particular forum in order to discharge their duties owed primarily to the liquidation court.

76. Moreover in *Schmitt*, the possibility that the relief sought in England might be unavailable in Germany was not only ultimately considered irrelevant. On the contrary, the need to demonstrate that relief was not available from the primary liquidation court had initially been contended to be a precondition for seeking assistance from the English court:

> "44…*It was accepted on both sides that the existence and possible effect of proceedings in the home jurisdiction did not represent a bar to recognition and assistance in England. The English court does not have to satisfy itself that the foreign administrator cannot obtain relief at home before jurisdiction can be established.*"

77. In the present case it is common ground that the present application for assistance has been made in this Court to obtain disclosure which is not available under a narrower Caymanian statutory equivalent of our own section 195. I reject the submission that this constitutes grounds for declining to provide the assistance sought. This is not a case where "*remedies will be refused* [because] *they are so different from those provided by the lex causae as 'to make the right sought to be enforced a different right'*": '*Dicey and Morris The Conflict of Laws*', 12th edition, page 171.

Findings: the merits of the examination/ production Orders

Preliminary matters

78. At the end of the hearing, a substantial portion of which was devoted to the argument that the March 4, 2013 Order as regards SHL but not SICL ought not to have been made,

counsel for PWC Exempted were unable to explain how the distinctive position of SHL impacted on the discovery process in practical terms. Chief Justice Smellie was shown correspondence with the Companies' former auditors' attorneys on September 3, 2010 in the course of the application for the Caymanian examination/production order granted on September 7, 2010. He commented: "*All I have is the correspondence which you have shown me which, I think, you correctly describe as stonewalling*". It appears that the former auditors of the Companies did not facilitate service on them of the Caymanian applications.

79. In the Third Dickson Affidavit sworn in support of the March 4, 2013 Orders, it is deposed that it was not until February 1, 2013 that PWC Exempted's London solicitors confirmed that their client would comply with the September 7, 2010 examination/production order. The First Lyndon Affidavit filed in response did not directly challenge this assertion. The deponent retorted that no complaints of non-compliance had been made However, it appears that the Companies' former auditors all but thumbed their nose at the Caymanian Court (whose jurisdiction they were not subject to) until they were served with a March 2012 Order with a penal notice attached and an attendance note that disclosed that the Caymanian Chief Justice had made adverse comments about the conduct of the former auditors and their London solicitors in relation to the Caymanian Orders.

80. Although PWC Exempted is not an overt target for adverse litigation brought by the JOLs at this stage, it seems clear that a combative and sophisticated defensive strategy has been engaged which requires the Court to adopt a healthily sceptical approach in evaluating the complaints made about the validity and scope of the Ex Parte Orders. The response to the document requests may well be grist for the mill in modern cross-border insolvency practice; and it may explain the perhaps somewhat aggressive approach taken by the JOLs in their conduct of the present applications. However, there is undeniably a massive insolvency and most of the books and records which would normally be obtained from the insolvent Companies' former management have reportedly been taken to a jurisdiction not noted for its cross-border insolvency cooperation record.

81. In these circumstances the general policy emphasis which this Court ought properly to be guided by is to err in favour of assisting the JOLs provided that no substantial (as opposed to purely technical or artificial) prejudice is caused to the former auditors who undeniably have information of relevance to the insolvent estates. One genuine basis for the former auditors to be cautious about carefully complying with the Orders is the existence of criminal sanctions for breach of confidentiality in the United Arab Emirates (UAE) where they are based.

82. In terms of timelines it seemed obvious to me that the JOLs had oversimplified the extent to which PWC Exempted could easily comply with the broader Bermuda Orders based on the work previously done in compliance with the Caymanian Orders. This was reflected in a belated open offer to receive staged production of the documents in question.

83. In terms of the substantive discretion to make the Orders, no arguable grounds for refusing the applications were advanced. For the same reasons articulated above in relation to SHL and the discretionary grant of common law assistance to the JOLs, I find that there is no principled basis for refusing to make the Orders merely because Bermuda law is more generous in its scope than the Caymanian counterpart provisions to section 195 of our Companies Act. There may well be circumstances where the PWC Exempted "forum shopping" complaint would gain more traction. The facts of the present case make it clear beyond serious argument that there is an objectively identifiable need to obtain as much information as possible about the Companies' affairs from their former auditors as the main corporate records have been taken by the former management (or key players in the former management team) beyond the reach of the JOLs.

Findings: were grounds for granting the applications on an ex parte basis made out?

84. The complaint that no sufficient grounds were made out for proceeding ex parte is, in my judgment, highly technical. The Caymanian examination/production Orders were obtained ex parte and no complaint about this fact was raised before the Cayman Court. Nevertheless it is true that the need to avoid giving notice of the Bermuda applications was substantially reduced by the simple fact that the former auditors were already aware of the Caymanian Orders and could hardly be expected to do anything to defeat the Bermuda Orders if given prior notice of the applications.

85. The JOLs proceeded on an ex parte basis on the grounds that this was the usual practice without seeking to justify this course in all the circumstances of the present case. In my judgment Mr. Smith was correct to contend that the strict legal position is that such applications may be made on an ex parte basis if sufficient grounds for so doing are made out: *Re Maxwell Communications Corporation plc* [1994] BCC 741 at 747 (Vinelott J); *Re PFTZM Ltd. (Jourdain & Ors v Paul)* [1995] BCC 280 (HHJ Paul Baker QC). The sort of reasons which can justify liquidators proceeding ex parte include:

    (a) extreme urgency, where it is neither possible to take the time to give notice or fix an *inter partes* hearing; or

    (b) "*where notice in advance of the service of the order might lead to the disappearance of the documents which the office holder wishes to inspect*": *Re PFTZM Ltd.* [1995] BCC 280 at page 287.

86. I would add to those two categories of case circumstances in which the liquidators wish to share with the Court confidential information about their grounds for seeking information from a former officer who has been identified as a potential defendant for a civil claim. It seems to me that there were no obviously cogent grounds for both proceeding ex parte and proceeding without notice in the present case. This finding is really only relevant by way guidance for future cases. The pre-existing local practice in Bermuda was for section 195 applications to be dealt with on an ex parte basis. PWC

Exempted has advanced no or no credible case for discharging the Ex Parte Orders of March 4, 2013 based solely on the fact that they were not given notice of the original applications.

Findings: was there material non-disclosure which justifies setting aside the ex parte Orders?

87. In paragraphs 39-47 of their Skeleton Argument, counsel for PWC Exempted complain about inadequate disclosure of the following principal matters:

    (a) the Branch office's substantial compliance in the Caymanian proceedings;

    (b) the JOLs' inactivity in the Cayman proceedings since 2500 documents were disclosed on May 12, 2012;

    (c) the inability of the former auditors to comply with the timelines set out in the Orders.

88. These complaints neither individually nor cumulatively justify setting the aside the Orders altogether. To the extent that PWC Exempted's compliance with the Caymanian Orders was underemphasised, this was understandable in light of the events occurring before such compliance took place. To the extent that counsel erroneously referred to non-existent battles over redactions at the ex parte hearing, he did that in the course of attempting to meet his clients' obligations of full and frank disclosure. To the extent that the ex parte application was advanced based on a misconceived assessment of how easy it would be to comply with the tight timelines sought, no prejudice has been suffered and before the *inter partes* hearing the JOLs proposed a more liberal production schedule. The most important consideration in rejecting the non-disclosure complaints as a ground for setting aside the Orders is that the application was made on the explicit understanding that PWC Exempted would have every opportunity to challenge, in particular, the logistics of compliance with the Orders at an *inter partes* hearing in due course.

89. I saw nothing in the related complaints about the "Competing Legal Considerations" set out in paragraphs 48-51 of the Skeleton Argument which justify serious consideration of refusing or setting aside the Orders altogether. The submission that the purpose of section 195 is "*to gather in company property*" is misconceived as a reading of the plain words of section 195(1) demonstrates:

    "*195 (1)The Court may, at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer of the company or persons known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company."*[emphasis added]

Findings: scope of the Orders and timelines for production

90. Mr Smith skilfully pointed out in oral argument why the initial production timeline was unreasonably short. At the ex parte hearing, I had insisted that a seven day production period should be increased to 14 days. I accepted his submission that reviews carried out for the purposes of disclosing documents which were the property of the Companies for the purposes of the Caymanian Orders would not be identical to reviews carried out in relation to other documents. However, counsel also referred to a number of requests that sought information about documents relied upon in formulating an audit opinion in circumstances where he contended no real case for seeking such information (which hinted at a challenge to the relevant audit opinions) was made out. This complaint had some merit; however, rather than excising these requests from the scope of the Order altogether, I consider that justice will be served by affording the former auditors more time to respond to the production requests.

91. Counsel relied upon PWC Exempted's evidence in First Lyndon (sworn on March 22, 2013) to the effect that if the objections to any discovery were rejected, four to six months would be required to comply with the March 4 Orders. The deponent Trent Lyndon is General Counsel of PwC Dubai, a branch of PWC. He also proposed, without elaboration, staged production. The JOLs proposed by email dated April 5, 2013 a compromise whereby 43% of the requested documents could be produced within three months and information on the capitalisation of the Companies and documents from 2000 on an urgent basis. It seems clear that there is no motivation on PWC Exempted's part to negotiate pragmatic agreements with respect to the document production process.

92. I find that there is no or no credible basis on which this Court should modify the scope of the March 4, 2013 Orders, looking at the matter in the round. I am satisfied that all the documents sought are genuinely required and sufficiently relevant to the Companies' affairs, even though the case for seeking information about documents relied upon for audit purposes has not been clearly spelt out. However, I am not satisfied that I should properly order on a non-consensual basis the staged production proposed by the JOLs in their April 5, 2013 email. I do not feel confident that I have a sufficient grasp of the practical implications of the proposal to fairly conclude that such proposal is just.

93. PWC Exempted has conceded in an Affidavit dated March 22, 2013 that it can fully comply with the Orders within a minimum period of four months. This is unlikely to be an overly conservative estimate. In my judgment, the most appropriate Order that this Court can make in all the circumstances is to vary the March 4, 2013 Orders so as to require PWC Exempted to produce all of the documents within four months of April 1, 2013 or no later than August 1, 2013. This achieves a more clear-cut result and also takes into account the reality that PWC Exempted may wish to pursue its appeal rights, a possibility that I somewhat delicately sought to elicit at the hearing but a topic upon which counsel refused to be drawn. The next session of the Court of Appeal is in just over two months' time.

94. The JOLs may well consider that the time period allotted is overly generous and may well be inconvenienced in not accessing certain material they genuinely need on an urgent basis. However, taking into account how long they took to obtain the March 2012 penal Order in Cayman and the inherent complexities of this type of contentious insolvency application, I consider that affording PWC Exempted four months is in global terms a proportionate Order likely to eliminate the need for interlocutory skirmishes in relation to a stay pending appeal. This means that in practical terms the overall time for compliance with the Orders will be nearly five months, which is not an excessive period of time in an insolvency of this size. Without wishing to undermine the goal of clarity in any way, both sides should have liberty to apply to seek directions about any issues which arise in relation to the implementation of the Orders as varied.

95. This variation of the Orders should not preclude PWC Exempted from producing documents on a staged basis either voluntarily or by agreement. The firm's Dubai Branch office has not covered itself in glory in the eyes of the Caymanian Court. Those responsible for directing the former auditors' tactical machinations should beware of being so focussed on convincing the JOLs that they are not a soft litigation target that they lose sight of the adverse impression their tactics potentially have on objective bystanders such as the courts.

96. I accept entirely that the scope of the production requests has become something of a moving target and that the Dubai Branch genuinely faces some confidentiality challenges which are more complicated than those which apply in Cayman or Bermuda. But no matter what legal structures may be devised to house the operations of professional service firms in the 21st century, the basic ethical duty of a former auditor to assist liquidators to mitigate the losses flowing from a former client's insolvency by furnishing what information he reasonably can has, surely, not been extinguished altogether.

Conclusion

97. For the above reasons, the application to set aside the Ex Parte Orders made on March 4, 2013 under section 195 of the Companies Act 1981 (SICL) and under section 195 and/or by analogy with section 195 (SHL) is refused. However the Orders are varied to the extent that PWC Exempted is granted four months from April 1, 2013 or until August 1, 2013 to comply with the Orders. I shall hear counsel as to costs.

98. The submissions that no jurisdiction to make the Order existed at common law in the case of SHL are rejected. I am now firmly of the view that I was wrong to hold in *Re Kingate* [2011] Bda LR 2 that an examination/production order could not be made in relation to a foreign debtor to which the Bermudian statutory insolvency regime did not apply because (a) relief under section 195 of the Companies Act 1981 could only be afforded to liquidators of insolvent companies which the Bermudian Court had jurisdiction to wind-up, and (b) in the absence of direct recourse to section 195 of the Companies Act 1981, the Court's powers under the general law were not sufficiently wide to enable the grant of corresponding relief.

99. The present application (as regards SHL) has raised issues of considerable general importance about the scope of the common law jurisdiction to assist foreign liquidators whose appointments have been recognised. It is unclear how these questions impact on the merits of the present examination/production Orders. However, it is obvious that these topics would benefit from more authoritative consideration at an appellate level.

Dated this 15th day of April, 2013 _____
IAN R.C. KAWALEY CJ