[HOUSE OF LORDS.]

HOULDSWORTH . . . . APPELLANT;

CITY OF GLASGOW BANK AND LIQUIDATORS . . . . RESPONDENTS.

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Joint Stock Company—Action by Shareholder against the Company in Liquidation for Damage caused by Fraudulent Misrepresentations of Directors inducing him to purchase Shares.

A person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may on finding out the fraud elect to retain the chattel or goods, and still have his action to recover any damage he has sustained. But the same principle does not apply to shares or stock in a joint stock company, for a person induced by the fraud of the agents of a joint stock company to become a partner in that company can bring no action for damages against the company whilst he remains in it: his *only* remedy is *restitutio in integrum,* and rescission of the contract; and if that becomes impossible—by the winding-up of the company or by any other means—his action for damages is irrevelant, and cannot be maintained.

H. bought from the *City of Glasgow Bank,* a co-partnership registered under the *Companies Act,* 1862, £4000 of its stock in February, 1877.

He was registered as a partner, received dividends and otherwise acted as a partner ever since. The bank went into liquidation in October, 1878, with immense liabilities: and *H.* was entered on the list of contributories, and paid calls. In December, 1878, *H.* raised an action against the liquidators, to recover damages in respect of the sum he had paid for the stock; the money he had already paid in calls; and the estimated amount of future calls. He founded his right to relief upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him. He admitted that after the winding-up had commenced it was too late for him to have rescission of his contract, and *restitutio in integrum:—*

Held, affirming the decision of the Court below, that, even although the fraudulent misrepresentations might, if the bank had been a going concern, have entitled him to rescind his contract, rescission being now impossible, as decided by *Oakes* v. *Turquand* (Law Rep. 2 H. L. 325), and *Tennent* v. *City of Glasgow Bank* (4 App. Cas. 615), they afforded no ground for an action against the liquidators; therefore the action was irrelevant.

APPEAL against a judgment of the Court of Session in *Scotland.*

The *City of Glasgow Bank* was an unlimited company, incorporated and registered under the *Companies Act,* 1862, and had by virtue of its articles of co-partnership power to deal in its own shares.

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In February, 1877, *Arthur Hooton Houldsworth*, the Appellant, purchased £4000 of the bank stock, from the bank itself, at the price of £9000. He was duly entered as a partner in the register of members; received dividends; and continued to be a partner ever since.

On the 2nd of October 1878, the bank stopped payment; and never resumed business. . And on the 22nd of the same month an extraordinary resolution to wind up the bank was passed; and liquidators were appointed. The Appellant was entered on the list of contributories, and paid calls.

On the 21st of December, 1878, he raised this action against the bank and its liquidators to recover damages in respect of (1.) £9046 5*s.* 3*d.*, the price of stock and stamp duty; (2.) the sum of £20,000, being loss sustained by him through paying the amount of the first call; and (3.) the sum of £200,000, the estimated amount of future calls which may be made upon him. And he founded his claim on the ground that he was induced to buy the £4000 stock by means of the fraudulent misrepresentations and concealments of the manager, and directors. In his form of action he did not attempt to obtain rescission of the contract and restitution, even in a question *inter socios.*

The Lord Ordinary (1) assoilzied the Respondents from the conclusions of the summons; and stated in his note that he was of opinion that the case was ruled by the decision of this House in *Addie* v. *Western Bank* (2).

On a reclaiming note against the Lord Ordinary's interlocutor, the First Division of the Court of Session, on the 4th of July, 1879 (Lord *Shand* dissenting), dismissed the Appellant's action as irrelevant (3).

Feb. 16, 17. *The Lord Advocate* (Right Hon. *W. Watson*), and Mr. *Herschell*, Q.C. (with them Mr. *Romer*), contended, for the Appellant, that the principal was liable for the fraud of his agent acting within the sphere of his business; and that that was equally the case where the principal was an incorporated company

(1) Lord *Rutherfurd Clark.*
(2) Law Rep. 1 H. L., Sc. 145.
(3) Court of Sess. Cas. 4th Series, vol. vi. p. 1164; Scot. Law Rep. vol. xvi. p. 700.

acting through its directors, and, therefore, prior to liquidation the company here were liable, in respect of the fraud of the directors, to make reparation for the loss suffered by the Appellant. See *Barwick* v. *English Joint Stock Bank* (1); *Mackay* v. *Commercial Bank of New Brunswick* (2), approved in *Swire* v. *Francis* (3); see also *Denton* v. *Great Northern Railway Company* (4); *Swift* v. *Winterbotham* (5); *dictum* of Lord *Coleridge* in *Swift* v. *Jewsbury* (6); *Weir* v. *Bell* (7), affirming *Weir* v. *Barnett* (8); opinion of Lord *Cranworth* in *Reedie* v. *London and North Western Railway Company* (9); of *Holt*, J., in *Hern* v. *Nichols* (10); also of *Parke*, B., in *Cornfoot* v. *Fowke* (11); and also *Bell's* Com. (7th ed.), 1, 6, 14; *Clark* on Partnership, vol. i. p. 257; *Jardine* v. *Carron Company* (12); *National Exchange Company of Glasgow* v. *Drew and Dick* (13), which last case was distinguished from *Burnes* v. *Pennell* (14), affirming *Forth Main Insurance Company* v. *Burnes* (15); *Traill* v. *Smith's Trustees* (16); *Clyesdale Bank* v. *Paul* (17). The Respondents relied on *Addie* v. *Western Bank* (18), but the argument in that case before the House was chiefly on the question of rescission of the contract; see report (19), and one of the chief differences between that case and this was that there, subsequently to *Addie's* purchase, but before he had made any claim for either restitution or damages, the bank was changed from an ordinary joint stock company to an incorporation. And Lord *Cranworth* seemed to have rested his opinion on that peculiar circumstance, being of opinion that the new incorporation did not take over the liabilities for claims of damages against the former company founded on the fraud of its officials. The committee of the Privy Council in

(1) Law Rep. 2 Ex. 259.
(2) Law Rep. 5 P. C. App. 394, and at pp. 410, 412.
(3) 3 App. Cas. 106, at p. 114.
(4) 5 E. & B. 860.
(5) Law Rep. 8 Q. B. 244.
(6) Law Rep. 9 Q. B. 301, at p. 312.
(7) 3 Ex. D. at p. 238.
(8) Ibid. p. 32.
(9) 4 Ex. 244, at p. 255.
(10) 1 Salk. 288.
(11) 6 M. & W. 358, at p. 373.
(12) Court of Sess. Cas. 3rd Series, vol. ii. p. 1101.
(13) 2 Macq. 103.
(14) 2 H. L. C. 497; 6 Bell's App. 541.
(15) Court of Sess. Cas. 2nd Series, vol. x. p. 689.
(16) Court of Sess. Cas. 4th Series, vol. iii. p. 770.
(17) Court of Sess. Cas. 4th Series, vol. iv. p. 626.
(18) Law Rep. 1 H. L., Sc. 145.
(19) Law Rep. 1 H. L., Sc. at p. 148.

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Mackay v. *Commercial Bank of New Brunswick* (1) held that *Addie* v. *Western Bank* (2) was decided upon that fact, which did not arise in the case before them or in *Barwick* v. *English Joint Stock Bank* (3); and, further, the Committee approved of Lord *Cranworth's* observation "that if by the fraud of the company's agent third parties have been defrauded, the corporation may be made responsible to the extent to which its funds have been benefited;" and here the bank had been largely benefited, for when the Appellant purchased the shares if the true state of the bank had been known they would have been worth less than nothing. Then Lord *Chelmsford*,—the only other Law Lord who decided *Addie's* case,—based his judgment exclusively on the right to rescind, and therefore did not take the same view of the case as Lord *Cranworth*. Also, though Lord *Chelmsford* remarked that an action of deceit does not lie against a company for the fraud of its directors, that remark was inconsistent with other parts of his judgment, where he concedes (*a*) that the fraudulent representations of the directors of such a company are imputable to the company, and (*b*) that the company can retain no benefit which it has derived from them. Those two points covered the whole contention and were sufficient for the Appellant's case.

They further maintained that the defrauded partner had his choice of reducing the contract, into which he was led by fraud; or of claiming damages without reducing the contract; for see *Amaan* v. *Handyside* (4); *Lindley* on Partnership [4th ed.], pp. 717, 923; *Sedgwick* on Damages [4th ed.], p. 339; Stair, Inst. 1, 9, 14. And dealing with a going company, was there any principle in law which would make the action for damages inapplicable?

[EARL CARNS, L.C.:—I quite understand why such an action should not be applicable: on your becoming a shareholder you must have divorce, or cannot have compensation.]

On general principle one can retain the shares, and yet get damages.

[EARL CAIRNS:—During the last quarter of a century the

(1) Law Rep. 5 P. C. App. 394, at p. 410, 413.

(2) Law Rep. 1 H. L., Sc. 145.

(3) Law Rep. 2 Ex. 259.

(4) Court of Sess. Cas. 3rd Series, vol. iii. p. 526.

Courts have been inundated with cases of this kind; and yet there is no case where such a contention has been put forward.]

Because rescission is more appreciable, and more sought for.

Then having this alternate right before liquidation, they submitted liquidation did not extinguish the liability, but it was enforceable by an action against the liquidators. Liquidation was not the repudiation of the debts and liabilities, but on the contrary was the ascertainment of the amount of such; see opinion of Lord *Chelmsford* in *Waterhouse* v. *Jamieson* (1); and Lord *Cairns* in *In re Duckworth* (2).

It could not be said that the liquidators had not sufficient means of satisfying the Appellant's claim, for the old shareholders had not yet been called upon. Therefore, it followed that though the winding-up put an end to rescission and restitution, *Oakes* v. *Turquand* (3), the right of an action for damages remained; see *dictum* of *Lindley*, J., in *Stone and Collins* v. *City and County Bank* (4), where he decided against the plaintiffs on the express ground that they had not brought their action for damages; see also the *dicta* of *Bramwell*, L.J., *Brett*, L.J., and *Cotton*, L.J., in that case on appeal (5).

It was not inconsistent that the Appellant should have damages against the company of which he was a member; nor that he should have to pay a share towards his own damages. The Act of 1862, sects. 158, 131, expressly provided for the proof against the company of the debts of all descriptions including damages; also such a claim as the Appellant's was sanctioned, or at least not prejudiced by sect. 38, sub.-sect. 7. There was no limitation to a case of fraud, therefore the Appellant's remedy was not limited to rescission. He was entitled to claim in the liquidation, though himself being a member he would be liable to pay calls *pro tanto* with the other members; but he was in the claim for damages to be regarded as an independent person, quite apart from his character as a partner. See also, beside cases previously cited,

(1) Law Rep. 2 H. L., Sc., at p. 37.
(2) Law Rep. 2 Ch. App. at p. 580.
(3) Law Rep. 2 H. L. 325.
(4) 3 C. P. D. 282, at p. 299.
(5) Ibid. at p. 306.

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New Brunswick Company v. *Conybeare* (1); *Ranger* v. *Great Western Railway Company* (2); *Scholefield* v. *Templer* (3).

Mr. *E. E. Kay*, Q.C., Mr. *Benjamin*, Q.C., Mr. *Davey*, Q.C., and Mr. *Balfour* appeared for the Respondents; but were not called upon to address the House.

The Law Peers having considered their judgment, delivered the following opinions:—

March 12. EARL CAIRNS, L.C.:—

My Lords, in this case the Appellant bought from the *City of Glasgow Bank* £4000 of its stock in February, 1877, paying £9000 for it. He was registered as a partner, received dividends, and otherwise acted as a partner. When the bank went into liquidation in October, 1878, he was entered on the list of contributories, and has since then paid very large sums for calls. On the 21st of December, 1878, he commenced the present action against the liquidators to recover damages in respect of the sum he had paid for shares and the moneys he has since paid for calls, and he founds his right to relief upon the ground of fraudulent misrepresentations made by the directors and others connected with the bank, for whose representations he alleges the bank was answerable.

As the question is one of relevancy, I will assume that the allegations of fraudulent misrepresentations are such as that if the bank had been a going concern the Appellant would have been entitled to rescind his contract and to have recovered back all sums paid in respect of his shares. The Court of Session has been of opinion that even although the averments amount to what I have stated, still they afford no ground for an action against the liquidators, and they have dismissed the action with costs. In my opinion the Court was right.

It was admitted before your Lordships, as indeed it could not be denied, that after the winding-up of the company commenced it was too late for the Appellant to repudiate his stock, and that

(1) 9 H. L. C. 711. (2) 5 H. L. C. 72.
(3) Joh. 155; 28 L. J. (Ch.) 452.

he must remain, as the liquidation found him, a partner in the bank and a contributory as such. It also came to be admitted in the course of the arguments at your Lordships' Bar that if the Appellant, remaining a partner, had a right to raise an action for damages against the liquidators after the winding-up, he must also have had a right before the winding-up to have remained a partner, and also then to have brought an action for damages. It appears to have been contended in the Court below that the Appellant might be unable to maintain the present action as a claim in the liquidation to be satisfied *pari passu* with other creditors, and yet might be able to maintain it as a claim against the company or against shareholders in the company after all other creditors were satisfied. In the argument at your Lordships' Bar I think it was felt to be impossible to maintain this theory of a deferred or secondary right of action against the company. I am satisfied there is no foundation for it. The *Winding-up Act* has no provisions for the payment of claims against the company except the claims of creditors. Creditors are supposed to be paid *pari passu*, and there is no provision after they are paid for opening up fresh claims by a contributory against the company. There are, indeed, provisions which, after the debts are paid, enable any inequalities in the contributions of the contributories to be set right, but that is quite a different matter.

The question, therefore, mainly argued at your Lordships' Bar, and upon which the decision of this case must, as I think, depend, was this: Can a man, induced by the fraudulent misrepresentations of agents of a company to take shares in the company, after he discovers the fraud, elect to retain the shares, and to sue the company for damages?

There is no doubt that according to the law of *England* a person purchasing a chattel or goods, concerning which the vendor makes a fraudulent misrepresentation, may, on finding out the fraud, retain the chattel or the goods and have his action to recover any damages he has sustained by reason of the fraud. I will assume, although no distinct authority has been produced, and I do not wish to express a decided opinion upon it, that the law of *Scotland* in the case of a chattel or of goods is the same as that of *England*.

But does the same rule apply to the case of shares or stock in a

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partnership or company? We are accustomed to use language as to such a sale and purchase as if the thing bought or sold were goods or chattels, but this it certainly is not. The contract which is made is a contract by which the person called the buyer agrees to enter into a partnership already formed and going, taking his share of past liabilities, and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself in a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular way and in no other way.

Does, then, the principle which in the case of a chattel admits of an action for damages, apply to the case of a partnership contract such as I have described?

It may go some way to answer this question to observe that, although during the last quarter of a century actions in every shape and form have been brought or attempted to be brought arising out of dealings in shares alleged to have been fraudulent, no case could be mentioned at the Bar in which an action for damages has been sustained, the Plaintiff retaining his position in the company. A few *dicta* were referred to, but they were of so vague and hypothetical a character that they are not deserving of further examination.

I will, however, ask your Lordships to look at the case on principle.

A man buys from a banking company shares or stock of such an amount as that he becomes, we will say, the proprietor of one hundredth part of the capital of the company. A representation is made to him on behalf of the company that the liabilities of the company are £100,000, and no more. His contract, as between himself and those with whom he becomes a partner, is that he will be entitled to one hundredth part of all the property of the company, and that the assets of the company shall be applied in meeting the liabilities of the company contracted up to the time of his joining them, whatever their amount may be, and those to be contracted afterwards, and that if those assets are deficient the deficiency shall be made good by the shareholders rateably in proportion to their shares in the capital of the company. This is

the contract, and the only contract, made between him and his partners, and it is only through this contract, and through the correlative contract of his partners with him, that any liability of him or them can be enforced.

It is clear that among the debts and liabilities of the company to which the assets of the company and the contributions of the shareholders are thus dedicated by the contract of the partners, a demand that the company, that is to say, those same assets and contributions, shall pay the new partner damages for a fraud committed on himself by the company, that is, by himself and his co-partners, in inducing him to enter into the contract which alone could make him liable for that fraud, cannot be intended to be included. Any such application of the assets and contributions would not be in accordance but at variance with the contract into which the new partner has entered.

He finds out, however, after he joins the company, that the liabilities were not £100,000 but £500,000. He is entitled thereupon, as I will assume, to rescind his contract, to leave the company, and to recover any money he has paid or any damages he has sustained; but he prefers to remain in the company and to affirm his contract, that is to say, the contract by which he agreed that the assets of the company should be applied in paying its antecedent debts and liabilities. He then brings an action against the company to recover out of its assets the sum, say £4000, which it will fall upon his share to provide for the liabilities, over and above what his share would have had to provide had the liabilities been as they were represented to him. If he succeeds in that action, this £4000 will be paid out of the assets and contributions of the company. But he has contracted, and his contract remains, that these assets and contributions shall be applied in payment of the debts and liabilities of the company, among which, as I have said, this £4000 could not be reckoned. The result is, he is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide; in other words, he is in substance, if not in form, taking the course which is described as approbating and reprobating, a course which is not allowed either in Scotch or English law.

My Lords, whatever differences may be pointed out between this

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case and the case of *Addie* v. *The Western Bank* (1) in this House, I think the *ratio decidendi* in that case would go far, if it did not go the whole way, to decide the present appeal. But I entertain no doubt, for the reasons I have stated, that on principle, irrespective of authority, the decision of the Court of Session was right. I will move your Lordships to dismiss the appeal with costs.

LORD SELBORNE:—

My Lords, the principle on which the cases of *Barwick* v. *The English Joint Stock Banking Company* (2), *Mackay* v. *Commercial Bank of New Brunswick* (3), and *Swire* v. *Francis* (4) (relied upon the Appellant), were decided, was thus stated by Mr. Justice *Willes* in the former of those cases, and repeated (from his judgment) by the Judicial Committee in the two latter: "The master is liable for every such wrong of his servant or agent as is committed in the course of his service, and for the master's benefit," because, although the master may not have authorized the particular act, "he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." To the principle so stated no exception can, in my opinion, be taken, though the manner in which the master is to be answerable, and the nature and extent of the remedies against him, may vary according to the nature and circumstances of particular cases.

That principle received full recognition from this House in *The National Exchange Company* v. *Drew* (5) and *New Brunswick Railway Company* v. *Conybeare* (6), and was certainly not meant to be called in question by either of the learned Lords who decided *Addie* v. *The Western Bank of Scotland* (1). It is a principle, not of the law of torts, or of fraud or deceit, but of the law of agency, equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual; and the decisions in all these cases proceeded, not on the

(1) Law Rep. 1 H. L., Sc. 145.
(2) Law Rep. 2 Ex. (Ch.) 259.
(3) Law Rep. 5 P. C. 394.
(4) 3 App. Cas. 106.
(5) 2 Macq. 103.
(6) 9 H. L. C. 711.

ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice *Willes* in *Barwick's Case* (1)), "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." It is of course assumed in all such cases that the third party who seeks the remedy has been dealing in good faith with the agent in reliance upon the credentials with which he has been entrusted by the principal, and had no notice either of any limitation (material to the question) of the agent's authority, or of any fraud or other wrongdoing on the agent's part at the time when the cause of action arose.

In the greater number, probably, of cases of this kind the question whether the fraud or other wrongful act of an agent could itself properly be imputed to his principal is not material; the liability of the principal to the third party, when properly measured by damages, being practically the same, whether he was privy to the wrongful act or not.

Sir *Montague Smith* in *Mackay* v. *Commercial Bank of New Brunswick* (2), criticised (perhaps justly) some expressions which fell from Lord *Cranworth* in this House in the two cases of *Conybeare* and *Addie*, particularly in the latter case, in which Lord *Cranworth* said that "an incorporated company cannot, in its corporate character, be called on to answer in an action for deceit." The sequel of Lord *Cranworth's* words appeared to me to shew that in using these expressions (perhaps technically inaccurate) he had substance, and not form, in view. In the old forms of common law pleading fictions were not seldom allowed, but not so as in the result to make the rights or remedies of the parties depend on the fiction rather than on the law applicable to the real facts which were allowed under those forms of pleading to be given in evidence. In *Barwick's Case* (1) a corporation was directly charged with fraud upon the pleadings (no mention being made of agency) and an objection taken on that ground was treated by Mr. Justice *Willes* as technical. "If" (he said) "a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the wrong of the person who is

(1) Law Rep. 2 Ex. (Ch.) 259. (2) Law Rep. 5 P. C. at p. 410.

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sought to be made answerable in the action." And all that was laid down by Sir *Montague Smith* in *Mackay's Case* (1) itself was, that there might be cases in which to work out the appropriate remedy against a principal who had "profited by the fraud of his agent," the form of action, technically called "an action of deceit," might be either necessary or convenient; that very learned Judge saying expressly that "the time had passed when much importance was attached to mere forms of actions;" and that "an action of deceit might be maintainble in which the fraud of the agent might be treated, for purposes of pleading, as the fraud of the principal."

In Equity, one of the main heads of which has always been the redress of fraud, the constructive imputation of fraud to persons not really guilty of it has never been treated as the ground of relief, though the law of agency was administered according to the same rules in Equity as at Common Law, and though in Equity, as well as at law, an innocent principal might suffer for the fraud of an agent. Vice-Chancellors *Knight Bruce* and *Parker*, and Lord Chancellor *Campbell* (all very eminent Judges) said (as Lord *Cranworth* and Lord *Chelmsford* also said in this House), that the law does not impute the fraud of directors to a company; and the same proposition would, I apprehend, be equally true, in the sense in which they intended it, if the principal whose agent was guilty of fraud were not a corporation but an individual. The real doctrine which Lord *Cranworth*, in *Addie's Case* (2), meant (as I understand him) to affirm was one of substance and not of form: "An attentive consideration" (he said) "of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited by those frauds; but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally."

(1) Law Rep. 5 P. C. 394. (2) Law Rep. 1 H. L., Sc. 145.

The words in this passage "to the extent to which the companies have profited by those frauds" may perhaps require some enlargement or explanation; but, subject to that qualification, I am of opinion that this doctrine is in principle right, and that the present case is one in which (as in the case of *Addie*) there would be a miscarriage of justice if the distinction which it involves were not attended to. This is not a case of parties at arm's length with each other, one of whom has suffered a wrong of which damages are the simple and proper measure, and which may be redressed by damages without any unjust or inconsistent consequences. For many purposes a corporator with whom his own corporation has dealings, or on whom it may by its agents inflict some wrong, is in the same position towards it as a stranger; except that he may have to contribute, rateably with others, towards the payment of his own claim. But here it is impossible to separate the matter of the Pursuer's claim from his status as a corporator, unless that status can be put an end to by rescinding the contract which brought him into it. His complaint is, that by means of the fraud alleged he was induced to take upon himself the liabilities of a shareholder. The loss from which he seeks to be indemnified by damages is really neither more nor less than the whole aliquot share due from him in contribution of the whole debts and liabilities of the company; and if his claim is right in principle I fail to see how the remedy founded on that principle can stop short of going this length. But it is of the essence of the contract between the shareholders (as long as it remains unrescinded) that they should all contribute equally to the payment of all the company's debts and liabilities.

Such an action of damages as the present is really not against the corporation as an aggregate body, but is against all the members of it except one, viz., the Pursuer; it is to throw upon them the Pursuer's share of the corporate debts and liabilities. Many of those shareholders (as was observed by Lord *Cranworth* in *Addie's Case* (1)) may have come and probably did come into the company after the Pursuer had acquired his shares. They are all as innocent of the fraud as the Pursuer himself; if it were imputable to them it must, on the same principle, be imputable to

(1) Law Rep. 1 H. L., Sc. 145.

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Pursuer himself as long as he remains a shareholder; and they are no more liable for any consequences of fraudulent or other wrongful acts of the company's agent than he is. Rescission of the contract in such a case is the only remedy for which there is any precedent, and it is in my opinion the only way in which the company could justly be made answerable for a fraud of this kind. But for rescission the Appellant is confessedly too late.

I will not enlarge further upon the reasons for this conclusion, which I know will be more fully explained by others of your Lordships. But I must add that I think the Court of Session was right in holding the present question concluded by *Addie's Case* (1). The only difference between *Addie's Case* and the present is this, that the *Western Bank of Scotland* was formed under 7 Geo. 4, c. 67, by which it was enabled to sue, and liable to be sued (upon all causes of action for which the shareholders for the time being were answerable) by its public officer; and it continued in that state till after the alleged frauds had been committed, so as to give a cause of action to the Pursuer, Mr. *Addie*. The subsequent registration, under 20 & 21 Vict. c. 49, s. 8, was in my judgment sufficient to transfer from the unregistered to the registered company all liabilities upon any cause of action whatever for which the unregistered company might have been sued by its public officer immediately before the registration. I do not understand that there was really any difference between Lord *Chelmsford* and Lord *Cranworth* in that case; both appear to me to have founded their judgments upon those views of the law of agency on the one hand, and of fraud on the other, to which I have already referred. One expression, indeed, of Lord *Cranworth*, in that part of his judgment which relates to the question of damages ("He comes too late"), might possibly, if it were not qualified by the subsequent context, have been taken to mean that even if the unregistered company had been liable to be sued for damages, by its public officer, down to the time of registration, that liability would not have been among the "debts and obligations" transferred by 20 & 21 Vict. c. 49, s. 8, to the registered company. Lord *Cranworth* was, I think, too good a lawyer and too accurate a thinker to have placed any such narrow (I had almost said unreasonable)

(1) Law Rep. 1 H. L., Sc. 145.

construction upon such words in such a statute. He made, to my mind, his real meaning plain by what he went on to say; from which it is apparent that if the *Western Bank* had been incorporated before, and not after, the frauds then in question, the corporation would not, in his opinion, have been liable for those frauds in an action of this kind for damages. And that, my Lords, is precisely the present case.

LORD HATHERLEY:—

My Lords, I agree in the conclusions that have been arrived at by those of your Lordships who have addressed the House in this case.

I think that the following points may be considered as concluded by authority; at all events I shall assume them so to be for the purposes of the case before the House. First, that an agent acting within the scope of his authority, and making any representation whereby the person with whom he deals on behalf of his principal is induced to enter into a contract, binds his principal by such representation to the extent of rendering the contract voidable, if the representation be false, and the contracting party take proper steps for avoiding it whilst a *restitutio in integrum* is possible. Secondly, that a corporation is bound by the wrongful act of its agent no less than an individual, and that such misrepresentation by the agent being a wrongful act, the result of such misrepresentation must take effect in the same manner against a corporation as it would against an individual. Thirdly, that, if there cannot be a *restitutio in integrum*, the contract cannot be rescinded, but must remain in force, whatever right may exist in regard to damages for injury sustained by the party deceived.

My Lords, in this case it may be assumed for the present purpose that the contract is one which was obtained by fraudulent misrepresentation on the part of an agent or agents of the *City of Glasgow Bank*, whereby the Appellant was led to purchase shares in that bank as though it were a profitable going concern, whereas it was in fact hopelessly insolvent, purchasing the privilege of becoming a shareholder, if it were a privilege, or, rather, as it turned out, acquiring that unfortunate position, for the sum of

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£9000. In about a year and a quarter after this purchase had been made the bank was in liquidation, and the Appellant alleges that he has already contributed £20,000 towards the debts of the company, and also that he is liable to an extent which he puts in his condescendence as being possibly about £200,000 more in respect of the debts of the concern. He asks as a remedy to recover the sum that he paid for his shares, less certain small deductions mentioned in the case, and also to be indemnified as to the payment of the £20,000 and the possible future liability. This remedy he asks for as against the company, of which at the time of the bank going into liquidation he was a member or partner, and from which partnership he has never been discharged.

The main point in the case is whether he should be allowed to proceed further in such an action, that is to say, the question arises on relevancy in reference to the remedy which this gentleman seeks to obtain with regard to the injury which he says has been done to him. The Lord Ordinary held that the case was concluded by *Addie's Case* (1), and the same view was entertained by three of the Judges in the Court of Session. The principal difference between the present case and that of *Addie* is that in *Addie's Case* (1) the company was not incorporated at the time of the purchase, but became so before the liquidation, whereas in the present case the company was incorporated before the time when the purchase was made by the Appellant, and he became a shareholder. In the view which I take of the case, I do not consider that difference to be one which should render relief possible in this case, if it was proper to withhold it in the case of *Addie.* It appears to me to be fatal to the Appellant's right to the relief he asks that he is still, or was at the date of the liquidation, a shareholder in the company against which he asks it. No case has been cited in which such a remedy as that sought by the Appellant in the present case has been allowed to take effect by any Court either in *Scotland* or in *England.*

What became the position of the Appellant when he had paid his money in respect of the transfer of shares into his name? He thereby became on the one hand entitled to any profits made by the employment of the capital of the company according to the

(1) Law Rep. 1 H. L., Sc. 145.

proportion which his shares bore to all the other shares in the company. And at the same time he undertook to bear a like aliquot share of all the debts and liabilities of the company incurred, or to be incurred, in respect of the business which the company was carrying on. Amongst the debts would be (if the Appellant be right) the debt due to himself in respect of the damage sustained by him through the wrongful act of the company in inducing him by misrepresentation to place himself on the list of shareholders. It appears that he did draw dividends (I think three) of alleged profits out of the concern.

Now suppose, and I fear from other cases that have come before your Lordships' House the supposition is by no means an improbable one, suppose I say that there should be some ten or twelve other shareholders in a like position with the Appellant with regard to purchasing shares under misrepresentation on the part of the company's agents, some of them having purchased shares before him and others after him; those ten or twelve shareholders would each of them have the same claim in respect of damages against the company (except in each case the party suing) as is now claimed by the present Appellant. The present Appellant would by his partnership contract have to bear his aliquot share of the damages that might be claimed by other misled shareholders who had been placed on the list by the same course of misrepresentation as himself. What end would there ever be to the interlacing claims on the part of misled shareholders *inter se* as to dividends received whereby the fund which might have been applied towards recouping and making good the debts of the company, including the damages claimed by the Appellant, was diminished? How could they be retained by the Appellant as against his fellow sufferers? He would clearly have to account for them as between himself and his fellow sufferers who would be claiming relief on the same grounds as himself.

In truth the Appellant is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself. As has been observed already by those of your Lordships who have preceded me, amongst the various cases which have been brought before the Courts in respect of dealings with joint stock companies, no case

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can be adduced in which a person so claiming to be a shareholder has at the same time successfully asserted his claim against a company in liquidation for such a debt as this, namely one in which he is himself a co-debtor with all his fellow shareholders to himself, and is himself in common with them responsible again to them individually for like liabilities irrespective of represensations made by their common agent.

Some clauses in the *Companies Act* were cited in the course of the argument as shewing the rights *inter se* on the part of shareholders of a company by which they were all to be brought into equality one with another when the settlement took place and arrangements for winding up were made by the liquidators. Those provisions as to liquidation for the purpose of equalizing the contributions of contributories *inter se*, do not appear to me to authorize such a scheme or contrivance as would be necessary in this case to effect the object proposed by the Pursuer. Having omitted to obtain a rescission of the contract, he would have to make a complicated inquiry such as I have described as between himself and other shareholders who could put themselves in the same position as himself as regards misrepresentation by the common agent; and nothing has been pointed out in the Act which leads to the supposition that any such inquiry as that was contemplated. What has really happened is this—he has had the misfortune, together with others, as I have said, in all probability, though that is not in evidence in this case, of being misled by the representations of the agent of the company. If your Lordships were to establish a precedent in his case there would probably be other claimants also, each of whom would have a claim which, it appears to me, could not be dealt with after the time for the rescission of the contract had gone by. If the Appellant obtains the relief he has sought, every other shareholder in the same position as himself might come forward to claim a similar relief. What has really happened is that both he and those other shareholders in a like position, have suffered from the misfortune of having employed a dishonest agent. As between third parties to the company and the Appellant, he might well be entitled to rescission of the contract whereby he became a shareholder, but, if time and circumstances have prevented that remedy and he must remain a shareholder,

I do not see how he can escape the burden occasioned by the common misfortune of himself and many of the other shareholders in having employed dishonest agents. I therefore feel that whatever rights this gentleman may have acquired in the first instance, his case has been rendered hopeless by what has taken place since, by reason of which it has been placed beyond his power to put things in such a position that his name can be struck off the share list altogether, in which case he would, according to some of the authorities which have been cited, have stood in the position of a stranger with reference to misrepresentations made by agents of the company.

I agree with the order which has been proposed to your Lordships by my noble and learned friend.

LORD BLACKBURN :—

My Lords, I also think that it is not necessary to hear the counsel for the Respondents, as after carefully considering the judgments below, and the arguments of the Appellant's counsel, I have come to the conclusion that the interlocutor appealed against was right, and that the appeal should be dismissed with costs.

The Lord Ordinary based his judgment on this short ground:— "The Lord Ordinary thinks that this case is ruled by the decision of the House of Lords in *Addie* v. *The Western Bank* (1);" and that, if correct, was a sufficient ground for his decision. For when it appears that a case clearly falls within the *ratio decidendi* of the House of Lords, the highest Court of Appeal, I do not think it competent, for even this House, to say that the *ratio decidendi* was wrong. It must, however, in my opinion, always be open to a party to contend that the differences between the facts in the case then under discussion and those in the case on which the decision in the House of Lords proceeded are so material as to prevent his case from falling within the *ratio decidendi* of the House, even though the opinions of the learned and noble Lords who decided the case in the House are so worded as to seem to apply equally to the facts in the case then under discussion; for unless those differences in fact did exist in the case in this House, or at least

(1) Law Rep. 1 H. L., Sc. 145.

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the possibility of their existence was prominently brought forward, I think the House cannot be taken to have decided that such differences in fact might not make a material distinction in law.

I think, therefore, that it is important to inquire what are the differences of fact between this case and that of *Addie* v. *The Western Bank* (1), and then to determine whether they do make a material distinction in law.

The *Western Bank* was a co-partnership carrying on the business of banking in *Scotland* under the provisions of 7 Geo. 4, c. 67. Whilst this was so, *Addie* entered into a contract with persons who were, though he did not know it, agents for the *Western Bank* to purchase shares in that bank. *Addie* paid to the agents of the bank the agreed consideration, and accepted shares, which in fact belonged to the bank, and in respect of them became a partner on the terms contained in the partnership deed of the *Western Bank.* Some time elapsed, and the *Western Bank* becoming insolvent stopped payment. Then advantage was taken of the provisions of the *Joint Stock Banking Companies Act,* 1857 (20 & 21 Vict. c. 49) s. 6, and it was resolved by a majority of the shareholders to register the *Western Bank* as a company, other than a limited company, under the provisions of the *Joint Stock Companies Act,* 1857. *Addie* was a party to this resolution. The *Western Bank* after registration was wound up. *Addie* was made a contributory, and he and such of the other contributories as were solvent paid calls, by means of which all the creditors were paid, and some surplus existing had to be returned to the contributories who had paid. Then, and not till then, *Addie* commenced his action in the Court of Session.

The interlocutor appealed against, which was reversed, was that of the 2nd of February, 1864: "That the Pursuer had stated matter relevant to go to trial."

The following appear to me to be the material statements in the case now before this House. The *City of Glasgow Bank* was originally, like the *Western Bank,* a co-partnership carrying on business in *Scotland* under the provisions of 7 Geo. 4, c. 67. The deed of co-partnery of this bank did not in any material respect

(1) Law Rep. 1 H. L., Sc. 145.

differ from that of the *Western Bank*. But whereas the *Western Bank* was registered under the provisions of the *Joint Stock Banking Companies Act*, 1857, after *Addie* had entered into the contract in respect of which he raised his claim, the *City of Glasgow Bank* was registered under the *Companies Act*, 1862, on the 29th of November, 1862, several years before the date of the transactions in respect of which the Pursuer raises his claim; and the Pursuer knew that he was purchasing shares the property of the bank, and dealing with the agents of the bank, whilst *Addie* was not aware of these facts; and this action was commenced earlier than that of *Addie*. It was commenced after the liquidation had begun, but before it was ascertained how much the solvent contributories would have to pay, or who would be solvent contributories.

I do not observe any other differences between the statements in the case now under discussion and the statements in the case of *Addie* v. *The Western Bank* (1). And as I think that those differences of fact make no distinction in law, and as the interlocutor appealed against in this case seems to me identical in effect with that pronounced by this House, I agree with the Lord Ordinary that this case is ruled by the decision of the House in *Addie* v. *The Western Bank*.

But one very important question was raised by the judgments in the Court of Session, and argued by the counsel at your Lordships' Bar, which, if ever it becomes necessary to decide it, may require much consideration. The contract with a joint stock company to take shares in that company is a very peculiar one. Whether the company be, as the *Western Bank* was, a banking co-partnership in *Scotland* under the 7 Geo. 4, c. 27, having such a deed of co-partnership as that bank had, or a joint stock company registered under the *Companies Act*, 1862, the contract equally is in substance an agreement with the company to become a partner in the company on the terms that the partner shall, in common with all his co-partners for the time being, contribute to make good all liabilities of the co-partnership as if this incoming partner had been a member of the partnership from the beginning. Further, he consents that any one of his co-partners may, by procuring a person to take his shares, get rid (at least *inter socios*) of his lia-

(1) Law Rep. 1 H. L., Sc. 145.

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bility, substituting that of the incoming shareholders. I know of no other contract which in these respects resembles this contract.

It was with this peculiar kind of contract that the House of Lords had to deal in *Addie* v. *The Western Bank* (1), and it is with this peculiar kind of contract that your Lordships have now to deal. I do not think the House is called on now to decide whether a difference in the kind of contract induced by the fraud would make a sufficient distinction in law to prevent the decision in *Addie's Case* (1) from governing such a case as that.

I do not think there is now any doubt that when a contract is, in the language of the English common lawyers, induced by fraudulent deceit of the other contracting party, or of one for whom he is responsible, or, in the language of the Civil Law, when there is *dolus dans locum contractui*, the contract is not void but only voidable. And it follows from this that though the deceived party may rescind the contract and demand restitution, he can only do so on the terms that he himself makes restitution. If either from his own act, or from misfortune, it is impossible to make such restitution, it is too late to rescind. But though he cannot rescind he may, at least in English law, as against the person actually guilty of the fraud, recover damages (*Clarke* v. *Dixon* (2) and *Cole* v. *Bishop*, mentioned in that case by Justice *Erle* (3)). The Lord President in this case says, that the deceived party may rescind if the fraud inducing the contract was that of an agent acting in the principal's business and within the scope of his authority, though the principal was ignorant of the fraud, and free from all moral guilt, or even, being an incorporation, was necessarily incapable of knowing anything except by its agents, and therefore free from all moral guilt (if such a phrase can be properly applied to an incorporated body), and so far I think the position is not disputed. But when he proceeds to say that "when the result of the fraud is the making of a contract between the party deceiving (not personally but through an agent) and the party deceived, I am not aware that any remedy is open to the latter, except a rescission of the contract, or at least without a

(1) Law Rep. 1 H. L., Sc. 145. (2) E. & B. 148.
(3) E. & B. at p. 153.

rescission of the contract," he states a proposition which is much controverted.

Lord *Shand* disputes it on principles and authorities of Scotch law well worthy of consideration, and then says:—

The whole question has been very carefully considered in recent cases in *England*, in which it has been settled, on principles which I am satisfied are sound, that an incorporation will be answerable in damages for the fraudulent representations of its agents made in the course of the business intrusted to them: *Barwick* v. *The English Joint Stock Bank* (1); *Swift* v. *Winterbotham* (2); *Mackay* v. *The Commercial Bank of New Brunswick* (3); *Swire* v. *Francis* (4); *Stone and Collins* v. *The City and County Bank, Limited* (5); *Weir* v. *Bell* (6). I say nothing of *Udell* v. *Atherton* (7), except that it was the decision of a Court equally divided; that it was considered in most, if not all, of the subsequent cases just cited; and that I am not aware of any judgment since its date in which it was spoken of with approval, while it has been more than once referred to as a decision to be explained and accounted for on special grounds.

Barwick v. *English Joint Stock Bank* (1) was decided just before the decision in *Addie* v. *The Western Bank* (8), and the noble and learned Lords who advised the House were not aware of that decision. I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This, no doubt, was a very technical question. The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud. It is not necessary now to decide whether that was right or wrong as the law stood before the decision in *Addie* v. *The Western Bank* (8), nor, as I think, whether it is overruled by that decision. *Mackay* v. *Commercial Bank* (3) was decided after *Addie* v. *The Western Bank* (8), and was distinguished from it. I do not think your Lordships need now inquire whether successfully or not.

But it seems to me that Lord *Chelmsford* did not lay down any general position as to all contracts. He says: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this—where a person has been drawn into

(1) Law Rep. 2 Ex. 259.
(2) Law Rep. 9 Q. B. 301.
(3) Law Rep. 5 P. C. 394.
(4) 3 App. Cas. 106.
(5) 3 C. P. D. 283.
(6) 3 Ex. D. 238.
(7) 7 H. & N. 172.
(8) Law Rep. 1 H. L., Sc. 145.

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a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been *induced to purchase shares by the fraud of the directors*, instead of seeking to set aside the contract, prefers to bring an action of damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally. The action of Mr. *Addie* is for the reduction of the deeds of transference of the shares, and alternatively for damages. But as it is brought against the company, it will follow from what has been said that he cannot recover unless he is entitled to rescind the contract."

I cannot say whether Lord *Chelmsford* meant to confine his observation to the particular kind of contract then before him, without deciding whether the same doctrine would apply to all kinds of contracts, or whether it was only by accident that he confined his language as he did. There are strong reasons given by the noble and learned Lords who have already spoken in this case for holding that when one has been induced by the fraud of the agents of a joint stock company to contract with that company to become a partner in that company he can bring no action of deceit against the company whilst he remains a partner in it. There are reasons which would not apply to every case in which a contract has been induced by fraud, as for example, if an incorporated company sold a ship, and their manager falsely and fraudulently represented that she had been thoroughly repaired and was quite seaworthy, and so induced the purchase, and the purchaser first became aware of the fraud after the ship was lost, and the underwriters proved that she had not been repaired and was in fact not seaworthy, and so that the insurance was void when it would be too late to rescind.

Lord *Cranworth* uses language applicable to all contracts; I cannot say whether he meant to apply the doctrine to all kinds of

contracts, however different from that with which he was dealing. I do not say that the difference of the contract from that to buy shares would distinguish the case. All that I say is, that if such a case arises, the consideration of the question whether it is decided by *Addie* v. *The Western Bank* (1) is not meant to be prejudiced by anything I now say.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 12th March, 1880.

Agents for Appellant: *Simson & Wakeford.*
Agents for Respondents: *Martin & Leslie.*

(1) Law Rep. 1 H. L., Sc. 145.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE No. FSD 190 OF 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF HQP CORPORATION LIMITED (IN OFFICIAL LIQUIDATION)

Appearances:	Mr Tom Smith KC of Counsel and Ms Shelley White and Mr Will Waldron of Walkers (Cayman) LLP for the Liquidators Mr Robert Levy KC of Counsel and Mr Guy Cowan and Mr Harry Shaw of Campbells LLP for the Petitioners Mr Richard Millett KC of Counsel and Mr Erik Bodden and Dr Alecia Johns of Conyers Dill & Pearman LLP for Access Industries Holdings and AI Autoparts LLC
Before:	The Hon. Justice David Doyle
Heard:	17 and 18 May 2023
Draft Judgment Circulated:	30 June 2023
Judgment delivered:	7 July 2023

HEADNOTE

Directions to liquidators in respect of whether shareholders may in principle assert claims against the Company for damages for misrepresentation in relation to their subscription for shares in the Company and how such claims rank in the liquidation of the Company; House of Lords decision in Houldsworth abandoned by Parliament not followed; the effect of English precedent in Cayman Islands law; circumstances in which a Cayman court may decline to follow English precedent

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JUDGMENT

Introduction

1. Martin Trott and Christopher Smith of R & H Restructuring (Cayman) Ltd, the joint official liquidators of HQP Corporation Limited (in official liquidation) (the "Company"), (the "Liquidators") by way of a Summons dated 11 November 2022 (the "Application") seek directions from the Court on 3 issues:

   (1) the treatment of share redemption requests made pursuant to the Company's articles and in particular, whether putatively redeeming Preferred Shareholders remain members or become creditors in respect of their unpaid redemption proceeds ("Issue 1");

   (2) whether the Preferred Shareholders may in principle assert claims against the Company for damages for misrepresentation in relation to their subscription for shares in the Company ("Issue 2"); and

   (3) to the extent misrepresentation claims are available to the Preferred Shareholders, how such claims rank in the liquidation of the Company ("Issue 3").

Thanks

2. The Court was greatly assisted by the parties and their legal representatives and I place on record my thanks, in order of appearance, to Tom Smith KC for the Liquidators, Robert Levy KC for DCM Ventures China Fund (DCM VIII), L.P., DCM VIII, L.P, DCM Affiliates Fund VIII, L.P., and Jencap Helmet (the "Petitioners") and Richard Millett KC for Access Industries Holdings ("Access") and AI Autoparts LLC ("AI") and the respective legal teams. It was a real pleasure and privilege to be subjected to their considerable written and oral advocacy skills. I should also thank them for the good, helpful and constructive spirit within which the hearing was conducted. All 3 leaders are a great credit to the legal profession and a fine example to all attorneys of how to assist the court as responsible officers of the court.

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Issue 1 – do the putatively redeeming Preferred Shareholders remain members or become creditors in respect of their unpaid redemption proceeds?

3. In respect of Issue 1, I am content to provide a direction that the Liquidators may proceed with the conduct of the liquidation on the basis that the Preferred Shareholders (as such term is defined in the third affidavit of Christopher Smith sworn in support of the Application (the "Preferred Shareholders")) who submitted redemption requests between 17 February 2021 and 2 July 2021 remain unredeemed shareholders of the Company in respect of the relevant instrument which was the subject of the redemption request.

4. Ultimately the direction in respect of Issue 1 was agreed between the parties but counsel recognised the Court nevertheless needed to be satisfied that it was a proper direction to make. I am so satisfied on the particular facts, on the proper construction of the Articles, in this case. Mr Millett puts the position with admirable clarity and conciseness in his skeleton argument dated 9 May 2023. On the proper construction of the Company's Articles (in particular Schedule A thereto) this is not a case (such as *Culross Global SPC v Strategic Turnaround Master Partnership Ltd* 2010 (2) CILR 364 or *Re Herald Fund SPC* 2016 (2) CILR 330 (CICA); 2017 (2) CILR 75 (PC)) where it was possible under the Articles for a redeemer to be fully redeemed (and so cease to be a member) yet remain unpaid and become a creditor for the redemption price. On the contrary, until payment of the redemption price, the redeeming shareholder remains a member: redemption only occurs upon payment by the Company. As Lord Mance, delivering the judgment of the Board in *Herald* pointed out at paragraph [15], the moment when redemption occurs, and when the prior shareholding interest is extinguished or acquired is a moment which can be defined and shaped by the articles.

Issue 2 – may the Preferred Shareholders in principle assert claims against the Company for damages for misrepresentation in relation to their subscription for shares in the Company?

5. Issue 2 was hotly contested and raised the fundamental issue as to the impact of authorities from other jurisdictions especially England and Wales on the law of the Cayman Islands.

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Stare decisis, ratio decidendi* and *obiter dicta

6. Before turning to the impact of English precedent on the law of the Cayman Islands we should briefly consider the position of *stare decisis*, *ratio decidendi* and *obiter dicta* which are important subjects in common law jurisdictions.

7. Going back to basics it must be remembered that it is only the *ratio decidendi* of an authority that is strictly binding in the relevant jurisdiction, but well-reasoned high level *obiter dicta* may be persuasive. A.T.H. Smith in *Glanville Williams: Learning the Law* (Fifteenth Edition) in respect of the position under English law stated at page 95:

> "English courts are obliged to follow previous decisions of English courts within more or less well-developed limits. This is called the doctrine of precedent [or *stare decisis;* let decided things stand]. The part of a case that is said to possess authority is the *ratio decidendi*, that is to say, the rule of law upon which the decision is founded."

8. At pages 105-106 the following is added:

> "In contrast with the *ratio decidendi* is the *obiter dictum*. The latter is a mere saying "by the way", a chance remark, which is not binding upon future courts, though it may be respected according to the reputation of the judge, the eminence of the court, and the circumstances in which it came to be pronounced … The reason for not regarding an *obiter dictum* as binding is that it was probably made without a full consideration of the cases on the point, and that, if very broad in its terms, it was probably made without a full consideration of all the consequences that may follow from it; alternatively the judge may not have expressed a concluded opinion."

9. Garner in *The Law of Judicial Precedent* (Thomson Reuters 2016) ("Garner") deals with the distinction between *ratio decidendi* and *obiter dicta* at page 44:

"The *Holding* [ratio decidendi] of an appellant court constitutes the precedent, as a point necessarily decided. *Dicta* do not: they are merely remarks made in the course of a decision but not essential to the reasoning behind that decision".

10. Sir Christopher Clarke, the President of the Court of Appeal of Bermuda in *The Corporation of Hamilton v The Attorney General* [2022] CA (Bda) Civ 6, stated:

> "90. It is sometimes suggested (and was suggested by Mr Myers) that the question whether a decision on an issue forms part of the *ratio* depends on whether the decision was necessary in order to produce the result which the Court reached. In my judgment this is too simplistic a view."

And added:

> "91. In order to decide what was the *ratio* of any decision it is necessary, in my view, to examine the route which the Court took in order to see whether the point in issue was an essential part of the Court's reasoning."

11. Neil Duxbury in *The Nature and Authority of Precedent* (Cambridge University Press 2008) ("Duxbury") at pages 12-13 states:

> "… precedents set by courts do not merely claim the attention of, but actually *bind*, other courts. This is the doctrine of *stare decisis* – i.e., earlier judicial decisions must be followed when the same points arise again in litigation."

12. Duxbury at pages 113 – 116 deals with the topic of "Distinguishing" and the following are extracts from his treatment of the subject:

> "'Distinguishing' is what judges do when they make a distinction between one case and another … we distinguish within as well as between cases. Distinguishing within a case is primarily a matter of differentiating the *ratio decidendi* from *obiter dicta* – separating the facts which are materially relevant from those which are irrelevant to a decision.

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Distinguishing between cases is first and foremost a matter of demonstrating factual differences between the earlier and the instant case – of showing that the *ratio* of a precedent does not satisfactorily apply to the case at hand [page 113] …

Most courts will distinguish cases fairly routinely and without controversy … courts are not only drawing a distinction but also arguing that the distinction is material, that it provides a justification for not following the precedent. Not just any old difference provides such a justification: the distinction must be such that it provides a sufficiently convincing reason for declining to follow a previous decision … The judge who tries to distinguish cases on the basis of materially irrelevant facts is likely to be easily found out. Lawyers and other judges who have reason to scrutinize his effort will probably have no trouble showing it to be the initiative of someone who is careless or dishonest, and so his reputation might be damaged and his decision appealed. That judges have the power to distinguish does not mean they can flout precedent whenever it suits them …" [page 114]

13. Cross and Harris in *Precedent in English Law* (Fourth Edition, Clarendon Press, Oxford 1991) ("Cross and Harris") at page 3 state:

> "It is a basic principle of the administration of justice that like cases should be decided alike."

14. Garner refers to the nature and authority of judicial precedents at page 21 with the following introductory words:

> "1. Treating Like Cases Alike
>
> Like cases should be decided alike. Following established precedents helps keep the law settled, furthers the rule of law, and promotes both consistency and predictability."

15. The legal system of the Cayman Islands is a common law system based on case-law. Cross and Harris at pages 3-4 state:

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> "In a system based on case-law, a judge in a subsequent case *must* have regard to those matters; they are not, as in some other legal systems, merely material which he *may* take into consideration in coming to his decision."

16. Elizabeth W. Davies' *The Legal System of the Cayman Islands* (Law Reports International, Oxford 1989), in a section dealing with "Judicial Precedent" starting at page 188 (not 138 as specified in the Index), states:

> "It has been observed that the development of the Cayman Islands legal system is, in many respects, similar to that of the English legal system. One area in which similarity is present is the importance of the doctrine of judicial precedent. This doctrine applies equally to law in these Islands (albeit in a form modified to suit the courts in this jurisdiction) as it does to law in England."

17. At page 193 the author states:

> "Difficulties do arise, however, when major reform takes place in England but is not taken up in the Islands."

18. Lord Neuberger and Lord Reed in *International Energy Group Ltd v Zurich Insurance plc* [2016] AC 509, in the complex field of mesothelioma claims, stated:

> "209 In conclusion, it seems to us that it is at least worth considering what lessons can be learnt from the history summarised in this judgment and more fully treated by Lord Mance and Lord Sumption JJSC. There is often much to be said for the courts developing the common law to achieve what appears to be a just result in a particular type of case, even though it involves departing from established common law principles. Indeed, it can be said with force that that precisely reflects the genius of the common law, namely its ability to develop and adapt with the benefit of experience. However, in some types of case, it is better for the courts to accept that common law principle precludes a fair result, and to say so, on the basis that it is then up to Parliament (often with the assistance of the Law Commission) to sort the law out. In particular, the courts need to recognise that, unlike

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Parliament, they cannot legislate in the public interest for special cases, and they risk sowing confusion in the common law if they attempt to do so.

210 When the issue is potentially wide ranging with significant and unforeseeable (especially known unknown) implications, judges may be well advised to conclude that the legislature should be better able than the courts to deal with the matter in a comprehensive and coherent way. It can fairly be said that the problem for the courts in taking such a course is that the judges cannot be sure whether Parliament will act to remedy what the courts may regard as an injustice. The answer to that may be for the courts to make it clear that they are giving Parliament the opportunity to legislate, and, if it does not do so, the courts may then reconsider their reluctance to develop the common law. For the courts to develop the law on a case-by-case basis, pragmatically but without any clear basis in principle, as each decision leads to a new set of problems requiring resolution at the highest level, as has happened in relation to mesothelioma claims, is not satisfactory either in terms of legal certainty or in terms of public time and money."

19. Lord Mance at paragraph 27 stated "The United Kingdom Parliament's reaction was its right, but does not alter the common law position apart from statute, or have any necessary effect in jurisdictions where the common law position has not been statutorily modified."

20. In *Willers v Joyce* [2018] AC 843 Lord Neuberger stated at paragraph 12 that "the JCPC should regard itself as bound by any decision of the House of Lords or the Supreme Court – at least when applying the law of England and Wales. That last qualification is important: in some JCPC jurisdictions, the applicable common law is that of England and Wales, whereas in other JCPC jurisdictions, the common law is local common law, which will often be, but is by no means always necessarily, identical to that of England and Wales."

21. In *Broad Idea International Ltd v Convoy Collateral Ltd* [2021] UKPC 24 Lord Leggatt (with whom Lord Briggs, Lord Sales and Lord Hamblen agreed) at paragraph 67 stated:

"The common law does not operate on the principle of third time lucky. On the contrary, at its core is the doctrine of stare decisis, meaning "stand by what has been decided". That

doctrine remains as essential as ever to securing stability, consistency and predictability in the common law. The Board has never acted on a strict rule that it is bound by its own previous decisions, nor those of the House of Lords or Supreme Court; but the Board will not depart from a previous decision of its own or of the House of Lords or Supreme Court without compelling reason to do so: see Lord Mance and J Turner, *Privy Council Practice* (2017), paras 5.07 – 5.21 and the cases there cited."

22. There is no doubt that English law and procedure has had and continues to have an important influence on the law and procedure of the Cayman Islands. See, for prime examples, section 11 (1) (like jurisdiction of His Majesty's High Court) and section 18 (jurisdiction to be exercised in accordance with the Rules but English practice to apply where no other provision made so far as "local circumstances permit" and any directions of the court) of the Grand Court Act (as revised). This is also illustrated by reference to Order 1, rule 5 (2) of the Grand Court Rules ("GCR") which provides that the Supreme Court Practice 1999 of England and Wales may be relied upon where appropriate as an aid to the interpretation and application of the GCR. In *Maples FS Limited v B&B Protector Services Limited and others* (Unreported, FSD 213 of 2021 (DDJ),14 July 2022) I stated:

> "25. … I think it sensible and appropriate also to have regard to subsequent editions of the English White Book and the developing case law in Cayman and other sophisticated common law jurisdictions throughout the world including England and Wales."

23. Where the English and Cayman statutory provisions or procedural rules are the same or substantially similar, of course, it makes sense to have regard to the English case law on the relevant statutory provision or procedural rule and to treat it, depending on the circumstances of the case, as a useful precedent.

English precedent in Cayman Islands law

24. Very little local precedent dealing with English precedent in Cayman Islands law was brought to my attention despite the importance of this subject to Issue 2. I gently touched upon the impact of

English precedent in Cayman Islands law, without receiving the benefit of argument from counsel, in *Arnage v Walkers* (Unreported, FSD 105 of 2014 (DDJ), 5 May 2021) at paragraphs 49 – 52:

> "49. It is important however to emphasise that English authorities are, of course, not binding in courts in the Cayman Islands but depending on the context and the issue under consideration English authorities, especially at appellate level, may be persuasive and in some cases highly persuasive. In considering the impact of English authorities regard must always be had to local circumstances.
>
> 50. In respect of the weight to be attached to judgments of the English Court of Appeal, Zacca P in *Miller v R* 1998 CILR 161 at 164 sets out the position of the Court of Appeal of the Cayman Islands as follows, albeit in the context of a criminal appeal:
>
> > "A decision of the English Court of Appeal, while not formally binding upon this court automatically, is necessarily one of great persuasive authority, specifically where it is unanimous and is directed towards a doctrine of the common law."
>
> 51. Sanderson J in *National Trust for Cayman Islands v Planning Appeals Tribunal* 2002 CILR 59 at 66 para 19 referred to *Miller* stating that in such appeal, the Court of Appeal acknowledged that "unanimous decisions of the English Court of Appeal are strong persuasive authority locally but not binding authority." Sanderson J referred to *de Lasala v de Lasala* [1980] A.C. 546 an authority in the Judicial Committee of the Privy Council in an appeal from Hong Kong adding, "the Privy Council stated that on questions of common law, a decision of the House of Lords was of very great persuasive authority locally because of the common membership of those courts. However, it stated that this principle does not apply where circumstances locally make it inappropriate to develop a field of common law in a manner similar to England."

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52. The Privy Council also referred to *de Lasala* in *Frankland v R* 1987-89 MLR 65 at 80 where Lord Ackner, delivering the judgment of the Board, stated:

> "Decisions of the English courts, particularly decisions of the House of Lords and the Court of Appeal in England, are not binding on Manx courts, but they are of high persuasive authority… Such decisions should generally be followed unless either there is some provision to the contrary, or, exceptionally, there is some (sic) good reason for not following the particular English decision. The persuasive effect of a judgment of the House of Lords, which has largely the same composition of the Judicial Committee of the Privy Council, the final Court of Appeal from a Manx court, is bound to be very high."

25. Paragraph 52 contains a typographical error. Before the words "good reason" the words "some local condition which would give" should be inserted.

26. I also brought to counsel's attention the Cayman Islands Court of Appeal judgment in *Schramm v Financial Secretary, Registrar of Companies* 2004-05 CILR 104. In that case the Court of Appeal was invited by counsel for the appellant to disapprove of the decisions of the English Court of Appeal in the cases of *In re Pinto Silver Mining Co.* (1878) 8 Ch D 273 and *In re London & Caledonian Marine Ins. Co.* (1879) 11 Ch. D 140. Collett JA declined to accept such invitation stating at paragraph 9 of the judgment delivered on 5 August 2004:

> "Quite apart from the respect which this court pays to the decisions of established courts of similar jurisdiction in the Commonwealth, it was pointed out to us that the decisions in question were subsequently approved by the House of Lords in *Russian & English Bank v Baring Brothers & Co Ltd* [[1936] A.C. 405]. It is rarely, if ever, that a court at this level fails to follow a line of authority so established. We are not prepared to do so in this case since there is no compelling reasons for us to do so." (My underlining.)

27. Without throwing the last sentence out of all reasonable proportion and attaching too much weight to it, it does appear implicit in that sentence that the Cayman Islands Court of Appeal would decline to follow a decision of the House of Lords (now the Supreme Court of the United Kingdom) if there was a "compelling reason" for them to do so.

28. Part of the headnote to the report of the judgment of the Cayman Islands Court of Appeal (Robinson, P., Kerr and Carberry, JJA) in *Smith v Commissioner of Police* 1980 – 83 CILR 126 reads as follows:

> "(5) In reaching this conclusion, the court was entitled to disregard a previous decision of the Judicial Committee of the Privy Council which had held that a licence was merely a privilege which could be revoked without observing the rules of natural justice and that certiorari did not lie against a licensing authority in such circumstances. Although in subsequent cases this decision had been heavily criticised – its effect had been limited to its special facts and it was no longer considered to be good law – the court was not entitled to depart from it for these reasons alone, since it was bound to follow every part of the *ratio decidendi* of a decision of the Judicial Committee. There were, however, other decisions of the Judicial Committee in which the *rationes decidendi* conflicted with that in the earlier case without actually overruling it. In these circumstances the court was entitled to choose to follow whichever decision it found the more convincing – and it could therefore choose not to follow the earlier decision (page 169, line 41 – page 170, line 18; page 177, lines 18-39; page 178, lines 15-30)."

29. In *Smith* the Cayman Islands Court of Appeal considered authorities from England, Ceylon, Australia, Canada and New Zealand and at page 178 preferred to follow an Australian High Court authority (*Banks v Transport Regulation Bd (Victoria)* (1968) 119 CLR) rather than the Privy Council case of *Nakkuda Ali v Jayarantne* [1951] AC 66. Carberry JA delivering the judgment of the court prayed in aid the following comments of Lord Diplock in *Baker v R* [1975] AC 744 at 788:

"Strictly speaking the per incuriam rule as such, while it justifies a court which is bound by precedent in refusing to follow one of its own previous decisions (*Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718), does not apply to decisions of courts of appellate jurisdiction superior to that of the court in which the rule is sought to be invoked: *Broome v. Cassell & Co. Ltd* [1972] A.C. 1027. To permit this use of the per incuriam rule would open the door to disregard of precedent by the court of inferior jurisdiction by the simple device of holding that decisions of superior courts with which it disagreed must have been given per incuriam."

30. In *Omni Securities Limited v Deloitte and Touche* 2000 CILR 102, Collett JA at page 111 (with whom Zacca P and Georges JA concurred), stated:

"The concept of a "shadow director" is a creature of UK statute which appears to have first seen the light of day in 1917. There has been no authority cited to us which so much as hints at its existence in the common law of England before that date. That same concept is conspicuously absent from the Cayman statutes, and since English common law was received into these Islands not later than 1865, there can be no room to discover its existence in Cayman law at all. There is, of course, no Cayman common law as distinct from the common law of England received into the dependency when these Islands were deemed first settled. The suggestion to the contrary made in the plaintiff's skeleton argument is thus untenable."

31. The Court of Appeal of Jamaica (Duffus Ag P, Lewis JA and Moody Ag JA) in *Levy v Administrator of the Cayman Islands* 1952-79 CILR 42 on 23 April 1963 dealt with arguments as to the introduction of the common law of England into the Cayman Islands by the original settlers. Duffus Ag P, at page 46 stated:

"I am satisfied that the Cayman Islands must be regarded as settled territory, and that the persons who settled in the Cayman Islands must be deemed to have taken with them to the

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> Cayman Islands the common law of England when they first settled here in the early 17th Century …"

Levy was applied by Chief Justice Summerfield in *Eden v R* 1952-79 CILR 406 who at page 414 stated, "[t]hat is the position today [29 October 1979] subject to any statute."

32. The helpful subject matter index of the Cayman Islands Law Reports 1952-2000 contains 4 pages of cases under the heading – "Jurisprudence – Reception of English Law", mainly in respect of practice and procedure. See for example *Re Inco Bank & Trust Corp* 1994 – 95 CILR 99 (Smellie J as he then was) in respect of the status of the English winding up rules in the Cayman Islands.

33. More recently, Kawaley J in *Arcelormittal North American Holdings LLC v Essar Global Fund Limited* (Unreported, FSD 2 of 2019, 16 November 2021) at paragraph 43, in the context of the *Norwich Pharmacal* jurisdiction, stated:

> "The English High Court's inherent jurisdiction and current practice is available to fill any gaps in the local statutes and rules. The converse also applies. English practice must be read subject to relevant local statutes and rules."

34. Kawaley J in *Dell v Smickle* (Unreported, Probate and Administration, 129 of 2019, 5 October 2021) at paragraph 9, in the context of the granting of letters of administration, stated:

> "Care must obviously be taken when applying English statutory provisions as a gap-filling measure, in the probate context, to ensure that one does not subvert the primacy of the Succession Act and Cayman Islands law. In *Uzzell*, section 42 was applied to incorporate not a minor and context-laden provision of English; rather a broad jurisdictional provision was applied, consistent with the notion that this Court's general jurisdiction corresponds to that of the English High Court by virtue of section 11 of the Grand Court Law."

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At paragraph 19 Kawaley J referred to section 42 of the Succession Act which "provides that where any matter is not provided for, English law and practice shall "*so far as local circumstances permit*" apply."

35. In *Perry v Lopag* (Unreported, CICA 16 of 2020 (Formerly FSD 205 of 2017 (NSJ)), 11 November 2021 and with errata 19 November 2021) Sir Jack Beatson JA (with whom President Sir John Goldring and Sir Richard Field JA agreed) at paragraph 77 stated:

> "A question of foreign law is treated as a question of fact to be proved in English law and in Cayman law by the evidence of suitably qualified experts in the relevant foreign law. It is common ground that in the absence of any Cayman authority on the approach to an appeal against a finding as to foreign law by the trial judge this court should adopt the approach in the English authorities."

36. Lord Lloyd-Jones in *Ramoon v Governor of the Cayman Islands* [2023] UKPC 9 at paragraph 51 stated:

> "… The decision of the Supreme Court in *Al Rawi* is, of course, not binding on the Judicial Committee of the Privy Council sitting on appeal from the Court of Appeal of the Cayman Islands. Nevertheless, *Al Rawi* possesses the authority of a decision of the Supreme Court comprising eight justices. (Lord Rodger of Earlsferry who had sat on the hearing of the appeal died before judgment was given.) Moreover, the Board finds the reasoning of Lord Dyson compelling. In the Board's view, it is simply not open to it to invent a CMP [closed material procedure] for the Cayman Islands under the guise of the development of the common law. This would be considerably more than an incremental development. It would be a major change involving an inroad into fundamental common law rights. Such a step should be taken, if at all, by the legislature which is better placed than is the judiciary to assess the policy considerations relating to the necessity for such a procedure and the practicalities of its operation. It would also be open to the legislature to define with

precision the scope of the exception and to make detailed procedural rules to regulate the procedure." (My underlining.)

37. Because of the lack of detailed jurisprudence in the Cayman Islands in respect of the position of English precedent in Cayman it may be helpful to look at other relatively compact common law jurisdictions to see how they treat English precedent.

38. Before I undertake that exercise I record that I take account of the wise words of Assistant Justice Kawaley sitting as a judge in Bermuda in his 471 page judgment in *Wong v Grand View Private Trust Company Limited and others* [2022] SC (Bda) Com (22 June 2022). In that case Assistant Justice Kawaley was considering the reception of English law which at paragraph 867 he said occurred in two principal ways "at common law or by statute". At paragraph 904 Assistant Justice Kawaley stated:

> "Reception is ultimately a jurisdiction-specific process so authorities from other jurisdictions are only really helpful to the extent that they elucidate the general judicial approach to the question."

English precedent in the Isle of Man

39. In *Frankland v R* 1978-80 MLR 275 the Appeal Division of the Isle of Man High Court (Glidewell JA and Brown, Acting JA) referred to *de Lasala* and at page 291 stated:

> "…The correct principle in our view is that decisions of English courts, particularly the House of Lords and the Court of Appeal are persuasive in the Manx courts but not binding. They should, however, generally be followed unless either there is something to the contrary in a Manx statute or there is some clear decision of a Manx court to the contrary, or exceptionally, there is some local condition which would give good reason for not following the particular English decision. When one comes to consider the persuasive effect of English decisions, the persuasive effect of a judgment of the House of Lords which

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has, of course, largely the same composition of the Judicial Committee of the Privy Council which is a Manx court – the highest court of this Island – is obviously very considerable."

40. Glidewell JA delivering the judgment of the court at page 292 stated that Privy Council decisions from the Isle of Man are binding on Manx courts. Referring to *de Lasala,* he stated:

> "I said a moment ago that that decision itself was binding on us, strictly that is not correct, because that is an appeal from Hong Kong and not from the Isle of Man. It could only be when it was an appeal from the Isle of Man that it strictly could be binding upon us, but it is clearly of even more persuasive authority since it is the Judicial Committee of the Privy Council than is a decision of the House of Lords."

41. The Privy Council (1987-89 MLR 65 at page 80) stated that Glidewell JA had correctly pointed out the position in respect of decisions of the English courts in the Manx courts and at pages 81 and 82 added:

> "Glidewell, J.A. correctly took the view that there was nothing in local conditions, much less in local statutes, that should lead the court to the view that the objective test as laid down in *D.P.P. v. Smith* was not the common law of England and therefore the law of the Isle of Man until Tynwald enacted the contrary in 1983. In reaching this conclusion, he expressed his awareness of the criticisms, particularly by academic writers, of *D.P.P. v. Smith*. It does not appear, however, that the learned Judge of Appeal's attention was drawn to Lord Diplock's clear view expressed in *Hyam v. D.P.P.* (4) that the decision was erroneous and how that error came to be made, following in this regard the observations of Byrne, J. when giving the judgment of the Court of Criminal Appeal in *D.P.P. v. Smith*, which their lordships have quoted. Moreover, Glidewell, J.A. did not have the benefit of the very recent observations made by Lord Bridge in his speech in *R. v. Moloney* (7) which their lordships have set out above, and those of Lord Scarman in his speech in *R. v. Hancock* (6) also quoted.

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Their lordships, having had the benefit of extended argument, and particularly in the light of the recent cases, have concluded that the decision in *D.P.P. v. Smith*, insofar as it laid down an objective test of the intent in the crime of murder, did not accurately represent the English common law. It therefore follows that the trial judges in both trials were in error in directing the jury that they were entitled to ascertain the intent of the accused by reference to an objective test."

42. In effect the Privy Council was saying that there was nothing in local statutes, local conditions or academic criticism that would have justified the Manx court in not following the objective test in *DPP v Smith*. However, noting that senior English judges (Lords Diplock, Bridge and Scarman) had commented adversely on *DPP v Smith,* the Privy Council in effect held that the decision in *DPP v Smith,* insofar as it laid down an objective test of intent in the crime of murder, did not accurately represent the English common law.

43. The Appeal Division of the Isle of Man (Deemster Luft and Hytner JA) in *Pate v R* 1981 – 84 MLR 130 dealt with the issue of provocation in Manx law. In England, Parliament had intervened by way of the Homicide Act 1957 but Tynwald, the Manx Parliament, had not followed suit. The success of the appellant's submissions depended "in part upon the view this court takes of the extent to which English authorities decided after 1957 … apply in the Isle of Man, and in part on the view we take of the true application of the authorities prior to that date … Unless there are strong reasons for not doing so, this court will follow decisions of the House of Lords and the English Court of Appeal. One strong reason for not following decisions of those courts would be different local conditions in the Isle of Man."

44. Judge of Appeal Hytner (who served the Isle of Man in that capacity for some 17 years) referred to the House of Lords' decision in *Bedder v DPP* [1954] 1 WLR 1119 describing it as "much criticised" and declined to follow it. Reference was made to the words of Lord Simon in *R v Camplin* [1978] 2 ALL ER 168 at 179 that "some of its implications constitute affronts to common sense and justice." Hytner JA at page 139 of *Pate* stated:

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"Where a decision of the House of Lords or the English Court of Appeal can be said to affront common sense and any sense of justice that, in our view, constitutes a sufficient special circumstance to warrant this court refusing to follow it." (My underlining.)

45. In respect of the Manx test laid down by the Privy Council in *Frankland*, I should for the sake of completeness refer to a couple of subsequent Manx judgments. The Appeal Division of the Isle of Man (Deemster Kerruish and Tattersall JA) in *Dominator Limited v Gilberson SL* 2009 MLR 161 referred to what they described as dicta in the *Frankland* case in respect of following English decisions and stated:

> "92. For the purposes of this appeal it is unnecessary for this court to express any view as to whether or not such dicta have the same force today as they had over 20 years ago. However, even without the benefit of full argument on such issue, we are bound to express some doubt whether they do so in the context of a jurisdiction which is becoming increasingly independent of English statutes and procedure and is frequently choosing to be informed by or to adopt the common law and practices found in jurisdictions other than England.
>
> 93. Similarly it may be that this court's decision in *In the matter of the Petition of Cussons* [2001-03] MLR 539, at 548, where this court stated:
>
> > 'The correct approach seems to us to be to establish the English precedent … and to follow that precedent unless there is any jurisdiction to depart from it in line with *Frankland v R.*'
>
> will need at some stage to be reconsidered."

46. The Appeal Division (Deemster Doyle, Tattersall JA and Deemster Corlett) in *R v Hamblett* 2013 MLR 385 in a judgment delivered on 12 September 2013 referred to *Dominator* at paragraph 39 and at paragraph 40 added:

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"In the past this court has frequently emphasised that local conditions may justify a different approach to that adopted in England and Wales … Moreover in *Invercargill City Council v Hamlin* [1996], ALL ER 756, [1996] AC 624 the Privy Council expressly held that the New Zealand Court of Appeal was entitled to develop the common law of New Zealand in areas of the common law which were developing and not settled." (My underlining.)

47. It may also be of interest to note that Judge of Appeal Hytner sitting in the Appeal Division of the Isle of Man in *Barr and Anglo International Holdings Limited* 1990-92 MLR 398 at 409, in the context of contempt of court, stated:

"Since this court is not in any event bound by decisions of the English courts, it should not be assumed that we would follow dicta abandoned by Parliament." (My underlining.)

48. At page 410 the appeal judge, having reviewed some of the relevant authorities, added:

"We are, therefore, satisfied that such part of the English common law as has been preserved by Parliament represents the Manx common law."

49. In *Bitel v Kyrgyz Mobil* (unreported judgment of the High Court of the Isle of Man delivered on 30 November 2007) in my capacity as a Deemster at first instance I stated:

"535. Judge of Appeal Hytner in *Barr and Anglo International Holdings Limited* 1990-92 MLR 398 at page 409 stated:

"Since this court is not in any way bound by decisions of the English courts it should not be assumed that we would follow dicta abandoned by Parliament."

536. In *City and International Securities Limited* 2001-03 MLR 239 Deemster Cain had little difficulty in not following the majority judgments in *Home Office v Harman* [1983]

A.C. 280 (House of Lords) which had been challenged before the European Commission of Human Rights.

537. In *Aguilar v Anglican Windows (IOM) Limited* 1987-89 MLR 317 at 325 an advocate endeavoured to persuade Deemster Corrin not to follow the Privy Council decision in *Selvanayagam v University of West Indies* on the grounds that it had been the subject of criticism and that their Lordships had confused remoteness and mitigation. Deemster Corrin at page 325 stated that the decision "is, nevertheless, a decision of the Privy Council and, if not actually binding, is very persuasive authority in this court, and I propose to follow it."

538. Deemster Corrin in *Cusack, Cotter v Scroop Limited* (judgment 16th January 1997) stated at page 9:

> "The Isle of Man is an active member of the Commonwealth and whilst historically it has tended to follow English law I feel quite free to look for guidance to other Commonwealth countries as there is no binding or persuasive authority to the contrary in England."

539. The High Court of Australia in *Cook v Cook* (1986) 162 CLR 376 at 390 stated:

> "… the history of the country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts."

540. Thanks in the main to Deemster William Cain and to Dr Alan Milner of Law Reports International the Island has had an excellent system of local law reporting for some many years now. Increasingly it is to our own local judgments that we are turning in dealing with the legal issues of the day.

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> 541. In addition to applying our own local precedents Manx courts will also continue to benefit from the learning and reasoning of judgments of the English courts and "other great common law courts" including the High Court of Australia."

50. Deemster Cain in *Re City and International Securities Limited* 2001-03 MLR 239 declined to follow the majority judgments of the House of Lords in *Home Office v Harman* [1983] AC 280 (as challenged before the European Commission on Human Rights and amicably settled with procedural rules in England being subsequently changed) and considered the proper course for the Manx courts was to follow the minority judgments, stating at paragraph 15:

> "Decisions of the House of Lords are not binding on this court, although they will generally be followed … I consider that this is one of those exceptional cases where this court should not follow a decision of the House of Lords. I therefore hold that it is not a contempt of court to publish documents which have been read aloud in open court."

51. Following Deemster Cain's lead I decided in *Barclays Private Clients International Limited* 2016 MLR Note 13 (judgment dated 17 August 2016) at paragraph 34 of the judgment not to follow the majority speeches in the House of Lords in the English case of *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 101 which concerned employment contracts in a bygone age, preferring to follow the powerful dissenting judgment of Lord Romer. I also noted at paragraph 36 the changed regulatory environment and that the effect of *Nokes* in English law had been overturned by subsequent legislation in the United Kingdom.

52. Certainty is also important. At page 40 of Ramsey B Moore's *Isle of Man and International Law* (1926) the learned Attorney refers to the words of Deemster Callow in 1911 in the case of *Goldsmith* that not to follow the English rule laid down in *Fletcher v Ashburner* and adopt a more equitable practice would "involve endless confusion, and would be to the prejudice of the Manx courts and legal profession. No one would know where they stood" and adds:

> "English decisions have always been accepted in the Isle of Man in the absence of local laws to the contrary, to the great advantage and uniformity of legal practice. But the Manx courts have never felt themselves bound to slavishly adhere to these principles".

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53. Deemster Corlett in *Kaupthing Singer & Friedlander (Isle of Man) Limited (in liquidation)* 2017 MLR 151 in a judgment delivered on 16 June 2017 stated at paragraph 56:

> "In summary I do not consider it appropriate to follow the English line of authority, particularly bearing in mind that the decisions arrived at appear to have been substantially dictated by a legislative history which the Isle of Man does not share. None of those authorities is in any event binding upon me. I am therefore free to choose a path which best reflects my view of the fairness (or relative unfairness) of the situation and which best promotes the policy set out by Tynwald in the law of insolvency in respect of which I am unable to see why there should be any discernible difference in result as between individual bankruptcy and corporate insolvency."

English precedent in Jersey

54. I turn now to an important judgment of the Court of Appeal of Jersey (James McNeill KC, Sir William Bailhache and Jeremy Storey KC) in *Energy Investments Global Limited v Albion Energy Limited* [2020] JCA 258. Bailhache JA, giving the judgment of the Court, stated:

> "36. The Respondent relies on the dictum of Lord Guest in Carl Zeiss Stiftung v Rayner and Keeler Limited (No 2) [1967] 1 AC 853 HL, where at p938 paragraphs A-C, he said:-
>
> > "In the case of [an English judgment] the cause of action is merged with the judgment… Not so in the case of foreign judgments… The plaintiff, therefore, has the option either of suing on the judgment or on the original cause of action. The doctrine of non-merger… is still, as I understand it, good law."
>
> 37. Advocate Hoy submitted that this was the English rule until the 1982 Act [Civil Jurisdiction and Judgments Act]. A statute which did not apply here would not change the position and thus it followed that if we were to apply the English common law doctrine of merger in the island, we should apply the whole of it. In

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effect, what the Respondent is inviting us to do is to declare the law of Jersey, in this respect so far in a state of uncertainty because there is no previous authority on the point, to be the same as the common law of England before 1982 in circumstances where, by statute that year, Parliament has decreed that the English common law be abrogated. In our judgment this would be both inappropriate and unnecessary. It is not the position that English common law provides any form of binding precedent in Jersey. Different expressions have been used in the courts from time to time to describe the nature of the doctrine of precedent in Jersey, but one thing which is certain is that nowhere in modern practice is there to be found any statement that decisions of the English courts are binding in the island. It is accordingly not the case that the court is obliged to apply the English common law rule. Nor, obviously, it is the case that the courts of this island are required to apply an Act of Parliament which changed the position in England but which does not apply to us here. Neither the English common law nor the inapplicable statute have any binding force in this jurisdiction. They are not of themselves precedents which we are required to follow.

38. The consequence is that we need to examine this issue, not from the perspective of English decisions of previous centuries nor from the perspective of what Parliament has ordained for England and Wales, but instead from the perspective of what is right as a matter of principle. In that limited context, we can have regard to the fact that Parliament has abrogated the common law rule, although for the reason given that is not conclusive." (My underlining.)

55. Sir Michael Birt, sitting as a Commissioner in Jersey in *The Attorney General v K* [2016] JRC 158, in the context of sentencing guidelines in criminal cases, at paragraph 67 stated:

"67. We would add that even if, contrary to our view, Da Graca is to be treated as a guideline case, it would, in our respectful view, be open to the Superior Number to suggest new guidelines if satisfied that there had been a compelling change of circumstance. In State of Qatar v Al Thani [1999] JLR 118 at 126, the Court considered the doctrine of precedent in this jurisdiction and held that the doctrine

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of stare decisis as expounded by the English courts was not part of the law of Jersey. However, it went on to say:-

> "A hierarchical structure of courts requires that deference be accorded by lower courts to higher courts. Even in France judges of lower courts will in practice follow the decision of higher courts in most cases. This court is generally bound by the decisions of the Court of Appeal and of course, as it always has been, by the decisions of the Judicial Committee of the Privy Council sitting on appeal from the courts of this jurisdiction. We qualify the proposition only because, in our judgment, it is open to the Royal Court, as it would be to a Scottish court, to decline to follow a decision which has been invalidated by subsequent legislation or some such compelling change of circumstance."" (My underlining.)

English precedent in Guernsey

56. Let us now take a trip across the water to Guernsey. In *Morton v Paint* (1996) 21 GLJ 61 (judgment of the Guernsey Court of Appeal 9 February 1996) Blom-Cooper J at page 40 stated:

> "Accordingly, Guernsey law, in adopting the English law rules in the field of tortious liability, could properly conform to what the UK Parliament had decreed was the "eminently sensible" rule. To bring the law of Guernsey into line with the statutory rule in England, and not to allow a parting of the ways for the two jurisdictions, does not have to await enactment of a similar law by the states of Guernsey. It can be done judicially. The argument, ably advanced by Mr Wessels for the respondent, would mean the ossifying of the very organism of the common law – namely, its constant adaptability to changing social conditions. It cannot be right that the law of negligence should remain stunted in its growth so long as the state of Guernsey fails to legislate.
>
> As Lord Scarman observed in Gillick v. West Norfolk and Wisbech Area Health Authority [1986] AC 112 at p.183D:

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"It is, of course, a judicial commonplace to proclaim the adaptability and flexibility of the judge-made common law. But this is more frequently proclaimed than acted on. The mark of the great judge from Coke through Mansfield to our day has been the capacity and the will to search out principle, to discard the detail appropriate (perhaps) to earlier times and to apply principle in such a way as to satisfy the needs of his own time. If judge-made law is to survive as a living and relevant body of law, we must make the effort, however inadequately, to follow the lead of the great masters of the judicial art.""

57. Southwell J on pages 59 – 60 stated:

"(5) It would not be appropriate to leave Guernsey law in the state reached by English law nearly 40 years ago, which was justly criticised as something of a blot on English jurisprudence and requiring urgent reform. For the Guernsey Courts to cling to obsolete English common law cases which ceased to be authoritative in England and Wales 39 years ago would not be in the interests of those who live in Guernsey or their visitors. It would be the more inappropriate because, as Mr Wessels accepted, it would involve clinging to such out of date cases concerning liability to lawful visitors, while adopting the more recent developments in Herrington concerning liability to trespassers, which in turn had to be superseded by statute in England and Wales because of their uncertainty.

In my judgment the weight of the argument lies on the side of development of Guernsey law by the courts, taking the principles evolved in Donoghue and Zaluzna as the basis of this development.

Accordingly, in my judgment the appeal should be allowed, and the duty of care owed by Mr Paint to Mrs Morton should be declared to be a duty to have done what a reasonable man would have done in the circumstances by way of response to the risk, in so far as foreseeable, in accordance with the Donoghue v Stevenson principles of the law of negligence." (My underlining, save for the underlined case law references.)

58. A youthful Sumption J agreed with both judgments.

59. Lord Hope in *Simon v Helmot* [2012] UKPC 5 at paragraph 6 referred to *Morton v Paint* and stated:

> "The English common law has persuasive force in Guernsey in areas not governed by Guernsey statutes or Guernsey customary law, in much the same way as it has in Scotland …"

Adding at paragraph 7:

> "This is not to say that the solutions that have been adopted in English law will be applied in Guernsey without an inquiry as to whether the underlying conditions in the respective jurisdictions are truly comparable …" (My underlining.)

60. Lord Clarke (giving the judgment of the Board) in *Spread Trustee Company Limited v Sarah Anne Hutcheson & others* [2011] UKPC 13 reassuringly showed that the Judicial Committee of the Privy Council is conscious of local sensitivities in the Crown Dependencies. At paragraph 40 he stated:

> "The Board entirely accepts that Guernsey looks to other jurisdictions for assistance in developing particular areas of the law … Guernsey law must in the end be interpreted in the light of its own terminology, context and history …"

61. I am conscious also of Lord Neuberger's comment at paragraph 13 of *Willers v Joyce* [2016] UKSC 44:

> "…the common law can develop in different ways in different jurisdictions (although it is highly desirable that all common law judges generally try and march together) …"

English precedent in Bermuda

62. In *Re First Virginia Reinsurance Ltd* [2003] Bda LR 47 Kawaley J (as he then was) sitting in Bermuda declined to follow an aspect of a first instance English authority *Re Emmadart Ltd* [1979] 1 ALL ER 599 which had been repealed by statute and not followed by a line of Australian cases. In that case, counsel submitted that *Re Emmadart Ltd* should not be followed in Bermuda for two

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broad reasons. Firstly, the decision was so unsatisfactory that it had been repealed by statute; section 124(1) of the Insolvency Act 1986 (UK) expressly empowered by the directors to petition for a company's winding up. Secondly, because Australian case law had "superior reasoning which was to be preferred." Kawaley J, for the detailed and cogent reasons specified in his judgment, felt that the case against applying the *Emmadart* analysis to the case of an insolvent company was a compelling one and the reasoning in that case was "fundamentally flawed".

English precedent in Hong Kong

63. Let us now fly off to Hong Kong, another jurisdiction with which the Cayman Islands have very strong connections. Harris J, one of the leading commercial judges in Hong Kong and internationally well respected, in *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676 distinguished the House of Lords decision in *Galbraith v Grimshaw* [1910] AC 508 and declined to follow it. Harris J at paragraph 19 was of the opinion that the analysis of the House of Lords in the early 20th century was "inconsistent with contemporary cross-border insolvency law and its reasoning is inapplicable to modern common law cross-border insolvency assistance". (My underlining.)

64. Harris J at paragraph 20 noted that *Galbraith v Grimshaw* had been subject to much academic criticism acknowledged by Their Lordships in *Al Sabah v Grupo Torras SA* [2005] UKPC 1; [2005] AC 333 as having "some force".

65. Harris J at paragraph 21 stated that the reasoning in *Galbraith v Grimshaw* "was in fact narrow" and concerned the rules of relation-back and a Scottish trustee and added:

> "At the time *Galbraith v Grimshaw* was determined cross-border insolvency assistance as we now understand it had not evolved."

66. Before the Hong Kong Court of Final Appeal was established the Privy Council dealt with an appeal from the Court of Appeal of Hong Kong in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80. Lord Scarman, in the language of the 1980s, delivered Their Lordships' judgment and at page 108 stated:

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"It was suggested, though only faintly, that even if English courts are bound to follow the decision in *Macmillan's* case the Judicial Committee is not so constrained. This is a misapprehension. Once it is accepted, as in this case it is, that the applicable law is English, their Lordships of the Judicial Committee will follow a House of Lords' decision which covers the point in issue. The Judicial Committee is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity. Though the Judicial Committee enjoys a greater freedom from the binding effect of precedent than does the House of Lords, it is in no position on a question of English law to invoke the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234 of July 1966 pursuant to which the House has assumed the power to depart in certain circumstances from a previous decision of the House. And their Lordships note, in passing, the Statement's warning against the danger of disturbing retrospectively the basis on which contracts have been entered into. It is, of course, open to the Judicial Committee to depart from a House of Lords' decision in a case where, by reason of custom, statute, or for other reasons peculiar to the jurisdiction where the matter in dispute arose, the Judicial Committee is required to determine whether English law should or should not apply. Only if it be decided or accepted (as in this case) that English law is the law to be applied will the Judicial Committee consider itself bound to follow a House of Lords' decision. An illustration of the principle in operation is afforded by the recent New Zealand appeal *Hart v. O'Connor* [1985] A.C. 1000, in which the Board reversed a very learned judgment of the New Zealand Court of Appeal as to the contractual capacity of a mentally disabled person, holding that because English law applied, the duty of the New Zealand Court of Appeal was not to depart from what the Board was satisfied was the settled principle of that law." (My underlining.)

67. Lord Scarman's comments must now be read in light of *Attorney General for Hong Kong v Reid* and *Willers v Joyce*.

68. Johannes M. M. Chan in *Paths of Justice* (Hong Kong University Press 2018) at page 6:

"We followed English law in many areas, sometimes too slavishly, without consideration of local circumstances. There are also many areas of local significance that have not been researched at all."

English precedent in New Zealand

69. We now travel to a well-known JCPC decision on an appeal from the Court of Appeal of New Zealand, namely *Attorney General for Hong Kong v Reid* [1994] 1 AC 324, to consider the historical position of English precedent in New Zealand. Lord Templeman at pages 338-339:

> "The New Zealand Court of Appeal in the present case declined to enter into the merits of *Lister & Co. v. Stubbs*, 45 CH.D. 1, founding itself on a passage in the judgment of this Board delivered by Lord Scarman in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] A.C. 80, 108, where his Lordship said the duty of the New Zealand Court of Appeal was not to depart from a settled principle of English law. While their Lordships regard the application of stare decisis in the New Zealand Court of Appeal as a matter for that court, they desire to make the following remarks, in case Lord Scarman's comments in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* have in any way been misunderstood.
>
> In the present case the Court of Appeal did not say and could not have meant that it was bound by a decision of the English Court of Appeal, since for many years the New Zealand courts have not regarded themselves as bound by decisions of the House of Lords, although of course continuing to pay great respect to them. The reasoning of the Court of Appeal, as their Lordships understand it, was rather that in the absence of differentiating local circumstances the court should follow a decision representing contemporary English law, leaving its correctness for consideration by this Board. Without in any way criticising that approach in the circumstances of this case, where the decision in question was of such long standing, their Lordships wish to add that nevertheless the New Zealand Court of Appeal must be free to review an English Court of Appeal authority on its merits and to depart from it if the authority is considered to be wrong. *Hart v. O'Connor* [1985] A.C. 1000 to which Lord Scarman referred in the passage mentioned by the Court of Appeal concerned

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the very different situation of the Court of Appeal wishing to apply English law but, in the judgments of this Board, misapprehending the state of the contemporary law. In any case where the New Zealand Court of Appeal has to decide whether to follow an English authority, its own views on the issue, untrammelled by authority, will always be of great assistance to the Board." (My underlining.)

Summary of the position of precedent in Cayman Islands law

70. Pulling all these loose threads together I think the basic tapestry which appears before me reveals the following:

(1) the *ratio* of a judgment of the Judicial Committee of the Privy Council on an appeal from the Cayman Islands is binding on all judges of the Cayman Islands (*de Lasala* and *Frankland*);

(2) English decisions, even of the House of Lords and now the Supreme Court, are not binding on any judges in the Cayman Islands but they may be persuasive and in some cases highly persuasive (*Frankland; Ramoon*; *Energy Investments*);

(3) a judge in the Cayman Islands may decline to follow a decision of an English court even at appellate level if:

(a) there is some provision to the contrary in a statute of the Cayman Islands (*Frankland*; *Simon v Helmot*);

(b) there is some clear decision of a court of the Cayman Islands to the contrary (*Frankland*);

(c) there is, exceptionally, some local condition which would give good reason not to follow it (*Frankland*);

(d) there has been some compelling change of circumstance since the delivery of the English decision (*The Attorney General v K*);

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(e) there is some "compelling reason" not to follow it (*Schramm*) such as the reasoning being "fundamentally flawed" (*Re First Virginia Reinsurance*);

(f) if the English decision has been abandoned or invalidated by the UK Parliament or not followed in other great common law courts such as the High Court of Australia (*Anglo v Barr; The Attorney General v K; State of Qatar v Al Thani*; *Morton v Paint*; *Barclays*);

(g) where English procedural rules have been implemented to remove the effect of the English decision (*Re City and International Securities*);

(h) where the common law was developing and is not settled (*Invercargill*);

(i) where the English decision has been "much criticised" and can be said to "affront common sense and any sense of justice" (*Pate*);

(j) where it is undesirable to "cling to obsolete English common law cases which have ceased to be authoritative in England and Wales" (*Morton v Paint*);

(k) where the underlying conditions in the respective jurisdictions are not truly comparable (*Simon v Hulmot*);

(l) where it is inconsistent with contemporary law and its reasoning is inapplicable to the modern common law (*Re CEFC*; *Barclays*);

(m) where by reason of custom, statute or for some other reasons peculiar to Cayman the English decision should be departed from (*Tai Hing Cotton Mill*); and

(n) if the English decision is obviously wrong or otherwise not persuasive (*AG v Reid*).

71. In the vast majority of cases the Cayman Islands courts will continue to follow English decisions where appropriate. At the risk of stating the obvious the above categories are simply categories (based on previous case law) of where a Cayman judge may be justified in not following an English decision. This does not turn the doctrine of precedent on its head. Cayman Islands courts at first

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instance will still, of course, be bound by the ratios of the Cayman Islands Court of Appeal and the Judicial Committee of the Privy Council on appeals from the Cayman Islands. Moreover, Cayman Islands judges at first instance would normally also follow the judgments of other judges at first instance unless satisfied that such judgments were wrong (see for example Cresswell J in *Alibaba.com* 2012 (1) CILR 272, Kawaley J in *Simamba v HSA* 2019 (2) CILR 213 and Parker J in *Padma Fund* (Unreported, FSD 201 of 2021 (RPJ), 8 October 2021)).

72. I appreciate that category (n) creates a risk of perhaps causing some confusion and uncertainty but I do not see why Cayman judges should be required to follow English decisions that are obviously wrong or otherwise not persuasive. Does the importance of certainty really require us to do that? I do not think so. We are a separate jurisdiction with our own common law. If the local judges overstep the mark in developing local common law in the best interests of the Cayman Islands the Cayman Parliament can intervene and legislate.

73. I accept that the reality will be in the vast majority of cases the Cayman Islands courts will follow English common law precedent but in some exceptional cases, especially where such precedent has been abandoned by the UK Parliament, it may decide to follow precedent from other leading common law courts such as the High Court of Australia. As we develop and mature as an independent jurisdiction we should have the confidence to break the umbilical cord from the English common law and develop our own common law to suit the best interests of the Cayman Islands. More and more we will be turning to local precedent.

74. In the present case, I ask myself should this Court reasonably be expected to follow a House of Lords decision from 1880 which has been much criticised, abandoned by the UK Parliament and not followed by the High Court of Australia or by the Supreme Court of Bermuda at first instance? It is to that question which we must now turn.

Houldsworth v City of Glasgow Bank

75. Much has been written and said about *Houldsworth v City of Glasgow Bank* 1880 5 App Cas. 317 (H.L.(Sc.)).

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76. Mr Millett says it is part of Cayman Islands common law and I should follow it. Mr Levy says it is distinguishable from the facts of the instant case (and should be distinguished) or should not be followed or form any part of Cayman Islands law. Mr Levy says that the decision in *Houldsworth* cannot sensibly be sustained in view of developments in company law since 1880, and the very different context in which it was decided. Mr Smith, although adopting a neutral stance on behalf of the Liquidators, provided opinions to the Liquidators stating that it would likely not be followed in the Cayman Islands. In his undated skeleton argument (provided for the hearing in May 2023) Mr Smith gently submitted that in the absence of any specific Cayman authority on the point, for their part the Liquidators would tend to approach the matter on the basis that the answer to Issue 2 is supplied by the decision of the High Court of Australia in *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1; [2007] 3 LRC 462 (*"Sons of Gwalia"*), being the most recent and leading Commonwealth authority on the point and which deals with all the earlier cases.

77. *Houldsworth* is a difficult case and of its time. It is necessary to determine what *Houldsworth* decided. I shall analyse the judgments to see if I can ascertain a *ratio*. I will also consider subsequent textbook and judicial commentaries upon it to see if they can shed any further light on this case.

78. The House of Lords in *Houldsworth* was dealing with a Scottish appeal. The author of the headnote appears to have concluded that the case was authority for the principle that a person induced by the fraud of the agents of a joint stock company to become "a partner in that company can bring no action for damages against the company whilst he remains in it: his *only* remedy is *restitutio in integrum*, and rescission of the contract; and if that becomes impossible – by the winding-up of the company or by any other means – his action for damages is irrelevant and cannot be maintained."

79. The bank was described in the headnote as "a co-partnership registered under the Companies Act 1862". It was an "unlimited company" and had "by virtue of its articles of co-partnership power to deal in its own shares." Mr Houldsworth was "registered as a partner" and after the bank went into liquidation he raised an action "upon the ground of fraudulent misrepresentations made by the directors and other bank officials to him." It was held that rescission was impossible as decided by

Oakes v Turquand and *Tennett v City of Glasgow Bank*. Mr Herschell QC appeared for Mr Houldsworth.

80. Earl Cairns LC at page 323 stated:

> "The *Winding-up Act* has no provision for the payment of claims against the company except the claims of creditors. Creditors are supposed to be paid *pari passu*, and there is no provision after they are paid for opening up fresh claims by a contributory against the company."

81. Earl Cairns at page 323 set out a question which he ultimately answered in the negative:

> "Can a man, induced by the fraudulent misrepresentations of agents of a company to take shares in the company, after he discovers the fraud, elect to retain the shares, and to sue the company for damages?"

82. Earl Cairns at pages 323 – 324 directed his mind to "the case of shares or stock in a partnership or company". Earl Cairns refers to a buyer agreeing to enter into a partnership "taking his share of past liabilities, and his chance of future profits or losses. He has not bought any chattel or piece of property for himself; he has merged himself into a society, to the property of which he has agreed to contribute, and the property of which, including his own contributions, he has agreed shall be used and applied in a particular and no other way."

83. Earl Cairns at page 325 referred to the "contract which the new partner has entered". The Lord Chancellor assumed he was entitled to rescind his contract, leave the company and recover any money he has paid or any damages he has sustained "but he prefers to remain at the company and to affirm his contract." He then brings an action against the company and if he succeeds money will be paid out of the assets and contributions of the company:

> "The result is, he is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide; in other words, he is in substance, if not in form, taking the course which is described as approbating and reprobating, a course which is not allowed either in Scotch or English law."

84. I pause to state four obvious facts. First, a share is a "piece of property". By section 33 (1)(a) of Companies Act it is stated to be personal estate. Second, a shareholder in a limited company has not "merged himself in a society" (see *Salomon v Salomon* [1897] AC 22). Third, a shareholder in a limited company is not required to contribute an amount exceeding the amount, if any, unpaid on the shares (section 49(d) of the Companies Act). In our case all the shares have already been fully paid. Fourth, Earl Cairns was dealing with what he described as "a partnership contract".

85. Lord Selbourne at page 330 felt that "for rescission the Appellant is confessedly too late."

86. Lord Hatherley at page 331 felt that "if there cannot be a *restituto in integrum*, the contract cannot be rescinded."

87. Lord Blackburn at page 335 did not even think it necessary to hear from counsel for the Respondent. The three silks lined up by the bank (no doubt at great expense), Mr Kay QC, Mr Benjamin QC, Mr Davey QC and the junior Mr Balfour all remained silent in the knowledge of a victory in the bag. At page 337 Lord Blackburn described the contract with a joint stock company to take share as "a very peculiar one". Lord Blackburn felt that whether the court was dealing with a deed of co-partnership as a bank, or a joint stock company "the contract equally is in substance an agreement with the company to become a partner in the company on the terms that the partner shall, in common with all his co-partners for the time being, contribute to make good all liabilities of the co-partnership as if this incoming partner had been a member of the partnership from the beginning." A corporate lawyer in 2023 may have real difficulty relating that description from 1880 to an investor in a limited company whose shares were fully paid.

Textbook commentary on Houldsworth

88. I set out below the way in which *Houldsworth* was dealt with by the textbook writers in the late 1800s, early 1900s and in 1957. I am most grateful to counsel for their assistance in this respect and the individuals who had the pleasure of diving deeply into the dusty shelves of the magnificent libraries in the Inns of Court in London.

89. Bris S *The Law of Corporations and Companies: A Treatise on the Doctrine of Ultra Vires* (3rd Ed. 1893) at page 433 referred at footnote 8 to *Houldsworth* as authority for the proposition that after

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a winding up order a shareholder cannot bring "an action for damages against the corporation – as against the latter his right of every description in respect of the alleged fraud are gone."

90. Buckley on *The Law and Practice under the Companies Acts* (5th Ed. 1887) at page 97 put forward *Houldsworth* to support the following statement:

> "The remedy of a shareholder who has been induced to take his shares by fraud is rescission and *restitutio in integrum*. He cannot retain the shares and have damages for the fraud in the same way as if it had been a purchase of goods, he could retain the goods and have damages. He cannot remain a member of the corporation and have damages against the corporation of which he himself is a member."

91. In the 12th edition published in 1949 reference to *Re Addlestone Linoleum Company* [1887] 37 Ch D 191 (*"Addlestone")* was added at footnote (b) on page 263 and at pages 281 to 281 the following statement appeared:

> "If the company has gone into liquidation, and rescission has become impossible he [the shareholder] can have no remedy against the company at all. His action for damages is as irrelevant against the company in liquidation as it would be against the going company."

92. Chadwyck Healey and others in *A Treatise on the Law and Practice relating to Joint Stock Companies* (3rd edition 1894) cite *Houldsworth* on page 605 to support the statement:

> "After the [winding-up] order, he can no longer sue the company for the misrepresentation by which he was induced to take the shares."

93. Hamilton in *A Manual of Company Law* (2nd edition 1901) at pages 154-155 uses *Houldsworth* to support the statement that a person who was induced to subscribe by misrepresentation will lose his right to rescission by the commencement of the winding-up of the company and will also be debarred from obtaining damages.

94. Kerr in *A Treatise on the Law of Fraud and Mistake* (3rd Edition 1902) at page 86 uses *Houldsworth* to support the statement that a person who has been induced to purchase shares by the fraud of the

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directors cannot maintain an action against the company if he retains his shares or if rescission is impossible by reason of the winding up of the company but he may sue the directors personally.

95. Walker B Lindley (the son of Lord Lindley) in *A Treatise on the Law of Companies as considered as a branch of the law of partnership* (6th Edition 1902) at page 94 in a publication of its time and heavily influenced by the law of partnership cites *Houldsworth* for the statement that:

> "It is however settled that a shareholder who has been induced by fraud to take shares in a company cannot maintain an action (or its equivalent, viz., a claim) for damages against the company when it is being wound up. This doctrine is based upon the winding-up provisions of the Companies Act 1862, and upon the rights of creditors under winding-up proceedings, and has no application to actions against individual directors or other persons."

96. Palmer's *Company Law* (1898) refers to *Houldsworth* at pages 47, 48 and 235 but not for any propositions relevant to the issue presently before the Court. Perhaps, in his mind at least, it was not authority for the general proposition other authors were using it for.

97. Rawlins and Macnaghten in *Law and Practice in Relation to Companies* (1901) at page 332 cite *Houldsworth* to support the general statement that:

> "When winding up has commenced, not only is the shareholder debarred from repudiating his shares, although he may have been induced to accept them by fraud of the company and its officers, but he cannot sue the company or its liquidator."

98. Smith in *A Summary of the Law of Companies* (9th Edition 1907) at page 38 cites *Houldsworth* to support the statement:

> "If a person induced to take shares in a company by misrepresentation cannot get rescission of his contract he is without any remedy against the company."

99. Let us now fast forward some 50 years to 1957 and Gower in *Principles of Modern Company Law* (2nd Edition 1957) at pages 295-196 (footnotes omitted) states:

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"In fact, however, it seems clear that the company is not liable in damages when shares have been purchased in such circumstances. This is because of the anomalous rule, laid down by the House of Lords in *Houldsworth v. City of Glasgow Bank*, to the effect that damages cannot be recovered from the company unless the allotment of shares is also rescinded. In laying down this rule the House do not seem to have recognised fully the separation between the corporate entity and the member, but the decision can be explained on two grounds. The first is that to recover damages would be inconsistent with the terms of the implied contract between all the shareholders. The second justification depends on the recognition of share capital as a guarantee fund for creditors. As we shall see, this conception is at the basis of the rule that a shareholder who wishes to rescind must do so promptly, since the existence of his shares may have led others to extend credit to the company. But if a shareholder were permitted to recover damages notwithstanding that he had lost the right to rescind, the consequences to third parties would be just as detrimental, since the assets of the company would be equally depleted. Hence the rule that he must act promptly, and unless he does so and rescinds the allotment (thus ceasing to be a shareholder) he will lose all remedies against the company." (My underlining.)

***Houldsworth* in context**

100. Mr Millett says that I must consider *Houldsworth* in its proper context including *Oakes v Turquand* [1867], *Tennett v The City of Glasgow Bank* [1879] and *Hull and County Bank* [1888].

101. *Oakes v Turquand* [1867] LR 2 HL 325 concerned a limited company. The first paragraph of the headnote states:

"Where a person has been, by the fraudulent misrepresentations of directors, or by their fraudulent concealment of facts, drawn into a contract to purchase shares in a company, the directors cannot enforce the contract against him, but he may rescind it. But he must do so within a reasonable time."

102. After judgment was delivered Mr Swanston, junior counsel for the unsuccessful appellants (his leader Mr Giffard QC was wise enough to stay silent off his feet), boldly rose to his feet and had

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the temerity to ask a question to avoid "some misunderstanding of your judgment" and he was promptly put firmly back in his place with the following judicial rebuke delivered by the Lord Chancellor at page 379 of the report:

> "I really do not think these points ought to be allowed to be raised at this stage. It is becoming very much the fashion to bring up points after the original hearing. I do not think that that is right, or that it is a practice we ought to encourage."

103. Attorneys in 2023 would do well to reflect upon those words uttered in 1867.

104. In *Tennant v City of Glasgow Bank* [1879] 4 App Case 615 HL (Sc.) Earl Cairns LC at 621 stated that in *Oakes v Turquand*:

> "This House has established that it is too late, after winding-up has commenced, to rescind a contract for shares on the ground of fraud."

105. *Re Hull and County Bank* [1880] 15 Ch D 507 concerned a limited company. Jessell MR at page 511 referred to the position where an applicant has been induced to become a shareholder by fraudulent misrepresentation: "Can he after winding up be relieved? I think he cannot …"

106. *Addlestone* also concerned a limited company. Kay J at pages 198-199 stated that in *Houldsworth*:

> "it was held that fraudulent misrepresentations of a director inducing the plaintiff to take shares might give him a right to rescind the contract, but gave him no right whatever to hold the shares and prove for damages against the company."

107. Lindley LJ at pages 205-206 stated:

> "The principle on which the House of Lords decided [*Houldsworth*] was that a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money – he must not directly or indirectly receive back any part of it, and this appears to me to govern the present case."

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Soden

108. The headnote to the report of judgments of the House of Lords in *Soden v British & Commonwealth Holdings Plc* [1998] A.C. 298 reads as follows:

> "*Held*, dismissing the appeal, that the rationale of section 74(2)(f) of the Insolvency Act 1986 was to ensure that the rights of members as such did not compete with the rights of the general body of creditors; that a sum was due to a member "in his character of a member" within section 74(2)(f) if the right to receive it was based on a cause of action founded on the statutory contract between the members and the company and members *inter se* imposed by section 14(1) of the Companies Act 1985 and such other provisions of the Act as conferred rights or imposed liabilities on members, but that where membership, though an essential qualification for acquiring the claim, was not the foundation of the cause of action, it fell outside section 74(2)(f); that an action founded on a misrepresentation by a company on the purchase of existing shares from third parties was not based on the statutory contract; and that, accordingly, any damages recovered by the first defendant would not be subordinated to the claims of other creditors (post, pp. 323C-G, 324A-C, 327A-F).
>
> *In re Addlestone Linoleum Co.* (1887) 37 Ch.D. 191, Kay J. and C.A., and *Webb Distributors (Aust.) Pty. Ltd. v. State of Victoria* (1993) 11 A.C.S.R. 731 distinguished."

109. The judges in that case had the benefit of submissions from company law heavy weights in Erskine Chambers including Robin Potts KC with Dan Prentice for the plaintiffs and William Stubbs KC and Catherine Roberts. Peter Gibson LJ in the Court of Appeal dealt with section 74(2)(f) of the UK Insolvency Act 1986. Section 74, so far as material, was in the following form:

> "(1) When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves. (2) This is subject as follows … (f) a sum due to any member of the company (in his character of a member) by way of dividends, profits or otherwise is not

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> deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves."

110. Peter Gibson LJ at page 310 referred to the reliance placed on *Houldsworth* by Mr Potts and said:

> "It was held that it was not possible for a member to claim damages against the company while remaining a member, and as the company had gone into liquidation, it was too late to rescind the contract. Mr Potts acknowledged that this decision lacks the clarity and sophistication of later judgments, but he rightly submitted that the ratio of the case and the policy underlying the ratio were relatively clear, viz. a member is precluded from bringing an action for damages for deceit arising out of a contract for the subscription for shares without first rescinding his contract of membership. It was in substance a case of approbating and reprobating, which, Earl Cairns L.C., said was not permitted."

111. Peter Gibson LJ referred to *Addlestone*, *Ooregum Gold Mining Co. of India v Roper* [1892] AC125 and *Webb*.

112. Lord Browne-Wilkinson in the House of Lords in *Soden* at page 323 onwards referred to the submission of Mr Potts that a sum due to a person in his character as a member of a company where it is due to him under the bundle of rights which constitute his shares in the company or by reason of a warranty or misrepresentation on the part of the company going to the characteristics or value of the shares which induces him to acquire those shares and dealt with such submissions as follows:

> "I cannot accept these submissions. Section 74(2)(f) requires a distinction to be drawn between, on the one hand, sums due to a member in his character of a member by way of dividends, profits or otherwise and, on the other hand, sums due to a member otherwise than in his character as a member. In the absence of any other indications to the contrary, sums due in the character of a member must be sums falling due under and by virtue of the statutory contract between the members and the company and the members inter se constituted by section 14(1) of the Companies Act 1985:

> "Subject to the provisions of this Act, the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

A contract to similar effect was prescribed by section 16 of the Act of 1862 and all Acts since then. To the bundle of rights and liabilities created by the memorandum and articles of the company must be added those rights and obligations of members conferred and imposed on members by the Companies Act. For ease of reference, I will refer to the combined effect of section 14 and the other rights and liabilities of members imposed by the Companies Acts as "the statutory contract." In my judgment, in the absence of any contrary indication sums due to a member "in his character of a member" are only those sums the right to which is based by way of cause of action on the statutory contract.

That is the correct interpretation is supported by the words in section 74(2)(f) "by way of dividends, profits or otherwise." There was some discussion in the judgment of the Court of Appeal whether these words disclose a genus requiring a sum "otherwise" due to be given a narrow construction under the ejusdem generis rule and as to what, if any, genus was disclosed by the words "by way of dividends, profits." In my view that is not the right approach to the section. The words "by way of dividends, profits or otherwise" are illustrations of what constitute sums due to a member in his character as such. They neither widen nor restrict the meaning of that phrase. But the reference to dividends and profits as examples of sums due in the character of a member entirely accords with the view I have reached as to the meaning of the section since they indicate rights founded on the statutory contract and not otherwise.

Moreover, the construction of the section which I favour accords with principle. The principle is not "members come last:" a member having a cause of action independent of the statutory contract is in no worse a position than any other creditor. The relevant principle is that the rights of members *as members* come last, i.e. rights founded on the statutory contract are, as the price of limited liability, subordinated to the rights of creditors

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based on other legal causes of action. The rationale of the section is to ensure that the rights of members as such do not compete with the rights of the general body of creditors.

If this is the correct dividing line between sums due in the character of a member and those not so due, there is no room for including in the former class cases where membership, though an essential qualification for acquiring the claim, is not the foundation of the cause of action. This is illustrated by the decisions on directors' remuneration. After an early aberration (*In re Leicester Club and County Racecourse Co.; Ex parte Cannon* (1885) 30 Ch.D. 629) it is now clearly established that directors' fees are not due to a director "in his character of a member" even where the articles of the company require a director to hold a share qualification and provide for the remuneration of the directors: *In re Dale and Plant Ltd.* (1889) 43 Ch.D. 255; *In re New British Iron Co.; Ex parte Beckwith* [1898] 1 Ch. 324; *In re W.H. Eutrope & Sons Pty. Ltd.* [1932] V.L.R. 453. Although membership is a necessary qualification for appointment as a director, the cause of action to recover the remuneration is not based on the rights of a member but on a separate contract to pay remuneration.

Mr Potts placed great reliance on the decisions in the *Addlestone* and *Webb* cases, in both of which it was held that a sum due in respect of damages payable for breach of contract or misrepresentation made by the company on the occasion of the *issue* (as opposed to the purchase) of its shares were held to be excluded by the section. Before considering these cases, there are two background points to be made. First, there was a principle established in *Houldsworth v. City of Glasgow Bank* (1880) 5 App.Cas. 317 that a shareholder could not sue for damages for misrepresentation inducing his subscription for shares unless he first rescinded the contract and that once the company had gone into liquidation such rescission was impossible. This principle has now been modified by section 111A of the Companies Act 1985, as inserted by section 131(1) of the Companies Act 1989. Second, it was not until the decision of this House in *Ooregum Gold Mining Co. of India Ltd. v. Roper; Wallroth v. Roper* [1892] A.C. 125 that it was established that a company had no power to issue shares at a discount."

113. Lord Browne-Wilkinson continued at pages 325-327 as follows:

"If there had been a cause of action in the *Addlestone* case, it must, as it seems to me, have been based upon the statutory contract between the member and the company. "Dividends" and "profits" represent what might be called positive claims of membership; the fruits which have accrued to be called positive claims of membership. But the principle must apply equally to negative claims; claims based upon having paid money to the company under the statutory contract which the member says that he is entitled to have refunded by way of compensation for misrepresentation or breach of contract. These, too, are claims necessarily made in his character as a member. But, in any event, the reasons given by Kay J. for treating the case as falling within section 38(7) are directed exclusively to matters relevant to a claim involving the issues of shares by the company but irrelevant to a claim relating to the purchase of fully paid shares from a third party. Under the statutory contract (including the obligation in the winding up to pay all sums not previously paid on the shares) the claimants were bound to pay the unpaid £2 10s. in respect of each share. If such a payment were not made the capital of the company would not be maintained and the general body of creditors would be thereby prejudiced. If, in such a case, the member could recovery by way of damages for breach of the contract to issue the shares at a discount the same amount as he was bound to contribute on the winding up that would indirectly produce an unauthorised reduction in the capital of the company. Such a failure to maintain the capital of the company would be in conflict with what Lord Macnaghten (in the *Ooregum* case [1892] A.C. 125, 145) said was the dominant and cardinal principle of the Companies Acts, i.e. "that the investor shall purchase immunity from liability beyond a certain limit, on the terms that there shall be and remain a liability up to that limit."

There is nothing in the *Addlestone* case to justify the application of that decision to cases where the claim against the company is founded on a misrepresentation made by the company on the purchase of existing shares from a third party. To allow proof for such a claim in competition with the general body of creditors does not either directly or indirectly produce a reduction of capital. The general body of creditors are in exactly the same position as they would have been in had the claim been wholly unrelated to shares in the company.

The decision of the High Court of Australia in the *Webb* case, 11 A.C.S.R. 731 stands on exactly the same footing. Section 360(1)(k) of the Companies Code of Victoria was in substantially the same terms as section 38(7) of the English Act of 1862 and section 74(2)(f) of the Act of 1986. The court held that section 361 was applicable to building societies as well as to the limited companies. Three societies had issued non-withdrawable shares. The claimants were claiming to prove for damages in the winding up of the building societies such damages being based on misrepresentations made by the societies on the issue of such shares to the effect that the shares were redeemable "like a deposit." The High Court held that the claim was excluded by the *Houldsworth* principle and held that the proposition deducible from that case was that a shareholder may not directly or indirectly receive back any part of his or her contribution to the capital save with the approval of the court. The High Court further relied on the *Addlestone* decision and section 360(1) but carefully delimited its application to cases of contracts to subscribe for shares. They held, 11 A.C.S.R. 731, 741 that the claim in that case "falls within the area which section 360(1)(k) seeks to regulate: the protection of creditors by maintaining the capital of the company." It is therefore quite clear that both the decision and the reasoning of the High Court were dependent upon the same factors as those in the *Addlestone* case, i.e. the protection of creditors from indirect reductions of capital. Those are factors relevant to cases of subscription for shares issued by the company but wholly irrelevant to purchases from third parties of already issued shares.

I express no view as to the present law of the United Kingdom where the sum due is in respect of a misrepresentation or breach of contract relating to the issue of Shares. Section 111A of the Act of 1985 provides:

> "A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register in respect of shares."

It is plain that this section operates so as, at least in part, to override the *Houldsworth* principle. But to what extent and with what consequential results is not yet clear. All that

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is necessary for the decision of the present case is to demonstrate, as I have sought to do, that the decisions in *Addlestone*, 37 Ch.D. 191 and *Webb*, 11 A.C.S.R. 731 do not apply to claims other than those relating to the issue of shares by the company.

For these reasons, which are substantially the same as those given by the trial judge and the Court of Appeal in their admirable judgments, I am clearly of the opinion that the sum if any due to B. & C. is not due to it in its "character of a member" of Atlantic within section 74(2)(f). The claim stands on exactly the same footing as any other claim by B. & C. against Atlantic which is wholly unrelated to the shares in Atlantic. In the circumstances, it is unnecessary to deal with the further point relied upon by B. & C. (but rejected by the Court of Appeal) that B. & C.'s claim being unliquidated is not "a sum due" within the meaning of the section.

I would dismiss the appeal."

114. Lords Lloyd, Steyn, Hoffmann and Hope agreed with Lord Brown-Wilkinson.

SPhinX

115. *Houldsworth* was very gently touched upon by Smellie CJ, as he then was, in *SPhinX Group of Companies* 2010 (2) CILR 1. In that case, the issue was whether the court should make a representation order in an application by liquidators for directions as to the proper administration of the liquidation estate in respect of 23 distinct issues or questions. Smellie CJ held that the Grand Court had inherent jurisdiction which was recognised by section 18(2) of the Grand Court Act. Question 20 raised an issue in respect of potential investor misrepresentation claims. Such issue was not before the court for determination but Smellie CJ, strictly *obiter* by way of introductory comments to the main representation order issue before the court and it would appear without the benefit of full argument on the misrepresentation point and with no reference to subsequent statutory developments following *Houldsworth* nor to *Sons of Gwalia* stated:

"21. On the long-standing authority of the House of Lords' decision in *Houldsworth v City of Glasgow Bank* (11), the SPhinX companies having been placed into liquidation, an

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investor seeking rescission of his share purchase contract and *restitutio in integrum* on the grounds of misrepresentation may well no longer have available to him such remedies …"

Direct Lending

116. *Houldsworth* was also mentioned by Segal J in *Re Direct Lending Feeder Fund Ltd* (Unreported, FSD 108 of 2019, 10 November 2022). At paragraph 24 Segal J in a sentence prior to his mention of *Houldsworth* stated:

> "… the JOLs said that they had been advised that there was an open question under Cayman Islands law as to whether a shareholder who had been induced by a misrepresentation to subscribe for shares can claim damages against a company in liquidation …"

117. At paragraph 94 Segal J refers to *SPhinX* and at paragraph 95 to Smellie CJ's judgment and his brief mention of *Houldsworth*.

The treatment of *Houldsworth* in two other jurisdictions

118. I now turn to the treatment of *Houldsworth* in two other jurisdictions.

***Televest* in Bermuda**

119. Ground J (as he then was) in 1995 had to consider the application of *Houldsworth* as a matter of the law of Bermuda. In his Reasons for Order in *Televest Ltd* (12 July 1995) at page 3 the judge referred to the preferred shareholders seeking to maintain a claim based upon material misrepresentations made in the prospectuses for the issue of their shares. Ground J stated:

> "…. The problem they face with this approach is that the common law of England was that a shareholder could not pursue an action for damages for deceit against a company in respect of the contract by which he obtained his shares, unless he was entitled to rescind the contract of allotment: Houldsworth -v- City of Glasgow Bank (1880) 5 App. Cas. 317. This rule, which was subsequently extended to actions for breach of the contract of allotment, precluded an action for damages where rescission had become impossible, for

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example because a winding-up order had been made. The rule was subsequently much criticised and has since been abrogated in England by section 111A of the Companies Act 1985, (inserted by the Companies Act 1989) which provides:

> "A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company ..."

However, that provision has not yet been followed by the Legislature in Bermuda.

Various arguments have been advanced to me to show that the subsequent history of statutory intervention to create rights in respect of non-fraudulent misrepresentations has overridden the rule in Houldsworth -v- City of Glasgow Bank (*supra*), but each of those arguments is itself fraught with difficulty and uncertainty. It was also suggested to me that being a decision of the House of Lords, and not of the Privy Council, I was not obliged to follow that decision – a submission which in strict law is correct, but which in due deference I find hard to apply. I prefer another approach.

The speeches of their Lordships in *Houldsworth's* case make it plain that they are concerned with the case of the shareholder who is in real sense a member of the company, and can participate in its decisions. It is also plain that they were applying an earlier decision on facts which were materially similar, Addie -v- the Western Bank, LR 1 HL.Sc. 145, and which they considered was indistinguishable. On that aspect Lord Blackburn had this to say:

> "But one very important question was raised by the judgments in the Court of Session, and argued by the counsel at your Lordships' Bar, which, if ever it becomes necessary to decide it, may require much consideration. The contract with a joint stock company to take shares in that company is a very peculiar one. Whether the company be, as the Western Bank was, a banking co-partnership in Scotland ... having such a deed of co-partnership as that bank had, or a joint stock

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> company registered under the Companies Act 1862, the contract equally is in substance an agreement with the company to become a partner in the company on the terms that the partner shall, in common with all his co-partners for the time being, contribute to make good all liabilities of the co-partnership as if this incoming partner had been a member of the partnership from the beginning. Further, he consents that any of his co-partners may, by procuring a person to take his shares, get rid (at least *inter socios*) of his liability, substituting that of the incoming shareholder. I know of no other contract which in these respects resembles this contract.
>
> It was with this peculiar kind of contract that the House of Lords had to deal in Addie -v- The Western Bank, and it is with this peculiar kind of contract that your Lordships have now to deal. I do not think the House is called on now to decide whether a difference in the kind of contract induced by the fraud would make a sufficient distinction in law to prevent the decision in *Addie's Case* from governing such a case as that."

In the instant case there is no real partnership: the Articles of the company are already in evidence (although not agreed for the purposes of this hearing), and from them it is apparent that the redeemable preference shares carried neither voting rights nor the right to participate in the appointment of directors. To that extent the preferred shareholders were entirely in the hands of the holders of the common shares, who constituted the real partnership that controlled the company. Nor did the preferred shareholders contract *inter se* to contribute to the liabilities of the company in the way envisaged by Lord Blackburn: no call could be made upon them, as the shares were in their nature fully paid up, and while it is true that the extent of the investment was hostage to the fortunes of the company, a shareholder could terminate that liability at any time when the company was solvent by giving notice to redeem. In those circumstances, I do not see why any principle should debar them from seeking a remedy in damages, be it for fraud, breach of contract, negligence or misrepresentation, against the company. It is not as if they have in any

meaningful sense become a part of the Company, and are thus essentially suing themselves. If further demonstration were needed, the example given by the Lord Chancellor, Earl Cairns, at p.325 of the decision in *Houldsworth's case*, illustrates just how removed the circumstances he was considering are from those of this case.

In my view, therefore, the shares were essentially an investment vehicle and not in any real sense to be compared with the type of shareholding envisaged by their Lordships in *Houldsworth's case*. In that case the House of Lords expressly envisaged their decision being distinguished in different circumstances, and I find that the circumstances before me are different and distinguishable, and that therefore that decision and any supposed rule established by it is no bar to these preferred shareholders pursuing claims against the Company.

In view of this decision I have not gone on to consider the application of section 31 of the Companies Act 1981, preferring not to do so in the somewhat artificial circumstances of this application, if it could be avoided.

SUMMARY

For the reasons given above I distinguish this case from Houldsworth -v- City of Glasgow Bank (1880) 5 App. Cas. 317, and hold that the preferred shareholders are not debarred by reason of that case from making a claim for damages in the liquidation based upon alleged misrepresentations made to them, however such a claim is framed.

At this stage I do not think that it is for me to decide whether the preferred shareholders are in fact creditors by reason of any particular misrepresentation, and so rather than give a direction in the form sought, I propose simply to direct that proofs of debt filed by the preferred shareholders should not be disallowed on the grounds of the rule in *Houldsworth's case*, but should be considered on their merits. I should, however, be happy

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to hear counsel further on the appropriate direction in view of my reasons, and I therefore give a liberty to apply in this regard.

However, that may not necessarily dispose of the substance of the application before me, because in considering the claims of the preferred shareholders the Liquidators will still be bound by section 158(g) of the Companies Act 1981. That subsection provides that:

> "(g) A sum due to any member of a company, in his character as member, by way of dividends, profits or otherwise shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories among themselves." (My emphasis.)

No argument has been addressed to me on the application of this subsection, and at this stage I simply observe that in *In re Addlestone Linoleum Company* (1887) 37 Ch D 191 CA (a case which counsel very properly put before me to illustrate the extension of the rule in *Houldsworth's case* to claims in contract), both the first instance judge and two members of the Court of Appeal considered that a claim for damages for breach of the allotment contract fell within the English precursor of this subsection. In view of that, I invite counsel to consider this point and address me further upon it if they wish, and I give a liberty to apply to do so."

***Sons of Gwalia* in Australia**

120. I now turn to *Sons of Gwalia,* an appeal dealt with by the High Court of Australia, that country's well-respected final court of appeal. I note all the points raised by Mr Millett in respect of *Sons of Gwalia* but I nevertheless find it of great persuasive weight in respect of Issue 2 and Issue 3.

121. In *Sons of Gwalia* the respondent bought shares in the appellant gold-mining company on the Australian Stock Exchange and 11 days later the company collapsed and went into administration.

Having made a claim for damages or compensation (under various Australian statutes) and the tort of deceit the respondent notified the administrators that he intended to submit his claim for proof as a creditor. The administrators applied to the Federal Court of Australia for a declaration that his claim was not provable or alternatively a declaration in terms of section 563A of the Corporations Act 2001 that payment of that claim was "to be postponed until all debts owed to, or claims made by, persons or otherwise than in their capacity as members of the company [had] been satisfied." At first instance the judge made declarations in favour of the respondent that he was a creditor of the company and his claim was not postponed until debts owed to, or claims made by, persons other than the respondent or others in his position had been satisfied. On appeal his decision was upheld by the Full Court. The administrators and a creditor which was not a shareholder, representing the body of general creditors appealed to the High Court. The non-shareholder contended that there was a common law principle derived from House of Lords authority (*Houldsworth*) that a shareholder was not entitled, directly or indirectly, to receive back any part of his contribution to the capital of the company, which precluded the respondent from suing for damages for misrepresentation inducing his acquisition of his shares or proving such a claim as a debt in a winding up unless he first rescinded the "membership contract" which he was unable to do once the company went into liquidation.

122. The headline states that it was held (Callinan J dissenting) that assuming the respondent had a valid claim against the company, that claim was not founded on any obligations owed by or to him as a member of the company, because on the true construction of section 563A of the 2001 Act a "person's capacity as a member of the company" defined and confined the particular kinds of obligations that were to be postponed until all other debts owed by the company were paid and in doing so the phrase identified the particular kinds of 'debt owed by a company' to which particular consequences, namely postponement of payment, were attached. An obligation did not fall within section 563A unless there was a connection between the obligation and membership of the company and the obligation which the respondent sought to enforce against the company was not founded on any rights he obtained or any obligations he incurred which the 2001 Act created in favour of a company's members. He was not seeking to recover any paid-up capital, or to avoid any liability to make a contribution to the company's capital and his claim would have been no different if he had ceased to be a member at the time it was made, or if his name had never been entered on the

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register of members. Instead, insofar as it was based on the statutory causes of action his claim arose out of the company's contravention of the investor and consumer protection provisions and the consequent liability for damages or other relief if sued by any person who suffered or was likely to suffer loss and damage as a result of such contravention, and insofar as his claim was based on the tort of deceit, it was a claim that stood altogether apart from any obligation created by the 2001 Act and owed by the company to its members. The respondent's claims were therefore not claims for money "owed by a company to a person in the person's capacity as a member of the company".

123. It followed that shareholders' claims to recover losses caused by a company's wrongdoing ranked equally with the claims of other unsecured creditors in the distribution of the assets of the company, and were not postponed until all debts owed to general creditors had been satisfied – *Soden* followed, *Houldsworth* explained, *Webb* doubted.

124. Per Gleeson CJ – a distinction was to be drawn between a shareholder claiming in the capacity of a member and a shareholder claiming otherwise than in the capacity of a member, and to make that distinction it was necessary to analyse the nature of a claim rather than merely describe its effect on other creditors. Per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ – there was no general policy in the 2001 Act that 'members came last' and there was no common law 'principle' of company law derived from *Houldsworth* applicable in Australia, since neither *Webb* nor *Houldsworth* itself established any common law 'principle' that a shareholder, no matter how his shares were acquired, could not sue a company to recover losses caused by the company's misrepresentation inducing his acquisition of his shares if the company went into liquidation.

125. Per Callinan J (dissenting) – having regard to the scope and objects of the 2001 Act, the language used in section 567A itself, the context and the history and the relevant case law and the desirability of maintaining coherence and fairness in the law, section 563A was to be construed as meaning that a shareholder did not have equal rights with ordinary creditors in a winding up in respect of a claim concerning the value of shares on which his membership of the company was based.

126. Gleeson CJ at paragraph [3] referred to the long history of section 563A "that goes back before the decision in *Salomon v Salomon & Co Ltd* [1897] AC 22 to a time when the separateness of a

corporation from its members had not been fully recognised, and when the difference between corporations and partnerships was not as distinct as it later became."

127. Gleeson CJ at paragraph [14]:

> "The principle in *Houldsworth* is famously elusive."

128. At paragraph [13] Gleeson CJ stated:

> "According to the second appellant's argument, there is a principle of common law, emerging from *Houldsworth*, which precludes a shareholder from proving in a winding up (or indeed a deed of company arrangement) for damages for misrepresentation inducing any acquisition of shares unless the shareholder has first rescinded 'the membership contract.' Once the company has become insolvent and has gone into liquidation or voluntary administration, rescission is not available."

129. Gleeson CJ at paragraph [16]:

> "*Houldsworth* was never authority for a principle as wide as that asserted by the second appellant."

130. Gleeson CJ at paragraph [20] referred to *Houldsworth* and "two possible sources of influence" that "might have been at work in *Houldsworth*", "one relating to partnership law, the other relating to the raising and maintenance of share capital". Gleeson CJ referred to the fact that *Houldsworth* was dealing with an unlimited company and on liquidation "the investor became liable to pay calls as a contributory, and the liability was unlimited" and "what the investor was attempting to do was, in effect, to obtain from the company reimbursement in respect of his liability to pay calls in the winding up of the company, in circumstances where he could no longer obtain rescission of the contract of allotment pursuant to which he acquired the shares which exposed him to the liability to pay calls."

131. Gleeson CJ referred to *Addlestone* and set out the following words of Lindley LJ in that 1887 case:

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> "The principle on which the House of Lords decided *Houldsworth v City of Glasgow Bank* was that a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money – he must not directly or indirectly receive back any part of it."

132. Gummow J at paragraph [49] stated:

> "… in Australia the existence of any such common law 'principle' of company law based upon *Houldsworth* should be rejected. Further, *Houldsworth* did not supply the support relied upon for the reasoning in *Webb*."

133. Gummow J at paragraph [65]:

> "… *Houldsworth* was decided at a time when the 1862 UK Act was relatively new and when other areas of law applicable to the relations between members, directors and the company were in a state of fluidity."

134. Gummow J at paragraph 69 referred to the reasoning in *Houldsworth* and its reliance on analogies with the principles of partnership law and approbating and reprobating and alternative remedies. Gummow J respectfully commented at paragraph [70] stating:

> "That reasoning bears the marks of its time."

135. Gummow J at paragraph [78]:

> "It is not easy to discern why an action for damages was inconsistent with the features of the contract whereby shares were taken up. Nor is it clear why this inconsistency should have prevented the shareholder from claiming that the fraud of the directors was imputable to the company."

136. Gummow J at paragraph [79]:

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> "Accordingly, *Houldsworth* should not be regarded in Australia as establishing any principle based upon the above reasoning; nor does it establish any exception respecting the responsibility of a principal for the frauds of an agent, stated by *Ashburner* in the passage referred to above."

137. Gummow J at paragraph [80] referred to *Salomon v A Salomon & Co Ltd* [1897] AC 22 and at paragraph [83] referred to Professor Gower in 1954 describing the 'anomalous rule' in *Houldsworth* and attempting to rationalise it on the notion that share capital is a 'guarantee fund' for creditors. Professor Gower's attempts plainly did not impress Gummow J and nor do they impress me. Gummow J at paragraph [85], with considerable persuasive force, stated:

> "… there is much to be said for the view that a company satisfying its liability in tort to a member should not be characterised as attempting an unauthorised reduction of capital. The award of damages is not charged upon any fund representing capital. Large awards may adversely affect the market value of shares in the company, but they do not require any return on capital."

138. Gummow J at paragraph [89] made reference to *Houldsworth* and *Addlestone* and stated:

> "References to partnership indicate an incomplete understanding of the separate nature of the personality of the corporate entity from those of the corporators. At the time *Addlestone* was decided, partnership law and company law were not distinctly regarded."

139. In 1878 it was established English law that a partner "shall not prove in competition with the creditors of the firm, who are in fact his own creditors" (*Lindley* 4th edn. 1878 pp 1187ff).

140. Kirby J with characteristic openness and pragmatism, fully conscious of the different roles of the judiciary and legislature at paragraph [133] stated:

> "If Parliament concludes that the interpretation adopted by the Federal Court in these appeals, now confirmed by this court, strikes the wrong balance between the rights of general creditors and the claims of disaffected shareholders, it can easily repair the defect by amending s563A of the 20021 Act … It should not therefore be assumed that the

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> inclusion of shareholder claims, such as those of the respondent, with the debts of general creditors is contrary to the will of Parliament or the result of a slip or oversight requiring a measure of judicial inventiveness and surgery."

141. Hayne J felt that the answers to the questions that arose in the appeal were to be answered by reference to the relevant statutory provisions in particular section 563A and section 553 of the 2001 Act. I set out section 553(1) of the Australian 2001 Act as follows:

> "Subject to this Division, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertaining or sounding only in damages), being debts of claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company."

142. Section 563A of the Australian 2001 Act is as follows:

> "Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied."

143. At paragraph [137] Hayne J set out the complicated questions for the court's determination with simplicity, clarity and conciseness:

> "What is meant by s563A by 'a debt owed by a company to a person *in the person's capacity as a member of the company*'? Is a claim by a shareholder for damages assessed as the loss sustained as a result of the shareholder's acquisition of the shares, when the shares were less valuable than was represented, or would have been revealed to be the case had proper disclosure been made, a claim in the capacity of shareholder? Does the answer to that question differ according to whether the shareholder acquired the shares by subscription and allotment by the company, or acquired them by transfer from an existing shareholder?"

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144. Hayne J at paragraph [183] recorded that the decision in *Houldsworth* concerned an unlimited company and was decided before *Salomon v Salomon & Co* which "revealed what is now accepted to be one of the axiomatic consequences of incorporation – the separate legal personalities of the corporation and its consequences." Hayne J also records that *Houldsworth* has been said "to be a decision that is anomalous because it shows confusion between the corporation and its members." Hayne J continued:

> "It has been described as being 'of legendary impenetrability' (see *Soden v British & Commonwealth Holdings plc* [1995] 1 BCLC 686 at 695). It is as Tadgell J said in *State of Victoria v Hodgson* [1992] 2 VR 613 to 625, a decision that 'no doubt bears the stamp of its era'. All this notwithstanding, the parties in *Webb Distributors* placed *Houldsworth*, not the applicable statutory provisions, at the forefront of their arguments."

145. Hayne J at paragraph [190] states:

> "Neither *Webb Distributors* nor *Houldsworth* established any common law 'principle' that no shareholder, no matter how the shares were acquired, can have a claim of the kind now in issue against a company whose assets were to be administered as on a liquidation."

146. Hayne J at paragraph [206] stated that the obligation which Mr Margaretic sought to enforce was not an obligation which the 2001 Act creates in favour of a company's members and concluded that the claim in the tort of deceit is not a claim "owed by a company to a person in the person's capacity as a member of the company."

147. I should record that I did not find Callinan J's sole dissent as persuasive.

148. Heydon J agreed with Hayne J at paragraph [262] and also concluded that Mr Margaretic's claim is not a claim for payment of 'a debt owed by a company to a person in [his] capacity as a member of the company'.

149. Heydon J at paragraph [263] had nothing to say about *Webb* and *Houldsworth* in addition to Hayne J's explanation as to why "they are not determinative."

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150. Crennan J at paragraph [265] agreed with Gleeson CJ and Hayne J and "generally" agreed with Gummow J and his analysis "of what was referred to in argument as a 'principle' said to be derived from [*Houldsworth*]."

151. Crennan J at paragraph [273] stated:

> "Any obligation on the company to pay compensation to Mr Margaretic for fraudulent misrepresentation inducing him to become a member and occasioning him loss does not answer the description of being owed to Mr Margaretic 'in [his] capacity as a member of the company'."

152. To complete the Australian picture I should refer to a release dated 26 November 2010 from David Bradbury MP in Australia, Parliamentary Secretary to the Treasurer where the following is stated:

> "Sons of Gwalia Bill passes Federal Parliament
>
> A Bill that reverses the Sons of Gwalia High Court decision and restores certainty to shareholders and creditors was passed by the Federal Parliament this week, said Parliamentary Secretary to the Treasurer, David Bradbury.
>
> The *Corporations Amendment (Sons of Gwalia) Bill 2020* reverses the High Court's decision in the *Sons of Gwalia v Margaretic* case, in which it was found that section 563A of the Corporations Act did not subordinate certain compensation claims by shareholders below the claims of other creditors.
>
> The decision not only challenged the common understanding of the ranking of claims but it created uncertainty for unsecured lenders and restricted the availability of credit for businesses.
>
> "These amendments give effect to the Gillard Government's decision to restore the common understanding of the subordination of claims prior to the Sons of Gwalia High Court decision," said Mr Bradbury.

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"The High Court decision would have allowed certain shareholders to have their claims for damages against an insolvent company ranked alongside unsecured creditors.

"When someone makes a decision to invest in a company, they do so in the hope of sharing in the company's profits.

"Creditors, on the other hand, are simply owed money for services or work they have provided, or for a return of the credit that has been extended.

"The effect of the High Court decision meant that unsecured creditors were less willing to lend money, reducing the availability of credit and increasing the cost of borrowing for business.

"The amendments also streamline the treatment of shareholder claimants in an external administration and eliminate common law restrictions on the capacity of a shareholder to recover damages against a company.

"This is an important amendment to our Corporations Act that will restore certainty for shareholders and creditors and I welcome its passage through the Parliament.""

153. It is important to note that the legislative intervention was in respect of the ranking of compensation claims rather than their existence.

Further criticism of *Houldsworth*

154. The dissatisfaction with *Houldsworth* has not been limited to statements by leading Australian judges. It has also attracted criticism from the Company Law Committee of the English Law Society and Bar Council, and has been abandoned by the UK Parliament.

155. In September 1988, the Company Law Committee of the Law Society of England and Wales produced a memorandum on *Houldsworth*. The memorandum had the approval of the Law Reform Committee of the General Council of the Bar. In the introduction it was recommended that doubts about the rule in *Houldsworth* be removed by amending legislation. It was noted that "For many years the rule, a mere footnote in most textbooks, was largely ignored by practitioners", adding that

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"The practical effects are potentially serious for investors." In April 1985 it had been recommended that the rule should be abolished. The memorandum refers in detail to "What the case decided". It reviewed the subsequent decisions including *Addlestone*. Under section 8 it is stated:

> "We understand that the Department of Trade and Industry is concerned that the abolition of the "rule" might lead to abuse. We do not think that concern is justified."

156. Under section 9 Conclusions the following is stated:

> "We consider that it [the 'rule' in *Houldsworth*] cannot be justified in the interests of investor protection and it fails to produce the benefits which are sometimes claimed for it. We therefore strongly recommend that the law be changed to make it clear that no person should be precluded from making any claim in contract, tort or otherwise by reason of his being a subscriber or shareholder in the company. If thought fit the rule could continue to apply on an insolvent liquidation, in the case of an unlimited company or to the extent of calls on partly paid shares. But we believe that it should be given a prompt burial as regards other situations. A short clause could achieve the desired effect and we suggest that the next Companies Bill would be an appropriate vehicle."

157. The impact of *Houldsworth* has been abandoned by the UK Parliament by way of section 131 of the Companies Act 1989 which was inserted into section 111A of the Companies Act 1985 which has been retained as section 655 of the Companies Act 2006.

158. In Technical Series Issue No 28 INSOL International *Update on Shareholder and Equity – Related Claims in Insolvency Proceedings* October 2013 at page 3 stated:

> "The English common law had previously acknowledged a rule, established in *Houldsworth v. City of Glasgow Bank* (1880) 5 App. Cas. 317, that a shareholder was prohibited from claiming damages from a company for misrepresentation inducing his subscription for shares unless he had first rescinded the subscription contract, and that once a company had entered liquidation such recission was impossible. This was largely nullified by section 111A of the Company Act 1985 (as inserted by section 131(1) of the Company Act 1989) but the rule was central to early judicial treatment of shareholder

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claims and operated to negate any detailed consideration of the issue of subordination prior to the amendment of the 1985 Act."

159. Scott Wotherspoon in *Property by any other name: the trouble with shareholder claims in Australia* (2007) 81 ALJ 75 refers to *Oakes*, *Tennent* and *Houldsworth* and "attacks the basal legitimacy of those cases and describe[s] the consequences that their overruling will have on Australian company law". At page 88 it is stated:

"Once it is accepted:

(1) that a member is separate from the company itself;

(2) that a member can be creditor of the same company;

(3) the perceived inability to rescind the subscription contract after the commencement of the winding up has no bearing on a shareholder's entitlements in deceit;

(4) a desire to protect creditors by preventing an *indirect* return of capital cannot preclude a shareholder maintaining a claim to rescind and so likewise should not preclude the maintenance of a shareholder's claim for damages; and

(5) that a claim in deceit is functionally distinct from a claim for rescission and, as will be seen in Part IV, neither claims arise under the statutory contract,

then the justification for the continuation of the rule in *Houldsworth's case* in Australia falls."

160. On page 89 reference is made to the importance of certainty in the law:

> "But a rule that is considered by many to be incoherent or inequitable may nonetheless be a just rule. A rule that is predictable and operates with certainty has the attraction of having normative force. Once appraised of the rule, people can order their affairs to accommodate the rule or simply choose not to participate in the market in which the rule applies."

161. The author, however, concludes on page 92 as follows:

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"The arguments advanced in this article have attempted to demonstrate that judicial intervention in this area is warranted, indeed essential. The reasoning in the 19th century trio is consistent with fundamental principles of private law and property law. This inconsistency is the main reason for their erratic application. In the current state of the authorities, the certainty demanded of the rule of law is undermined to the point that it discredits the Australian legal system.

The fact that the United Kingdom Parliament has sought to abolish the rule in *Houldsworth's case* might do no more than suggest that the High Court should leave any change to Parliament. It is submitted that this would be an inappropriate judicial response to the problem. As Australia's ultimate court of appeal, the High Court is uniquely placed to expose the errors inherent in the cases that have been subject to attack in this article ..."

162. Marina Nehme and Margaret Hyland in *Houldsworth: An obsolete piece in the legislative puzzle* 12 UWSLR 124 briefly and critically examine the reasoning behind the *Houldsworth* 'rule':

"An argument will be developed that this 19th century case is antiquated and serves only to complicate and confuse the application of the statutory regime. Accordingly, the principle in the case should be abolished by legislative intervention. It is only through parliamentary action that the real or illusory application of the *Houldsworth* rule can be erased once and for all from the corporate landscape."

163. The authors refer to the Australian case law including *Sons of Gwalia* adding at pages 150-151 that:

It is important to acknowledge that even though *Houldsworth* was not applied in [*Sons of Gwalia*], the High Court did not abolish the *Houldsworth* rule. This leaves us today in an unenviable situation because there is confusion as to when the *Houldsworth* rule will apply ... Due to the confusion, the legislator needs to intervene and abolish *Houldsworth*. The case is a relic of the past; a past that is based on a very different legal and economic foundation."

164. Di Lernia: *Should the rule in Houldsworth Case be abrogated by statute?* (2009, Masters Thesis, University of New South Wales) submitted that the Australian High Court "was justified in

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choosing not to apply the rule in *Houldsworth's Case* and thus allowing shareholders to claim as unsecured creditors" but noted that "the rule may still prove good law in certain cases". The author seeks to demonstrate that "the decision in *Houldsworth* and subsequent interpretation and application of the "rule" therein suffer from deep flaws, and have been productive of relative injustice. It is argued that it is necessary to put the current uncertainty surrounding the applicability of *Houldsworth* in Australia beyond doubt through legislative abrogation of the rule in *Houldsworth's Case*." The author, in an Australian context, seeks to argue that "a policy of shareholder parity with unsecured creditors best meets the goals of insolvency and securities law regimes while contributing to the sustainability of a fair and efficient market, and investor participation in it."

Decision not to follow *Houldsworth* and reasons for such decision

165. Attempts may be made to distinguish *Houldsworth* from the facts of the present case before the Court. In *Houldsworth* the relevant entity was an unlimited co-partnership. In the present case, the Company is a limited liability company and the shares are fully paid up. The present case does not involve investors seeking to claim back money which they have contracted to contribute to pay the debts and liabilities of the Company. To that extent, it can easily be distinguished on the facts. However, the *ratio* of *Houldsworth* appears to have been interpreted subsequently as applying to limited companies. I have set out the headnote and some of the textbook commentary earlier in this judgment. I have also set out the comments of Lindley LJ in *Addlestone* at pages 205-206 and the comments of Peter Gibson LJ and Lord Browne-Wilkinson in *Soden* in respect of the *ratio* of *Houldsworth*. If *Houldsworth* were good English and Cayman Islands law, I do not think I could legitimately distinguish it.

166. Having had the benefit of detailed submissions on the issue I have however concluded that *Houldsworth* can no longer be regarded as good English law (indeed it has been abandoned by the UK Parliament). It is not a part of Cayman Islands common law. In my judgment, this is one of those rare cases where this court is justified, indeed obliged, to decline to follow an English decision.

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167. Mr Millett, with hints against inappropriate "judicial activism", submitted that it would be "positively dangerous for the court to play lawmaker", and stressed the importance of certainty to investors who choose Cayman. He respectfully suggested that if the Grand Court refuses to follow *Houldsworth* there would be significant risks of "serious adverse unintended consequences", including "a serious impact on the willingness of lenders to lend". His warnings advanced to an assertion that if the Grand Court refused to follow *Houldsworth* it would "open floodgates to investor claims" and would turn the decision of the Cayman Islands Court of Appeal and the Privy Council in *Herald Fund SPC (in official liquidation)* [2016] 2 CILR 330 on their heads and would mean that investors would be far readier to redeem to exit their investment, for fear of being subordinated to investors who stayed in and then decided to file a misrepresentation claim. I also note the comments of Lord Collins in *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36 in respect of judicial law-making and the respective roles of the judiciary and the legislature.

168. I do not, for one moment, accept the charge that in not following *Houldsworth* I would be playing lawmaker or becoming an inappropriate judicial activist. If there has been any judicial over-reach in this area of law it has arguably been committed by the House of Lords who in their judicial capacity in *Houldsworth* in effect amended or restricted section 158 of the English Company Act 1862 (not referred to in the judgments) to exclude claims by those who invested into an unlimited banking company with articles of partnership on the basis of fraudulent misrepresentation made by the directors and other bank officials. All I am doing is applying section 139(1) of the Companies Act (2023 Revision) of the Parliament of the Cayman Islands and declining to follow a judgment from a foreign jurisdiction which has been abandoned by its own Parliament and not followed in other jurisdictions including Australia and Bermuda. I am simply applying a local statutory provision untainted by a foreign judgment abandoned by its own Parliament. That is far from acting as a lawmaker or an inappropriate judicial activist.

169. Section 139 provides as follows:

"Provable debts

> 139. (1) All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.
>
> (2) Foreign taxes, fines and penalties shall be admissible to proof against the company only if and to the extent that a judgment in respect of the same would be enforceable against the company pursuant to the *Foreign Judgments Reciprocal Enforcement Act (1996 Revision)* or any laws permitting the enforcement of foreign taxes, fines and penalties."

170. Debts arising from claims for damages for misrepresentation fall within the wide wording of section 139(1) of the Companies Act (2023 Revision). By Cayman Islands statute these claims are admissible to proof against the Company. In arriving at that conclusion I am not injecting any uncertainty into this area of law. I am simply applying a local statutory provision untainted by *Houldsworth,* an authority arising in a foreign jurisdiction and not binding on this court and subsequently abandoned by its own Parliament. If the Parliament of the Cayman Islands wishes to legislate to amend section 139(1) or in respect of any "severe adverse unintended consequences" of this judgment, to use the cautionary words of Mr Millett, then that is a matter for Parliament.

171. If policy considerations are relevant one factor to consider would be investor protection in a country whose vibrant economy is in large part based on the attraction of outside investors using Cayman corporate vehicles. If those investments are based on fraudulent misrepresentations it would be unfortunate, to put it mildly, if such defrauded investor did not have a remedy against the relevant Cayman company. A remedy against a director may be insufficient. I was not addressed on any persuasive policy reasons as to why an investor in such circumstances should not in its capacity as a creditor have a claim against the Cayman company.

172. I have decided that I should not follow *Houldsworth* for a number of reasons:

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(1) it is arguably contrary to or adds an unjustifiable judicial restriction to the plain wording of a local statute (section 139 of the Companies Act);

(2) it has been abandoned by the UK Parliament, and has been heavily and persuasively criticised by others and not followed in the High Court of Australia and the Supreme Court in Bermuda at first instance;

(3) its reasoning is inconsistent with contemporary company law;

(4) it is an obsolete English common law decision which has ceased to be authoritative in England; and

(5) it is simply not persuasive in the present context.

173. I have therefore concluded that the proper direction that I should give the Liquidators on Issue 2 is that they may proceed with the conduct of the liquidation on the basis that any Preferred Shareholder shall be permitted to submit a proof of debt asserting a claim for damages for misrepresentation against the Company, and any such proof of debt shall be adjudicated (and/or otherwise treated procedurally by the Liquidators) in accordance with Order 16 of the Companies Winding Up Rules (2023 Consolidation) (proof of debts in official liquidation).

Issue 3 – how do the misrepresentation claims rank in the liquidation?

174. I have considered the respective positions and arguments of the parties in respect of ranking. The Liquidators refer to the initial opinion of Mr Smith which contended that the misrepresentation claims would not be caught by section 2 or 5(c) of Schedule A to the Articles and would therefore rank *pari passu* with the redemption claims but ahead of the claims of the unredeemed Preferred Shareholders. This contention was repeated in a supplemental opinion of Mr Smith.

175. The Liquidators consider that section 37(7)(a) of the Companies Act would not apply as the redemption closing was scheduled to take place after the commencement of the Company's liquidation (and did not take place). The redemption payments would therefore fall outside the scope of section 37(7) by virtue of section 37(7)(a)(i).

176. The Liquidators also refer to the effect of the Articles in particular Article 102 and section 2(a) of Schedule A to the Articles. The question is whether section 2(a) is sufficiently broad to cover potential damages claims, including claims for fraudulent misrepresentation in connection with the subscription for the shares and therefore whether the entitlement of the Series D Shareholders fall to be paid in priority to claims for damages for misrepresentation of other Preferred Shareholders, in accordance with the waterfall set out in section 2(a). Section 2 provides that the entitlements of the Series D Shareholders are to be paid "[b]efore any distribution or payment shall be made to the holders" of the other series of shares. The Liquidators say that the critical question is whether this operates so as to subordinate claims for damages for misrepresentation by such shareholders. The Liquidators recognise that there are arguments both ways.

177. The Liquidators refer to the argument that the commercial purpose of section 2(a) is to entrench the priority of the Series D Shareholders, and the other series of Shareholders, relative to each other and this should, as a result, extend to <u>all</u> types of claim which in any way relate to the shares. Furthermore, any damages award for misrepresentation can be said to be literally a "distribution or payment". On the other hand, it can be said that it makes no sense to regard section 2(a) as extending to claims for damages for misrepresentation where it is said that the effect of the misrepresentation was to cause the shareholder wrongly to agree to the effect of the contractual waterfall under the Articles. Otherwise, there is circularity. The Liquidators add that the allegations made in the case presently before the Court include contentions that, not only did the fraudulent conduct induce them into subscribing for shares, but that it also persuaded them to accede to the creation of new shares and the admissions of new classes of investors whose rights under the amended Articles had priority.

178. In his Initial Opinion dated 13 April 2022, Mr Smith at paragraph 68 refers to arguments either way on Issue 3. One argument refers to the commercial purpose of section 5(c) to entrench the priority of the Series D shareholders and the other series of shareholders. At paragraph 69, Mr Smith says:

> "169. On the other hand, the language of section 5(c) does not clearly extend to such other claims. Moreover, it can be said that it makes no sense to regard section 5(c)

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as extending to claims for damages for misrepresentation where it is said that the effect of the misrepresentation was to cause the shareholder wrongly to agree to the effect of the contractual waterfall. As noted above, the allegations made in the present case include contentions that, not only did the fraudulent conduct induce them into subscribing for shares, but that it also persuaded them to accede to the creation of new shares and the admission of new classes of investors whose rights under the amended Articles had priority."

179. At paragraph 70, Mr Smith comes off the fence and says:

"Overall, I think that a court would be likely to regard this latter argument as decisive."

180. In his Supplemental Opinion dated 2 November 2022, Mr Smith at paragraph 33 refers to "arguments both ways on this" and again mentions the "commercial purpose" argument. At paragraph 34, Mr Smith refers to paragraph 69 of his Initial Opinion and the "no sense" argument:

"34. On the other hand, as pointed out in the Initial Opinion at [69], it can be said that it makes no sense to regard section 2(a) as extending to claims for damages for misrepresentation where it is said that the effect of the misrepresentation was to cause the shareholder wrongly to agree to the effect of the contractual waterfall under the Articles. As we understand it, the allegations made in the present case include contentions that, not only did the fraudulent conduct induce them into subscribing for shares, but that it also persuaded them to accede to the creation of new shares and the admission of new classes of investors whose rights under the amended Articles had priority."

181. At paragraph 35, Mr Smith comes off the fence and concludes:

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> 35. In these circumstances, we think that the Court would be more likely to take the view that section 2(a) is concerned with the return of capital to investors and not with damages claims made by such investors."

182. The Petitioners' position is that the misrepresentation claims do not fall within section 49(g) of the Companies Act and would rank as ordinary unsecured claims in the liquidation. They should therefore be provable in competition with the ordinary trade creditors of the Company and be paid *pari passu* on that basis.

183. The Petitioners refer to section 49(g) of the Companies Act and similar provisions in English and Australian legislation.

184. The Petitioners say that to determine the priority of the misrepresentation claims it must be considered whether the sums which would be due to the Preferred Shareholders are due to them "in their capacity as a member" of the Company "by way of dividends, profits or otherwise" and thus whether they fall within section 49(g) of the Companies Act. The position of the Petitioners is that the misrepresentation claims do not fall within such words, properly construed.

185. The Petitioners refer to *Re Addlestone*, *Soden* and *Sons of Gwalia* and submit that the answer to this issue should be that tortious claims for damages for misrepresentation made by a member against the Company of the type identified in the case presently before me do not fall within section 49(g). The Petitioners again with considerable persuasive force say that such claims are, properly analysed, not brought by a member in their character as a member, and they are not claims which have as their foundation rights or obligations arising under the statutory contract. To the contrary the claims are for damages arising by reason of a tort practised on the member by the Company, before the member became a member.

186. The Petitioners submit that Lord Browne-Wilkinson's comment in *Soden* in respect of negative claims (at page 325G) is not only *obiter* but, respectfully, it is also incorrect. This is because, like Earl Cairns in *Houldsworth*, it falls into the trap of conflating a subscription contract with the statutory contract composed of the articles and the relevant statutory obligations.

187. The Petitioners add that even if the claims could be said to arise out of the share purchase agreements, they are agreements which are separate to the statutory contract. In fact, the claims do not arise out of those agreements, properly analysed. The foundation of the misrepresentation claim is a (pre-contractual) tort. It is not the agreement itself (which is the product of the inducement), and the claim does not arise from some obligation owed by the Company to the member pursuant to their statutory relationship. I find these submissions compelling.

188. The Petitioners state that there is no principled basis for suggesting a member who suffers financial damages by reason of such conduct cannot prove in the Company's liquidation in parity with its ordinary creditors. Thus, the statutory construction suggested accords with common sense and inherent justice.

189. The Petitioners invite the Court to conclude that the damages claims which might be available to Preferred Shareholders do not fall within section 49(g) of the Companies Act and the claims of such members would rank as ordinary creditor claims to be paid *pari passu* with such claims.

190. In a section in their skeleton argument dated 10 May 2023 entitled "Subsequent Priority of Claims if Subordinated to Ordinary Claims", the Petitioners say that properly construed Article 102 and section 2(a) of Schedule A to the Articles are not concerned with payments made to members in respect of damages claims which all or some of those members may have. They are concerned with distributions (of dividends due or of the Company's capital) to members upon a liquidation of the Company. The Petitioners add that it is inherently unlikely that the members intended that section 2(a) of Schedule A to the Articles should extend to claims for damages for misrepresentation at all, but particularly where the effect of the misrepresentation was to cause the shareholders to agree to put those provisions into place.

191. Access and AI submit that if the Court is not with them on their primary contention and declines to follow *Houldsworth* then nonetheless their claims rank for proof in priority to the claims of the misrepresentation claimants, and neither *pari passu* with or subordinate to them. They add that come what may the misrepresentation claims should certainly not rank above the liquidation preference waterfall contained in section 2 of the Schedule to the Articles. They say that the Liquidators are non-committal on this issue (Initial Opinion of Mr Smith dated 13 April 2022 at

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[68] and [69] and the Supplemental Opinion at [33] and [34]). I do not regard paragraph [70] of Mr Smith's Initial Opinion (quoted above) as "non-committal." Again I do not regard paragraph [35] of Mr Smith's Supplemental Opinion (quoted above) as "non-committal".

192. Access and AI submit that if the misrepresentation claims are admitted to proof in the liquidation they should rank neither ahead nor behind the relevant Preferred Shareholder's claim for the respective liquidation amounts. They say that there is no principled basis on which to accord them such priority or subordination. Their argument continues that since they remain members and their claims are in the character of a member, they must remain bound by section 2 and the upshot is that their damages claim will rank in accordance with the relevant position in the waterfall that the Preferred Shares the subject matter of their claims hold, and *pari passu* with other shareholder claimants for the relevant series liquidation amount.

193. Access and AI refer to *Addlestone*, *Webb Distributors*, *Soden* and *Sons of Gwalia*. They refer in particular to the comments of Lord Browne-Wilkinson in *Soden*, at page 323, that "sums due in the character of a member must be sums falling due under and by virtue of the statutory contract between the members and the company" and at page 325 "... the principle must apply equally to negative claims; claims based upon having paid money to the company under the statutory contract which the member says he is entitled to have refunded by way of contract." They seek to distinguish *Sons of Gwalia* and submit that there are other reasons for this Court not to follow it because (1) it created uncertainty for unsecured lenders and its effect was reversed in the Corporations Amendment (Sons of Gwalia) Act 2010; and (2) it is contrary to *Addlestone* and *Soden* which although not formally binding on this Court are nonetheless part of the common law of Cayman except to the extent that they are either inconsistent with Cayman Islands legislation or the Grand Court has developed the principle in a different way, neither of which they say is the case.

194. Standing back from the cases they refer to two underlying points:

(1) a claim for damages for misrepresentation which induced a contract of subscription for shares is, in economic terms, a claim for restitutionary damages in the amount of the contributed capital, just as it would be if the claim were for restitution based on, say,

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mistake. The fact that the cause of action is a common law claim for damages based on a tort is not relevant: the practical outcome from both the shareholder's and the company's point of view is a return of capital. That is not so with an open market purchase since the loss claimed is not measured by reference to the subscription price but to the trade price at which the shareholder bought the shares from the seller, which may bear little relationship to the value of the capital originally subscribed for; and

(2) a claim for damages for misrepresentation inducing a subscription agreement is founded on the statutory contract because it is via the subscription agreement that the statutory contract comes into being and the member's obligation to contribute capital and other liabilities arise. It is artificial and over-narrow to limit "sums due to a member in his character as a member" to those contractually due to and from the company under the articles, as opposed to the subscription agreement and the articles taken together as a transaction. After all, a subscription agreement is simply an agreement to buy the contract of membership comprised in the articles, and with it the order of priority on a winding up. It would be absurd to make the application of section 49(g) depend on the cause of action, or the manner in which the claim is pleaded, or the measure in which the claim is pleaded, or the measure of the loss claimed.

195. Access and AI say that the next question is how, within section 49 (g), any admitted misrepresentation claims should rank in relation to other shareholders who are owed series liquidation amounts under section 2. They say there are three possibilities. Either (1) misrepresentation claimants rank ahead of all other Preferred Shareholders; or (2) they rank behind all other Preferred Shareholders, or (3) they rank *pari passu* with each series holders in their respective claims for the relevant liquidation amount. They, somewhat unconvincingly, say that the misrepresentation claimants cannot be accorded either priority to all other shareholders or subordinated to all other shareholders and that therefore leaves a *pari passu* approach on a series by series basis. I am unpersuaded by their submissions that the misrepresentation claims should map the position in the waterfall which the relevant series of shares in which they were induced to invest holds and that this would be a simple and principled result which would be consistent with

the contractual arrangements with the other shareholders and with the statutory scheme under section 49(g).

196. They make the generalised and somewhat vague submission that it would be unprincipled and unjust to afford misrepresentation claimants priority over all other shareholders and such would set section 2(a) at naught.

197. In conclusion on this issue Access and AI say that the claims for damages for misrepresentation are claims due to members in their character as members for the purposes of section 49(g) of the Companies Act. They add that as such they rank behind unsecured creditors but *pari passu* on a per series basis with the relevant series shareholders for their respective liquidation amounts pursuant to section 2(a) of Schedule A of the Company's Articles.

198. I have to say that on this issue I found Mr Levy's submissions and *Sons of Gwalia* far more persuasive than Mr Millett's submissions and Lord Browne-Wilkinson's *obiter* comment in *Soden*.

199. Section 49(g) of the Companies Act (2023 Revision) does not apply to misrepresentation claims. These debts are not debts due to Preferred Shareholders in their capacity as members and any sums due to those successfully advancing misrepresentation claims would not be due to them under the statutory contract between members and the company and the members *inter se* constituted by the relevant statutory provision. I do not find Lord Browne-Wilkinson's *obiter* comment in *Soden* on "negative claims" relied upon by Mr Millett persuasive. I agree with Mr Levy that a subscription contract is necessarily anterior to and separate from the statutory contract. A claim for misrepresentation as envisaged in the case presently before me arises from a tort independent to the statutory contract. The cause of action is not founded on the rights arising by virtue of and derived from the statutory contract. There is considerable force in Mr Levy's submission that on Lord Browne-Wilkinson's own analysis, a claim for damages for misrepresentation in the sense relevant to the case presently before me is not a claim brought "in the character of a member". This position is also strongly and persuasively supported by *Sons of Gwalia* (see in particular Gummow J at [52], [87]-[93]; Hayne J at [205] and [206]). I appreciate that on this ranking point *Sons of Gwalia* has in effect been abandoned by the Australian Parliament apparently following

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representations by the lending industry. I nevertheless still find the judicial reasoning on this ranking point highly persuasive.

200. Furthermore, the contractual waterfall set out in the Articles is not applicable. Article 102 of the Articles provides that if the Company shall be wound up, the assets available for distribution amongst the members shall be distributed in accordance with section 2 of Schedule A. I agree with Mr Levy that Article 102 applies to the members in their capacity as members and the debts arising from misrepresentation claims are not debts arising in their capacity as members. The cause of action in tort is not based on the statutory contract. The debts are not member debts, they are creditor debts of those who are determined to have valid claims based on misrepresentations prior to becoming members. I do not agree that section 2(c) of Schedule A is wide enough to cover debts arising from damages claims for misrepresentation.

201. In respect of Issue 3 I have decided that I should direct that the Liquidators may proceed with the conduct of the liquidation on the basis that the claims of any admitted proofs of debt submitted by Preferred Shareholders in respect of damages for misrepresentation against the Company shall rank as unsecured debts of the Company.

Costs

202. There was also an ancillary issue in respect of costs which I can deal with fairly briefly as it was in effect agreed between the parties and what was suggested by way of costs orders was proper. In my judgment, the costs of the Liquidators of and incidental to the Application should be paid out of the assets of the Company as an expense of the liquidation. The costs of and incidental to the Application of the other parties appearing before the Court should also be paid out of the assets of the Company as an expense of the liquidation such costs to be taxed on the indemnity basis if not agreed by the Liquidators.

Apologies for length of judgment

203. I am conscious that this judgment is far too long and I apologise for that. By way of tentative explanation I offer the following:

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(1) Firstly, with my present judicial commitments (including preparing for and presiding over hearings and delivering judgments thereafter) I simply could not in June and July find the time to further edit the judgment to reduce its length. As Winston Churchill and many others have been reported to have said in the past: If I had more time available my speech/contribution would have been much shorter.

(2) Secondly, on Issue 2 as I decided not to follow the House of Lords in *Houldsworth* I felt the need to explain myself in detail. I was provided with no detailed local Cayman guidance at appellate level or at first instance level as to the position of English precedent in Cayman Islands law and therefore spent many pages of this judgment reviewing relevant authorities from other jurisdictions and attempting a summary of the position under the laws of the Cayman Islands. I then had to deal with *Houldsworth*, *Soden* and *Sons of Gwalia* at some length.

(3) Thirdly, I also felt the need to explain in detail my decision not to follow the *obiter* comment of Lord Browne-Wilkinson in *Soden* on negative claims in respect of Issue 3.

Order

204. Counsel should forward a draft order reflecting the determinations contained in this judgment within 5 days from the delivery of this judgment.

David Doyle

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THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT

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IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 108 of 2019 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF DIRECT LENDING INCOME FEEDER FUND, LTD. (IN OFFICIAL LIQUIDATION)

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Richard Millett KC with Simon Dickson, Jessica Vickers, Laura Stone and David Ramsaran of Mourant Ozannes (Cayman) LLP for Eiffel eCapital US Fund**
	Tom Smith KC with Mathew Dors and Rupert Stanning of Collas Crill for the JOLs
Heard:	**25-26 May 2023**
Invitation to provide further submissions:	**10 July 2023**
Draft judgment circulated:	**29 February 2024**
Judgment delivered:	**13 March 2024**

HEADNOTE

Whether original holders of redeemable preference shares who claim damages for deceit but who are unable to rescind their subscription agreements are entitled to prove in the winding up and if they are the ranking in the winding up of such claims and the comparative ranking claims by holders of redeemable preference shares who completed the redemption process before the winding up or who have rights to prove in the winding up under section 37(7) of the Companies Act – the basis for the decision of the House of Lords in Houldsworth and of

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subsequent English cases including Soden v British & Commonwealth and whether the common law rule derived from these cases is or should be good law in the Cayman Islands – the capital maintenance rule in Cayman company law

JUDGMENT

Introduction

1. This judgment deals with a significant point of principle and authority in Cayman Islands' insolvency law, namely whether a shareholder who was induced to subscribe for their shares by a misrepresentation made by or on behalf of the company can after the commencement of the company's winding up rescind their subscription contract and prove for damages in competition with non-shareholder creditors and ahead of other shareholders' rights to a distribution. In order to determine this point it is necessary, *inter alia*, to consider what was decided by the House of Lords in *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 (***Houldsworth***), what proposition of law that case and the cases that followed or referred to it stand for and whether *Houldsworth* and that proposition of law is good law, and should continue to be applied, in this jurisdiction.

2. The background to the applications with which this judgment deals are set out in my judgment dated 10 November 2022 (the ***Judgment***). The joint official liquidators (***JOLs***) of Direct Lending Income Feeder Fund, Ltd (in official liquidation) (***DLIFF***) had applied (by summons) for directions concerning various matters. First, the treatment in the liquidation of (and the exercise of their powers as official liquidators in relation to) claims made or to be made by investors against DLIFF based upon alleged misrepresentations by DLIFF in connection with the investors' subscription for their shares. Secondly, the treatment of claims by investors who had sought unsuccessfully to redeem their shares in DLIFF with effective redemption dates prior to 8 February 2019 (the ***Redemption Claims***). The tenth affidavit of Christopher Johnson (***Johnson 10***), one of the JOLs, set out the background and gave details of the investors (see [20.2]).

3. Following the filing of a further summons by Eiffel eCapital US Fund (***Eiffel***) a hearing was held to determine the appropriate procedural directions to be given to allow the Court

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to adjudicate on the JOLs' application for directions. The Judgment and the order made to give effect to it set out the directions which I gave for this purpose and provided for a hearing to be listed at which:

(a). the JOLs would advocate for the grant of the following orders (the ***Misrepresentation Orders***):

(i) an order that the JOLs be directed to exercise their function of adjudicating claims on the basis that any claims from investors of DLIFF based upon asserted misrepresentations by DLIFF in relation to their subscriptions for shares in DLIFF were not barred as a matter of law solely due to the fact that DLIFF was in liquidation; and

(ii) an order that, in the event that any claims from investors of DLIFF based upon asserted misrepresentations by DLIFF in relation to their subscriptions for shares in DLIFF were admitted, the JOLs be directed to pay such claims either (i) *pari passu* with any admitted Redemption Claims, or, in the alternative, (ii) in priority to any admitted Redemption Claims.

(b). Eiffel would advocate against the grant of the Misrepresentation Orders. Eiffel, Prêtons Ensemble 2 and Eiffel eCapital Global Fund (the ***Eiffel Funds***) were shareholders of DLIFF who gave notice to redeem their shareholding on 21 November 2018 but who had not been paid the redemption proceeds (parties in the position of the Eiffel Funds have been referred to as ***Late Redeemers***). The Eiffel Funds have filed proofs of debt in the liquidation (on 27 September 2019) but the JOLs have not yet adjudicated the proofs.

4. The hearing (the ***Hearing***) took place on 25 and 26 May 2023. At the Hearing, Richard Millett KC appeared for Eiffel and Tom Smith KC appeared for the JOLs.

5. Shortly before the Hearing, upon receipt of the parties' skeleton arguments, I found out that the same issue arising on the JOLs' summons had been raised and was to be dealt with by Mr Justice Doyle in another liquidation and proceeding in this Court. This is the official liquidation of HQP Corporation (***HQP***). A hearing before Justice Doyle had been

listed on 17 and 18 May 2023, very shortly in advance of the Hearing. At the Hearing, I raised this issue with Mr Millett KC and Mr Smith KC (both of whom were counsel in *HQP* and had appeared before Justice Doyle). I noted that in my view it would have been more cost-effective for the common issue of principle arising in both liquidations (even if the underlying facts were different) to have been listed before one Grand Court Judge (or at least for that possibility to have been raised with the Court in advance of the listing of two separate hearings). That would have avoided a duplication of expense and effort and the risk of inconsistent judgments. I was told that consideration had been given to this approach but that the liquidation committees wished there to be a separate adjudication of the issue in each liquidation. I said that in the circumstances, since the hearing before Justice Doyle had now taken place and all parties in these proceedings were ready and wished to go ahead, it seemed to me that the best way to proceed was for me to hear the parties' submissions but then to wait until Mr Justice Doyle had handed down his decision before finalising and deciding what approach to take in my judgment. Mr Millett KC and Mr Smith KC were content with this although they both requested that I consider the issues raised and prepare a separate judgment since, they submitted, the arguments before me had developed differently from the arguments presented to Mr Justice Doyle and the context in which the issues arose in DLIFF's liquidation was different from that of HQP.

6. Mr Justice Doyle (with his usual promptness and efficiency) delivered his judgment on 7 July 2023 (***Justice Doyle's Judgment***) and I received a copy of the decision shortly thereafter. At that point, I asked the parties whether they wished to have the opportunity to make further submissions based on and by reference to Justice Doyle's Judgment, but they declined the invitation as they considered further submissions to be unnecessary.

7. I have now had an opportunity to study Mr Justice Doyle's elegant and clearly reasoned judgment (unfortunately because of the summer break shortly after the handing down of Justice Doyle's Judgment and a number of other heavy cases that I have had to deal with it has taken me some time to finalise this judgment). I am aware that Mr Justice Doyle has granted permission to appeal and therefore, that the issues he has dealt with and which arise in this case will be considered by the Court of Appeal. I considered whether the right approach was simply to follow his reasoning and decisions and then to leave it to the Court of Appeal to decide whether to affirm Mr Justice Doyle's ruling. I must confess

to finding this an appealing option (no pun intended) but in view of the firm request not to do so made by Mr Millett KC and Mr Smith KC and since, as will become apparent, I take a different view from Mr Justice Doyle on the key issues arising, I concluded that I should set out my own analysis and decisions.

The core issues and the parties' submissions in outline

8. In deciding whether to make the Misrepresentation Orders it is necessary to determine whether claims for unliquidated damages for misrepresentation made by members who were induced to subscribe for their shares by DLIFF's misrepresentations (***Misrepresentation Claimants***) are entitled to be admitted to proof in DLIFF's liquidation at all (the ***Proof Point***) and then if such claims are admissible where they rank in the order of priorities in the liquidation (the ***Priority Point***), in particular whether they rank (a) in priority to Redemption Claims (by investors such as the Eiffel Funds) (b) *pari passu* with Redemption Claims or (c) subordinate to such Redemption Claims.

9. Eiffel contends that:

   (a). the Misrepresentation Claimants' claims are barred from admission to proof by the principle of law (the ***Houldsworth Principle***) established by the House of Lords in *Houldsworth v City of Glasgow Bank* (1880) 5 App Cas 317 (***Houldsworth***) and the subsequent cases that have explained and followed it. This Court should follow and apply that principle.

   (b). if, contrary to Eiffel's primary contention, the Misrepresentation Claimants' claims are admissible and admitted to proof then nonetheless Eiffel's claims (and all Redemption Claims) rank in priority to the Misrepresentation Claimants' claims and are neither *pari passu* with nor subordinate to them.

   (c). the question of admissibility and ranking are to some extent linked not only because many of the relevant authorities examine both questions together but also because the issue of admissibility becomes less significant if the Misrepresentation Claimants' claims are treated as subordinated to Redemption Claims. Eiffel argued that if the Court declined to apply the Houldsworth Principle then unless

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misrepresentation creditors were subordinated to creditors with claims for payment of redemption monies (such as Eiffel) or to redeeming shareholders who had become creditors by having given notice of redemption, the order of liquidation priorities would be disturbed because the Court would be permitting shareholders (the Misrepresentation Claimants) improperly to elevate themselves to the status of creditors. This would potentially have a damaging impact on the Cayman Islands as an investment centre (and indeed more generally) and raised policy issues that were best considered by and left for decision by the legislature and not the Court.

10. The JOLs contend that:

(a). even though those Misrepresentation Claimants who had failed to exercise the right to rescind their subscription agreements (or membership contract) before the commencement of DLIFF's winding up had lost the right to rescind (and it was assumed for the purpose of this application that none of the Misrepresentation Claimants had exercised their right to rescind prior to the commencement of the liquidation) and were therefore now unable to claim damages under section 14(2) of the Contracts Act (1996 Revision) (the ***Contracts Act***) (which gives the Court the power to declare the contract subsisting and award damages in lieu of rescission), nonetheless they remained entitled to claim both damages arising from fraudulent misrepresentation and statutory damages under section 14(1) of the Contracts Act (which creates a statutory claim for innocent misrepresentation subject to the defence set out in the sub-section). In the case of these causes of action the remedies of rescission and damages were not alternative but cumulative and the availability of rescission was not a condition for such damages claims as it was for claims under section 14(2).

(b). such misrepresentation claims (the ***Misrepresentation Claims***) are provable. Section 139(1) of the Companies Act establishes what debts and claims of creditors are admissible to proof. The Misrepresentation Claims are covered by and come within that sub-section. Section 140(1) of the Companies Act establishes the rights of creditors to be paid and of members to receive a distribution out of the assets of the company in liquidation. The Misrepresentation Claims are covered by, and the Misrepresentation Claimants are entitled to rely on, that sub-section. There was no

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statutory prohibition against the admission of claims from members whether in their character as members or otherwise.

(c). the Misrepresentation Claims are also not barred by any principle established by *Houldsworth* or the cases that followed it, even if it is considered to form part of the law of the Cayman Islands. The Houldsworth Principle, properly understood, could be summarised as follows. Where a shareholder contracts to contribute to a company a certain amount to be applied in payment of the debts and liabilities of the company then it was inconsistent with his position as a shareholder, while he remained a shareholder, to claim back any of that sum. That principle however was not engaged in the present case because (i) none of the investors in DLIFF were under any liability to DLIFF to contribute funds to the winding up (all of the shares were issued as fully paid up and there was no question of the JOLs making any calls on any shareholder); (ii) the Misrepresentation Claimants would be seeking neither to avoid obligations under the statutory contract nor a return of share capital but simply damages (the measure of which would be contingent, *inter alia,* upon subscription monies, the value of the shares at acquisition and potentially disposition, loss of profits and benefits); (iii) there was therefore no inconsistency between the relevant investors making Misrepresentation Claims and any obligation on their part to contribute funds to DLIFF to pay its debts and liabilities. The Misrepresentation Claims did not involve the Misrepresentation Claimants seeking to claim back money which they had agreed to contribute to pay the debts and liabilities of DLIFF.

(d). while section 49 of the Companies Act provides for the subordination (but not the preclusion) of claims by members in their character as such, the Misrepresentation Claims are not made by the relevant investors in their capacity as shareholders in DLIFF.

11. My conclusions on the Proof Point can be summarised as follows:

(a). I consider that in the absence of any binding authority in this jurisdiction and in view of the dispute concerning the meaning and effect of the English cases starting with and following *Houldsworth*, the proper approach is to determine the legal

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position under English law and then consider whether the law as so formulated applied or should be applied in this jurisdiction.

(b). there is no dispute (and I must therefore assume) that the Misrepresentation Claimants lost the right to rescind their subscription agreements on the commencement of DLIFF's winding up (although I consider that the issue of whether the right to rescind is permanently lost or is only barred to the extent that the exercise of the right would prejudice third party creditors may need further consideration by a higher Court).

(c). there was, before the legislative intervention in 1989, a common law rule (which I have referred to below as the "no-proof proposition") in England to the effect that where a shareholder was not entitled to rescind his/her subscription contract after the commencement of the winding up (and it was established by authority that the right to rescind terminated on winding up), the shareholder was not entitled to prove in a winding up for damages for misrepresentation (which induced him/her to enter the subscription contract). But in my view, the rule, properly understood, only precluded such a shareholder from proving in competition with external (non-shareholder) creditors and did not give rise to an absolute bar on proof even after non-member creditors had been paid in full (or were suitably provided for).

(d). that common law rule operated alongside the statutory regime governing the right to prove in a winding up. The English statutory code governing the winding up of companies was (and is) not considered to be complete and was (and is) subject to some long-established judge made (common law) rules including the no-proof proposition.

(e). since the relevant statutory code and the common law rules (as set out in the case law) governing winding up and capital maintenance in this jurisdiction are based on and are broadly similar (albeit not identical) to the related statutory regime and common law rules in England, the starting point is the law in England and the related principles and legal reasoning which apply in this jurisdiction, so that the no-proof proposition should be treated as good law in the Cayman Islands unless there is a proper reason which justifies adopting a different common law rule.

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(f). the JOLs argued that (if they were wrong about the proper interpretation of English law, which in my view they were) there were a number of strong reasons for treating the law of the Cayman Islands as different from England and for recognising or adopting a different common law rule here. In particular, they said that: (i) the case law in other jurisdictions, particularly in Australia and Bermuda, demonstrated that the no-proof proposition was unsound and could not be justified as a matter of law; (ii) the fact that other jurisdictions had changed the law by legislation demonstrated that the English common law rule was outdated and damaging; and (iii) that local conditions required a different approach (in particular the need to protect and promote the important and large investment funds industry which depended on the use of companies issuing redeemable shares as open-ended investment funds) and that the amendments made to the companies legislation in this jurisdiction (in particular the provisions in the Companies Act which liberalise our capital maintenance rules as they apply to redeemable shares and the use of the share premium account to make payments due on the redemption of the shares without the need to satisfy the statutory solvency test) reflected careful policy choices (to support investment funds by promoting and protecting the interests of investors in those funds, even if this was at the expense of creditors) which would be undermined by following the approach under English law.

(g). in my view, while it is clear that there are now material differences between the companies law in this jurisdiction and in England (and I accept that the capital maintenance rules here have been liberalised and are different from those in England in some material respects) and while I also accept the great importance and significance for this jurisdiction of the investment funds industry and the need to establish a legal framework and conditions that are conducive to the effective operation of the investment funds' business model, I do not consider that these factors justify the conclusion that the no-proof proposition has been and should remain a common law rule in this jurisdiction. Having said that, if I am wrong as to the proper analysis of the English cases so that the English law rule established an absolute bar on the admission of claims for damages in deceit by original holders of redeemable shares, I would refuse to apply the rule in those terms and apply it in the qualified form that I have formulated and described.

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(h). the JOLs' arguments, in my view, are overstated and in some cases unsupported by relevant and probative evidence. The amendments to the capital maintenance rules as they relate to payments out of the share premium account on redemption do not apply to claims for damages in deceit and, in any event, must be considered alongside the statutory regime governing the right to prove and ranking of shareholders who exercised their right to redeem before the winding up. It seems to me that it would be inconsistent with that regime for original holders of redeemable shares with claims for damages in deceit to be able to prove and rank ahead of non-member creditors when such redemption creditors cannot do so. I also do not regard the reasoning in the Australian and Bermudian cases as undermining the reasoning that supports and justifies the no-proof proposition. Finally, and significantly, the JOLs have not adduced any evidence to show that the retention or adoption of the no-proof proposition (as I have formulated it) would have any, let alone a significant adverse effect, on our investment funds industry.

(i). I have carefully considered Justice Doyle's Judgment and while I have found his reasoning to be cogent and while I would usually follow his approach, on this occasion it seems to me that different reasoning and a different conclusion are required and justified. This can be explained, I think, because we are dealing with authorities that have been widely referred to as opaque and recognised as cases whose reasoning is notoriously difficult to discern and pin down.

12. My conclusions on the Priority Point can be summarised as follows:

(a). I have, as already noted, held that the Misrepresentation Claims are not provable in competition with the claims of non-member creditors but are provable once those external creditors have been paid (or fully and properly provided for). This ranking is the result of both the no-proof proposition and section 49(g) of the Companies Act. In my view, the Misrepresentation Claims are subject to section 49(g) since they are "*due to [a] member of a company in that person's character of a member by way of dividends, profits or otherwise*." As a result they are not "*deemed to be a debt of the company, payable in… competition [with] …any other creditor not being a member of the company*." I consider that the reasoning of Lord Browne-

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Wilkinson in *Soden v British & Commonwealth Holdings plc* [1998] AC 298 is sound and represents the law in this jurisdiction and, furthermore, is to be preferred to that of the majority of Justices in the High Court of Australia in *Sons of Gwalia Ltd v Margaretic* [2007] 3 LRC 462.

(b). the claims of holders of redeemable preference shares who gave notice of and completed the process of redemption before the winding up (redemption creditors) are also subject to section 49(g). The claims of members subject to section 49(g) rank *pari passu*. Accordingly, the claims of Misrepresentation Claimants and of the redemption creditors are provable after the non-member creditors have been paid (or provided for) and then rank equally.

(c). while there appear to be no holders of redeemable shares who had failed to give notice to redeem and complete the redemption process before the winding up but who have rights under section 37(7)(a) of the Companies Act, so that the question of their ranking as against shareholders with claims subject to section 49(g) does not arise for decision, I consider it likely that the shareholders with rights under section 37(7)(a) are to rank, after payment of the non-member creditors, *pari passu* with the shareholders with claims subject to section 49(g). This is because the Companies Act establishes a parallel subordination and therefore similar ranking for both classes of claimant without stipulating that one class ranks ahead of the other and because giving shareholders with rights under section 37(7)(a) equal ranking with redemption creditors can be seen as giving effect to the policy of protecting the position of holders of a limited class of redeemable shareholders who can be seen as deserving equal treatment with redemption creditors because they must show that their terms of redemption provided for redemption before, and that the company could have lawfully paid the sums due on redemption in the period up to the start of, the winding up.

(d). once again I have, reluctantly, found myself unable to adopt Justice Doyle's reasoning and follow his conclusion on this issue. My explanation for my different conclusion is set out below.

Background

13. DLIFF is part of a master/feeder fund structure in which it is the offshore feeder fund. DLIFF and its onshore counterpart, Direct Lending Income Fund, L.P. (***DLIF***, together with DLIFF, the ***Feeder Funds***) sought subscriptions and invested in DLI Capital Inc. (the ***Master Fund***). DLIFF was established in 2016 as part of a group restructuring in order to act as the offshore feeder fund for the DLI Group. A number of (non-U.S.) investors of DLIF redeemed their investments in DLIF in late 2016 and re-invested in DLIFF. DLIFF then continued to seek subscriptions from non-U.S. investors until the suspension of subscriptions in February 2019.

14. Investors invested in DLIFF by subscribing for redeemable shares in various series initially at an offering price of $1,000 per share and thereafter at the prevailing Net Asset Value (***NAV***) per share for the relevant series. The shares had a nominal value of US$0.01 each, whereas the prevailing NAV per share (over the trading lifetime of DLIFF) was in the region of $1,000 to $1,200, meaning that the vast majority of each subscription was premium. Under the terms of DLIFF's articles, such premium was to be credited to the share premium account (see article 36).

15. The DLI Group encountered liquidity difficulties in late 2018 and in particular had suffered losses in respect of an investment into a company called VoIP Guardian LLC. The last net asset value struck in respect of DLIFF was for the valuation day of 30 November 2018 and was approximately US$180 million. However, a number of redemption and subscription requests were made for effective dates between 1 December 2018 and DLIFF's suspension of subscriptions and redemptions on 8 February 2019 (the ***Suspension Date***). Following the suspension, and the filing of a complaint by the SEC on 22 March 2019, DLIFF together with the rest of the DLI Group was placed in receivership on 1 April 2019 pursuant to an order of the U.S. District Court for the Central District of California and Mr Bradley Sharp was appointed as receiver.

16. Mr Sharp, having obtained approval from the District Court, proceeded to exercise the rights of DLIFF's managing shareholder to place DLIFF into voluntary liquidation in this jurisdiction by passing a special resolution on 14 May 2019. Mr Sharp and Mr

Christopher Johnson were appointed as joint voluntary liquidators (***JVLs***). On 18 June 2018, Mr Sharp and Mr Johnson (as JVLs) applied by way of petition for the liquidation of DLIFF to continue under the supervision of the Court and on 25 July 2019, the Court made an order to that effect (that Mr Sharp and Mr Johnson be appointed as the joint official liquidators).

17. Over the course of its trading life (from October 2016 to February 2019), DLIFF accepted approximately US$287.7m in subscriptions and paid out approximately US$128.3m in redemptions and monthly distributions (leaving a balance of US$159.4).

18. The subscriptions included cash paid by investors in respect of first-time subscriptions for shares in DLIFF with subscription dates of 1 January 2019 or 1 February 2019 (the ***New Late Subscribers***) and cash paid by investors who had previously invested in DLIFF but then paid cash to DLIFF in respect of further subscriptions for shares in DLIFF with subscription dates of 1 January 2019 or 1 February 2019 (the ***Pre-Existing Late Subscribers***, together with the New Late Subscribers, the ***Late Subscribers***).

19. The redemptions paid out included redemptions by investors who were fully redeemed prior to December 2018 (who therefore in effect withdrew from the fund with an aggregate of US$4.7m net profit). DLIFF's net investment value by reference to the remaining investors (but excluding redemption requests effective after 30 November 2018) was therefore approximately US$164.1m. As noted above, DLIFF's last stated NAV (for 30 November 2018) was approximately US$180m. However, the JOLs believe that the NAV was materially mis-stated for much, if not all, of the life of DLIFF. For that reason, the JOLs consider it more appropriate to refer to and calculate investment value by reference to net investment.

20. The stakeholders of DLIFF can be most conveniently categorised as follows:

(a). unsecured, third-party creditors who were not investors of DLIFF, such as former service providers (the ***Trade Creditors***).

(b). DLIFF's current investors (each an ***Investor*** and together the ***Investors***), comprise the following sub-groups (these groups are not mutually exclusive so that an

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Investor could be, for example, a Late Subscriber in respect of part of its investment and an Unredeemed Investor in respect of the remainder and since certain of the Late Redeemers only sought to redeem part of their shareholding in DLIFF with effective redemption dates prior to the Suspension Date then at least with respect to part of their investments they are also categorised as Unredeemed Investors):

(i). those Investors who sought to redeem their shareholding in DLIFF with effective redemption dates prior to the suspension of withdrawals and voluntary redemptions on the Suspension Date but who remain unpaid (the ***Late Redeemers***).

(ii). those Investors who made payments to DLIFF on 1 January 2019 or 1 February 2019 in respect of either initial or additional subscriptions for shares in DLIFF with subscription dates on those days (the ***Late Subscribers***). The sums paid by the Late Subscribers was approximately US$10.8 million.

(iii). those Investors not falling into the above two categories (the ***Unredeemed Investors***). The net value of their investments totals approximately US$125.5 million.

21. The Trade Creditors are relatively small in number and amount and the JOLs say that there is no chance of a sufficient number of claims from the other stakeholders ranking *pari passu* with the Trade Creditors to prevent them being paid in full. They will therefore be paid in full in any event. There were also some investors of DLIFF who withdrew all their funds invested in DLIFF prior to the Suspension Date (the ***Former Investors***). Ignoring the possibility that the Former Investors (as ultimate beneficial owners of the shares) might have reinvested in DLIFF after such redemption via a different nominee, they have no economic interest in the distribution of DLIFF's assets.

22. The JOLs consider that it is at least reasonably arguable that Investors holding at least 75% of the existing issued shares (by net investment value) in DLIFF have *prima facie* claims for damages for misrepresentation against DLIFF.

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23. The JOLs estimate that DLIFF will receive total distributions from the Master Fund of approximately $80 million. The JOLs have received proofs of debt from the Trade Creditors in the amount of $19,649, claims in respect of unpaid redemptions totalling approximately $33 million based on the November 30, 2018 NAV, and claims from the Late Subscribers of approximately $11 million. Accordingly, the JOLs have to date determined the liquidation to be solvent. However, once liquidation expenses are settled, there is unlikely to be more than 50% of the net cash invested by Investors available for distribution. Accordingly, the relative priority of the Investors' claims *inter se* (including in relation to the claims of the Misrepresentation Claimants) is likely to be of critical importance in determining who receives distributions out of the proceeds of the realisation of DLIFF’s assets.

The basis of the claims made by the Misrepresentation Claimants

24. The JOLs say that in the event that claims based on misrepresentation are asserted by the Misrepresentation Claimants, each such claim can be expected to comprise a claim for damages based upon the principle that the claimant is entitled to be put in the position he would have been in if no false representation had been made (insofar as money can do it). In these circumstances, such a claim for damages can be expected to include (a) the difference between the subscription price paid and the value of the shares, (b) losses in value after purchase but prior to disposition (or, in a liquidation context, distribution), (c) loss of profits that would otherwise have been earned with the subscription monies and (d) a credit in respect of any benefits (i.e. dividends) received as a result of the subscription.

25. The JOLs also say that if claims based on misrepresentation are both available as a matter of law and payable in priority to the return of capital to Investors (whether ahead of or *pari passu* with the debts of unsecured creditors or subordinated debts), this would have a significant impact on distributions in the liquidation. Those Investors who are able to establish claims based upon misrepresentation would be entitled to be paid ahead of those who are not able to establish either Misrepresentation Claims or other claims such as those asserted by the Late Subscribers and Late Redeemers. Additionally, it is possible that the Misrepresentation Claims would significantly dilute the claims of the Late

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Subscribers (if admitted), and subordinate the claims of the Late Redeemers (if admitted) such that they could be rendered valueless.

Eiffel's position

26. The Eiffel Funds are former holders of redeemable shares. On 21 November 2018, the Eiffel Funds issued redemption requests for all their shares and on the same day DLIFF's investment manager (Direct Lending Investments LLC) (the ***Manager***) confirmed receipt and said that the redemption requests would be processed "*with a 12/31/18 effective date*." Pursuant to article 8.8 of DLIFF's articles, the redemption date was therefore 31 December 2018. On that date, the Eiffel Funds (including Eiffel) ceased to be shareholders and became creditors of DLIFF for the redemption price. That was confirmed by letter from the Manager dated 11 February 2019, which also confirmed that the redemption price was payable in priority to other payments or distributions to DLIFF's equity-holders. On 11 February 2019, the Manager notified the Eiffel Funds that, effective 8 February 2019, DLIFF had suspended investor's rights to redeem or withdraw their investments and to be paid outstanding redemption payments. Consequently, the Eiffel Funds were not paid the redemption proceeds then due. They are Late Redeemers. On 27 September 2019, each of the Eiffel Funds filed proofs for their unpaid redemption proceeds plus interest in the total sum of US$27.4 million. Eiffel's proof of debt is for US$12,589,611.81.

The Proof Point - Eiffel's submissions

Eiffel's primary case

27. As I have noted, Eiffel's primary case is that the Misrepresentation Claimants' claims are barred from admission to proof by the principle established by the House of Lords in *Houldsworth* and the subsequent cases that followed and explained that this Court should apply that principle.

28. Eiffel submitted that *Houldsworth* as interpreted by subsequent English authority stood as and was authority for the proposition that shareholders with misrepresentation claims were not entitled after the commencement of a winding up to rescind their subscription

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contracts and prove in the winding up for damages. This proposition remained good law and was sound in principle. The basic rationale for this proposition of law (and therefore for the Houldsworth Principle) was that after a winding up, when a company's capital was to be fully available to meet all its debts and liabilities to creditors (or members with statutory priority), a subscriber for shares could not remove from the company the economic benefit of his/her original contribution to its capital. He/she could not rescind their contract of subscription, and thereby their membership, and the liabilities to contribute that go with it. He/she must retain (and to use Eiffel's phrase, he/she was stuck with) the legal and economic consequences of continuing membership. If that were not so, and he/she could be paid out the value of his original subscription, he/she would reduce the capital of the company at the very moment that the company needed it most. That, Eiffel said, would offend the most fundamental of rules of company law. What is more, the shareholder would also remain on the register and be entitled to whatever surplus might remain. The shareholder could not have it both ways.

29. Eiffel argued that it remained a common law rule that it was unlawful for a company to return capital otherwise than in a manner permitted by statute, and allowing the Misrepresentation Claims to be proved in a winding up would involve such a return of capital. A return of capital (including making payments to shareholders which in substance amounted to a return of capital) was precluded by the common-law rule in *Trevor v Whitworth* (1887) 12 App Cas 409 (that a company has no power to purchase its own shares unless permitted by statute). Eiffel accepted that the rules governing the return of capital were now almost entirely statutory but argued that statute did not cover the whole territory. *Trevor v Whitworth* remained good law and stood as a foundational principle. Eiffel submitted that it would be wrong to erode the statutory control of and restrictions imposed on returns of capital by creating a new category of shareholder claim and right pursuant to which capital could in substance be returned to shareholders while they remained shareholders and retained their shares.

30. Eiffel said that the widespread reference to the "principle in *Houldsworth*" was misleading. The principle or proposition of the common law on which Eiffel relied had been developed and been articulated in a line of cases of which *Houldsworth* was arguably the most significant but the basis of and the scope of the common law principle was not limited to the facts of or by the formulation of the principle

expressed in *Houldsworth* (it was, Eiffel said, not confined to the four corners of that decision). That was why, Eiffel submitted, the exercise of seeking to distinguish *Houldsworth* or to confine it to its particular facts was only attractive from a forensic perspective. By the turn of the twentieth century, *Houldsworth* had come to stand for a wider principle than the case itself decides. But the cases, when taken together, established a very clear principle or common law rule (the use of the term "the rule in *Foss v. Harbottle"* was analogous).

31. Eiffel accepted that there was no decision binding on this Court which required the Court to follow the ratio of *Houldsworth* (as properly understood) and the English (or other common law jurisdiction) cases applying and explaining (or reformulating) it but Eiffel argued that since the Houldsworth Principle as Eiffel formulated it was entirely consistent with Cayman company and insolvency law and since the established practice of this Court was generally to apply the English common law, the Court should give effect to the Houldsworth Principle in this case and generally. The exceptions to the practice of following the English common law related to cases where the relevant English common law rule had been overruled, was inconsistent with Cayman Islands legislation, or where the Court had developed the common law in Cayman in a materially different way. These exceptions did not apply to the Houldsworth Principle and in this case. Furthermore, Eiffel noted that the Judicial Committee of the Privy Council was not bound by the English common law (or decisions of the House of Lords or Supreme Court) where local conditions required that a different approach be taken to the common law as applied in a particular jurisdiction or even to a similar statutory provision, but once again Eiffel submitted that there were no local conditions that made it inappropriate for the common law rule established by the *Houldsworth* line of cases to be applied in this jurisdiction. Eiffel said that it was significant that the former Chief Justice (Sir Anthony Smellie) had in one case (discussed below) considered it to be "*obvious*" that misrepresentation claims could not be admitted to proof in a winding up on the basis of "*the longstanding authority of Houldsworth.*"

The proposition of law for which Houldsworth stands as authority

32. Eiffel noted that in *Houldsworth* the claimant had in February 1877 subscribed for and bought £4,000 of shares in the defendant bank. The bank went into insolvent liquidation

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in October 1878, and in December 1878 the claimant brought proceedings against the bank and its liquidators for fraudulent misrepresentations made by the bank's directors which had induced him to subscribe for the shares. He claimed by way of damages the amount of his subscription monies. The House of Lords dismissed his appeal on the basis that since, on the winding up, he had lost his right to rescind, he could not thereafter maintain an action for damages against the company for fraudulent misrepresentation.

33. Eiffel submitted that the principle (or proposition) of law for which *Houldsworth* should now be treated as authority (put at its simplest) was that after a winding up order is made a member cannot claim against the company, and prove for, damages for misrepresentation made by the company which induced him to subscribe for his shares which he still holds.

34. Eiffel argued that this principle or proposition derived from the related principle, established by the House of Lords in *Oakes v Turquand* (1867) LR 2 HL 325 (***Oakes***) and *Tennent v City of Glasgow Bank* (1879) 4 App Cas 615 (***Tennent***), that once a winding up had supervened it was not possible to rescind a contract of subscription for shares on the grounds of fraudulent misrepresentation. Both of those earlier decisions of the House of Lords were affirmed in *Houldsworth*.

35. Eiffel accepted that the precise formulation of the *ratio* of *Houldsworth* and of the proposition of law for which the decision was to stand as authority were contested and debated in a number of decisions (in various jurisdictions) and by textbook writers and commentators. Eiffel submitted that nonetheless the rationale which emerged from the speeches in *Houldsworth* was that after a winding up a shareholder could not both retain his shares and claim damages from the company for the value of his investment where the damages would in economic terms involve or equate to a return of capital. That is, he cannot approbate and reprobate. He cannot take inconsistent positions by both claiming to remain a shareholder and seeking to recover the economic or financial value of his shares and investment.

36. In the later decision of the English Court of Appeal in *Re Addlestone Linoleum Co* (1887) 37 Ch D 191 (***Addlestone***), Lindley LJ had explained the decision in *Houldsworth* (at pages 205-206) as follows:

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"*The principle on which the House of Lords decided [Houldsworth] was that a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as shareholder, while he remains such, to claim back any of that money – he must not directly or indirectly receive back any part of it*."

37. That rationale, Eiffel submitted, could be understood in terms of the common law prohibition on the unauthorised return of capital, which was in development at the time. The cases articulating this principle culminated in two decisions of the House of Lords in *Trevor v Whitworth* and *Ooregum Gold Mining Co of India v Roper* [1892] AC 125 (***Ooregum***). In *Webb Distributors (Aust) Pty Ltd v State of Victoria* [1993] 4 LRC 395 (***Webb***), Mason CJ, giving the lead judgment of the High Court of Australia, had correctly identified the link between the principle in *Houldsworth* and the principle in *Trevor v Whitworth* and *Ooregum*.

38. This approach, Eiffel said, had been clearly set out at the Court of Appeal level in the decision upheld by the High Court in *Webb*. Eiffel relied on the reasoning of Justice Tadgell (who gave the leading judgment with which Justices Fullagar and Gobbo agreed) in the Appeal Division of the Supreme Court of Victoria in *State of Victoria v Hodgson and others* [1992] 2 V.R. 613. Eiffel relied on various passages in Justice Tadgell's judgment, and I set them out in full below since Eiffel's case closely follows Justice Tadgell's reasoning (underlining and emphasis added):

[page 617] "The central issue seems to be this: whether a person who has subscribed share capital, and would in a winding up rank for repayment of capital behind unsecured creditors, may, instead of being left to his rights as a contributory, prove as an unsecured creditor for an unliquidated sum if he can make out a cause of action sounding in damages designed to compensate him for having subscribed the share capital..... That formulation of the issue is reminiscent of the question posed for resolution by Earl Cairns [Lord Chancellor] in Houldsworth ... The House of Lords answered the question No. The company there in question, the City of Glasgow Bank, was an unlimited company in liquidation. Rescission of the contract to take shares was not sought or available and the shareholder was left with his liability upon his shares, which was held to be inconsistent with a right to claim damages against the company and its liquidator. Later commentators have not been altogether agreed on the ratio decidendi of the case or its scope. ...

[pages 626 to 628] There are several bases on which the conclusion in Houldsworth's Case appears to be founded. One is that, to allow a present

shareholder to sue the company would in effect involve his making a claim against himself along with his fellow members. This seems to have influenced Lord Hatherley: at p. 333. Insofar as it did so this basis would seem to justify part of Professor Gower's criticism ... it could scarcely survive Salomon v. Salomon & Co. Ltd. .... The appellant, however, did not rely on this basis. Lord Hatherley also referred to the prospect, if a claim for damages by a person in the position of the appellant were allowed, of a series of interlacing claims for damages by several members, leading to endless calls. Anderson J. in Re Dividend Fund Incorporated, at p. 454, referred to this as 'something akin to perpetual motion', and as tending to suggest that the claim should not be countenanced. The point is relevant, if at all, only when the claim is made against an unlimited company, which is not this case. ***Another basis for the conclusion in Houldsworth's Case is that the allowance of a claim for damages by a member against a company of which he is a member would be inconsistent with implied terms of the contract by which the member became a member, in that the claim would entrench on share capital to the detriment of creditors and other members. Even Professor Gower seems to have conceded that the decision might be justified on that ground****: The Principles of Modern Company Law 2nd ed., 1957 p. 295; and it is a ground on which the Solicitor-General relied for the appellant. It derives support from the speeches in Houldsworth's Case of Lord Cairns, at p. 325, and Lord Selborne, at p. 329, whose remarks suggest the thesis that one of the implied terms of the contract of membership is that the company's property is to be used only for the purpose of achieving its objects, which do not include the payment of compensation to defrauded subscribers: cf. Pennington. Vincent J. was evidently unimpressed with the thesis: his response was that it 'borders on the bizarre'. Another response may be that, given that a member may rescind his contract to take shares at any time during the life of the company, it is nothing to the point to say that creditors and fellow members would be disadvantaged by a claim for damages: Ford, p 298.*

There was a concession in the course of argument in Houldsworth's Case that, if a shareholder at the commencement of the winding up could validly raise a claim for damages of the kind sought against the company and its liquidator after the commencement of the winding up, he must also have had a right before the winding up to have remained a shareholder and yet to maintain an action for damages against the company. Hence the form of the question posed by Lord Cairns, quoted above, which did not suppose that the company was in liquidation. Accordingly, save that the winding up precluded rescission of the contract to take shares, the burden of the reasoning of their Lordships appears not to have depended on the fact that the company was in liquidation, or particularly upon the winding up provisions of the Companies Acts.

Whatever difficulties there may be in accepting the result in Houldsworth's Case as wholly justifiable when the company is not in liquidation, there is every justification for it in the case of a company in liquidation, including a company limited by shares*.*

In my opinion the principle of limited liability leads inevitably to the conclusion that a member at the commencement of the winding up of a company limited by shares cannot prove in the winding up for damages designed to indemnify him for loss sustained in subscribing share capital to the company. The member's

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only title to such damages would depend on his having sustained loss through a subscription of share capital. If he were to obtain indemnity from the company in respect of that loss he could not logically be regarded as having subscribed the share capital for the subscription of which the company had indemnified him.

Central to his liability is s. 360(1) of the Code. That section requires that, on the winding up of a company to which it applies, every member is liable to contribute to the property of the company in accordance with the formula it prescribes. That is an ineluctable obligation of those who are members at the commencement of the winding up, as it has been ever since the Companies Act 1862, s. 38 of which was the model for s. 360. The obligation is to contribute to an amount sufficient for payment of the company's debts and liabilities and the costs, charges and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories among themselves, with the qualifications that the section sets out:.............The principle is that any claim for debt or damages that a member might mount against the company for any reason at all cannot directly or indirectly diminish the obligation to pay the monetary amount which the member is liable to contribute as a member. ***It must follow that a holder of fully-paid shares cannot diminish the amount of his already-paid contribution to the property of a company that is in liquidation by obtaining [an] indemnity from the company against loss sustained by the making of that contribution. If the member were to prove in the winding up, and receive a dividend designed to provide for such indemnity, he would remain subject to such liability as his membership involved. His contract of membership, being unrescinded, would carry with it an obligation to contribute the par value of his shares. It would not be open to him, having obtained as a dividend an amount equal to the whole or part of his contribution, to contend that in reality his shares were fully paid****."*

This conclusion does not depend on an acceptance of the whole of the reasoning in Houldsworth's Case but is indicated by much of it. It is more particularly indicated by the reasoning of Kay J. and the Court of Appeal in Re Addlestone …, which applied the more general approach in Houldsworth's Case — and in my respectful view naturally and inevitably applied it — to the case of a winding up of a company limited by shares*."*

39. Eiffel said that Lord Justice Lindley in *Addlestone* had correctly set out the true ambit of the approbation and reprobation principle. This is that a person cannot remain a shareholder and have back the capital he/she has contributed, whether by way of an offset against their liability to pay a call or by way of damages representing already invested capital. This was a principle that applied to a limited company. In essence, to repay a shareholder the value of his/her contribution to the company's capital while he/she still continued to hold their shares was a form of unlawful return of capital. After a winding up, the interests of the creditors and other members intervened and would be prejudiced if the capital were reduced.

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40. Eiffel submitted that the speech of Lord Browne-Wilkinson in *Soden v British & Commonwealth Holdings plc* [1998] AC 298 (***Soden***) made clear that this was the law and the basis and scope of the applicable common law principle. *Soden* was concerned with whether a claim for damages against a company for misrepresentations which had induced a purchaser of shares to buy them on the market from an existing shareholder was subordinated by section 74(2)(f) of the UK Insolvency Act 1986. It involved an examination of both *Houldsworth*, *Addlestone* and *Webb*. Eiffel submitted that the House of Lords had had the opportunity to rule but had not decided that *Houldsworth* was either wrongly decided or ought no longer to reflect the common law. *Houldsworth* and the Houldsworth Principle were live issues not least because had the House of Lords considered that *Houldsworth* was wrongly decided or that the Houldsworth Principle was not good law, they could and would surely have said so and thereby have rendered entirely academic the key distinction relied on by Lord Browne-Wilkinson between a share purchase from the company as subscriber (to which the Houldsworth Principle was held to apply) and a share purchase from a third party (to which the Houldsworth Principle was held not to apply).

41. Eiffel submitted that on the contrary the central part of Lord Browne-Wilkinson's reasoning was based on the proper scope of the Court of Appeal's decision in *Addlestone*, which in turn was based heavily on *Houldsworth*. Although the effect of *Houldsworth* had been reversed by the UK Parliament by legislation in 1989 (section 111A of the Companies Act 1985, introduced by section 131 of the Companies Act 1989) its correctness as a matter of common law was not in doubt and was taken as read by both counsel in argument and by Robert Walker J, the Court of Appeal and the House of Lords. Eiffel argued that critically the basis for the key to the distinction drawn by the House of Lords in *Soden* (between a claim for misrepresentation inducing a subscription agreement with the company and one inducing a market purchase) was that in the former case, the acquiring shareholder had contributed the capital, which in economic terms he sought to recover from the company, whereas in the latter case he had not. Accordingly, the distinction could and should be explained as one based on the need to respect the common law rule prohibiting a return of capital save as permitted by statute.

42. In *Soden* (at page 326), Lord Browne-Wilkinson had said as follows (underlining added):

> "*If such a payment [to contribute the sums not previously paid on shares] were not made the capital of the company would not be maintained and the general body of creditors would thereby be prejudiced. If, in such a case, the member could recover by way of damages for breach of the contract to issue the shares at a discount the same amount as he was bound to contribute on the winding up that would indirectly produce an unauthorised reduction of capital of the company. Such a failure to maintain the capital of the company would be in conflict with what Lord MacNaghten (in the Ooregum case [1892] AC 125, 145) said was the dominant and cardinal principle of the Companies Acts, i.e., "that the investor shall purchase immunity from liability beyond a certain limit, on the terms that there shall be and remain a liability up to that limit.*""

43. Eiffel submitted that this view and analysis was consistent with other judicial explanations for *Houldsworth*, to the effect that the winding up order put an end to the normal relationships between the shareholders, creditors and the company (see for example, *Re Hull & County Bank (Burgess' Case)* (1880) 15 Ch D 507 (***Burgess' Case***) and *Southern British National Trust v Pither* (1937) 57 CLR 89, at 113, 114 per Dixon J). Furthermore, this view was supported by the analysis of a highly regarded company law specialist, Professor Gower in *The Principles of Modern Company Law* (2nd Edn., 1957 at pages 295-6) where the decision in *Houldsworth* had been justified on two grounds. First, that to recover damages would be inconsistent with the terms of the implied contract between all shareholders. Second, that the company's share capital should be recognised as "*a guarantee fund for creditors*."

44. Eiffel submitted that there is a common law rule in the form articulated by Lord Browne-Wilkinson in *Soden*. This rule, or principle, had been assumed without argument to be correct in this jurisdiction in the judgment of the former Chief Justice (Smellie CJ) in *Re SPhinX* [2010 (2) CILR 1] (which I discuss further below) and had been approved as part of the *ratio* in decisions of the English Court of Appeal (*Addlestone*) and House of Lords (*Soden*). Even if it was arguable, Eiffel said, that Lord Browne-Wilkinson's observations in *Soden* were *obiter,* they remained of very great persuasive authority and should be followed by this Court.

Gower

45. I have noted Eiffel's reference to Professor Gower's discussion of this issue in the second edition of his well-known company law textbook (as had Justice Tadgell in *Webb*). It is worth noting what Professor Gower had said:

> *"In fact, however, it seems clear that the company is not liable in damages when shares have been purchased in such circumstances. This is because of the anomalous rule, laid down by the House of Lords in Houldsworth v. City of Glasgow Bank, to the effect that damages cannot be recovered from the company unless the allotment of shares is also rescinded. In laying down this rule the House do not seem to have recognised fully the separation between the corporate entity and the member, but the decision can be explained on two grounds. The first is that to recover damages would be inconsistent with the terms of the implied contract between all the shareholders …The second justification depends on the recognition of share capital as a guarantee fund for creditors……As we shall see, this conception is at the basis of the rule that a shareholder who wishes to rescind must do so promptly, since the existence of his shares may have led others to extend credit to the company. But if a shareholder were permitted to recover damages notwithstanding that he had lost the right to rescind, the consequences to third parties would be just as detrimental, since the assets of the company would be equally depleted."*

46. Eiffel submitted that this discussion (written in 1957) could be treated as representing a fair analysis of the English common law at that date. Although Professor Gower (generally recognised to be a leading authority on company law) had said that the rule in *Houldsworth* was "*anomalous*", he had offered a principled justification for it. There was no trace in Professor Gower's analysis of an attempt to distinguish *Houldsworth* or to confine it to its Victorian past or to say that it only applied to unlimited companies or partnerships or, critically, to say that it only applied to claims for damages representing unclaimed calls or amounts outstanding from shareholders and had no application to cases where the shareholder held fully paid-up shares.

Can Houldsworth, or the proposition of law based on it relied on by Eiffel, be distinguished in this case?

47. Eiffel rejected, for the reasons I have summarised, the grounds on which the JOLs sought to say that *Houldsworth* and *Addlestone* were distinguishable. It was irrelevant that the Investors are not obligors to DLIFF under the statutory contract. Furthermore, although

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it was true that in the modern era companies did not tend to issue partly paid shares, that was not always the case and there were many cases in which articles placed continuing financial obligations on members. Indeed, the articles in this case did so. Article 6.6 relating to a placement fee and article 6.7 relating to an equalisation credit imposed liabilities that the directors were permitted to impose on members at their discretion.

48. Eiffel also rejected the JOLs' argument (which I summarise below) that allowing the Misrepresentation Claims to be admitted to proof would not result in a breach of the capital maintenance rules or a return of capital as a matter of Cayman Islands law. The JOLs argued that the subscription price paid by the Investors in this case (and in most cases involving Cayman funds) was largely premium and the capital maintenance rules in this jurisdiction (as contained in the Companies Act since 2011) did not impose a solvency test where on a redemption of shares the redemption price was paid out of the share premium account. Eiffel argued that the JOLs' position was based on the proposition that the Misrepresentation Claims were to be treated as in substance claims for the return of the premium paid and as a redemption. This, Eiffel submitted, was wrong.

49. Eiffel said that the JOLs had argued that under modern investment arrangements in the Cayman Islands' financial industry an investor's subscription price often included a substantial premium and therefore returning it to him by way of damages was not (at least to that extent) a return of capital. Eiffel accepted that the Privy Council had confirmed in *DD Growth Premium v RMF Market Neutral Strategies* [2018] BCC 152 (***DD Growth***) that, since 2011, Cayman Islands company law had allowed redemption payments out of a share premium account without the need to satisfy the solvency test. However, Eiffel submitted that it did not follow from this that the admission to proof of the Misrepresentation Claims was permissible and unaffected by the capital maintenance rules. Admission of (and payment of a dividend on) the Misrepresentation Claims was not the equivalent of paying the redemption price out of the share premium account. Eiffel argued that the Misrepresentation Claims were for damages for misrepresentation, which sought to put the Misrepresentation Claimants in the position they would have been in had they not invested at all. That inevitably involved them receiving and included compensatory damages for having contributed an

amount which represented the base capital invested. The damages (and sums sought by the Misrepresentation Claimants) were a proxy for the return of capital.

50. Eiffel argued that while it might be technically correct to say that the shares were purchased by Investors at a premium, and that the premium was then allocated to a share premium account which did not form part of the company's base capital, it was irrelevant in this case. Eiffel submitted that if Investors were permitted to prove for damages for misrepresentation in the amount of the whole of their invested capital, including the premium to par, that would drive a coach and horses through section 34(2) of the Companies Act which prohibited a *distribution* of that part of a company's capital (i.e., that part allocated or transferred to the share premium account) to members unless the company was cash flow solvent. It would be inconsistent, Eiffel said, to require cash flow solvency as a pre-condition to a distribution to members out of the share premium account but to allow the sums credited to that account to be available to meet a proof for damages claimed by a member for misrepresentation, in the amount of the premium he/she had paid for his/her shares. The JOLs' argument based on *DD Growth*, that there was no solvency test governing distributions to shareholders from the share premium account, was wrong. Although there was no solvency test for the payment of redemption monies out of the share premium account, that was not the case for "*distributions or dividends*." A payment of damages for misrepresentation was not the payment of the redemption price or analogous to such a payment. It was, at least in commercial terms, the making of a return of capital to the member (that is, a distribution) and the payment of such damages was not a permitted use of the share premium account at all. Eiffel submitted that it would be surprising (and inconsistent with the purpose of the relevant provisions in the Companies Act) if the sums credited to the share premium account could not only be used for that purpose but could be paid away free from any solvency condition. The flaw in the JOLs' argument was to equate damages for misrepresentation with a claim for the redemption price.

The judicial treatment of Houldsworth (and the Houldsworth Principle) in other common law jurisdictions

51. Eiffel submits that no authority had gone so far, at least in terms of its *ratio*, as to decide that *Houldsworth* (or the Houldsworth Principle) were no longer good law or part of the common law.

52. Eiffel says that:

(a). *Houldsworth* has been followed and applied in Australia and Canada (see *Re Dividend Fund Inc (in liquidation)* [1974] VR 451*; Milne v Durham Hosiery Mills* (1925) 3 DLR 725 and *Webb* at 405-406).

(b). in *Re Televest* [1995] Bda LR 71 (***Televest***) the Supreme Court of Bermuda (Ground J) declined to refuse to follow *Houldsworth* (implicitly accepting its correctness in law) but chose to distinguish it on the facts.

(c). in the recent decision of the Singapore High Court (Justice Chua Lee Ming) in *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd & Li Hua* [2021] SGHC 217 (***Song Jianbo***), the court did doubt that *Houldsworth* should be followed but in the end distinguished it. The grounds of distinction (that the liability of the shareholders in this case was limited and that the shares were redeemable) were, Eiffel argued, inapposite since the company in question had not actually been wound up.

(d). the decision of the High Court of Australia in *Sons of Gwalia Ltd v Margaretic* [2007] 3 LRC 462 (***Sons of Gwalia***), on which the JOLs placed great reliance, was certainly critical of *Houldsworth* in different ways in *obiter dicta* across the six judgments but the actual *ratio* of the decision was concerned with the priority to be accorded to a claim by a member for damages for misrepresentation under the applicable legislation and not the availability of a proof in a winding up.

53. Eiffel submitted that in *Televest* while Mr Justice Ground had declined to follow *Houldsworth,* he had accepted its correctness in law and chose to distinguish it. Eiffel noted that Ground J did not say that just because the principle in *Houldsworth* had been abrogated in the UK he was free to disregard it. Instead, he distinguished *Houldsworth*

on the basis, among other things, that it was a case dealing with an unlimited liability partnership where the shareholder concerned owed call monies. He also distinguished *Houldsworth* as a business from the company in the case before him, which was an investment vehicle. Eiffel submitted that this Court should not follow Ground J's decision. First, at least based on the report of his judgment, Mr Justice Ground had not had the benefit of full argument on the issue (as had been the case here). Second, it was unclear as to what he meant and what was covered by his reference to an "*investment vehicle*" (was a holding company or only a fund covered?) and treating such vehicles as outside the rule in *Houldsworth* was not based on any clear principle. It did not appear that Ground J had considered *Addlestone* (a case in which the company concerned was limited) or *Burgess* and *Televest* was decided before *Soden*.

54. Eiffel made a number of points in relation to *Sons of Gwalia*:

(a). first, the case was distinguishable from the present case on the basis that unlike the Misrepresentation Claimants, Mr Margaretic did not acquire his shares by subscription but on the open market from a third party (the case considered the scope and effect of section 563A of the Corporations Act 2001 (the ***2001 Act***) which stated that "*payment of a debt owed by a company to a person in the person's capacity as a member of the company whether by way of dividends profits or otherwise is to be postponed until all debts owed to or claims made by persons otherwise than as members have been satisfied*"). The case was therefore on all fours with *Soden* in that the damages claim was admissible to proof and was not subordinated.

(b). the analysis and discussion of *Houldsworth* was *obiter* in the decision of the majority (comprising Justices Heydon, Hayne, Gleeson, Gummow, Kirby and Crennan). Eiffel reviewed their decision and reasoning as follows.

(c). Eiffel submitted that Justice Heydon had correctly described the irrelevance of *Houldsworth* and the basis and *ratio* of the High Court's ruling in his short judgment at [260]-[264]. Heydon J had agreed with the orders proposed by Hayne J on the issue of whether Mr Margaretic's claim was within section 553 of the 2001

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Act and was therefore subordinated. As regards *Houldsworth,* Justice Heydon had said that (underlining added):

> *"[263] So far as Webb … and Houldsworth …were relied on by Gwalia and ING in relation to the construction of s 563A, it is not necessary to say more about them than that which Hayne J has said in explaining why they are not determinative (see Hayne J's reasons at paras [180]–[190], above) [and we can look at that]. Further, the issue on which the Webb case was decided was whether a claim was provable, whereas the issue on which the Gwalia appeal is to be decided in relation to s 563A turns on whether a provable claim ranks after or alongside the claims of general creditors.*
>
> *[264]. So far as those cases were relied on by ING in its written submissions in chief in support of a contention that Mr Margaretic's claim was not provable, by reason of a principle which, it contended, had been stated in Houldsworth's case and approved by this court in the Webb case, it is not necessary to deal with them. That is because both at the start and at the close of his final address, counsel for ING abandoned that contention. If that contention was not abandoned, I agree with Hayne J's reasons for rejecting it …"*

(d). Justice Hayne had also considered that the case was not about the Houldsworth Principle. Justice Hayne had formulated the question to be decided at [135] (does a shareholder's claim in deceit or under the applicable consumer and investor protection statutes rank with the claims of other creditors or is it postponed?) and then said (at [136]) that the questions in the case were to be answered by reference to the applicable statutory regime, in particular sections 553 and 563A of the 2001 Act and did not depend upon any principle of judge-made law: "*In particular, they do not depend upon the application, or the identification of the content, of what is sometimes called 'the rule in Houldsworth's Case'*." Justice Hayne had also noted that after the conclusion of oral argument on the appeal the parties had been asked to make submissions about whether Mr Margaretic's claim was a provable debt which Eiffel said might explain why *Houldsworth* came to be considered by the High Court and why it was dealt with in a somewhat piecemeal manner.

(e). Gleeson CJ had noted that the principal issue in the case was whether "*the (assumed) liability*" of Sons of Gwalia (the company) was a liability to Mr

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Margaretic in his capacity a member and had dealt with *Houldsworth* under the heading "*A Preliminary Question.*" The Chief Justice had noted (at [13]) that according to the second appellant (ING) there was a principle of the common law emerging from *Houldsworth* which precluded a shareholder from proving in a winding up for damages for misrepresentation inducing any acquisition of shares unless the shareholder had first rescinded the membership contract but that once the company had gone into liquidation, rescission was no longer available. ING had submitted that if that was correct, section 563A of the 2001 Act could not apply because the section assumed and subordinated a liability which did not exist. The Chief Justice noted that Mr Margaretic was not a party to any contract with the company for the acquisition of the shares. While he had said that the "*principle in Houldsworth [was] famously elusive"* his conclusion had been that, while "*Houldsworth was never authority for a principle as wide as that asserted by ING*" the appeal "*was to be decided upon the true construction of the provisions of the 2001 Act and in particular section 563A*."

(f). Justice Gummow agreed with the decision of Justice Hayne. Eiffel said that even though he had dealt with *Houldsworth* at length, had sought to explain what the decision was to be understood as standing for and had said that "*there was much to be said for the view that a company satisfying its liability in tort to a member should not be characterised as attempting an unauthorised return of capital*" (at [85]), he had, importantly, concluded that both "*the 'principle' attributed to Houldsworth and Houldsworth itself [had nothing] to do with the presently relevant provisions of the 2001 Act*" (see [86]). Eiffel noted Justice Gummow's rejection of the proposition that as a matter of Australian law there was a common law principle derived from *Houldsworth* that prevented "*a shareholder claim such as that of Mr Margaretic arising in the first place, irrespective of statutory issues respecting admission to proof and ranking of claims*" and his view that *Houldsworth* "*did not supply the support relied upon for the reasoning in Webb"* but submitted that these views were not part of the reasoning which supported his decision in the case and in any event should not be followed by this Court. For completeness, it is worth quoting what Justice Gummow said. He had prefaced his discussion of *Houldsworth* by noting that the need to deal with the decision arose because of the way that ING had put its case. At [47]-[49] he had said this (underlining added):

> *"47. "In what follows, I deal further with two additional and related points. The first is the adequacy of the reasons given in Webb … and the second is the dependence upon that reasoning of a principle said to be derived from the speeches in the House of Lords in Houldsworth …*
>
> *48. It also is appropriate to deal in some detail with Houldsworth for a particular reason, which emerges from the way in which ING put its case on what would be a threshold issue. In its written submissions ING submitted that 'the principle in Houldsworth' prevented, as a matter of common law, a shareholder claim such as that of Mr Margaretic arising in the first place, irrespective of statutory issues respecting admission to proof and ranking of claims. In the course of oral argument counsel appeared to shift ground but, however that may be, in subsequent supplementary written submissions ING again invoked 'the rule in Houldsworth' and its significance for Webb, upon which decision ING relied.*
>
> *49. As these reasons will seek to demonstrate, in Australia the existence of any such common law 'principle' of company law based upon Houldsworth should be rejected. Further Houldsworth did not supply the support relied upon for the reasoning in Webb."*

(g). Justice Kirby had focussed on and agreed with the approach adopted by the Chief Justice to the construction of section 563A. He was not concerned to analyse and assess whether Mr Margaretic was entitled to maintain a proof. Justice Kirby referred (at [103]) to the result of the appeal as being that "*any 'debt' later demonstrated to be 'owed'*" by the company to Mr Margaretic would not be postponed to the debts owed to the general creditors.

(h). Eiffel submitted that it was not possible to distil a single rationale from these judgments which was critical of *Houldsworth* and undermined the propositions of law which Eiffel argued *Houldsworth* stood as authority for, nor which provided a clear and cogent justification as to why *Houldsworth* (and those propositions of law) should not be followed in any modern common law jurisdiction which had not statutorily modified or abrogated them. *Sons of Gwalia* was not a decision forming part of English law or the law of the Cayman Islands and there was much in the reasoning, particularly that of Justice Gummow, that was focussed on the position in Australia, in particular dealing with the impact on the decision of the need to interpret and give effect to Australian investor protection legislation.

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The irrelevance in this jurisdiction of the statutory reversals of the Houldsworth Principle in other jurisdictions

55. Eiffel argued that the bar on claims for damages for misrepresentation by shareholders against the company remained part of the English common law until it was reversed or substantially modified by section 111A of the Companies Act 1985, introduced by section 131 of the Companies Act 1989. That statutory provision was now contained in section 655 of the UK Companies Act 2006 and stated as follows:

> *"A person is not debarred from obtaining damages or other compensation from a company by reason only of his holding or having held shares in the company or any right to apply or subscribe for shares or to be included in the company's register of members… in respect of shares."*

56. Eiffel submitted that this Court should therefore proceed on the basis that the principle in *Houldsworth* was properly part of English law until the Companies Act 1989 came into force and that it required statutory intervention to reverse it. That was clear from the debate which had preceded the enactment of section 131 of the Companies Act 1989, which was said to have been supported by a memorandum from the Law Society. That memorandum appeared to have been the output of a wide consultation among the legal profession and the financial sector at the time and section 131 was one part of the UK's broader de-regulation of the financial markets in the mid-1980s and the concomitant investor protections.

57. Eiffel noted and of course accepted that legislative bodies in some other common law jurisdictions had passed legislation to similar effect. This had been done in Bermuda by section 54A of the Companies Act 1981, with effect from 23 July 1999; in Australia by section 247E of the 2001 Act with effect from 18 December 2010 and in Hong Kong by section 40B of the Companies Ordinance (Winding Up and Miscellaneous Provisions) (Cap 32), enacted by section 10 of the Companies (Amendment) Ordinance (Ord No 3 of 1997), with effect from 10 February 1997. However, other legislatures had not done so. Canada, New Zealand, Singapore and the BVI have not enacted equivalent legislation. In fact, in Canada the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act were amended in 2009 in order expressly to subordinate misrepresentation claims.

58. Eiffel submitted that this Court should therefore proceed on the basis that reversal or modification of *Houldsworth* was a matter for the Cayman Parliament following proper consultation and that since to date Parliament had not seen fit to enact legislation to reverse or modify *Houldsworth*, the Court should continue to respect and apply it.

Can and should this Court refuse to follow the Houldsworth Principle?

59. Eiffel submitted that this Court cannot and should not refuse to follow *Houldsworth* and the Houldsworth Principle.

60. Eiffel said that two related questions arose for consideration. First, what would be the basis on which the Court could refuse to follow *Houldsworth* and the Houldsworth Principle? Secondly, what approach to the existing law should the Court adopt?

61. Eiffel cited a number of well-known decisions including *Frankland v R* 1987-89 MLR 65 (an appeal to the Privy Council from the Isle of Man); *Willers v Joyce & Anor (No 2)* [2018] AC 843 (UK Supreme Court); *National Trust for Cayman Islands v Planning Appeals Tribunal* [2002] CILR 59; *Schramm and Hiscox Syndicate 33 v Financial Secretary* [2004-05] CILR 104 (Cayman Court of Appeal); *Arnage v Walkers (*Mr Justice Doyle, unreported, 5 May 2021) and *International Energy Group Ltd and Zurich Insurance plc UK Branch* [2016] AC 509 (UK Supreme Court).

62. Eiffel made the following points based on, and relied in particular on the following passages in, these judgments:

(a). Sanderson J had set out the proper approach in *National Trust* (at [19]) (underlining added):

> *"As the Court of Appeal in Miller v R has acknowledged (1998 CILR at 164), unanimous decisions of the English Court of Appeal are strong persuasive authority locally but not binding authority. In de Lasala v de Lasala [1980] AC 546, the Privy Council stated that on questions of the common law, a decision of the House of Lords was of very great persuasive authority locally because of the common membership of those courts. However, it stated that this principle does not apply where circumstances locally make it inappropriate to develop a field of common law in a manner similar to England."*

(b). in *Schramm,* the Court of Appeal had considered the circumstances in which a local Cayman judge could fill a gap in the common law in order to follow legislative changes made in England. The background was that in England, before legislation had cured the problem, there could be no restoration to the register of a company dissolved following a voluntary winding up. That problem had been cured by statute but similar legislation had not been enacted here. The Court of Appeal held that it was not the judicial function to fill the gap and amend the law here to achieve the same result. Just because the UK Parliament had enacted company law legislation to correct an allegedly perceived injustice does not justify this Court from amending the law by judicial decision (so that *Schramm* is on all fours with the present case and met the JOLs' argument that *Houldsworth* should no longer be regarded as good law because it has been reversed by statute in the UK). At [8] of his judgment, Collett JA had said that (underlining added):

> *"By contrast, the Cayman companies legislation, enacted by the local legislature since it ceased to be a dependency of Jamaica, has always based itself upon the 1865 legislation of the United Kingdom and not the later models. Extensive overhaul of this legislation was undertaken here at the end of the 1980s but, despite that review, no decision was taken to follow the later UK models instead. That decision must be regarded as a deliberate one on the part of the well-informed local legislature and is readily to be understood as a reaction to the establishment of the formidable array of offshore companies registered in these Islands, which present a scenario unlike that of the United Kingdom, Canada, Australia or other established countries of the Commonwealth: they do not, to anything like the same extent, seek to attract overseas business incorporations. Occasional injustice must be regarded as the price which the local legislature has considered to be worth permitting to occur rather than to introduce the uncertainties which might plague the Law if the more recent English precedents, or indeed those very recently introduced in Australia, were to be adopted here. Indeed Australia has radically reformed its legislation within the recent past."*

(c). in *International Energy Group* (at page 209), Lord Neuberger said that (underlining added):

> *"In conclusion, it seems to us that it is at least worth considering what lessons can be learnt from the history summarised in this judgment and more fully treated by Lord Mance and Lord Sumption JJSC. There is often much to be said for the courts developing the common law to achieve what appears to be*

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a just result in a particular type of case, even though it involves departing from established common law principles. Indeed, it can be said with force that that precisely reflects the genius of the common law, namely its ability to develop and adapt with the benefit of experience. However, in some types of case, it is better for the courts to accept that common law principle precludes a fair result, and to say so, on the basis that it is then up to Parliament (often with the assistance of the Law Commission) to sort the law out. In particular, the courts need to recognise that, unlike Parliament, they cannot legislate in the public interest for special cases, and they risk sowing confusion in the common law if they attempt to do so.

When the issue is potentially wide ranging with significant and unforeseeable (especially known unknown) implications, judges may be well advised to conclude that the legislature should be better able than the courts to deal with the matter in a comprehensive and coherent way. It can fairly be said that the problem for the courts in taking such a course is that the judges cannot be sure whether Parliament will act to remedy what the courts may regard as an injustice. The answer to that may be for the courts to make it clear that they are giving Parliament the opportunity to legislate, and, if it does not do so, the courts may then reconsider their reluctance to develop the common law. For the courts to develop the law on a case-by-case basis, pragmatically but without any clear basis in principle, as each decision leads to a new set of problems requiring resolution at the highest level, as has happened in relation to mesothelioma claims, is not satisfactory either in terms of legal certainty or in terms of public time and money."

63. Eiffel submitted that under established practice this Court will generally apply the English common law save to the extent that it has been overruled by or was inconsistent with Cayman legislation or where the Court had developed the common law in this jurisdiction in a materially different way from that in England. Eiffel noted that the Privy Council was not bound by the English common law (or decisions of the House of Lords or Supreme Court) where local conditions required that a different approach be taken (see Mance and Turner, *Privy Council Practice* (2017) at [5.30]-[5.31]). Eiffel argued that there was nothing inappropriate about following *Houldsworth* and the Houldsworth Principle and there was no Cayman custom, practice or trend that had been identified that would suggest that the law as established thereby was causing a problem in the Cayman Islands such that it should not be followed, or that the Privy Council would regard itself as free to depart from it because of something particular to the Cayman Islands.

64. Eiffel argued that Parliament has had thirty-three years to follow the UK Parliament and enact the equivalent of section 131 of the UK's Companies Act 1989 (now section 655 of the UK 2006 Companies Act); twenty-three years to follow the Bermuda legislature

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and twenty-five years to follow Hong Kong, but it had not done so. The Companies Act was regularly reviewed and frequently revised so that it was most unlikely that the absence of a statutory reversal of *Houldsworth* was the result of an oversight.

65. Furthermore, Eiffel submitted that it would be positively dangerous for the Court to "*play lawmaker.*" Given the enormous importance of certainty to investors who choose to invest in this jurisdiction it would be rash for the Court to create a new class of potential creditor (who would, if the JOLs were right) take priority over even fully redeemed but unpaid investors in a winding up. It was reasonable to infer that those who invest in Cayman Islands' companies by way of acquiring redeemable shares did so on the basis of the law as it stands (or was understood), namely that whether they have redeemed or not as at the date of the winding up, they will not have to compete *pari passu* with (let alone be subordinated to) members who were misled by the company into investing and want their investment back. Eiffel said that if the law in Cayman was to adopt that position then the widest prior consultation among the financial community was essential. Only Parliament could do that, as the UK Parliament had done in the late 1980s before enacting section 131 of the Companies Act 1989. Standing back, Eiffel said, a refusal now by this Court to follow *Houldsworth* risked serious adverse and unintended consequences. For example, there were many ordinary Cayman companies that were not engaged in the investment or funds industry for whom the consequences would need to be considered (*Houldsworth* applied to all of them). Further, it could be assumed that currently ordinary unsecured creditors and lenders dealt with and invest in Cayman companies on the basis that misrepresentation claims would not be admitted to proof. If all investors were now permitted to rank *pari passu* with unsecured creditors, it might have a serious impact on the willingness of unsecured lenders to lend. There was also the risk of opening the floodgates to investor claims for misrepresentation and in turn burdening officeholders with a potentially unmanageable adjudications process.

The Proof Point - the JOLs' position

Proper approach and merits

66. The JOLs said that in addressing the availability (and priority) of damages claims made by shareholders based upon misrepresentation, it was necessary to begin by examining

the decision in *Houldsworth* and its subsequent judicial treatment by foreign courts, noting that such decisions were persuasive but not determinative. As I note below, the JOLs submitted that there was no Cayman Islands authority which determined whether *Houldsworth* was good law and should be followed in this jurisdiction.

67. In the JOLs' view, in terms of merits, considerations of fairness supported allowing the Misrepresentation Claimants to claim as creditors (and to rank *pari passu* with other creditors). This was because DLIFF (and DLIF) had been operated as a massive fraud from the beginning and the JOLs could not see why, as a matter of fairness, Investors who had, by mere good fortune, lodged their redemption requests shortly before the commencement of the liquidation should enjoy priority over the other Investors who had failed for whatever reason to do so. All (or most) of the Investors were, in substance, in the same position and had probably been induced to invest by the fraud of DLIFF's management and there was no reason why the law should produce a result which prioritised and preferred some of the Investors over others. The JOLs said that *Houldsworth* and *Addlestone* were the only two English cases in which the so-called Houldsworth Principle had been applied to bar misrepresentation claims by shareholders and on the basis of the *ratio* of those decisions, they only applied to a case where the shareholder was under a liability to contribute funds to the company in liquidation in order to meet the claims of creditors and what the shareholder was not allowed to do was to assert what was, in effect, an offsetting damages claim to evade that subsisting liability to contribute.

Houldsworth

68. The JOLs submitted that the true scope of the principle for which *Houldsworth* was authority (as Gleeson CJ had noted in *Sons of Gwalia*) had been set out by Lindley LJ in *Addlestone* (at pages 205-206) as follows: "*The principle on which the House of Lords decided Houldsworth .... was that a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money - he must not directly or indirectly receive back any part of it.*" Where a shareholder was liable to make a contribution to be applied in payment of the debts and liabilities of the company then it was inconsistent with his position as a shareholder to

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claim back any of that money. The reason why Mr Houldsworth's claim was rejected was that his claim for damages was inconsistent with his contract of membership, which contract could not be rescinded given the liquidation of the company. Eiffel's formulation of the proposition of law to be derived from *Houldsworth* was too broad.

69. The JOLs noted that the House of Lords (comprising Lord Chancellor Earl Cairns, Lord Selborne, Lord Hatherley and Lord Blackburn) had agreed with the decision of the Court of Session and held that Mr Houldsworth could not maintain his claim for damages. The JOLs said that their Lordships had held that (a) as the winding-up had commenced, it was too late for rescission and *restitutio in integrum* (based on the decisions in *Oakes v Turquand* (1867) LR 2 HL 325 and *Tennent*) and (b) in those circumstances, Mr Houldsworth's claim for damages would not be allowed on the basis that it was inconsistent with his outstanding obligations (under the statutory contract).

70. The Lord Chancellor, Earl Cairns, had considered the decision of the House of Lords in *Addie v The Western Bank of Scotland* (1867) LR 1 HL 145 to be of sufficient authority to "*go far, if it did not go the whole way, to decide the present appeal*" but also invited their Lordships "*to look at the case on principle.*" He had identified the question of principle to be decided as follows:

> *"The question, therefore, mainly argued at your Lordships' Bar, and upon which the decision of this case must, as I think, depend, was this: Can a man, induced by the fraudulent misrepresentations of agents of a company to take shares in the company, after he discovers the fraud, elect to retain the shares, and to sue the company for damages?"*

71. Earl Cairns had considered that Mr Houldsworth's action for damages was inconsistent with his contract of membership and that, having affirmed the contract of subscription, Mr Houldsworth was impermissibly seeking to approbate and reprobate. He said this (at pages 324-325) (underlining and emphasis added):

> *"A man buys from a banking company shares or stock of such an amount as that he becomes, we will say, the proprietor of one hundredth part of the capital of the company. A representation is made to him on behalf of the company that the liabilities of the company are £100,000, and no more. His contract, as between himself and those with whom he becomes a partner, is that he will be entitled to one hundredth part of all the property of the company, and that the assets of the company shall be applied in meeting the liabilities of the company contracted up*

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to the time of his joining them, whatever their amount may be, and those to be contracted afterwards, and that if those assets are deficient the deficiency shall be made good by the shareholders rateably in proportion to their shares in the capital of the company. This is the contract, and the only contract, made between him and his partners, and it is only through this contract, and through the correlative contract of his partners with him, that any liability of him or them can be enforced.

……..

He finds out, however, after he joins the company, that the liabilities were not £100,000 but £500,000. He is entitled thereupon, as I will assume, to rescind his contract, to leave the company, and to recover any money he has paid or any damages he has sustained; ***but he prefers to remain in the company and to affirm his contract****, that is to say, the contract by which he agreed that the assets of the company should be applied in paying its antecedent debts and liabilities.* ***He then brings an action against the company to recover out of its assets the sum, say £4000, which it will fall upon his share to provide for the liabilities, over and above what his share would have had to provide had the liabilities been as they were represented to him****. If he succeeds in that action, this £4000 will be paid out of the assets and contributions of the company. But he has contracted, and his contract remains, that these assets and contributions shall be applied in payment of the debts and liabilities of the company, among which, as I have said, this £4000 could not be reckoned.* ***The result is, he is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide; in other words, he is in substance, if not in form, taking the course which is described as approbating and reprobating, a course which is not allowed either in Scotch or English law****.”*

72. The JOLs submitted that the essence of Lord Cairns’ reasoning was founded on the characterisation of Mr Houldsworth as a partner, which in substance he was, because he had originally started a partnership and once it was incorporated, it was incorporated as an unlimited company. Therefore, Mr Houldsworth remained liable as shareholder to meet all the assets and liabilities of the partnership and it was not within the intent or scope of the partnership contract that the assets and liabilities of the partnership should be applied in satisfying a liability which was due to him.

73. The JOLs noted that Lord Selborne considered Mr Houldsworth's claim for damages to be inconsistent with his (unrescinded) contract of membership with the company. He said this (at page 329) (underlining added):

"[here] it is impossible to separate the matter of the Pursuer's claim from his status as a corporator, unless that status can be put an end to by rescinding the contract which brought him into it. His complaint is that by means of the fraud alleged he was induced to take upon himself the liabilities of a shareholder. <u>The loss from</u>

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> *which he seeks to be indemnified by damages is really neither more nor less than the whole aliquot share due from him in contribution of the whole debts and liabilities of the company; and if his claim is right in principle I fail to see how the remedy founded on that principle can stop short of going this length. But it is of the essence of the contract between the shareholders (as long as it remains unrescinded) that they should all contribute equally to the payment of all the company's debts and liabilities.*"

74. The JOLs submitted that Lord Selborne had treated Mr Houldsworth's claim as being one that in substance was made against the other partners so that he was seeking to put upon them the share of the debts and liabilities of the partnership which he, by being one of the co-partners, had agreed to bear. Lord Selborne's reasoning was founded on notions of partnerships, the rights and obligations of partners, transmuted through, in this case, to an unlimited company. Furthermore, his reasoning suggested that the corporation may not be a separate legal entity and it was relevant to recall that the judgment was handed down in advance of the House of Lords' decision in *Salomon v Salomon* [1897] AC 22. The JOLs said that it had to be borne in mind that *Houldsworth* had been decided at a fairly early stage in the development of English company law and that the partnership model had strongly informed the legal analysis (reinforced by the facts of the case, given the history of the company and the fact that it was an unlimited company).

75. The JOLs said that Lord Hatherley had also considered (at page 333) that Mr Houldsworth's status as shareholder was "*fatal to [his] right to the relief he asks*" and that he was "*trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself.*"

76. The JOLs submitted that when considering the inconsistency relied on it was important to remember that the company in *Houldsworth* was an unlimited company. Since it was an unlimited company Mr Houldsworth became liable to pay calls as a contributory and the liability was unlimited. What he therefore sought to do by his action for damages was, in effect, to obtain from the company reimbursement in respect of his liability to pay calls in the winding up of the company, in circumstances where he could no longer obtain rescission of the contract of allotment pursuant to which he had acquired the shares which exposed him to the liability to pay calls. As such, he was seeking to avoid his liability as a shareholder and to reduce the capital of the company available to meet the claims of creditors.

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Addlestone

77. The JOLs noted that *Addlestone* concerned a limited and not an unlimited company but crucially the shares had not been fully paid. While the company had purported to issue £10 preference shares at par, they were in fact issued at a discount. After the company had gone into liquidation, the liquidator made calls on the shareholders for the amounts unpaid on the shares (£2, 10 shillings). The relevant shareholders (the JOLs say no doubt in response) then sought to make claims for damages in respect to the issue of preference shares. Accordingly, the JOLs say, *Addlestone* is a case like *Houldsworth* in the sense that the shareholders were under a liability to contribute to the company albeit that they were not under an uncapped liability to contribute.

78. In these circumstances, it was unsurprising they say that the Court of Appeal (Lindley LJ) had followed *Houldsworth*. He held that *Houldsworth* was authority for the proposition that where a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, then it was inconsistent with his position as a shareholder to seek to claim back any of that money. Therefore, like *Houldsworth*, the decision in *Addlestone* was founded on considerations relating to the maintenance of the company's capital which meant that the damages claim was inconsistent with the plaintiff's obligations as a shareholder.

Webb

79. The JOLs noted that *Houldsworth* and *Addlestone* had been considered by the High Court of Australia in *Webb*. In 1990, three affiliated building societies faced liquidity issues and subsequently went into liquidation. A shareholder, Webb Distributors, was appointed as a representative of the holders of non-withdrawable shares (who claimed they had been deceived as to the nature of their shares). The State of Victoria had been assigned the claims of depositors and so became the societies' majority creditor. The liquidator of the societies sought directions as to whether the shareholders' claims were provable and whether they were precluded from claiming damages due to the Houldsworth Principle.

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80. The majority in the High Court (McHugh J had dissented) had noted that Tadgell J (in the Appeal Division below) had been conscious of the criticisms made of *Houldsworth* but considered (at page 405d-e) that *"[whatever] criticisms may be made of the reasoning in Houldsworth, the decision has been applied or treated as applicable to limited companies not only in the United Kingdom... but also in Australia... and Canada.*" They had also noted that the decision in *Houldsworth* had been explained in various ways but that it was perhaps best explained by Lindley LJ in *Addlestone*. They had said (at page 406h) that "*the critical question is not whether Houldsworth is right or wrong but whether the proposition which the House of Lords distilled in the case from the provisions of the Companies Act 1862 is incorporated in the provisions of the [Companies (Victoria)] Code*". That proposition was said (at page 406h-i) to be that: "*a shareholder may not, directly or indirectly, receive back any part of his or her contribution to the capital of the company*."

81. The relevant provision of the Companies (Victoria) Code was Section 360(1) which is similar in all material respects to section 49(g) of the Companies Act. Both had their origins in Section 38(7) of the UK Companies Act 1862. The majority agreed (at 407c) with the finding of Tadgell J that "*the principle in Houldsworth received statutory recognition in s360(1) of the Code and was therefore imported into the windings up of the three building societies.*" The majority set out their conclusion as follows (at 408c-e):

> "*Paragraph (k) of s 360(1) will not prevent claims by members for damages flowing from a breach of contract separate from the contract to subscribe for the shares.....But, in the present case, the members seek to prove in the liquidation damages which amount to the purchase price of their shares, which is a sum directly related to their shareholding. Moreover, they sue as members, retaining the shares to which they were entitled by virtue of entry into the agreement and they seek to recover damages because the shares are not what they were represented to be. Accordingly, the claim falls within the area which s 360(1)(k) seeks to regulate: the protection of creditors by maintaining the capital of the company.*"

82. The JOLs, relying on what was said about this reasoning in *Sons of Gwalia* by Gleeson CJ (at [14]) and Justice Gummow (at [86]), submitted that the majority in *Webb* were wrong to say that the principle in *Houldsworth* had received statutory recognition in section 360(1) of the Victorian Companies Code since that principle which operated to bar certain claims for damages by a shareholder was obviously different from section

360(1), which assumed that a claim could be made, and provided for its subordination, in the liquidation (to the claims of other creditors). Moreover, the language of section 360(1), derived from section 38(7) of the 1862 Companies Act, pre-dated the decision in *Houldsworth*. The JOLs also noted that in McHugh J's dissenting opinion he had observed that the principle in *Houldsworth* was "*misconceived because a company is an entity separate from the shareholder*s" and "*a source of injustice because, once the company goes into liquidation, the shareholder can neither rescind the contract of allotment nor obtain damages*." McHugh J had accepted that *Houldsworth* was an entrenched rule of Australian company law and so did not seek to set it aside directly but instead avoided giving effect to the decision by relying on the Trade Practices Act 1974 and by rejecting the argument that the relevant provisions in that Act contained an implied limitation which excluded companies in liquidation.

Soden

83. In 1988, British & Commonwealth Holdings plc (***B&C***) purchased the entire share capital of Atlantic Computers plc for £434m. In 1990, Atlantic Computers went into administration. B&C, which had also gone into administration, brought proceedings against, *inter alia*, Atlantic for damages for negligent misrepresentations said to have been made by Atlantic so as to induce B&C to acquire its shares. The administrators of Atlantic applied to the Court for directions as to the priority of such claims under section 74(2)(f) of the UK Insolvency Act 1986.

84. This was the successor provision to section 38(7) of the UK Companies Act 1862 and was materially similar to both section 360(1)(k) of the Victorian Companies Code and section 49(g) of the Companies Act. It provides as follows:

> *"(1) When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves.*
>
> *(2) This is subject as follows:*
>
> *………*

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> (d) *in the case of a company limited by shares, no contribution is required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member;*
>
> ………
>
> (f) *a sum due to any member of the company (in his character of a member) by way of dividends, profits or otherwise is not deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves."*

85. The question in *Soden* was whether the claim of B&C fell within section 74(2)(f). It was not argued that the claim for damages was barred by *Houldsworth* so that the scope of any principle established by *Houldsworth* did not arise for determination. At first instance, Robert Walker J (as he then was) found that B&C was not claiming in its character as a member and distinguished the decisions in *Addlestone* and *Webb* on the basis they concerned claims by original (i.e. subscribing) members, and that "*by contrast, B&C was never an original member in respect of any shares in Atlantic [and nor does B&C seek] to withdraw from Atlantic, directly or indirectly, any capital which [it] has ever contributed."* The Court of Appeal, in upholding the decision of Robert Walker J, concluded that the majority decision in *Addlestone* and the decision in *Webb* failed to give the proper weight to the statutory language used and considered that there were qualifications upon the principles regarding the maintenance of capital and that members come last. On appeal to the House of Lords, Lord Browne-Wilkinson had delivered a speech with the unanimous support of the other members and, as I have already noted, distinguished for the purposes of section 74(2)(f) between claims for damages for misrepresentation from shareholders who subscribed for shares in the company and claims from shareholders who had acquired shares by purchase. In doing so, he had noted as a "*background point*"" that "*there was a principle established in Houldsworth ….. that a shareholder could not sue for damages for misrepresentation inducing his subscription for shares unless he first rescinded the contract and that once the company had gone into liquidation such rescission was impossible*."

86. The JOLs submitted that Lord Browne-Wilkinson's formulation of the applicable principle and the proposition of law to be derived from *Houldsworth* was both *obiter* and, for the reasons summarised above relating to the JOLs' submissions as to the

proper interpretation of the basis for the decision in that case, too wide and unsupportable. It should not be treated as authoritative or persuasive and should not be followed by this Court.

Sons of Gwalia

87. The JOLs argued that the decision and reasoning of the majority supported their case. The High Court of Australia had decided that the Houldsworth Principle did not bar Mr Margaretic's claim and also that that claim for damages was not subordinated under s.563A. The JOLs noted that ING had invited the High Court of Australia to find that "*the principle in Houldsworth*" prevented, as a matter of common law, a shareholder claim of the type made by Mr Margaretic from arising, irrespective of statutory issues respecting admission to proof and the ranking of claims. The JOLs argued that, following a detailed analysis of *Houldsworth* and its interpretations in the UK and Australia, the High Court had rejected the existence of any principle of company law that precluded a member from proving in the winding up of a company for damages for misrepresentations inducing the acquisition of shares where the member had not rescinded the contract pursuant to which the shares had been purchased and where rescission was no longer available by reason of the company's insolvency.

88. The JOLs submitted that the majority's decision on the *Houldsworth* point was part of the *ratio*. They said that point had been raised and put before the Court and the High Court had to decide it because if it was right that Mr Margaretic's claim was barred then the asserted subordination did not arise. The JOLs noted that this was supported by the headnote in the law report (at page 464) which stated as follows:

> *" Per Gleeson CJ, Gummow, Kirby, Hayne, Heydon, and Crennan JJ [so that is the six of them. There was one dissent]. There was no general policy in the 2001 Act that members come last and there was no common law principle of company law derived from Houldsworth applicable in Australia, since neither Webb nor Houldsworth itself established any common law principle that a shareholder, no matter how his shares were acquired, could not sue a company to recover losses caused by the company's misrepresentation inducing its acquisition of shares if the company went into liquidation."*

89. The JOLs, like Eiffel, reviewed the reasoning of the majority.

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90. They said that Gleeson CJ had analysed *Houldsworth* as involving a shareholder impermissibly seeking to evade his liability to pay calls made and required to be paid in the winding up.

91. The JOLs submitted that Gummow J had mounted a sustained and compelling attack on the claim that *Houldsworth* was authority for the continuing existence of a wide common law rule prohibiting a shareholder from maintaining a claim for damages for misrepresentation inducing his/her purchase of their shares. Gummow J had devoted various sections of his judgment to *Houldsworth* and (at [49]) had clearly rejected the proposition that as a matter of Australian law there was a common law principle derived from *Houldsworth* that prevented "*a shareholder claim such as that of Mr Margaretic arising in the first place, irrespective of statutory issues respecting admission to proof and ranking of claims*" and had said (in the same paragraph) that *Houldsworth* "*did not supply the support relied upon for the reasoning in Webb.*"

92. The JOLs noted and relied on what Gummow J had said about the majority's reasoning in *Webb*. Gummow J had noted the majority's view that the principle that a shareholder may not directly or indirectly receive back any part of his or her contribution to the capital of the company could be derived from *Houldsworth* and had then observed (at [78] and [79]) that:

> "*78. It is not easy to discern why an action for damages was inconsistent with the features of the contract whereby shares were taken up. Nor is it clear why this inconsistency should have prevented the shareholder from claiming that the fraud of the directors was imputable to the company.*
>
> *79 Accordingly, Houldsworth should not be regarded in Australia as establishing any principle based on the above reasoning, nor does it establish any exception respecting the responsibility of a principal for the frauds of an agent ...*"

93. The JOLs noted that Justice Hayne had also considered *Houldsworth* to have been founded upon considerations of preservation of capital:

> *"The conclusion reached in Webb Distributors concerned, and concerned only, the rights of a member who had subscribed for shares, as distinct from having acquired shares by contract from a person other than the company itself. Maintenance of capital may be relevant to a shareholder's entitlement to recover*

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from the company amounts that the shareholder subscribed as capital, but it has no direct relevance to the recovery from the company of damages for loss occasioned by the making of a contract to acquire existing shares in the company from a third party. It has no direct relevance to that second kind of case because the shareholder does not seek the return of what was subscribed as capital when the shares were allotted. Whether, in the first kind of case, it is right to describe the claim as one which seeks the return of what was subscribed is a question that need not be answered here. Even if it were right, it would provide no reason for concluding that a shareholder like Mr Margaretic, who was not a subscriber, has no claim against the company under the consumer and investor protection provisions mentioned at the start of these reasons. Nor would it provide a reason for concluding that such a shareholder had no claim for deceit. Neither Webb Distributors nor Houldsworth established any common law "principle" that no shareholder, no matter how the shares were acquired, can have a claim of the kind now in issue against a company whose assets were to be administered as on a liquidation. The reasoning in those cases, because it was founded in important respects upon considerations of preservation of capital, can have no direct application when the plaintiff shareholder did not subscribe capital. But whether or not that is so, the asserted common law "principle" could not deny the operation of the relevant consumer protection and investor protection provisions. Finally, the conclusion reached in Webb Distributors, like the conclusion reached in Houldsworth, turned, in important respects, upon whether the shareholder could rescind the contract with the company for subscription for shares. None of these considerations is relevant to the present matters where there was no contract for the acquisition of shares made between the shareholder, Mr Margaretic, and the company, SOG. "

94. The JOLs said that Heydon J had agreed with Hayne J on this issue and that Crennan J had agreed with Gummow J.

95. The JOLs noted that subsequently legislation was passed which reversed the decision in *Sons of Gwalia* on the priority point but not on the proof point. The Australian legislature had taken the view that the correct approach was to allow the misrepresentation claims in principle but then to treat them as subordinated. The result was very similar to the current position in England. In Australia, shareholder misrepresentation claims are not barred but are subordinated in a liquidation. In England, shareholder misrepresentation claims are also not barred but there is a distinction on the basis of *Soden* between damages claims arising through a subscription for shares, which are subordinated, and damages claims arising from a transfer of shares, which are not subordinated.

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Televest

96. The JOLs invited the Court to follow the approach taken by Mr Justice Ground in *Televest*. They submitted that the facts and issues in *Televest* were essentially the same as in this case and that Ground J had reached the right conclusion for the right reason.

97. Televest Limited was an investment vehicle. Investments were solicited by the issue of prospectuses and investors became the holders of redeemable preference shares. However, not every application for shares succeeded since the various offers were oversubscribed. In such a case the applicant, rather than receiving a refund of his subscription, received a convertible loan note (which notes bore interest at the same rate as the redeemable preference shares and were convertible into such shares at Televest' s option). When Televest went into liquidation there were insufficient funds to pay the notes and the shares so that satisfaction in full of the notes would have substantially depleted the recoveries of the preference shareholders. Ground J said that the "*problem facing the Liquidators [was] that the Preferred Shareholders [were] strictly to be treated as contributories, and hence rank in priority after the note-holders. In reality the satisfaction in full of the note-holder's claims will seriously deplete the assets available for distribution, leaving the preferred shareholders with a much reduced sum between them*."

98. The JOLs agreed that this gave rise to what was clearly seen by the Judge as an odd and unfair situation given the way in which the subscriptions had been made and on the basis that all investors had presumably been equally affected by the misrepresentations made in the prospectuses. Ground J had acknowledged the perceived unfairness when he said that "*If it were simply a question of fairness and equity, [he] would have no doubt that the two classes of investors should be treated equally, and that there should therefore be a pari passu distribution among them*" but also the impact of the *prima facie* legal position resulting from the fact that under the company's legislation the investors as contributories ranked behind the noteholders as creditors. He had noted that "*the problem faced by the preference shareholders was that the common law of England was that a shareholder could not pursue an action for damages for deceit against a company in respect to the contract by which he obtained his shares, unless he was entitled to rescind the contract of allotment: Houldsworth ...* " and that various ways to avoid the

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consequences of the distinction between contributory and creditor were advanced. He rejected the argument that the history of statutory intervention to overturn *Houldsworth* in other jurisdictions (but not Bermuda) was sufficient to make *Houldsworth* bad law in Bermuda and that the fact that the House of Lords rather than the Privy Council had decided the case was relevant. Instead, in a manner that the JOLs submit to be right and justified, he distinguished *Houldsworth* and explained why the facts of *Houldsworth* did not apply to the facts of that case. Ground J set out his reasoning as follows (underlining added):

> *"The speeches of their Lordships in Houldsworth's case make it plain that they are concerned with the case of the shareholder who is in a real sense a member of the company, and can participate in its decisions. It is also plain that they were applying an earlier decision on the facts which were materially similar, Addie v the Western Bank [1867] LR 1 Sc 145, and which they considered was indistinguishable.*
>
> *[He then quoted from the speech of Lord Blackburn in Houldsworth at page 337 where he noted that the contract with a joint stock company to take shares was a very peculiar one since it was in substance an agreement with the company to become a partner in the company on the terms that the partner would in common with all his co-partners for the time being contribute to make good all liabilities of the co-partnership as if this incoming partner had been a member of the partnership from the beginning].*
>
> *"In the instant case, there is no real partnership: the Articles of the company are already in evidence (although not agreed for the purposes of this hearing), and from them it is apparent that the redeemable preference shares carried neither voting rights nor the right to participate in the appointment of directors. To that extent the preferred shareholders were entirely in the hands of the holders of the common shares who constituted the real partnership that controlled the company. Nor did the preferred shareholders contract inter se to contribute to the liabilities of the company in the way envisaged by Lord Blackburn. No call could be made upon them, as the shares were in their nature fully paid up, and while it is true that the extent of the investment was hostage to the fortunes of the company, a shareholder could terminate that liability at any time when the company was solvent by giving notice to redeem. In those circumstances, I do not see why any principle should debar them from seeking remedy in damages, be it for fraud, breach of contract, negligence, or misrepresentation against the company. It is not as if they have in any meaningful sense become a part of the company and are thus essentially suing themselves [which was, of course, one of the points which their Lordships have made in Houldsworth]. If further demonstration were needed, the example given by the Lord Chancellor Earl Cairns at p.325 of the decision in Houldsworth's case, illustrates just how removed the circumstances he was considering are from those of this case."*

99. The JOLs submitted that Mr Justice Ground had identified two important respects in which *Houldsworth* was distinguishable from the case before him (and that these points applied equally in this case). First, that in *Televest* there was no possibility of the preferred shareholders having a liability to contribute because the shares were fully paid up. Secondly, that because the shares were redeemable shares the investment of the shareholder could be withdrawn at any time simply by operating the mechanics set out in the company's articles of association.

Song Jianbo

100. The JOLs also relied on the decision of the Singapore High Court in *Song Jianbo* where the Court had doubted whether *Houldsworth* should be followed and distinguished it on the basis that Sunmax was a limited company (unlike the City of Glasgow Bank) and that the shareholder's claim did not amount to an impermissible return or reduction of share capital.

Applying the principle and proposition of law properly derived from Houldsworth and the subsequent decisions to this case

101. The JOLs submitted that the Misrepresentation Claims were not barred by any principle established by *Houldsworth*, even if such a principle was considered to form part of the law of the Cayman Islands. This was for two reasons. First, there is no inconsistency between the Misrepresentation Claims and the obligations of the relevant Investors as shareholders in DLIFF. In particular, such claims did not involve the Investors seeking to claim back money which they had contracted to contribute to pay the debts and liabilities of DLIFF. Secondly, the Misrepresentation Claims were not made (and would not in future be made) by the relevant Investors in their capacities as shareholders in DLIFF (this second reason overlaps with the issues arising in relation to the Priority Point).

102. The correctness of the first reason turned on the proper analysis of *Houldsworth*. The JOLs submitted that, based on the authorities on which they relied and their submissions as to what these cases decided, the proposition of law for which *Houldsworth* stands as authority was (as noted above) that summarised by Lindley LJ in *Addlestone*, namely that where a shareholder contracts to contribute a certain amount to be applied in payment

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of the debts and liabilities of the company, then it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money. This formulation of the applicable proposition of law reflected the analysis of *Houldsworth* by the Australian High Court in both *Webb* and *Sons of Gwalia* and was supported by, in particular, the speech of Lord Cairns in *Houldsworth*. Therefore, the JOLs submitted, the principle was not engaged (and the proposition of law did not bar proofs by the Investors with Misrepresentation Claims) in the present case because:

(a). none of the Investors were under any liability to DLIFF to contribute funds to the winding up. All of the shares were issued as fully paid up and there was no question of the JOLs making any calls on any shareholder.

(b). the Misrepresentation Claimants would not be seeking to avoid obligations under the statutory contract or a return of share capital but simply damages, the measure of which would be contingent upon, *inter alia,* (i) the amount of the subscription monies, (ii) the value of the shares at acquisition and (potentially) disposition, (iii) loss of profits and (iv) benefits.

(c). there was therefore no inconsistency between the relevant Investors asserting Misrepresentation Claims and any obligation on their part to contribute funds in order to pay the debts and liabilities of the DLIFF.

103. The JOLs argued that furthermore the Misrepresentation Claims were likely to be for damages represented (in large part) by the difference between the sums advanced by Investors in return for their shares and the actual value of those shares at the time of disposition (i.e. in the liquidation). To the extent that a damages claim for the difference in value calculated on that basis could be construed as a return of capital (which the JOLs submitted was not the case) it was instructive to consider what element of the subscription actually amounted to share capital (as the concept was understood in *Houldsworth*). Of the sums advanced by Investors for their shares only a very small amount was attributable to share capital, with the vast majority being attributable to premium. The preference shares had a nominal value of one cent per share but were issued for prices at around a $1,000 to $1,200 per share. So the overwhelming majority of each subscription price was premium. The JOLs said that the amount that was not premium was effectively *de minimis*. This was typical the JOLs said for a Cayman Islands investment fund using the

form of a Cayman exempted limited company issuing redeemable shares (see *DD Growth* at [10]).

104. The JOLs argued that as a matter of Cayman Islands law amounts standing to the credit of the share premium account could not properly be described as share capital. Technically the share premium account did not form part of the share capital. The premium when shares were issued must be credited to the share premium account. This was the result of the provisions of the articles and sections 34 and 37 of the Companies Act.

105. First, the premium had to be paid into a separate account. Article 36 required the directors to establish a share premium account and credit to that account a sum equal to the amount of the premium paid on the issue of any share. Section 34(1) of the Companies Act states that "*Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the value of the premiums on those shares shall be transferred to an account called 'the share premium account.*'"

106. Secondly, payments could be made out of the share premium account to pay the redemption price when shares were redeemed. A company was at liberty to use and pay out the sums credited to its share premium account for various purposes including to pay the redemption price of shares to shareholders:

(a). article 36.2 states that sums credited to the share premium account may be used to pay the premium on the redemption.

(b). section 34(2) of the Companies Act provides that (underlining added):

> *"The share premium account may be applied by the company subject to the provisions, if any, of its memorandum or articles of association in such manner as the company may, from time to time, determine including -*
>
> *(a) paying distributions or dividends to members;*
>
> *(b) paying up unissued shares of the company to be issued to members as fully paid bonus shares;*

> (c) *<u>any manner provided in section 37</u>[section 37 deals with the redemption and repurchase of shares];*
>
> (d) *writing off the preliminary expenses of the company; and*
>
> (e) *writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company.*
>
> *Provided that <u>no distribution or dividend</u> may be paid to members out of the share premium account unless, immediately following the date on which the distribution or dividend is proposed to be paid, the company shall be able to pay its debts as they fall due in the ordinary course of business….."*

(c). section 37(1) authorises a company (if permitted to do so by its articles) to issue redeemable shares and section 37(3) regulated the manner in which such shares may be redeemed. Section 37(3)(f) identifies four sources for payment of the redemption price. It states that "*Shares may be redeemed or purchased [a] out of profits of the company, [b] out of the share premium account or [c] out of the proceeds of a fresh issue of shares made for the purposes of the redemption or purchase or [d] in the manner provided for in subsection (5)*."

(d). section 37(3)(g) states that shares (save for treasury shares) redeemed under section 37 shall be treated as cancelled on redemption and the amount of the company's issued share capital shall be diminished by the nominal value of those shares.

(e). section 37(5)(a) states that (underlining and emphasis added) "*Subject to this section, a company limited by shares ….. may, if so authorised by its articles of association, <u>make a payment in respect of the redemption … of its own shares otherwise than out of its profits, **share premium account** or the proceeds of a fresh issue</u>*."

(f). section 37(6)(a) provides (again underlining added) that "*<u>A payment out of capital by a company for the redemption .. of its own shares</u> is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary course of business*."

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(g). section 37(6)(b) states (underlining added) that "*References in subsections (6) to (9) to payment out of capital are, subject to paragraph (f), references to any payment so made, whether or not it would be regarded apart from this subsection as a payment out of capital*."

107. Thirdly, the JOLs submitted that while there was a solvency test, as set out in the proviso to section 34(2), that applied to and regulated distributions and dividends paid out of the share premium account, and a solvency test as set out in section 37(6)(a) that applied to redemption payments out of capital, there was no solvency test that applied to the payment of redemption proceeds otherwise than out of capital, which included a payment out of the share premium account. The JOLs noted that the reference to "*share premium account*" in section 37(5)(a) was key and had been incorporated in 2011 as a result of an amendment to the subsection. It was clear from the Privy Council's judgment in *DD Growth* that section 37(5)(b) stipulates that "*payments out of capital*" for the purpose of the solvency test in section 37(6)(a) means payments other than those identified and listed in section 37(5)(a), which after 2011 included payments out of the share premium account. So a payment on the redemption of shares out of a share premium account was not a payment out of capital and therefore could be made even if the company was unable to pay its debts as they fell due in the ordinary course of its business immediately following the proposed date of payment. In *DD Growth,* Lord Sumption and Lord Briggs in their majority judgment had analysed the old version of section 37(5)(a) in its unamended form (so that it did not refer to the share premium account) as follows (at [35]).

> *"Beginning again with s.37(6), and leaving aside the issue about the meaning of "debts as they fall due in the ordinary course of business", there is nothing difficult or uncertain about its purpose and effect, which is to subject any payment out of capital for the redemption or purchase by a company of its own shares to the solvency test as a condition for its lawfulness. But it immediately begs the question what is "a payment out of capital". That question is answered in terms by s.37(5)(b), which is expressed to apply in the context of subss.(6)–(9). It is "any payment so made, whether or not it would be regarded apart from this subsection as a payment out of capital". It is common ground, and clearly correct, that the phrase "any payment so made" means any payment referred to in s.37(5)(a); ie "a payment in respect of the redemption or purchase of its own shares otherwise than out of its profits or the proceeds of a fresh issue of shares". Since a payment out of share premium account is plainly not a payment out of profits or out of the proceeds of a fresh issue of shares, it is deemed to be a payment out of capital, provided only that it is made "in respect of" the redemption or purchase of the company's own*

shares. It was common ground, and plainly correct, that the phrase "in respect of" is wide enough to include a payment of the premium due on the redemption of shares."

108. At [48] they noted that "*The argument for RMF was that, in the context of a progressive liberalisation of the regime for the maintenance of capital, share premium account had, from 1948 in the UK and from 1963 in the Cayman Islands, been available for the payment of a premium on redemption of shares without any requirement for commercial solvency. For completeness, it was pointed out that this has clearly been the position from 2011, when share premium account was, by further amendment of s.37(5)(a), clearly excluded from the definition of capital payments.*"

109. The JOLs argued that given that the share premium account may be used to make payments to shareholders even if the company was insolvent, it could not be said that such account formed part of the company's share capital (to which the ordinary capital maintenance rules applied). Moreover, it could not be said to be inconsistent with a shareholder's obligations under his contract of membership for him to bring a claim seeking to recover by way of damages an amount that included the sums advanced by him to the company which were credited to the share premium account.

110. The JOLs noted that Eiffel had suggested that the principles requiring and regulating the maintenance of capital existed not only to protect third party creditors of a company but also former shareholders with claims for redemption proceeds and/or members with statutory priority. However, Eiffel had cited no authority in support of this proposition. The JOLs submitted that the common law principles relating to the maintenance of capital did not extend that far. They were only concerned with the protection of creditors and not shareholders, as was made clear in *Trevor v Whitworth*.

Can and should this Court refuse to follow Houldsworth?

111. The JOLs argued that the Houldsworth Principle (formulated in the manner they had identified) was not part of Cayman Islands law. There was no existing Cayman Islands authority on the point, aside from a brief *obiter dictum* in *Re SPhinX Group* [2010 (2) CILR 1]. Further, the Houldsworth Principle was not part of either English law (as a result of legislative change) or Australian law (as a result of judicial decision).

112. The JOLs noted that in *SPhinX,* Smellie CJ had referred to *Houldsworth* in the following terms (underlining added):

> *"Question 20 (the last in category (b)) uniquely raises an issue of potential liability of the SPhinX companies to certain investors who invested after the SMFF and PlusFunds losses were allegedly known to SPhinX management and who were not informed about those losses—in other words, potential investor misrepresentation claims. The issue raised by question 20 is therefore whether such potential misrepresentation claims should be regarded as ranking as creditor claims. No such claims have yet been brought or are any longer likely to be brought and so there is no perceived need at the moment to incur the costs of having that question answered through the court. Moreover, no such claims are likely to be brought because there appears to be an obvious answer to them.*
>
> *On the long-standing authority of the House of Lords' decision in Houldsworth…., the SPhinX companies having been placed into liquidation, an investor seeking rescission of his share purchase contract and restitutio in integrum on the grounds of misrepresentation may well no longer have available to him such remedies. For the SPhinX companies, having long since been placed in liquidation and all their assets and liabilities subject to the liquidation regime through the courts, such remedies are no longer possible. Investors must therefore resort only to such rights as their shares might afford them in the context of the liquidation of the SPhinX estates."*

113. The JOLs submitted that this statement did not amount to a binding endorsement and approval of the Houldsworth Principle (as formulated by our former Chief Justice) since the statement was made in the context of a directions hearing where the nature of the substantive issue was only brought to the Court's attention in the briefest of terms. The Court was not informed of the underlying arguments, even in summary form; the Court was neither asked nor required to make a substantive determination and it was clear that the existence of a clear principle emerging from *Houldsworth* was assumed without argument. Furthermore, the former Chief Justice's comments were *obiter dictum*.

114. The JOLs cited and relied on most of the decisions cited by Eiffel. But they drew different conclusions from the application of the principles established by those cases:

(a). first, they argued that Eiffel was seeking to establish as a common law rule in this jurisdiction a proposition that was not part of the *ratio* of *Houldsworth.* They submitted that the approach set out in *Frankland v R* did not mandate the

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application of that broader principle. The reasoning in *Frankland v R* applied to decisions of the Court of Appeal and the House of Lords of England and not to broader principles of wider application that might or might not be extrapolated from those decisions when applied to quite different facts.

(b). secondly, they argued that Eiffel's case was based on a precedent that has not been part of the English common law for almost 35 years and had been jettisoned, whatever its scope, because it was thought to be a bad rule. Where the Court was being asked to apply a principle derived from an English case, which the English Parliament had itself expressly rejected, it was difficult to see how such a decision could be treated as highly persuasive within the meaning of *Frankland v R*. It was also relevant that most other common law jurisdictions which have had cause to consider the point have clearly rejected the continued application of *Houldsworth* by one means or another (by legislation to overturn or by overruling or distinguishing the decision). Furthermore, the judgment in Houldsworth had been handed down almost 150 years ago, was given at a time when company law was in its infancy (prior even to the decision in *Salomon v Salomon*) and related to a very unusual form of company (which had started life as a partnership under the Bankers (Scotland) Act 1826 and was then re-registered as an unlimited company under the 1862 Companies Act and was governed by a deed of co-partnership).

(c). thirdly, the JOLs submitted that the Court should take into account that the common law did not speak with one voice since other leading common law courts (in particular Australia at the highest level) had rejected the argument that *Houldsworth* supported a rule that all shareholders' claims for damages for misrepresentation against a company in liquidation are barred. The JOLs submitted that Cayman Islands law will have regard to decisions of different common law jurisdictions, and will strive for a position that is consistent with rather than opposed to the laws of the other common law jurisdictions (citing *dicta* from the judgment of Lord Neuberger in *FHR European Ventures LLP v Cedar Capital Partners* [2015] AC 250 at [45]). The JOLs submitted that substantial weight should be given to the reasoning of the Justices of the High Court of Australia in *Sons of Gwalia* which could be said to pay more regard to modern business conditions and the way companies are used in commerce today.

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(d). fourthly, the JOLs said that it was highly significant that the Cayman Islands had its own distinctive policies and rules so far as the maintenance of capital of companies is concerned, largely driven by the needs of the investment funds industry, which made it wrong and inappropriate to simply apply English company law decisions in this field (particularly decisions which have their foundation in the company law in England in the nineteenth century) without taking into account the particular Cayman Islands' perspective. In the language of *Frankland v R*, this was a local condition which makes it inappropriate simply to apply English case law. *Houldsworth* was decided at a time when the rules as to maintenance of capital in England were judge-made, and indeed, it could be said that *Houldsworth* itself was decided even before any rules as to the maintenance of capital had really been articulated at all because it predated *Trevor v Whitworth* by about seven years but even leaving that point aside, it was obviously not now the position that rules as to maintenance of capital are judge-made. In fact, they were almost entirely legislative and highly technical and reflect various policy considerations. This was an area of company law, the JOLs submitted, where the Cayman Islands had developed its own distinctive position that reflected the prominence and importance of the investment fund industry within the Cayman Islands and the need to take the requirements of that industry into account. While it was true that under English rules of capital maintenance priority is given to the interest of creditors over shareholders, the position in the Cayman Islands is much more nuanced reflecting the interests of investors in investment funds and it was not right to say that as a matter of Cayman Islands law the interests of creditors necessarily take priority over the interests of investors in investment funds (the JOLs cited various passages from the Privy Council's judgment in *DD Growth* to which I have referred above and below).

115. The JOLs said that while the extract from *Privy Council Practice* and from the judgment in *National Trust for the Cayman Islands* cited by Eiffel confirm, as they accept, that it is open to the Court to consider whether local conditions make it inappropriate to apply the English common law position, it was doubtful whether the approach there outlined applied in the present case. That was because in the present case the principle which Eiffel says ought to be applied on any view no longer forms of part of English law. Eiffel

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had argued that the Court ought to apply, as part of Cayman Islands law, a principle that used to form part of English law until 1989.

116. The JOLs submitted that Eiffel was wrong to suggest that a refusal by this Court to apply *Houldsworth* should be characterised as the reversal of *Houldsworth* and that such a decision was properly a matter for the Cayman legislature rather than for the Court. The JOLs argued that in fact, in view of the circumstances referred to in the previous paragraph, it was Eiffel which was asking the Court to legislate by now introducing the principle into Cayman law in order to bar potentially valid and valuable damages claims which would otherwise be available as a matter of Cayman law. Furthermore, Eiffel's floodgates argument was exaggerated and unpersuasive. Other leading common law jurisdictions (the UK, Australia, Hong Kong) allow claims such as the Misrepresentation Claims without any apparent difficulty.

117. Accordingly, this Court had a blank canvas on which to set out a rule and approach that was worked for and fitted with the local law and the needs of the financial and funds industry in this jurisdiction.

The Proof Point - discussion and decision

The core issues

118. In circumstances where the parties agree that there is no Cayman authority (or decision of the Privy Council in a Cayman appeal) that I am required to follow, to my mind the two main questions raised by the Priority Point are whether:

(a). prior to the enactment of section 131 of the 1989 Act there was a common law rule in England based on *Houldsworth*, the subsequent authorities which discuss it and the company law authorities which delineate common law rules in related areas, to the effect that a shareholder is not entitled (a) to rescind his/her subscription contract after the commencement of the winding up and (b) therefore or in any event, to prove in a winding up for damages for misrepresentation (which induced him/her to enter the subscription contract), at all or in competition with external

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(non-shareholder) creditors? I will call this supposed common law rule or proposition of law the ***no-proof proposition***.

(b). if the answer to this question is yes, so that the no-proof proposition was good law in England prior to section 131 of the 1989 Act coming into force, was and is the no-proof proposition good law in the Cayman Islands? This requires an evaluation of the reasoning in cases in other jurisdictions (in particular in Australia and Bermuda) to see whether they undermine or establish a sound basis for challenging the no-proof proposition and then whether even if it appears that the no-proof proposition was sound as a matter of English law there are reasons why it should not be applied in this jurisdiction as a result of the local considerations identified and relied on by the JOLs.

119. To answer the first question it is necessary to establish what the relevant cases decided (and whether the no-proof proposition was a necessary part of the reasoning that led to the decision – that is, was part of the *ratio* - in each case), and whether they stand as authority for the no-proof proposition (and if so in precisely what terms). To answer the second question, it is necessary to establish whether this jurisdiction in general applies common law rules to the winding up of companies and then if it does, whether the no-proof proposition is and should be one of them.

The no-proof proposition was good law in England up to 1989

120. It seems to me that when assessing whether the no-proof proposition was good law in England (based on and in light of the authorities relied on by Eiffel and the JOLs), it is necessary to consider two core issues:

(a). was there a common law rule that prohibited the return of capital otherwise than in the manner and pursuant to the procedures as authorised by statute (the ***Maintenance of Capital Rule***)?

(b). would the admission to proof of a claim for damages for misrepresentation by a person induced to subscribe for shares, where that person has not rescinded or is unable to rescind their subscription contract, give rise to a breach of the

Maintenance of Capital Rule (or putting it another way, did the Maintenance of Capital Rule apply to such a claim for damages)?

121. Eiffel submitted that the answer to the question posed in (a) above is yes and that *Houldsworth* is one of a line of cases culminating with *Soden* that established that in England the answer to the question posed in (b) above was also yes. It seems to me that Eiffel is right on these points and I generally accept the submissions they make.

122. In my view, the starting point is the proposition that, as a matter of English law it remains a common law rule that the return of capital without statutory authority is unlawful. *Progress Property Co Ltd v Moore*, [2010] UKSC 55 and *Aveling Barford Ltd v Perion* [1989] B.C.L.C. 626 stand as authority for this proposition. In *Progress Property* at [23], Lord Walker affirmed Mummery LJ's finding in the Court of Appeal that (underlining added):

> *"The common law rule devised for the protection of the creditors of a company is well settled: a distribution of a company's assets to a shareholder, except in accordance with specific statutory procedures, such as a winding up of the company, is a return of capital, which is unlawful and ultra vires the company."*

123. There are a number of earlier authorities which establish the common law rule including *Trevor v Whitworth*. I agree with Eiffel that this is a foundational principle of English company law which remains good law despite the fact that the law governing the return of capital is now almost entirely derived from statute. I do not take the JOLs to dispute this point.

124. It seems to me to be clear that the English authorities establish that as a matter of English law, by 1989 the common law Maintenance of Capital Rule applied to any claim by a shareholder that if paid or admitted in a winding up would involve the company making a distribution out of capital to the shareholder otherwise than as permitted by the statutory rules; and that admission to proof (at least in an insolvent liquidation) of a claim by an original shareholder (who remained a shareholder in the absence of rescission) for damages for misrepresentation inducing entry into the subscription agreement was treated as such a impermissible distribution. It had been held that to permit such claims to be admitted in such a winding up would infringe the Maintenance of Capital Rule in that it would give rise to an indirect return of capital to the shareholders concerned.

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125. The principal authority that established that this was the position is *Soden* in the House of Lords (decided in 1997). Even though the claimant in *Soden* was an on-market purchaser rather a subscriber for shares, the case involved a claim for damages for misrepresentation and is a modern (indeed the most recent English) authority which views the cases from *Houldsworth* onwards through the lens of modern company law concepts and doctrines.

126. The following are the key passages from Lord Browne-Wilkinson's judgment (at page 326) that seem to me to make this good (underlining added):

> *"There is nothing in the Addlestone case to justify the application of that decision to cases where the claim against the company is founded on a misrepresentation made by the company on the purchase of existing shares from a third party. To allow proof for such a claim in competition with the general body of creditors does not either directly or indirectly produce a reduction of capital. The general body of creditors are in exactly the same position as they would have been in had the claim been wholly unrelated to shares in the company.*
>
> ………
>
> *The High Court [in Webb] held that the claim was excluded by the Houldsworth principle and held that the proposition deducible from that case was that a shareholder may not directly or indirectly receive back any part of his or her contribution to the capital save with the approval of the court. The High Court further relied on the Addlestone decision and section 360(1) but carefully delimited its application to cases of contracts to subscribe for shares. They held, 11 A.C.S.R. 731, 741 that the claim in that case "falls within the area which section 360(1)(k) seeks to regulate: the protection of creditors by maintaining the capital of the company." It is therefore quite clear that both the decision and the reasoning of the High Court were dependent upon the same factors as those in the Addlestone case, i.e. the protection of creditors from indirect reductions of capital. Those are factors relevant to cases of subscription for shares issued by the company but wholly irrelevant to purchases from third parties of already issued shares.*

127. It seems to me that this analysis is an essential part of Lord Browne-Wilkinson's reasoning. The status and admissibility of claims for misrepresentation by original shareholders, and the common law rule or principle to be derived from *Houldsworth* and *Addlestone*, were raised by the administrators and a decision on these issues, and the

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reason why such claims were inadmissible, was the first step in Lord Browne-Wilkinson's reasoning as to why it was necessary to consider whether claims by secondary market purchasers fell within section 74(2)(f).

128. At page 327A-B, Lord Browne-Wilkinson said that "*All that is necessary for the decision of the present case is to demonstrate, as I have sought to do, that the decisions in Addlestone .. and Webb…. Do not apply to claims other than those relating to the issue of shares by the company*"). He decided that an action founded on a misrepresentation by a company made to a third-party purchaser of shares from a member was not based on the statutory contract between the members and the company and the members *inter se.* This was because he accepted as good law the proposition that a member who had subscribed for his shares (and thereby contributed capital) could not after the commencement of the winding up have his claim for damages for misrepresentation admitted to proof because that would result in an unlawful return of capital whereas the third party on-market purchaser had not contributed capital so that admitting his claim for damages for misrepresentation would not involve a return of capital (as Robert Walker J (as he then was) had said at first instance [1995] BCLC 686, 698-699 "*Addlestone and Webb were both claims by original members. The claimants were complaining of the very transaction under which, by becoming members, they had contributed part of the company's capital"*). As Lord Browne-Wilkinson said at page 327, "*All that is necessary for the decision of the present case is to demonstrate, as I have sought to do, that the decisions in Addlestone, 37 Ch.D. 191 and Webb, 11 A.C.S.R. 731 do not apply to claims other than those relating to the issue of shares by the company."* I note that leading counsel for the administrators of Atlantic, Robin Potts QC, had argued both in the Court of Appeal and in the House of Lords that (as was summarised in the judgment of Peter Gibson LJ at page 315) "*the common denominator which requires postponement of misrepresentation claims by transferees and subscribers alike lies in the basic principles as to maintenance of capital*" and that in his judgment in the Court of Appeal Lord Justice Peter Gibson had said (at page 316) that:

> *"We of course accept that the underlying rationale of section 74(2)(f) is the principle of the maintenance of capital or the principle that members come last; but whilst we are wholly in sympathy with those principles, the legislature has chosen not to give universal application to them. In contrast with the position of a partner in partnership law, the legislature has imposed limiting conditions by*

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requiring the sum due to the member to be so due in his character of a member by way of dividends, profits or otherwise."

129. I agree with Eiffel that even if Lord Browne-Wilkinson's analysis of the reasons for the inadmissibility of misrepresentation claims by non-rescinding original shareholders, and of *Houldsworth* and *Addlestone* (and *Webb*, which I discuss below) was only *obiter,* it remains of great persuasive authority and shows what the position was in English law at the time that the decision was handed down. This is not only because of the expertise in company and insolvency law of Lord Browne-Wilkinson (and the other members of the panel who sat on the case which included Lord Hoffmann) but also because, as I have mentioned, of the scope of the argument before their Lordships and because the judgment is based on an updated and modern conception of the key company law doctrines in issue.

130. I broadly accept Eiffel's submissions as to the proper approach to interpreting *Houldsworth*, *Addlestone* and the subsequent English cases leading up to *Soden*.

131. It is undeniable that the facts in *Houldsworth* are distinguishable from those of this case, that it was decided in the context of shareholders as partners in unlimited companies having a liability to contribute and at an early stage in the development of the concepts of corporate capital, corporate personality and the Maintenance of Capital Rule. But *Houldsworth* was one of a number of cases in the 1880s and 1890s (including *Tennent*, *Addlestone*, *Trevor v Whitworth*, *Ooregum* and *Salomon v Salomon*) which together settled the common law rules relating to these core concepts and together stand as authority for the no-proof proposition (I discuss below the issues concerning the precise formulation of that proposition).

132. The reasoning of their Lordships in *Houldsworth* focussed primarily on the fact that Mr Houldsworth was a member of an unlimited company with a continuing liability to contribute and that he could not throw that liability on his co-contributors and co-obligors (those co-obligors were the focus of the concern and not the external creditors who would in any event be paid by the other contributories). The House of Lords rejected the submission that there was no inconsistency between the claim for damages and remaining a partner and contributory. Earl Cairns thought that the inconstancy arose because Mr Houldsworth had agreed that the assets of the company should be applied in paying its

antecedent debts and liabilities and not liabilities owed to him as a result of his acquisition of his shares. Lord Selborne, who spent a good part of his judgment dealing with the attribution issue (Mr Houldsworth had argued that since a principal was liable for the fraud of his agent acting within the sphere of his business, even where the principal was an incorporated company acting through its directors, prior to liquidation the Bank was liable in respect of the fraud of the directors to compensate him for his loss), thought that while Mr Houldsworth remained a shareholder the question of whether he could claim was an issue as between the members and it could not be right that he could "*throw upon them [his] share of the corporate debts and liabilities [of the Bank].*" Lord Hatherley took a similar view ("*In truth [Mr Houldsworth] is trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself….no case can be adduced in which a person so claiming to be a shareholder has at the same time successfully asserted his claim against a company in liquidation for such a debt as this, namely one in which he is himself a co-debtor with all his fellow shareholders to himself, and is himself in common with them responsible again to them individually for like liabilities irrespective of representations made by their common agent.*"). Lord Blackburn considered that the issues were "*ruled by the decision of the House [of Lords] in Addie v The Western Bank*" (in which a claim in deceit by a partner/shareholder against a bank operating as a co-partnership in had been dismissed where the bank had been registered and incorporated as a joint stock company after the partner/shareholder had acquired his shares on the ground, *per* the Lord Chancellor, that the company could not be sued for frauds committed by the directors before incorporation).

133. But as Lord Justice Peter Gibson said in the Court of Appeal in *Soden* (at page 310 F-H):

> "*Mr. Potts [for the administrators] acknowledged that [the] decision* in Houldsworth *lacks the clarity and sophistication of later judgments, but he rightly submitted that the ratio of the case and the policy underlying the ratio were relatively clear, viz. a member is precluded from bringing an action for damages for deceit arising out of a contract for the subscription for shares without first rescinding his contract of membership. It was in substance a case of approbating and reprobating, which, Earl Cairns L.C., said was not permitted.*"

134. The importance of the inconsistency point was also highlighted by Lord Justice Lindley in his formulation in *Addlestone* of the principle on which the decision in *Houldsworth*

was based. But in *Addlestone,* the inconsistency was not simply between a shareholder having an *outstanding* liability to contribute to the capital of a company at the same time as (while still a shareholder) seeking damages for the loss suffered as a result of becoming a member payable out of the company's capital in competition with creditors. In *Addlestone,* the shareholders who held shares (in a limited company) issued at a discount had paid the calls made on them. Having done so, they then sought leave to prove as a creditor "*for breach of contract or otherwise in respect of the shares*." There was therefore no outstanding liability owed by the shareholders. As Lord Browne-Wilkinson said in *Soden* (at page 325F-G), there was some doubt about the cause of action relied on by the claimant shareholders but in his view the claim must have been for breach of (or related to) the statutory contract between the members and the company. The inconsistency, as Lindley LJ said, was between remaining a shareholder and claiming back, directly or indirectly, any part of the sums paid over as capital. And as Lord Browne-Wilkinson said in *Soden* (in the context of the capacity in which the claims for damages were being made) "*the principle must apply equally to negative claims; claims based upon having paid money to the company under the statutory contract which the member says that he is entitled to have refunded by way of compensation for misrepresentation or breach of contract*." Kay J (at page 200), Cotton LJ (at page 204-205), Lindley LJ (at page 206) all explained *Houldsworth* on the basis that Mr Houldsworth was impermissibly seeking to circumvent and avoid his responsibility as a shareholder to contribute capital to the Bank and therefore had no right to prove in the winding up.

135. As Mr Millett KC put it in his submissions on *Addlestone* (day 2 transcript at page 13):

> *"… contribution to capital has two facets. There is the liability to pay for your shares in the first place and the concomitant prohibition on your having payment back after a winding-up whilst remaining a shareholder. That we say is plain from Trevor v. Whitworth. In fact, it is the case before a winding-up, too, but, because a winding-up wholly alters the position and the obligations of creditors intrude, it becomes even more important. To put it in a nutshell, you cannot claim while remaining a member, because you remain liable to contribute and, if you have got your money back, you still remain liable to contribute it, so the money would have to go back in again. Or you will have received your shares and nil paid, unlike other shareholders, or at a discount of 100 per cent, which is the same thing*."

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136. It also seems to me that the understanding and scope of the Maintenance of Capital Rule I have outlined above is supported by the decisions of Mr Justice Harman and the Court of Appeal in a case related to *Soden*. This is *Barclays Bank plc v British and Commonwealth Holdings plc* [1995] BCC 19 and 1059 (admittedly a case not cited by the parties but one which it seems permissible to refer to as emphasising reasoning in cases which were cited). It is true that the case is distinguishable from the facts of this case since it did not involve a claim for damages for misrepresentations made by the company but instead a claim by redeemable preference shareholders for breach of a contract to pay the redemption price of the shares if the company failed to do so and then a claim against the company by the third parties (so that the preference shareholders who were paid had, assuming that they had not exercised their right to redeem before the winding up, no cause of action which could constitute them as creditors and potentially entitle them to separate treatment from that of other preference shareholders). Nonetheless, the case illustrates how the Maintenance of Capital Rule applies broadly and covers claims to prove in the winding up which can be characterised as giving rise to an indirect return of capital and the unjustifiable elevation of the rights of shareholders to the claims of creditors. The basis for the decision is neatly described in Ferran, Howell and Steffek's *Corporate Finance Law and Practice* (3rd. ed., OUP, 2023 at page 208):

> *"An indirect return of capital was .. in issue in Barclays Bank plc v British and Commonwealth Holdings plc where a group of banks ..was required to buy a company's redeemable preference shares in the event of the company failing to redeem those shares in accordance with their terms. The company gave financial covenants to the banks so that if it found itself unable to redeem its preference shares it would also be in breach of [the contract with] the banks. The economic effect of the arrangement was that the banks had to pay for the shares but could then prove in the company's liquidation as creditors for the amount that they had paid for the shares as the sum due for breach of contract. This arrangement was held to amount to an indirect return of capital, contrary to Trevor v Whitworth, on the basis that the rule in that case was wide enough to catch an agreement which was only likely to be called upon in the event of the company's insolvency and which enabled shareholders in that event to obtain from third parties a payment in an equivalent amount to the payment due from the company and for the third parties thereupon to become entitled as creditors to seek repayment from the company. Had the decision been otherwise, the effect would have been to allow a claim by one group of shareholders to be converted into a claim ranking before general shareholders' claims and equally with other creditors."*

137. As Harman J said at page 28:

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> *"….[this] leads to the conclusion that any agreement which is only likely to be called upon if the company has no distributable profits and which will, if called upon when the company becomes insolvent, have the effect of increasing the liabilities of a company, by substituting, for rights which are rights held by shareholders ranking behind creditors, rights held by a creditor ranking equally with other creditors, is objectionable by reason of the rule in Trevor v Whitworth . It is clear that, upon the footings stated in the special case, the effect of the three stages: (a) the exercise by Caledonia of its put options against Tindalk, (b) the obligation of the plaintiff banks to fund Tindalk's liabilities to pay Caledonia, and (c) the breach of the covenants given by B & C to the plaintiff banks, leads in combination to the rights of Caledonia as a preference shareholder to have its preference shares redeemed, which rights are an obligation of B & C to one of its members and as such ranking behind its obligations to unsecured creditors, being substituted, in effect, by the rights of the plaintiff banks ranking as unsecured creditors equally with other such creditors against B & C."*

138. At [7] of their reply skeleton, the JOLs said that "*In essence, the point is that there is an inconsistency between a shareholder being, on the one hand, under an obligation to contribute to the assets of the company in liquidation and, on the other hand, being able to assert a damages claim for misrepresentation against the company in connection with his subscription for shares. This is particularly so where, as in the case of an unlimited company or where all the shares were issued as partly paid, the other shareholders would have fund the monies paid to the claiming shareholder in respect of his damages claim*." For the reasons I have given, it seems to me that the JOLs' submission, to the extent that it went this far, that the decisions in *Houldsworth* and *Addlestone* can and should be confined to cases of unlimited companies or of shares which at the commencement of the winding up were not fully paid or which were subject to an outstanding liability to make a contribution to the company's capital, should be rejected.

The no-rescission following winding up rule – does it apply when the company is or becomes solvent?

139. It is an important part of Eiffel's case that the Misrepresentation Claimants remain shareholders as a result of their being unable to rescind their subscription agreements. The JOLs did not challenge the proposition that the Misrepresentation Claimants' right to rescind their subscription contracts was lost and terminated on the commencement of the winding up. As I have already noted, the point had been conceded (and said to have been rightly conceded) in *Houldsworth* and has been held to be correct in a number of the subsequent cases.

140. I must therefore decide this case on the basis that the Misrepresentation Claimants' right to rescind was lost on the commencement of DLIFF's winding up. However, since Justice Doyle has given leave to appeal his judgment so that at least the HQP case is going up to the Court of Appeal (and may possibly be appealed further), it seems to me to be appropriate to record a reservation I have on this point. It seems to me to be at least arguable that since the right to rescind is barred on winding up because of the intervention of third party rights the winding up order should only preclude rescission having effects as against those third parties (the third party rights are the rights of creditors and possibly shareholders to a distribution in accordance with the statutory scheme imposed by the Companies Act - as was held in *Ayerst (Inspector of Taxes) v C. & K. (Construction) Ltd* (1976) AC 167 the effect of a winding up order is to divest the company of the beneficial ownership of its assets since it can no longer use them for its own benefit and they must be distributed in accordance with the statutory scheme).

141. During the hearing, I referred Mr Millet KC and Mr Smith KC to the discussion of *Houldsworth* and this rescission point in O'Sullivan, Elliott and Zakrzewski (***O'Sullivan***), *The Law of Rescission* (3rd ed., 2023, OUP) at [25.21] - [25.78]. I explained that I considered this to be the most detailed, up to date and useful discussion of the issues that arise in the case in any of the available textbooks. I invited them to review the analysis adopted by O'Sullivan and make any submissions on it that they wished to make.

142. Mr Millett KC during his oral submissions referred to certain of the passages from chapter 25 in O'Sullivan (in particular [25.36] and [25.60]) dealing with winding up as a bar to shareholder's rescission (it is worth adding that it seems to me that the discussion of *Houldsworth* and the subsequent cases in O'Sullivan support Eiffel's position and the analysis and approach I have set out above – see in particular [25.49] where it is said, under the heading "*Bringing a damages claim*" and after referring to *Houldsworth,* that "*Today the rule is explained in terms of protecting creditors from an unauthorised return of capital*" citing in footnote 81 *Webb* and *Soden* as well as *Johnson v McGrath* (2005) 195 FLR 101 and *Cadence Asset Management v Concept Sports* (2005) 147 FCR 434 at 446).

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143. O'Sullivan considers the question of whether the right to rescind is lost even where the company is solvent and says this (at [25.59]-[25.60]):

> *"25.59 The bar applies where the assets of the company are sufficient to pay creditors and the costs of the winding up, at least when rescission is sought for the purpose of avoiding liability as a contributory. That is because the statutory obligation to contribute extends to the payment of such sums as are necessary to adjust the rights of contributories among themselves.*
>
> *25.60. The position is probably the same if the shareholder wishes to rescind in order to recover the price paid for shares. There are comments obiter in [Stone v City and County Bank (1877) 3 CPD 282 (CA) (**Stone**) at page 298-299 although O'Sullivan says at 295] that might suggest rescission would be permitted if at the time of repudiation, no debts to the company remain unpaid. But it is unlikely that this approach would be followed. Even if the company is solvent, rescission permits a shareholder to become a creditor and thereby to obtain priority over other shareholders and [Burgess's case] decided [see pages 512-513] that the bar was intended to protect creditors and shareholders alike."*

144. O'Sullivan concludes that there is at least a suggestion in the old cases that rescission might be allowed where and once the company's creditors have been paid (see Brett LJ at page 311 and Cotton LJ at pages 313-314 in *Stone*) but that *Burgess' Case* is authority for the bar on rescission is absolute. In *Burgess' Case* Mr Burgess had argued that that he was still entitled to rescind his subscription contract because the company was solvent and that all that was decided in *Oakes* was that a shareholder was not entitled to rescind if there were creditors to be paid and that Bramwell L.J. in *Stone* had treated *Oakes* as having been decided on the principle that the power to rescind a contract was gone because the rights of creditors were to be adjusted. Jessel MR (see in particular at pages 512-513) held that Mr Burgess' claim failed. O'Sullivan (at [25.37]) accurately summarises the Master of the Rolls' reasoning as follows: "*the rights of shareholders as co-contributories were also to be protected on winding up. Rescission was therefore barred even if the creditors could all be paid in full, because it would have the effect of increasing the contribution from the remaining shareholders*." But O'Sullivan goes on to note (at [25.38]) that the Supreme Court of Canada has held that the reason for the bar on rescission is that the winding up creates an entirely new situation by altering relations not only between the creditors and shareholders but also between the shareholders *inter se* (*Re Northwestern Trust Co* [1926] SCR 412 at 419) and that Dixon J had taken a

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similar view in *Southern British National Trust Ltd v Pither* (1937) 57 CLR 114 which had been cited with approval by Crennan J in *Sons of Gwalia* at [270].

145. It is not clear to me that the Master of the Rolls' reasoning in *Burgess' Case* (which depends on the prejudice to other contributories of allowing rescission even after creditors have been paid in full because of the statutory power to adjust the right of contributories) would be applied today in a case involving fully paid up shares and in a case where there is no basis for an adjustment of the rights of contributories. Furthermore, and importantly, it is as least arguable that in the modern era the bar on rescission arising from the intervention of third parties (such as bona fide purchasers for value without notice) is not absolute. Instead the bar only operates to preclude rescission having effects as against those third parties: see *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch. 91 at [50], Jordan English, *Deeds, Rescission and Restitution* [2023] L.Q.R. 2023at 363-368 and O'Sullivan at [20.23]. Allowing rescission at the point at which all creditors had been paid would, it might be said, be consistent with the underlying rationale, as explained above, for disallowing damages claims for misrepresentation by shareholders, namely the need to preserve the capital of the company when it is needed on a winding up to pay those with a prior ranking interest in the company, namely its creditors.

146. Justice Gummow discussed the basis for the no rescission rule in his judgment in *Sons of Gwalia* (I consider his analysis of the Houldsworth Principle below) and noted that some of the explanations given in the older cases were no longer sustainable (see [55]-[57]). He concluded, somewhat inconclusively, as follows (underlining added):

> *"58. Thirdly, however, in administering an equitable remedy such as that of rescission, it is proper to take into account both the supervening, albeit indirect, interests of the shareholders and creditors referred to by Isaacs J in Blyth, and the changes brought about in the enjoyment of the rights of shareholders and creditors by the administration required by a winding up, even where the claims of creditors will be satisfied. It is in this context that one may agree with the view of Dixon J in Southern British National Trust Ltd v Pither that the denial of equitable relief to rescind the contract of membership after winding up was inevitable.*
>
> *59. However, it is difficult in this area to state propositions in absolute terms. Shortly after Pither, in Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd, Rich ACJ, Dixon and*

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McTiernan JJ held that the plaintiff was entitled to an order for rectification of the register of members and stayed an order for repayment of subscription moneys with interest to enable the plaintiff to prove in the winding up of the company for those moneys. The proceedings had been instituted six weeks before the lodgement of the winding-up petition, but at a time when the company was in a hopeless financial position.

60. Whatever be the basis in principle for the rescission cases, they do not dictate any particular conclusion respecting the denial in Houldsworth of the existence of any remedy in damages. Something more now should be said respecting that case."

147. Justice Gummow therefore doubted that a right to rescind could continue after the significant changes brought about by the commencement of a winding up to the rights of creditors and shareholders and of the company in respect of its assets, but he acknowledged that there might be exceptions or qualifications to the absolute bar. But because he considered that the inability to rescind did not affect Mr Margaretic's right to claim and prove for damages or compensation under the applicable statutes there was no need to take the analysis further.

A common law rule that applies to the statutory regime for proving in a winding up?

148. In my view it is clear that a common law rule can affect and qualify a creditor's right to prove in a winding up so that it is wrong to say that the no-proof proposition cannot be regarded as good law because it is inconsistent with the statutory statement in section 139 of the Companies Act of what is provable. I do not regard the approach of the majority Justices of the High Court of Australia in *Sons of Gwalia*, in which they appear to regard all issues affecting the right to prove as being a bare matter of statutory interpretation, as consistent with the English cases, whose approach seems to me to be the right one.

149. The proper approach was set out by Lord Neuberger in *Re Lehman Brothers International (Europe) (In Administration)* his judgment in [2018] AC 465 at [13] as follows:

"Further, despite its lengthy and detailed provisions, the 1986 legislation does not constitute a complete insolvency code. Certain long-established Judge-made rules, albeit developed at a time when the insolvency legislation was far less detailed, indeed by modern standards sometimes positively exiguous, nonetheless survive. Recently invoked examples include the anti-deprivation principle (see Perpetual

Trustee Co Ltd v BNY Corporate Trustee Services Ltd [2012] 1 AC 383), the rule against double-proof (discussed in In re Kaupthing Singer & Friedlander Ltd (in administration) (No 2) [2012] 1 AC 804, paras 8 to 12), the rule in Cherry v Boultbee (1839) 4 My & Cr 442 (also discussed in Kaupthing (No 2) [2012] 1 AC 804, paras 13 to 20), and certain rules of fairness (alluded to in In re Nortel GmbH [2014] AC 209, para 122). Provided that a Judge-made rule is well-established, consistent with the terms and underlying principles of current legislative provisions, and reasonably necessary to achieve justice, it continues to apply. And, as Judge made rules are ultimately part of the common law, there is no reason in principle why they cannot be developed, or indeed why new rules cannot be formulated. However, particularly in the light of the full and detailed nature of the current insolvency legislation and the need for certainty, any judge should think long and hard before extending or adapting an existing rule, and, even more, before formulating a new rule."

150. Accordingly, the common law can establish a gloss on and overlay the statutory rules where it is consistent with the statutory regime. The no-proof proposition is consistent with the Companies Act in so far as it gives effect to a core policy of the companies legislation, being the Maintenance of Capital Rule (subject to my analysis below as to impact of the rules regulating the payment of the redemption price from the share premium account). Furthermore, section 139 does not purport to deal with whether particular causes of action entitle a creditor to prove. It stipulates that all liabilities that are otherwise properly admissible are provable whatever their legal character (for example whether they are certain or contingent, present or future).

The formulation of the no-proof proposition – is it absolute or qualified and how does it relate to the statutory subordination effected by section 49(g)?

151. The question arises as to whether, since the justification and rationale for the no-proof proposition is the Maintenance of Capital Rule, and the need to ensure that the company's capital is maintained for the benefit of creditors, the no-proof proposition should operate only as a ranking rule prohibiting the admission to proof of a damages claim in competition with and until payment in full of all external creditors. This question raises the further issue of the relationship between the common law rule (the no-proof proposition) and the statutory subordination of sums due to members in their character as a member effected by section 49(g). I shall consider section 49(g) in greater detail when discussing the Priority Point but it needs to be reviewed in this context to assess whether it throws any light on the proper formulation and operation of the common law rule.

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152. If the Misrepresentation Claims are admissible but within and subject to section 49(g) then the right of the Misrepresentation Claimants to prove is suspended and subject to the no-competition principle. There is a qualified rather than an absolute prohibition designed to ensure that the rights of members as members come last and the right of creditors to have first recourse to capital is preserved (i.e. to give effect to the Capital Maintenance Rule). It might be said to follow that since section 49(g) gives effect to and ensures respect for the Capital Maintenance Rule, there is no need for a separate common law rule (the no-proof proposition) if damages claims by shareholders in deceit for their loss are within the sub-section (or at least there is no need for an absolute bar on the admission to proof of such claims), so that cases can be decided solely by reference to and in reliance on the statutory subordination provisions (what I will label the "***no need for an absolute bar principle***").

153. Section 49(g) is in the following terms (underlying added):

> *"no sum due to any member of a company in that person's character of a member by way of dividends, profits or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between that person and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributions amongst themselves."*

154. Section 49(g) is in substantially the same terms as the original enactment giving effect to the statutory subordination, namely section 38 of the UK's Companies Act 1862 (which was enacted and in force before *Houldsworth*). This provided that (underlying added):

> *"No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves."*

155. Section 74(2)(f) of the UK's Insolvency Act 1986, which was considered by the House of Lords in *Soden*, is in similar terms (underlining added):

> *"(1) When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and*

> *liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves.*
>
> *(2) This is subject as follows . . . (f) a sum due to any member of the company (in his character of a member) by way of dividends, profits or otherwise is not deemed to be a debt of the company, payable to that member in a case of competition between himself and any other creditor not a member of the company, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves."*

156. The Australia statutory provision, section 563A of the 2001 Act, which was considered by the High Court in *Sons of Gwalia* (and which I discuss further below) was drafted in different terms:

> *"Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied."*

157. In *Sons of Gwalia,* Justice Hayne commented on the effect of section 38(7) on the right to prove (and it seems to me that his approach properly sets out the effect of section 49(g)). He said that (at [151]) (underlining added):

> *"The second aspect of note about s 38(7) is that it spoke of a "sum due to any member of a company, in his character of a member". It said that no sum of that kind "shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company". In modern terms it was a provision that is best understood, when applied in an insolvent winding up, as regulating the ability of a member to prove in the winding up rather than as a provision regulating priority of payment. If the company was insolvent there would inevitably be competition between the member and other creditors, and the sum due to a member "in his character of a member" was not to be deemed to be a debt. Only if the company was solvent could there be no competition of the kind identified and only then could there be any "final adjustment of the rights of the contributories amongst themselves."*

158. It appears that the interrelationship between the common law rule and the statutory subordination provision was somewhat confused in the judgment of, or at least not clearly dealt with by, the Justices of the High Court in *Webb*.

159. They noted that Tadgell J in the Appeal Division of the Supreme Court of Victoria had "*concluded that the principle in Houldsworth received statutory recognition in [section*

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360(1) of the Companies (Victoria) Code]" and held that this conclusion was correct and that "*it draws support from the provisions of 360(1)(k).*" As I have also already noted, Section 360(1)(k) is similar in all material respects to section 49(g) of the Companies Act. Tadgell J had not considered the relationship between the statutory subordination of members' claims arising under section 360(1)(k) and the no-proof proposition since, as he said at page 631 lines 20-23, there was no need for him to do so as he had decided (in answering question (b) in the affirmative) that the non-withdrawable shareholders were precluded from bringing an action in damages. They had no provable claim. His focus was on section 360(1) which is equivalent to the preamble or chapeau of section 49 (every member is liable to contribute to the property of the company an amount sufficient for the payment of its debts and liabilities) and the limitation in section 360(e) in the case of limited companies to the amount unpaid on shares. The High Court dismissed the appeal but appear to have decided the case on the basis of section 360(1)(k) and that the shareholders had no claim *which could prevail against the claims of creditors* (see the headnote on page 396 and the conclusion of the judgment of the majority at page 411).

160. Chief Justice Gleeson in *Sons of Gwalia* pointed out that the view that *Houldsworth* could be seen as having received a legislative indorsement gave rise to a "*chronological curiosity*" because the language of section 360(1)(k) reflected that in section 38(7) of the 1862 Act which predated *Houldsworth* and he noted (at page 473) the apparent confusion in the Justice's judgment in *Webb* between a denial and a postponement or subordination of a claim. If, as Tadgell J had held, the claim was precluded then "*section 360(1)(k) would not have applied.*" Chief Justice Gleeson concluded (see [16] at page 473i and [24]-[26]), in my view rightly, that the High Court in *Webb* must be taken to have decided the case on the basis of section 360(1)(k) although they considered that "*some of the considerations underlying Houldsworth [were] relevant to the interpretation of section 360(1)(k) operating in addition to the Code.*" Gleeson CJ considered that (see [28]) for the purposes of section 360(1)(k) (and as a matter of the proper construction of the section) it was necessary to have regard to nature of the claim being made rather than its economic effect (on creditors). It was therefore insufficient to look to the rationale for the Houldsworth Principle (the Capital Maintenance Rule) and treat any claim which was economically equivalent to a return of capital as being a debt owed to the claimant in his/her capacity of member. In any event, Mr Margaretic did not seek to recover paid up capital and his claim was not founded on any rights he obtained or obligations he incurred

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by virtue of his membership of the company. He also noted (at [12]) that the fact that section 360(1)(k), like section 49(g), stated that the member's claim was not to be treated as a debt in a case of competition between a member-creditor and other creditors "*might account for some elision of the issue whether a debt is provable and the issue of ranking in terms of priorities*" (however section 563A, the section that was to be applied in *Sons of Gwalia*, did clearly distinguish those issues and assumed that a certain debt was provable in the winding up).

161. The other Justices of the High Court sitting in *Sons of Gwalia* also considered that the proper construction of section 563A did not depend on and was not affected by (and that the construction of section 360(1)(k) in *Webb* should probably not have depended on) any judge-made law in general and the Houldsworth Principle in particular (see for example the judgment of Justice Hayne at [136], [148], [185] and [192], Gummow J at [86] and Kirby at [114]). Kirby J (at [110]-[111]) considered that, although tempting, section 563A of the 2001 Act was not to be interpreted, as the Justices in *Webb* were taken to have done in relation to section 360(1)(k), by reference to the "*presumed general policy of the 2001 Act*." Justice Gummow considered that, because of the chronology, the Houldsworth Principle had nothing to do with section 360(1)(k), based as it was on section 38(7) although there appears to have been only a limited discussion, in the judgment of Hayne J, as to the reason for the enactment of section 38(7) in 1862. It is unclear how Justice Gummow could safely conclude that this subsection had a purpose that was distinct from the rationale for the Houldsworth Principle even if, as he thought, that principle represented a subsequent rationalisation of the decision on *Houldsworth* in light of the "*developing doctrine applicable to company law*". Hayne J considered (at [184]) that "*decisions after Houldsworth especially [Addlestone] explained Houldsworth as depending upon the application of section 38(7) of the 1862 Act*" and (at [187]) that it was "*Not until Addlestone that there was any attempt to relate the conclusion in Houldsworth to relevant provisions of the 1862 Act*" (for the reasons set out above, this view of *Addlestone* seems to me to be wrong).

162. Lord Browne-Wilkinson in *Soden* clearly did not think that the existence of section 74(2)(f) (and before that of section 38(7)) of itself obviated the need for and was a basis for rejecting as good law the no-proof proposition, although the point was not argued.

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163. I must say that I see the force of the no need for an absolute bar principle and for saying that there is no need for a common law rule that imposes an absolute and permanent prohibition on the right of the Misrepresentation Claimants to prove. Rather it imposes a qualified bar and works alongside and supports the regime established by section 49(g).

164. This is because (a) on the basis that a broad construction of section 49(g) is justifiable so that the Misrepresentation Claims are treated as subject thereto and (b) the relative ranking between the Misrepresentation Claims which will be admitted to proof once all external creditors had been paid, and the rights of shareholders to a distribution, is appropriate and justifiable.

165. As regards (a), in my view, as I explain below, the broad approach to the construction of section 74(2)(f) taken by Lord Browne-Wilkinson in *Soden* is justifiable and should be applied to section 49(g).

166. As regards (b), I discuss further below the ranking of the Misrepresentation Claims, assuming that they are provable after non-member creditors have been paid in full. If the no-proof proposition is treated as only applying up to the point at which non-member creditors have been paid in full (or possibly provided for) then it would be a common law rule that supplemented and supported the regime established by sections 49(g) and section 37(7) of the Companies Act (the statutory regime now sets out the primary rules with the common law rule a secondary rule which is operative where the statutory regime is unclear or incomplete). The Misrepresentation Claimants could prove in the winding up but on a basis which respected the Maintenance of Capital Rule and was entirely consistent with the relevant provisions in the Companies Act which are designed to preserve the rights of non-member creditors to prevent claims by shareholders as members from having prior access to the company's capital.

167. It does not seem to me that allowing holders of redeemable shares to prove in the winding up for damages for misrepresentation unfairly or improperly prejudices the position of other holders of redeemable shares or shareholders (and therefore the rights and position of other shareholders does not require or justify treating the no-proof proposition as resulting in an absolute bar on the right to prove). It does seem to me that the Capital Maintenance Rule is designed primarily to protect creditors rather than members albeit

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that shareholders have an interest in ensuring that the company's capital is maintained so that it can discharge its liabilities and conduct its business. But allowing the Misrepresentation Claimants to prove for damages in deceit after non-member creditors have been paid recognises that they are (also) creditors with a monetary claim against the company who are entitled to rank ahead of shareholders (who have no such claims). As between the shareholders *inter se* the redeemable shareholders with misrepresentation claims are, at common law, entitled to be treated as creditors and have priority. The only limitation, which the reasoning in *Houldsworth* and progeny developed and spelt out, is that such shareholders with misrepresentation claims cannot claim as creditors in competition with non-member creditors when such claims involve in substance a return of the capital. It is true that on this approach the Misrepresentation Claimants are entitled to prove while they retain their shares but this does not prejudice the other shareholders because the Misrepresentation Claimants have to bring into account and reduce their claim by the value of the shares they retain. There is therefore no question of double-recovery to the prejudice of the other shareholders (which would occur if the Misrepresentation Claimants could prove for their loss without giving credit for the value of the shares which they retain). Of course, the relative ranking of the monetary claims of holders of redeemable shares with rights under section 37(7), redemption creditors and with misrepresentation claims is also and primarily governed by section 37(7) and section 49(g) of the Companies Act, which I discuss in detail below.

168. I appreciate that, as I have explained, this approach has not been adopted in the English case law and that it is inconsistent with the decision in *Addlestone* where the preference shareholders were held to have no right to prove. It might also be said to be inconsistent with the cases on the "no recission following the winding up" rule which reject the argument that the right to rescind should revive after all external creditors have been paid and the company is solvent. Furthermore, I can see that it can also be argued that since the statutory regime also provides for the subordination of the Misrepresentation Claims to non-member creditors it pre-empts and obviates the need for the common law rule. However, because it has never been held that the statutory subordination that started with section 38(7) of the 1862 Act has that effect, and because I can see that there may be benefits in retaining a consistent common law rule alongside the statutory regime, I have concluded that the preferable approach is to treat the no-proof principle as good law in the formulation I have set out (which seems to me to reflect, as I have explained, the

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underlying reasoning in the cases and the underlying policy and to present a rational and integrated view of the law in this area).

The Australian authorities

169. I do not regard the reasoning in *Webb* or *Sons of Gwalia* as requiring or justifying a different approach to that which I have derived from the English cases.

170. *Webb* supports the view that the Houldsworth Principle is sound and good law and is to be regarded as based on and as giving effect to the Capital Maintenance Rule. It also, in my view rightly, recognises that there is a close relationship between the common law rule and the statutory regime although the High Court's reasoning on this is not, as I have explained, as explicit and clear as it could have been. The Justices in *Sons of Gwalia* were primarily motivated by the need to give effect to the important statutory right to compensation and statutory investor protection regime and considered that the case before them had to be decided by reference to that statutory regime and that created by the 2001 Act alone without reference to (and without being read down by reliance on) old common law rules derived from English law. They were not prepared to undermine the statutory right by giving section 563A a wide construction when that section did not explicitly provide for that result. What they did say on the Houldsworth Principle, save for Justice Gummow (whose final conclusion on the Houldsworth Principle is not clear), also supports the view that it is to be regarded as based on and as giving effect to the Capital Maintenance Rule.

171. Following but keeping in mind these general remarks, I shall make some comments on the judgments in *Webb* and *Sons of Gwalia*.

Webb

172. The reasoning in the Appeal Division and the High Court in *Webb* supports the view that *Houldsworth* and the subsequent cases are authority for the no-proof proposition and that the rationale for this common law principle is the Maintenance of Capital Rule (as Lord Browne-Wilkinson noted in *Soden* at page 326 in the passage which I have already referred to and cited).

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173. In *Webb,* Mason C.J., Deane, Dawson and Toohey JJ. said [1993] 4 LRC 395 at 407-408 said this (underlining added):

> "*The statutory provisions authorising the return of capital are not inconsistent with the Houldsworth proposition. Indeed, they proceed on an acceptance of part of the reasoning which underpinned the decision in that case. They permit a return of capital to shareholders when it is established to the satisfaction of the court that the return of capital will not prejudice the interests of creditors or when it is consented to by creditors [I would note that this formulation of the Houldsworth Principle lends support to the approach I have set out above and to the no need for an absolute bar principle]. Hence the statutory provisions treat the subscribed capital as protection to creditors and accept that the capital should not be returned directly to shareholders otherwise than pursuant to a permissible return of capital……. But, in the present case, the members seek to prove in the liquidation damages which amount to the purchase price of their shares, which is a sum directly related to their shareholding.*"

174. As I have already noted, I accept that *Webb* is to be treated as a case deciding an issue concerning ranking and not the right to prove. As the majority noted (at page 406h-i) the critical question in the case related not to whether the decision in *Houldsworth* to bar Mr Houldsworth's proof was right but rather the proper construction of the relevant statutory provision, namely section 360(1)(k), and whether the section should be understood as embodying the same rationale and principle and seeking to achieve the same effect as the decision in *Houldsworth*. The Justices were clear in this context that the rationale and principle underlying the decision in *Houldsworth* was the common law Maintenance of Capital Rule.

Sons of Gwalia

175. It seems to me that Eiffel's analysis of *Sons of Gwalia* is broadly correct.

176. As Justice Heydon confirmed at [263] and [264] (quoted above), the issue in the case concerned the ranking and not the admissibility of the claim. While there had been a challenge to the admissibility of the claim by ING this appears to have been half hearted. As Justice Heydon pointed out it appears that ING had abandoned the point by the end of oral submissions. This may explain why the *Houldsworth* and admissibility issue are

dealt with, at least by the Justices other than Justice Gummow, in an incomplete and piecemeal fashion.

177. Justice Heydon said that to the extent that the challenge had not been abandoned he agreed with the reasons given by Justice Hayne for rejecting it. Justice Hayne rejected it because he considered there were no grounds for barring a proof by a purchaser from the subscribing shareholder. The rationale which had been relied on for barring a proof by the original shareholder could have no relevance in this case. But he accepted that the Maintenance of Capital Rule could be relevant to and a justification for refusing to allow such an original subscriber to prove. He said this (at [190]) (underlining added):

> *"The conclusion reached in Webb Distributors concerned, and concerned only, the rights of a member who had subscribed for shares, as distinct from having acquired shares by contract from a person other than the company itself. Maintenance of capital may be relevant to a shareholder's entitlement to recover from the company amounts that the shareholder subscribed as capital, but it has no direct relevance to the recovery from the company of damages for loss occasioned by the making of a contract to acquire existing shares in the company from a third party. It has no direct relevance to that second kind of case because the shareholder does not seek the return of what was subscribed as capital when the shares were allotted. Whether, in the first kind of case, it is right to describe the claim as one which seeks the return of what was subscribed is a question that need not be answered here. Even if it were right, it would provide no reason for concluding that a shareholder like Mr Margaretic, who was not a subscriber, has no claim against the company under the consumer and investor protection provisions mentioned at the start of these reasons. Nor would it provide a reason for concluding that such a shareholder had no claim for deceit. Neither Webb Distributors nor Houldsworth established any common law 'principle' that no shareholder, no matter how the shares were acquired, can have a claim of the kind now in issue against a company whose assets were to be administered as on a liquidation. The reasoning in those cases, because it was founded in important respects upon considerations of preservation of capital, can have no direct application when the plaintiff shareholder did not subscribe capital. But whether or not that is so, the asserted common law 'principle' could not deny the operation of the relevant consumer protection and investor protection provisions. Finally, the conclusion reached in Webb Distributors, like the conclusion reached in Houldsworth, turned, in important respects, upon whether the shareholder could rescind the contract with the company for subscription for shares. None of these considerations is relevant to the present matters where there was no contract for the acquisition of shares made between the shareholder, Mr Margaretic, and the company, Gwalia."*

178. Chief Justice Gleeson did not say that *Houldsworth* was not authority for the no-proof proposition. He simply said (at page 473h) that the case was "*never authority for a*

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principle as wide as that asserted by [ING." ING had argued, as explained at [13], that "*there is a principle of common law emerging from Houldsworth, which precludes a shareholder from proving in a winding up … for damages for misrepresentation inducing any acquisition of shares unless the shareholder has first rescinded the 'membership contract' [and rescission was no longer available after the company became insolvent or went into liquidation].*" Thus, the Chief Justice recognised that what was important was the proposition of law emerging from and to be derived from the case law following *Houldsworth* and was saying that this proposition of law never purported to bar a claim by a shareholder who had purchased their shares from the original shareholder.

179. Gleeson CJ seems to have accepted that the Capital Maintenance Rule was or could have been a proper justification for barring a proof by an original shareholder and that this reasoning had influenced the majority's decision to treat section 360(1)(k) as applying to the non-withdrawable shareholders in *Webb*. He noted (at [26]) that the approval given by the majority in *Webb* to the reasoning of Kay J in *Addlestone* suggested that on the issue of the capacity in which sums were due to the claimants the conclusion that the sums were due to them in their capacity as members was reinforced by the idea that they were in substance seeking to recover capital they had subscribed (and also see [the reference to capital maintenance at [31]). However, he was satisfied (at [31]) that Mr Margaretic was not to be treated as seeking to recover paid-up capital.

180. Crennan J agreed with both Gleeson CJ and Hayne J. He also said that he agreed with Justice Gummow's reasons and analysis of the principle to be derived from *Houldsworth*, to which I now turn.

181. Justice Gummow rejected ING's challenge to Mr Margaretic's right to prove based on *Houldsworth* (see [98]). He noted (at [48]) that ING had relied in its supplementary submissions on the rule in *Houldsworth* and its significance for *Webb* in support of that challenge. He said (at [49]) that in Australia the existence of "*any such common law principle should be rejected.*"

182. Justice Gummow's starting point in his analysis is important. He said (at [34]) that the resolution of the issues in the appeal turned "*upon the construction*" of the 2001 Act and that:

> *"35 The apparently seamless continuity in the reception and development of the common law in Australia is apt to distract attention from the supreme importance of statute law. In this vein, the submissions presented on these appeals proceeded from an implicit premise which is false.*
>
> *36 There are no 'general principles of company law' applicable in a winding up and to which there must be reconciled those provisions of the 2001 Act and its predecessors (beginning with the Companies Act 1862 ... which stipulate a particular system of proof of debts and the ranking of debts and the placement of 'shareholder claims' in that system.*
>
> *37. Further in any quest to locate such general principles, the older case law is not always a satisfactory guide. Excessive significance should not be attributed to statements in nineteenth century British cases decided at a time of endeavours to 'flesh out' the developing body of statute law by use of principles derived from a range of sources in the general law.."*

183. Justice Gummow thus considered that in Australia the common law rules developed in England could have no role to play when interpreting and deciding the effect of the more recent and local statutory regime governing the admission of proofs in a winding up. As I have already explained, I do not consider that this approach is the same as or consistent with the approach taken in England to the role of the common law or in my view to the approach which should be taken in this jurisdiction where our company and insolvency law is to be considered as still closely aligned with and derived from the English law.

184. Justice Gummow did go on to consider in some detail the decision in *Houldsworth* and *Addlestone* particularly in light of their treatment in *Webb*. He said (at [53]) that the first proposition on which the decision in *Webb* had rested was that "*the share capital represents a guarantee fund and protection to creditors which should not be returned to shareholders other than on a permissible reduction of capital*." However, he concluded (at [96]) that this (and the other propositions on which *Webb* was said to be based) was "*open to question*" and "*should not be accepted as correct as they relate to the 2001 Act*." So he linked his decision to the construction of this Australian statute. He also noted (at 97]) that *Webb* was based on a different statute (section 360(1)(k)) with different language "*whereas Hayne J indicates claims of the kind now brought by Mr Margaretic would not have been admissible to proof*." As I have already noted, section 360(1)(k) is in the same terms as section 49(g) while section 563A of the 2001 Act is drafted differently.

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185. Justice Gummow considered (see [67]) that *Houldsworth* had not been determined "*by reference to the law respecting admission or ranking of claims in a winding up conducted in accordance with section 38 of the 1862 Act*" and had decided that the claim was invalid for other reasons. It appears from his analysis of the issues raised and the reasoning in the judgments in *Houldsworth* that he considered that *Houldsworth* was not itself a maintenance of capital case. Rather the case dealt with (a) the application to the case of a defrauded shareholder of the rule that a purchaser of goods who bought under a fraudulent misrepresentation was entitled to retain the goods and recover damages - the defrauded shareholder who retained his shares was not entitled to the same relief because such damages were inconsistent with the contract into which he had entered and by which he wished or was required to abide (an approach emphasised by Earl Cairns LC) and (b) the extent to which the law of agency rendered a company liable for the fraud of its directors (on which Lord Selborne and Lord Blackburn particularly relied). He also thought (perhaps speculated is a better description) (see [84]) that there was no justification for a maintenance of capital rule after the 1862 Act had permitted a company to carry on business even after it had exhausted its capital through trading.

186. Justice Gummow did recognise (at [86]) that the case "*must be understood in the milieu of developing doctrine applicable to company law*" and that (at [63]) it represented "*the gradual development of legal thought respecting the nature of corporate personality.*"

187. So in my view at least three of the majority of six Justices cannot be taken to disagree fundamentally with the existence of the no-proof proposition based on the Maintenance of Capital Rule and Justice Gummow's approach is based to a significant extent on his view that the Australian statute law governing the right to prove in a winding up was not to be construed or treated as qualified by reference to common law rules developed in another jurisdiction (England) a long time before the enactment of the Australian statute.

Televest

188. I do not find the approach taken by Justice Ground to be persuasive.

189. The learned judge in his admirably succinct judgment started from a clear view of the merits and was obviously anxious to avoid what he considered would be, on the facts, a

serious injustice. This was the result of "*the mere chance*" (see page 2) that some investors received preferred shares and others notes (with the consequence of different rankings in a winding up). He noted (at page 3) that "*in an attempt to avoid the consequences of this*" the preferred shareholders had sought to maintain claims based on misrepresentation.

190. Justice Ground rejected, rightly in my view, the argument made by the preferred shareholders that he could ignore *Houldsworth* and *Addlestone* as being only a decision of the House of Lords or because of the history of statutory intervention in other jurisdictions. However, he did consider that the common law rule barring a proof by a shareholder for damages for misrepresentation did not apply on the facts because it only applied in cases where shareholders were in a "*real sense a member of the company and can participate in its decisions*" (see page 3) and in a *"real partnership"* together (see page 4). The holders of the redeemable preference shares had no such rights to participate in decision making (by for example appointing directors) and were not treated as partners and liable to contribute as Mr Houldsworth was. However, for the reasons I have given above, I do not consider that these matters prevent the application of the no-proof proposition or justify a departure from the Maintenance of Capital Rule.

191. Justice Ground also relied on the fact (see page 4) that the preferred shares "*were essentially an investment vehicle*." He noted that they could terminate their liability to contribute capital at any time when the company was solvent by giving notice to redeem. The preferred shareholders had therefore not "*in any meaningful sense become a part of the company" so as to be "essentially suing themselves*." But once again, for the reasons I have given, I do not consider that the application of the no-proof proposition depends on whether a shareholder has become part of the company such that it would be regarded as suing itself were its claim for misrepresentation to be admitted. The no-proof proposition is based on the need to respect the Maintenance of Capital Rule and its application depends on whether the shareholder has contributed capital which is required to be maintained and is subject to that rule. To the extent that it can be said that redeemable preference shares of the kind in issue in *Televest* were not part of the company's capital in this sense and if the damages claim could be treated as a claim for the payment of sums which did not constitute or represent such capital then it would be

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possible to justify Ground J's decision. I must now turn to the question of the treatment and status as capital of the redeemable preference shares in issue in this case.

The meaning of capital for the purposes of the Maintenance of Capital Rule and the treatment of redeemable shares under the Companies Act

192. The Capital Maintenance Rule relates to and governs the withdrawal (and the return to shareholders) of a company's legal capital. This is, in general terms, the fund of contributions made by shareholders when subscribing for (and in consideration for the issue of) their shares. As I have noted, the rules providing for the maintenance of capital were first formulated in the nineteenth century decisions I have referred to but are now largely governed by statute. In this jurisdiction, the main statutory provisions regulating the share capital of a company limited by shares are set out in sections 8, 13-19, 33-35, 37, 37A and 37B of the Companies Act (together with section 49 concerning the liability of members). These provisions permit, subject to the satisfaction of certain conditions, shares to be issued without a nominal or par value and at a discount.

193. As Lord Sumption and Lord Briggs said in their majority judgment in *DD Growth* at [4] "*Cayman law (like the law of the UK) has always contained restrictions upon the ability of a company to reduce its capital, primarily for the protection of its creditors. Although originally to be found in judge-made law, they are now almost completely statutory*." However, as both Lord Sumption and Lord Briggs, and Lord Hodge in his dissenting judgment, acknowledged, there are material differences between the UK and Cayman regimes as a result of legislative amendments in this jurisdiction since 1987.

194. The nature and extent of these differences were discussed by Lord Sumption and Lord Briggs at [47]-[50] of their judgment as follows (underlining added):

> "47. *Turning to the wider legislative history, counsel for both parties travelled at length through the history of the common law and statutory provision for the maintenance of capital, beginning with Trevor v Whitworth (1887) 12 App. Cas. 409 and continuing through the UK Companies Acts from 1929 onwards into the Cayman Islands legislation which, in its original form in 1963, mirrored that to be found in the UK Companies Act 1948 . Thereafter the two legislative schemes diverged.*
>
> 48. *The argument for RMF was that, in the context of a progressive liberalisation of the regime for the maintenance of capital, share premium account had,*

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from 1948 in the UK and from 1963 in the Cayman Islands, been available for the payment of a premium on redemption of shares without any requirement for commercial solvency. For completeness, it was pointed out that this has clearly been the position from 2011, when share premium account was, by further amendment of s.37(5)(a), clearly excluded from the definition of capital payments. Why, it was asked rhetorically, should there have been a blip in that process of liberalisation which applied a solvency test to the use of share premium account for this purpose, which had previously been absent?

49. *The answer in the Board's judgment is that, prior to 1987, Cayman law permitted only the issue and redemption of preference shares, rather than equity shares, following in that respect the precedent set by the Companies Act 1948. In sharp contrast with shares of the type in issue in these proceedings, where the premium may exceed the nominal amount by several orders of magnitude, the premium likely to be payable upon the redemption of preference shares would typically be modest, limited to some capitalisation of coupon, unpaid on early redemption. The propensity for permitting the premium payable on redemption of equity shares to undermine capital maintenance, by comparison with preference shares, was perceptively analysed by Professor Gower in 1980 in his consultative report "The Purchase by a company of its Own Shares" (Cmnd 7944). At [22], after pointing out that s.58 of the Companies Act 1948 permitted a premium payable on redemption to be provided for out of share premium account, he continued:*

> *"This anomaly may not matter much in the case of preference shares in the strict sense, where the premiums are likely to be small. But in relation to redeemable equity shares the premiums might well be many times the nominal value, resulting in a substantial reduction of capital on redemption. It is therefore suggested that sections 56 and 58 should be amended so as to prevent redeemable shares from being redeemed otherwise than out of profits or an issue of new capital without any use of share premium account which would be left intact."*

50. *In due course, the UK Parliament followed that advice and prohibited the use of share premium account for the payment of premium on redemption of shares, when extending the ability of a company to issue and redeem shares from preference shares to equity shares. This was done in the Companies Act 1981. By contrast, in 1987 the Cayman Islands adopted a more nuanced approach. The ability to issue and redeem shares was extended from preference shares to equity shares, and share premium account was permitted to be used for funding the premium payable on redemption. It is not surprising in that context that the Cayman Islands legislature took the more modest step of imposing a solvency test from the use of share premium account for that purpose rather than, as in the UK, prohibiting it altogether. It may well be that this was done specifically to permit or encourage the use of shares and share premium as an investment vehicle in the way commonly used by open-ended investment companies as illustrated by the facts of this appeal. There was no time before 2011 at which, in the Cayman Islands,*

redeemable equity shares could be issued, or redeemed, when there was also an uncontrolled right to fund premium payable on redemption out of share premium account. If the solvency test was imposed in 1987, as the Board considers that it was, it cannot in the light of the legislative history sensibly be described as some unaccountable blip in an otherwise seamless liberalisation of the capital maintenance regime."

195. This discussion acknowledges the process of liberalisation of aspects of the capital maintenance regime in this jurisdiction, the significance of the enactment of legislation to permit the issue of redeemable preference shares in 1987 and the importance of Parliament's further and clear decision in 2011 to confirm by the amendment to section 37(5)(a) that the payment of premium due on the redemption of shares could be made out of the share premium account without the need to satisfy the statutory solvency test (on the basis that the sums credited to that account are not treated as a payment out of capital). I also acknowledge from my own experience of dealing with relevant cases (even though no evidence has been adduced from investors or market participants as to the attitudes and expectations of those who invest in redeemable shares in Cayman funds and vehicles) that since holders of redeemable shares rarely if ever have decision making powers (in relation to the appointment of directors or with respect to management) their ability to redeem rapidly and withdraw their funds is of real practical importance.

196. Lord Hodge agreed. As he said at [67] of his judgment: "*The relevant provisions of the 2007 Companies Law are the consolidation of provisions introduced in 1963, 1987 and 1989. The legislative history of the current provisions, which have been set out at [33] above, differs markedly from the way in which companies legislation in the UK has regulated the share premium account. The policies behind the legislation in the UK do not, in my view, provide a reliable guide as to the meaning of the 2007 Companies Law*." Lord Hodge differed from the majority because in his view, on the proper construction of the Cayman Islands legislation, the payment of premium due on the redemption of shares out of the share premium account was permissible without the need to satisfy the solvency test even before the 2011 amendment. He also noted at [69] that *".. in 1987 company law in the Cayman Islands was altered radically when companies were empowered to issue redeemable equity shares*."

197. So there is a clear difference in the capital maintenance rules in this jurisdiction and England as they relate to the use of sums credited to the share premium account to pay the premium due on the redemption of redeemable shares. The position under English law is different. As the current edition of Gower (11th ed., 2021 at 16-006) puts it, (the strong language used revealing the significance of the different approach taken in this jurisdiction):

> *"It is clear that the amount received by the company by way of the nominal value of the shares issued constitutes part of its legal capital. The amount (often much more significant) received by way of premium is today treated in much the same way. Prior to 1948, when companies issued shares at a premium, the value of the premium was treated differently from the par value. Legal capital was regarded as determined by the nominal or par value of the shares; if they had been issued at price above par the excess was not "capital" and indeed constituted part of the distributable surplus which the company … could return to the shareholders by way of dividend. This was of course a ridiculous rule except on the basis that it might be an indirect way of subverting the capital based distribution rules."*

198. In this case, as the JOLs pointed out, only a minute part of the subscription price paid by Investors represented the nominal value of the shares. The overwhelming majority of each subscription price was premium which was credited to the share premium account. The JOLs argue that in light of the legislative regime, and in particular since under the Companies Act payments out of the share premium account to pay the redemption price are not treated as payments out of capital, admitting to proof in the liquidation the damages claims of the Misrepresentation Claimants cannot be treated as or give rise to a breach of the Capital Maintenance Rule as that rule applies in this jurisdiction. The no-proof proposition (and the Houldsworth Rule) cannot operate to bar the admission of the Misrepresentation Claims.

199. The JOLs say, as I have noted, that the Misrepresentation Claims are likely to be for damages representing the difference between the sums subscribed by Investors for their shares and the actual value of those shares at the time of the liquidation. They argue, as I understand their case, that since the amount subscribed was almost entirely in respect of premium it follows that the damages claims represent compensation flowing from the payment of, and in respect of, that premium and should be treated, for capital maintenance purposes, in the same way as the payment of premium on a redemption and therefore as not involving a payment out of capital. Putting the point more broadly, they

say that since the sums owing on redemption can be paid out of the share premium account even if the company cannot satisfy the statutory cash flow insolvency test, there can be no objection on capital maintenance grounds to admitting the Misrepresentation Claims in the winding up.

200. Eiffel agrees that the Misrepresentation Claimants' claims for damages for misrepresentation are intended to put them in the position that they would have been in had they not invested and that this includes compensatory damages for having contributed such amount as represents the base capital invested. However, Eiffel submits that a claim for damages for is not the same as a redemption. Payment of such a claim would amount to a distribution because it is essentially a return of capital and is therefore subject to the conditions and proviso in section 34(2). A redemption or a claim for the redemption price is calculated on a different basis (NAV), which bears only a limited relationship to the sums initially invested. There is another difference. If a claim for damages was admitted, the Misrepresentation Claimants' shares are not cancelled and DLIFF would not get the shares back.

201. The basis and calculation of a claim for damages for deceit was not dealt with in depth in the parties' submissions but I accept that, as a general matter, it is right to say that they are calculated on the basis that the claimant is to be put in the position they would have been in if the tort had not been committed. This means getting back what they paid less the value of what they received. As was held by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 in the context of a shareholder claim based on a false representation, the general rule means that damages will be assessed on the date on which the securities were purchased (the transaction date). Accordingly, the amount will be calculated as the difference between the price paid for the shares and their actual/true value as at the transaction date. But this is not an absolute rule and claimants may seek to depart from the general rule, for example by seeking to recover the difference between the price paid for the shares and the amount realised on disposal of the shares (which is often one of the methods by which damages are calculated and will be an attractive option where there has been a later fall in value of the shares). I assume that this is the reason why the JOLs say that in this case it can be expected that the Misrepresentation Claimants will seek to calculate their loss

by reference to the difference between the subscription price and the nil value of their shares at the date of the winding up.

202. So I accept that it can be said that the damages claim will compensate the holders of redeemable preference shares for (and to that extent can be said to represent) the value of what they paid on subscription and that almost all of that was premium. The shareholder is getting back from the company the financial equivalent of what he/she paid for the shares. The shareholder is entitled to get back what it paid but must give credit for the value of what it received. The problem for the JOLs is that the Companies Act does not say that any payment representing premium (or the return of premium) can be made without satisfying the statutory solvency test and, furthermore, it regulates the ranking and treatment of a claim in the winding up for the unpaid redemption price.

203. The qualification to the capital maintenance rule as it relates to the payment of premium on the redemption of shares is narrowly focused and precisely defined. It is a permission to pay (a) upon redemption (b) out of the share premium account (c) prior to the commencement of the liquidation in circumstances where (d) distributions must satisfy the statutory solvency test and (e) the statute provides that in the winding up sums owing in respect of the unpaid redemption price, if provable at all, are subordinated to the payment of non-member creditors.

204. But the damages claim is in law not a claim for payment of the redemption price. The cause of action is different. The shareholder has and retains the shares and is not seeking to exercise the right to redeem. Instead, where there is no rescission, the shareholder claims (*inter alia*) for the difference between the value of the shares he/she holds and the subscription price.

205. Even if the damages claim could, adopting the substance over form approach which is generally used when applying the Capital Maintenance Rule (see *Progress Property* and *Aveling Barford*), be treated as a claim for the payment (return of) the premium paid on subscription, it is not a payment out of capital for the purpose of section 37(5)(a) and (b), where there is no redemption. The substance over form approach strongly suggests that the correct characterisation of the misrepresentation claims is as a return of capital

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(mainly premium) otherwise than on and by way of redemption (and therefore a distribution).

206. In any event, and critically, section 37(7) and section 49(g) make it clear that even where a holder of redeemable preference shares (who has exercised his/her right to redeem or was entitled to do so before the winding up) is entitled to prove in the winding up for the unpaid redemption price, his/her claims rank after those of non-member creditors and therefore, to that extent, remain subject to the Capital Maintenance Rule. There is no exemption from the Capital Maintenance Rule for unpaid redemption creditors and so it cannot be said that there is such an exemption for shareholders with misrepresentation claims. The statutory permission to pay sums due on redemption out of the share premium account without the need to satisfy the solvency test is substituted following the commencement of the winding up by the rules as to proof and ranking set out in sections 37(7) and 49(g).

207. Accordingly, I reject the JOLs' submission that there can be no objection to admitting the Misrepresentation Claims on capital maintenance grounds because of the provisions in the Companies Act which permit sums due on redemption to be paid out of the share premium account without the need to satisfy the statutory solvency test.

Can and should this Court refuse to follow the Houldsworth Principle?

208. I note Justice Doyle's detailed, wide ranging and scholarly review of the authorities from multiple jurisdictions and the related literature dealing with the precedential value and weight to be given to decisions of the House of Lords, Privy Council and foreign courts. He set out the principles which he derived from these authorities at [70] of Justice Doyle's Judgment and I would gratefully adopt and follow his statement of the position (but emphasise that most of the points identified are factors to be taken into account in a broad based assessment of whether in any particular case English law is to be treated as having been received into and a part of Cayman Islands law).

209. I generally accept Eiffel's submissions on this issue (with some exceptions which I mention below). I have carefully considered the various authorities relied on by the JOLs (and the authorities and principles identified by Justice Doyle). I have also carefully

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considered the submissions made by the JOLs but I am unable to accept them. Therefore, and with some serious hesitation and reluctance because I am differing from Justice Doyle's conclusion, I consider that the English cases demonstrate that there is a common law rule which applies and should be applied in this jurisdiction (based on the rules of capital maintenance that underlie English and Cayman corporate law) that affects and qualifies the right of shareholders claiming damages for misrepresentation to prove in a winding up. The decisions leading up to *Soden* which I have discussed are obviously not binding on me, but I do regard the reasoning and decision in *Soden* as of considerable persuasive authority and weight.

210. It seems to me that, for the reasons I have given, the no-proof proposition (giving effect to and being part of the Maintenance of Capital Rule) was good law and a common law rule in England before the 1989 Companies Act and that in the absence of a similar legislative intervention here, it has been and remains a common law rule in this jurisdiction. Our company law (in particular the law governing the maintenance of capital and proof in a winding up) is, as a general matter, derived from and based on English law and while there are significant differences of approach in respect of redeemable shares and the use of funds credited to the share premium account to pay premiums on redemption, the differences do not, in my view, justify the conclusion that the no-proof proposition is inconsistent with or has been abrogated or its rationale undermined by the relevant provisions of the Companies Act. The no-proof proposition is embedded in and an important part of the common law rules regulating the maintenance of capital (in both England and this jurisdiction) and cannot be treated as a distinct rule that can be separated and discarded. The no-proof proposition, as I have explained, is not just based on *Houldsworth* but also on the various cases after it that worked out and defined the scope and effect of the Maintenance of Capital Rule. To say that *Houldsworth* was decided a long time ago when company law was in its infancy seems to me to be beside the point. The case law as a whole up to *Soden* needs to be considered and taken into account. Furthermore, as I have also explained, in my view it is well established here and in England that common law rules can operate alongside the statutory code governing company liquidations.

211. I accept, as I have said, that company law in this jurisdiction has diverged in material respects from that in England and that the importance of redeemable shares for the funds

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and financial services industry has driven many of the changes. But the application of the no-proof proposition does not undermine or threaten the rights or position of holders of redeemable shares. At least, no evidence was adduced to show that it did. Even redemption creditors who have given notice of redemption and not been paid are subordinated to the rights of non-member creditors. I can see and take it that the JOLs' main objection was to the application of the no-proof proposition as an absolute bar to proof. But I have concluded that the no-proof proposition as properly understood (or, if necessary, as should be applied in this jurisdiction) only operates as a qualification to the right to prove.

212. I also accept that we do not look only to the case law in England when considering what the common law rules applicable to companies are and should be and that decisions of the High Court of Australia are also of considerable weight. But, as I have explained, I do not regard the reasoning of the majority in *Sons of Gwalia* as demonstrating that the reasoning in the English cases in general and in *Soden* in particular is obviously wrong or otherwise not persuasive or an affront to common sense (to use the language of Justice Doyle’s factors in [70(g)] and [70(i)] respectively). It seems to me that there were strong local factors which influenced the views and reasoning of the majority and that there was no clear, uniform and persuasive rejection of the application of capital maintenance rules in a different statutory context as applies in this jurisdiction (we have no statute which evidences a strong public policy to allow investors who have been defrauded to rank equally with all creditors). For the reasons I have given, I also do not find that the decision of Justice Ground in *Televest* provides a basis for rejecting the no-proof proposition as part of Cayman law (nor did I find the reasoning Justice Chua Lee Ming in *Song Jianbo* persuasive).

213. I do not accept that it follows that because the English Parliament has (and other legislatures have) chosen to enact legislation to give shareholders with misrepresentation claims, or to clarify the law to confirm that such shareholders have, a right to prove this Court should treat Cayman Islands law as similarly amended or that the common law before amendment should *ipso facto* be treated as having been wrong or flawed. The foreign legislation represents a decision of the local government to change the law. It is then a matter for our Parliament to decide whether to follow suit and enact amending legislation. I agree with Eiffel that it is significant that the Cayman Islands Parliament

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has not done so. The decision of another government (particularly the UK government) to change the law is a factor to be taken into account when considering whether to modify a common law rule in this jurisdiction but for my part there would need to be a clear and compelling reason in order to justify this Court making the amendment to the law rather than leaving it to the Cayman Parliament to follow the foreign governments. I certainly consider that it would be wrong for this Court to modify or abrogate a common law rule on the basis of the needs and wishes of investors in the funds sector without at least clear and comprehensive evidence on the position being adduced (see the reasons for caution given by Lord Neuberger in *International Energy Group*).

214. I agree with the JOLs that the *dicta* of Smellie CJ referring to *Houldsworth* in *SPhinX* did not amount to a binding endorsement and approval of the Houldsworth Principle but it does in my view reflect a common understanding and assumption within the Cayman profession that the right of shareholders making misrepresentation claims to prove was qualified.

215. I also agree with the JOLs that Eiffel's floodgates argument was exaggerated and unpersuasive.

216. As will be clear, I do not accept the four arguments made by the JOLs and summarised at [114] above as to why there are good grounds for adopting a different approach in this jurisdiction from that established by *Houldsworth* and the subsequent case law. I accept that Eiffel seeks to establish as a common law rule in this jurisdiction a proposition that was not part of, or clearly part of, the *ratio* of *Houldsworth* but that does not fundamentally affect the analysis. *Houldsworth* and the other cases rely on establishing the common law rule and in my view that rule applied in England and still applies in this jurisdiction.

217. It seems to me that when taking into account all of the factors that have been relied on by the JOLs, and having regard to the factors listed by Mr Justice Doyle at [70] of Justice Doyle's Judgment, there is no sufficient basis justifying a refusal by this Court to treat the no-proof proposition as good law or to refuse to apply it in this jurisdiction, at least as I have formulated it. To the extent that it could be said that I am wrong as to the proper formulation of the no-proof proposition as a matter of English law and that in English

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law it imposes an absolute and permanent bar on the proof of misrepresentation claims, then I would hold that the no-proof proposition should only be treated as incorporated into and as part of Cayman Islands law in the formulation I have given it.

The Priority Point - the statutory provisions

218. I have already referred to and quoted from section 49 of the Companies Act but it is as well to set out again at this point the core statutory language:

> *"In the event of a company being wound up every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding up and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves:*
>
> *Provided that —*
>
> *…….*
>
> *(g). no sum due to any member of a company in that person's character of a member by way of dividends, profits or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between that person and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributions amongst themselves."*

219. Section 37(7) of the Companies Act states as follows:

> *(a) Where a company is being wound up and, at the commencement of the winding up, any of its shares which are or are liable to be redeemed have not been redeemed or which the company has agreed to purchase have not been purchased, the terms of redemption or purchase may be enforced against the company, and when shares are redeemed or purchased under this subsection they shall be treated as cancelled.*
>
> *Provided that this paragraph shall not apply if —*
>
> *(i) the terms of redemption or purchase provided for the redemption or purchase to take place at a date later than the date of the commencement of the winding up; or*
>
> *(ii) during the period beginning with the date on which the redemption or purchase was to have taken place and ending with the commencement*

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of the winding up the company could not, at any time, have lawfully made a distribution equal in value to the price at which the shares were to have been redeemed or purchased.

(b) There shall be paid in priority to any amount which the company is liable by virtue of paragraph (a) to pay in respect of any shares — (i) all other debts and liabilities of the company (other than any due to members in their character as such); and (ii) if other shares carry rights whether as to capital or as to income which are preferred to the rights as to capital attaching to the first mentioned shares, any amount due in satisfaction of those preferred rights,

but subject to that, any such amount shall be paid in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members."

The Priority Point - Eiffel's submissions

Eiffel's case in outline

220. Eiffel's case in summary is that:

(a). the Misrepresentation Claims arise from the statutory contract between the relevant member and the company and are therefore made by that member in its character as a member. As such, Misrepresentation Claims fall within section 49(g) and are subordinated to the redemption creditors' claims.

(b). the Late Redeemers' claims (and the claims of all shareholders who have redeemed but not been paid) should be treated on the same basis as claims made by shareholders who have a right to enforce their redemption against the company under section 37(7)(a) of the Companies Act. Section 37(7)(a) claims are, by virtue of section 37(7)(b), to be paid in priority to any shareholder claims arising under section 49(g).

(c). the resulting waterfall of priorities (after liquidation expenses and preferential creditors) was therefore: first, all ordinary unsecured creditors (section 37(7)(b)(i)); second, the Late Redeemers' claims (section 37(7)(b)(i) and section 49(g)); third, Misrepresentation Claims (section 37(7)(b)(i)) and fourth the return of equity to shareholders (section 140(1)).

The ranking of the Misrepresentation Claims

221. Eiffel submitted that the question of whether Misrepresentation Claims fall within section 49(g) had not been considered by this Court but was the subject of highly persuasive English and Australian authority, which had decided that such claims were subject to equivalent statutory provisions.

222. Eiffel submitted that in *Addlestone*, the facts of which are summarised above, Kay J regarded it as "*unquestionable*" that the shareholders were making their claims in the character of members (for the purposes of section 38(7) of the Companies Act 1862) and the only question was whether such sums were due "*by way of dividends, profits or otherwise*." He held that they were analogous to a dividend and so were caught by the words "*or otherwise.*" Kay J had considered that the shareholders were from a practical perspective admitting their liability to pay the sum due to the unsecured creditors but seeking to get it back "*out of the pockets of those very creditors themselves*." Eiffel says that the English Court of Appeal (Cotton, Lindley and Lopes LJJ) upheld Kay J in reasoning and result. Lopes LJ approved Kay J's construction of section 38(7) and said (at page 206) that there was no substantial distinction between a claim for breach of contract (as in *Addlestone*) and a claim for misrepresentation (as in *Houldsworth*). Cotton LJ had said (at page 205) that "*I think it would have been very difficult to come to the conclusion that [the claimant shareholders] could compete with outside creditors*."

223. Eiffel also relied on the decision of the High Court of Australia in *Webb* which considered, as noted above, section 360(1)(k) of the Victorian Companies Code. Eiffel relied on the passage in the judgment of Mason CJ (at page 408) quoted above.

224. In addition, Eiffel argued that support for their position was to be found in the judgments of the Court of Appeal and the House of Lords in *Soden*. In the Court of Appeal (Peter Gibson LJ, giving the judgment of the court) held that *Webb* was of "*high persuasive authority for the proposition that damages in tort for misrepresentation by a company as to the nature of its shares, which induces a contract to subscribe for shares in the company, come within section 74(2)(f)*." In the House of Lords, Lord Browne-Wilkinson had drawn a distinction between a claim for misrepresentation made by an original

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subscriber and by a person who had purchased his shares from an original subscriber (or from another shareholder). *Soden* involved the latter type of claimant and Lord Browne-Wilkinson had concluded that a claim by a purchaser of shares that had already been issued was not covered by section 74(2)(f). Eiffel argued that Lord Browne-Wilkinson had justified this distinction in part on the same basis as had been adopted in *Addlestone* and *Webb*, namely the protection of creditors from indirect reductions of capital. Eiffel submitted that this distinction was part of the *ratio* since the analysis of the nature of the two different types of claim and claimant was essential to Lord Browne-Wilkinson's reasoning (and not mere *obiter dicta*). In particular, Lord Browne-Wilkinson had said as follows (page 322-327) (underlining added):

> *"Mr. Potts, for the administrators of Atlantic, submitted that the basic principle applicable was that "members come last," i.e. the members of a company can take nothing until the outside creditors have been paid in full. He further submitted that in the present case there would be a manifest absurdity if B. & C., as shareholder in its wholly owned subsidiary Atlantic, could circumvent that rule by claiming as damages sums quantified by reference to the worth of the Atlantic shares payable in respect of a misrepresentation leading to the acquisition of such shares. This would be to enable B. & C. to convert its position from that of a holder of worthless shares in its wholly owned subsidiary into that of a creditor ranking pari passu with ordinary creditors of that subsidiary.*
>
> *He submitted that a dealing or contract is not independent of the corporate nexus of membership or of the character of membership where such dealing or contract itself brings about the status of membership whether by way of subscription for shares or transfer of shares. In particular, he submits, a claim is maintained in the character of a member where the claimant seeks to recover from the company the price which he has paid for his shares on the basis that such shares are not worth what they were warranted or represented by the company to be worth. The claimant who is induced to acquire his shares by subscription falls within the class of those who are not allowed to compete with general creditors: see In re Addlestone Linoleum Co. (1887) 37 Ch.D. 191 and Webb Distributors (Aust.) Pty. Ltd. v. State of Victoria (1993) 11 A.C.S.R. 731. There is no reason, he submitted, why a claimant who is induced to acquire his shares by purchase (as opposed to allotment) should be in a different position. In short, he submits that a sum is due to a person in his character as a member of a company where it is due to him under the bundle of rights which constitute his shares in the company or by reason of a warranty or misrepresentation on the part of the company going to the characteristics or value of the shares which induces him to acquire those shares.*
>
> *I cannot accept these submissions. Section 74(2)(f) requires a distinction to be drawn between, on the one hand, sums due to a member in his character of a member by way of dividends, profits or otherwise and, on the other hand, sums due to a member otherwise than in his character as a member. In the absence of any other indication to the contrary, sums due in the character of a member must be*

sums falling due under and by virtue of the statutory contract between the members and the company and the members inter se constituted by section 14(1) of the Companies Act 1985…….

A contract to similar effect was prescribed by section 16 of the Act of 1862 and all Acts since then. To the bundle of rights and liabilities created by the memorandum and articles of the company must be added those rights and obligations of members conferred and imposed on members by the Companies Acts….

That this is the correct interpretation is supported by the words in section 74(2)(f) "by way of dividends, profits or otherwise." There was some discussion in the judgment of the Court of Appeal whether these words disclose a genus requiring a sum "otherwise" due to be given a narrow construction under the ejusdem generis rule and as to what, if any, genus was disclosed by the words "by way of dividends, profits." In my view that is not the right approach to the section. The words "by way of dividends, profits or otherwise" are illustrations of what constitute sums due to a member in his character as such. They neither widen nor restrict the meaning of that phrase. But the reference to dividends and profits as examples of sums due in the character of a member entirely accords with the view I have reached as to the meaning of the section since they indicate rights founded on the statutory contract and not otherwise.

Moreover, the construction of the section which I favour accords with principle. The principle is not "members come last:" a member having a cause of action independent of the statutory contract is in no worse a position than any other creditor. The relevant principle is that the rights of members as members come last, i.e. rights founded on the statutory contract are, as the price of limited liability, subordinated to the rights of creditors based on other legal causes of action. ***The rationale of the section is to ensure that the rights of members as such do not compete with the rights of the general body of creditors****. If this is the correct dividing line between sums due in the character of a member and those not so due, there is no room for including in the former class cases where membership, though an essential qualification for acquiring the claim, is not the foundation of the cause of action.*

Mr. Potts placed great reliance on the decisions in the Addlestone and Webb cases, in both of which it was held that a sum due in respect of damages payable for breach of contract or misrepresentation made by the company on the occasion of the issue (as opposed to the purchase) of its shares were held to be excluded by the section. …..

[Kay J in Addlestone] also decided that the claim was excluded by the Houldsworth principle.

In the Court of Appeal, the point under section 38(7) received little attention. Cotton L.J. decided that the shareholders could not prove because the issue of shares at a discount (if it had occurred) was unlawful and that in any event the claim failed under the Houldsworth principle. As to the section 38(7) point he said, obiter, 37 Ch.D. 191 , 205: "I think it would have been very difficult to come to the conclusion that they could compete with the outside creditors." Lindley L.J.

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decided the case solely on the Houldsworth principle. Lopes L.J. said that he agreed with the construction put by Kay J. on section 38(7).

If there had been a cause of action in the Addlestone case, it must, as it seems to me, have been based upon the statutory contract between the member and the company. "Dividends" and "profits" represent what might be called positive claims of membership; the fruits which have accrued to the member by virtue of his membership. But the principle must apply equally to negative claims; claims based upon having paid money to the company under the statutory contract which the member says that he is entitled to have refunded by way of compensation for misrepresentation or breach of contract. These, too, are claims necessarily made in his character as a member*. But, in any event, the reasons given by Kay J. for treating the case as falling within section 38(7) are directed exclusively to matters relevant to a claim involving the issue of shares by the company but irrelevant to a claim relating to the purchase of fully paid shares from a third party. Under the statutory contract (including the obligation in the winding up to pay all sums not previously paid on the shares) the claimants were bound to pay the unpaid £2 10s.. in respect of each share. If such a payment were not made the capital of the company would not be maintained and the general body of creditors would be thereby prejudiced. If, in such a case, the member could recover by way of damages for breach of the contract to issue the shares at a discount the same amount as he was bound to contribute on the winding up that would indirectly produce an unauthorised reduction in the capital of the company. Such a failure to maintain the capital of the company would be in conflict with what Lord Macnaghten (in the Ooregum case [1892] A.C. 125 , 145) said was the dominant and cardinal principle of the Companies Acts, i.e. "that the investor shall purchase immunity from liability beyond a certain limit, on the terms that there shall be and remain a liability up to that limit."*

There is nothing in the Addlestone case to justify the application of that decision to cases where the claim against the company is founded on a misrepresentation made by the company on the purchase of existing shares from a third party. To allow proof for such a claim in competition with the general body of creditors does not either directly or indirectly produce a reduction of capital. The general body of creditors are in exactly the same position as they would have been in had the claim been wholly unrelated to shares in the company.

The decision of the High Court of Australia in the Webb case, 11 A.C.S.R. 731 stands on exactly the same footing. .... The High Court held that the claim was excluded by the Houldsworth principle and held that the proposition deducible from that case was that a shareholder may not directly or indirectly receive back any part of his or her contribution to the capital save with the approval of the court. The High Court further relied on the Addlestone decision and section 360(1) but carefully delimited its application to cases of contracts to subscribe for shares. They held, 11 A.C.S.R. 731, 741 that the claim in that case "falls within the area which section 360(1)(k) seeks to regulate: the protection of creditors by maintaining the capital of the company." It is therefore quite clear that both the decision and the reasoning of the High Court were dependent upon the same factors as those in the Addlestone case, i.e. the protection of creditors from indirect reductions of capital. Those are factors relevant to cases of subscription for shares

<u>*issued by the company but wholly irrelevant to purchases from third parties of already issued shares.*</u>*"*

225. Eiffel noted that Lord Browne-Wilkinson had gone on to discuss section 111A of the UK Companies Act but submitted that he was not doubting that *Houldsworth* remained good law. He clearly, Eiffel argued, considered that *Houldsworth* had been good law before the enactment of that section but did not wish or need to consider the extent to which the principle in or represented by *Houldsworth* had been amended and the extent to which it remained good law in the UK after the enactment of section 111A. Lord Browne-Wilkinson had said this (at page 326-327):

> *"I express no view as to the present law of the United Kingdom where the sum due is in respect of a misrepresentation or breach of contract relating to the issue of shares. Section 111A of the Act of 1985 provides:….*
>
> *It is plain that this section operates so as, at least in part, to override the Houldsworth principle. But to what extent and with what consequential results is not yet clear. All that is necessary for the decision of the present case is to demonstrate, as I have sought to do, that the decisions in Addlestone, 37 Ch.D. 191 and Webb, 11 A.C.S.R. 731 do not apply to claims other than those relating to the issue of shares by the company."*

226. Eiffel submitted that the decision in *Sons of Gwalia* is distinguishable and also that it should not be followed by this Court.

227. Eiffel noted that *Sons of Gwalia* was an open market purchase case and not a subscription case (like *Soden* but unlike *Webb* and this case). The cause of action was a statutory claim for damages for deceptive and misleading conduct, based on section 52 of the Trade Practices Act 1974 and section 12DA of the Australian Securities and Investments Commission Act 2001 and the nub of the decision was that the statutory subordination of claims due to members in their character of members (under section 563A of the Corporations Act 2001) did not apply to claims brought under the statutory tort provisions.

228. Eiffel also said that the result in *Sons of Gwalia* had been seen to have such a damaging impact on the Australian financial community that the Federal legislature was forced to reverse its effect in the Corporations Amendment (Sons of Gwalia) Act 2010. This indicated that the approach adopted in the case was undesirable from a policy perspective.

In addition, the decision was contrary to *Addlestone* and *Soden*, which although not formally binding on this Court were nonetheless part of the common law of the Cayman Islands.

229. Eiffel submitted that the proper analysis of the ranking of the Misrepresentation Claims could be summarised as follows:

(a). a claim for damages for misrepresentation which induced a contract of subscription for shares was, in economic terms, a claim for restitutionary damages in the amount of the contributed capital. The fact that the cause of action was a common law claim for damages based on a tort was irrelevant. The practical outcome of both from the shareholder's and the company's point of view was a return of capital (both base capital and share premium). That was not so with an open market purchase since the loss claimed was not measured by reference to the subscription price but to the trade price at which the shareholder bought the shares from the seller, which may bear little relationship to the value of the capital originally subscribed for.

(b). a claim for damages for misrepresentation inducing a subscription agreement is founded on the statutory contract because it is via the subscription agreement that the statutory contract comes into being and the member's obligation to contribute capital and other liabilities arise. It was artificial to limit *"sums due to a member in his character as a member"* to those contractually due to and from the company under the articles, as opposed to the subscription agreement and the articles taken together as a single transaction. After all, a subscription agreement was simply an agreement to buy the contract of membership comprised in the articles.

The ranking of claims by the Late Redeemers (redemption creditors)

230. Eiffel argued that the shareholders who had redeemed before the winding up (including the Late Redeemers) (redemption creditors) were only subordinated to non-member creditors. Even if the Misrepresentation Claimants were permitted to prove in the winding up, the redemption creditors ranked ahead of them (and any shareholders holding redeemable shares that came within section 37(7)(a)).

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231. Eiffel relied on the judgments of the Cayman Court of Appeal and the Privy Council in *Re Herald Fund SPC (in official liquidation)* [2016] 2 CILR 330 and [2017] 2 CILR 75 (JCPC) (***Herald***).

232. Eiffel said that *Herald* had decided that unpaid former shareholders whose shares had been redeemed before the commencement of the winding up would have a provable claim as creditors for the redemption price under section 139(1) of the Companies Act, since they had ceased to be members of the company when their shares were redeemed. It had been decided that they were not subject to or caught by section 37(7). That subsection applied only to unredeemed shareholders who had started but not completed the redemption process required by the articles before the commencement of the winding up. Shareholders who had redeemed before the winding up (and therefore who had become creditors) were however subject to section 49(g) since their claims were founded on their contract of membership (the articles). Their claim to the redemption price was therefore postponed, but only postponed, to non-member unsecured creditors. They still ranked ahead of the rights of all other shareholders.

233. Eiffel submitted that the basis on which the Court of Appeal had accorded priority to redemption creditors over ordinary member claims was the power of adjustment as between members contained within section 49(g). Eiffel submitted that Field JA (at [54]) had followed and adopted the analysis of Mitchell JA in *Somers Dublin Ltd v Monarch Pointe Fund Ltd* Eastern Caribbean Supreme Court, (BVI C.A.), Case No. HCVAP/2011/040, 11 March 2013, unreported, per Mitchell JA at [20]-[24].

234. In *Somers,* the Eastern Caribbean Supreme Court in the Court of Appeal considered the purpose and effect of section 197 of the BVI Insolvency Act 2003. That section provides that "*A member, and a past member, of a company may not claim in the liquidation of the company for a sum due to him in his character as a member, whether by way of dividend, profits, redemption proceeds or otherwise, but such sum is to be taken into account for the purposes of the final adjustment of the rights of members and, if appropriate, past members between themselves*." The Eastern Caribbean Supreme Court in the Court of Appeal decided that the purpose of this section was merely to subordinate the former members' claims (along with other claims arising out of membership) as creditors to that of ordinary unsecured (and usually external) creditors. They held that when section 197

said that a past member "*may not claim in the liquidation*" it must be read as referring to and barring claims as an ordinary unsecured creditor and not as barring claims as a deferred creditor as part of the "*final adjustment of the rights of members and ... past members between themselves*". It had therefore been wrong for the trial judge to have held that the redeemed members in their character as such should rank equally with the continuing members claiming a return on their capital. It was wrong to have held that redeemed members were not deferred creditors and as such entitled to have their claims against the company satisfied in priority to any claim by the continuing members. The redeemed members must be paid before any surplus was ascertained out of which the continuing members would be paid. Eiffel noted that Field JA in *Herald* had said (at [54]) (underlining added) that "*As Mitchell, J.A. said in reference to s.197 of the BVI Insolvency Act in the Somers Dublin Ltd. decision, any adjustment within s.197 must give higher priority to former members who have become creditors as a result of a redemption than to mere continuing members.*"

235. Eiffel submitted that since the Court of Appeal's decision in *Herald* was upheld by the Privy Council, it was binding on this Court and stood as authority for the following propositions:

(a). the claims of redemption creditors (including the Late Redeemers) who had redeemed in accordance with the articles did not fall within section 37(7)(a). They were therefore entitled to prove in accordance with section 139(1) as creditors of DLIFF.

(b). since such redemption creditors were former members of the company and their claims arise out of the statutory contract with the company, their claims engage section 49(g) and are subordinated to the claims of ordinary outside creditors.

(c). although section 37(7)(a) is not engaged in the case of such claims, a redemption creditor's claim ranks ahead of the claims of other shareholders which are subject to section 49(g) by way of adjustment under section 49(g) (following *Somers*) and in the same way that they would do if they had the benefit of the priority given by section 37(7)(b).

(d). therefore, since the Misrepresentation Claims were made by shareholders in their character as such within section 49(g) the redemption creditors had priority over the Misrepresentation Claimants.

236. Eiffel submitted that the decision of Justice Mangatal in *Re Centaur Litigation SPC* (unreported, 28 November 2017) (***Centaur***) was wrongly decided and should not be followed. That case concerned a group of Cayman Islands investment funds, collectively referred to as the Centaur entities, that were involved in the business of litigation funding. It was subsequently discovered that the funds were a victim of fraud perpetrated on them by their controllers, with some $27m misappropriated. The joint official liquidators of the Centaur entities sought directions and relief in relation to a number of issues. One of the issues related to the relative priority between the claims of former members for the redemption price of their shares and claims by continuing members for other liabilities such as unpaid dividends. The joint official liquidators contended that there was no basis on which to distinguish shareholder creditor claims and redemption creditor claims in the distribution waterfall where there were no claims in the liquidation falling under section 37(7). The joint official liquidators argued that where there were no section 37(7) claims the priority waterfall set out in section 37(7)(b) was not engaged so that the only statutory provision governing priorities was section 49(g), with the result that both types of claim would rank *pari passu*. The liquidation committee submitted that the correct analysis, following *Herald*, was that shareholder debt claims would be subordinated to redemption creditor claims. Mangatal J held that both redemption creditor claims and shareholder debt claims would rank *pari passu*. She considered that section 37(7) did not apply and that therefore the redemption creditors fell back into section 49(g) and ranked *pari passu* with other member claims.

237. Eiffel submitted that Justice Mangatal had in substance ignored the decision in *Herald*. The learned judge had been bound by the *ratio* of *Herald* that redemption creditors, like redeeming members under section 37(7), have priority over member claims. Eiffel argued that Justice Mangatal appeared to have concluded that because section 37(7) did not apply, redemption creditors *ipso facto* enjoyed no priority over member claims. But, Eiffel submitted, that was not right because the Court of Appeal in *Herald* had held that they did, even though not within section 37(7). Justice Mangatal, Eiffel said, had failed to have any regard to the basis on which Field JA had reached his decision, namely the

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adoption of the self-same approach by Mitchell JA in *Somers*. That decision covered exactly that point, treating redemption creditors as deferred creditors, ranking behind ordinary unsecured creditors but ahead of member claims. Justice Mangatal had failed to take account of the express language of section 49(g) which required adjustment between member claims, which would include those of redemption creditors. Eiffel argued that the result in *Centaur* was perverse. It meant that members who had not completed their redemption as at the date of the winding up had priority over member claims (by virtue of section 37(7)(b)) but redemption creditors who had completed all necessary steps to redeem and had been redeemed but not paid, would be in a worse position.

238. Eiffel argued that the Court should conclude that although redemption creditors were subordinated by section 49(g) as regards ordinary creditors, they rank ahead of member claims, including the Misrepresentation Claims.

239. In his oral submissions, Mr Millett KC summed up Eiffel's case thus (day 2 transcript page 92):

> *"The underlying legislative intent or fairness, whichever you take, is the conversion from member to creditor. That has to be given full weight and the effect of that is simply to treat redemption creditors, whatever misrepresentation claimants might or might not have, but redemption creditors ... [as] only subordinated to unsecured outside creditors. Section 49(g) has no further subordinating effect and nor does anything else. My Lord, we would simply leave it like this. Although the Privy Council did not examine in detail the question I just showed you about how they would rank amongst themselves, what they were doing is proceeding on the assumption that a redemption creditor must rank at least pari passu with an uncompleted redeemer within section 37 and certainly not junior to him, otherwise the whole analysis would have been completely pointless."*

The Priority Point – the JOLs' submissions

The ranking of the Misrepresentation Claims

240. The JOLs relied on the decision and reasoning of the majority in *Sons of Gwalia* which they submitted was correct and should be applied to the construction of section 49(g) and followed by this Court.

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241. As I have explained, the High Court had decided that damages claims brought by a shareholder against the company for misrepresentation were not brought in his capacity as a member of the company in the context and for the purpose of section 563A of the 2001 Act.

242. Justice Hayne said that the starting point was that the relevant obligation had to be linked to the shareholder's membership of the company (at [202]):

> *""Membership" of a company is a statutory concept. That is why the connection between obligation and membership that must be shown, if the obligation is to fall within s 563A, will find its ultimate foundation in the relevant legislation, now the 2001 Act. It is the legislation which defines the obligations owed by and to the members of a company. That definition of obligations will often require resort to the company's constituent documents to flesh out the content of the relevant obligation. It is on that basis that reference is often made to "the statutory contract", but it is the statute (now s 140 of the 2001 Act) which gives those documents their particular legal effect. And in other cases, it will not be necessary to look beyond the four corners of the statute to conclude that the obligation which the member seeks to enforce is an obligation owed to members."*

243. He had then explained what the JOLs described as the critical distinction between a claim to recover monies paid under a contract and a claim to recover monies paid to create a contract (at [205]) (underlining added):

> *"If money is paid to the company under the statutory contract, there may be cases in which it may be said that the obligation which it is then sought to enforce is one whose ultimate foundation is the legislative prescription of the rights of members. Whether that is so would depend entirely upon the facts and circumstances of the particular case and, very probably, would be much affected by the provisions of the company's constituent documents. But if money is paid to the company to create the relationship of member (as will be the case when a person subscribes for shares) the company's obligation to pay damages for fraudulent misrepresentation inducing that subscription, or to pay damages because loss was occasioned by the company's misleading or deceptive conduct, will not, in the absence of specific legislative provision to the contrary, be an obligation whose foundation can be found in the legislative prescription of the rights and duties of members. In this respect, absent specific legislation giving subscribing members particular remedies as members, no distinction is to be drawn between shareholders who complain that a company's deceit or misleading or deceptive conduct induced them to acquire shares in the company according to whether that acquisition was by subscription or transfer."*

244. Having established these principles, Hayne J had rejected the notion that the obligation (whether based upon consumer/investor protection statutes or in the tort of deceit) was an obligation which the 2001 Act created in favour of a company's members. The JOLs submitted that even though the claims of Mr Margaretic were in part based on statutory investor protection provisions under Australian law they were also based in the tort of deceit, and it was clear that Justice Hayne's reasoning did not depend on whether a subscriber's claim relied upon statutory provisions (regarding e.g. investor protection) or the tort of deceit. In either case, by its very nature, the claim was not reliant upon rights or obligations arising under the statutory contract. As Hayne J had said (at [205]-[206]) "*In so far as the claim is put forward in the tort of deceit, it is a claim that stands altogether apart from any obligation created by the 2001 Act and owed by the company to its members. Those claims are not claims 'owed by a company to a person in the person's capacity as a member of the company*'."

245. The JOLs also supported the High Court's conclusion that there was no distinction for these purposes between claims by subscribing investors and claims by transferee investors. They submitted that to the extent that there was any inconsistency between the decisions in *Sons of Gwalia* and *Soden*, the former was to be preferred. It represented a fully reasoned decision of the High Court of Australia which post-dated the *dictum* in *Soden* and which expressly dealt with it as part of a finding of the High Court which formed the *ratio* of the decision. By contrast, Lord Browne-Wilkinson's statement was *obiter*, since as he himself said, all that it was necessary to decide in *Soden* was that the decisions in *Addlestone* and *Webb* did not apply to B&C's claims as a subsequent transferee of the shares.

246. The JOLs argued that the Misrepresentation Claims would not be made by the relevant Investors in their character as members within the meaning of section 49(g). Misrepresentation Claims based on the tort of deceit, whether brought by subscribing Investors or transferee Investors, did not constitute claims made by such investors "*in their character as members*" since such claims were not founded upon obligations owed by DLIFF under the statutory contract of membership (e.g. to pay dividends, to return capital) and the causes of action did not depend on, and were not based on, the statutory contract. Rather, the claims were founded on tortious acts and statutory wrongs committed by DLIFF. Whilst the quantum of the damages claims might in part be

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measured by the subscription amount, they were not necessarily limited to this since the object of the damages is to compensate the claimant for all the loss he/she has suffered which may include a loss of profits.

The ranking of claims by the Late Redeemers (redemption creditors)

247. The JOLs submitted that if the Court found, contrary to their primary case, that the Misrepresentation Claims were subject to and subordinated by section 49(g), then they would rank *pari passu* with the claims of the Late Redeemers (and after the claims of external creditors who were given priority by section 49(g)).

248. The JOLs argued that the Court should reject Eiffel's submission that where the Misrepresentation Claims were subject to section 49(g) the claims of the Late Redeemers should rank ahead of such claim. They relied on the decision of Mangatal J in *Centaur* that *"there remains no statutory or common law basis on which to distinguish Shareholder creditor Claims within the distribution waterfall."*

249. The JOLs said that Eiffel had argued that the Court of Appeal in *Herald* had held that redemption claims should rank as if they were claims under section 37(7)(a), even if they were not to be treated as such. Eiffel had relied on [55] of the judgment of Field JA in the Court of Appeal (although it is helpful to set out [52]-[55] to provide the proper context):

> *"52 In proving their claims under s.139(1), the claimants would be acting in the capacity of creditors. They ceased to be members of Herald once their shares were redeemed under the articles: see Somers Dublin Ltd. v. Monarch Pointe Fund Ltd. (5) which is considered in para. 54 below.*
>
> *53. Pursuant to s.49(g) of the Companies Law, the claims would rank, in my opinion, behind the claims of Herald's ordinary creditors. As recorded above, the respondent submitted to the contrary, relying on the reasoning in Western Union Intl. Ltd. v. Reserve Intl. Liquidity Fund Ltd. (7) where, in reference to s.197 of the BVI Insolvency Act, Bannister, J. held that a claim for redemption proceeds in a liquidation is not a claim founded on the statutory contract between a member and the company but arises after the claimant has ceased to be a member. With respect, I decline to accept this reasoning. Although the claimants ceased to be members of Herald upon redemption of their shares, their claims for redemption proceeds would be founded on the statutory contract between them as members and Herald and*

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as such would be claims for sums "due to any member of a company in his character of a member" within s.49(g).

54. *However, the claimants' claims would rank ahead of the entitlement of other Herald shareholders to be paid sums due to them in their capacity of members. As Mitchell, J.A. said in reference to s.197 of the BVI Insolvency Act in the Somers Dublin Ltd. decision, any adjustment within s.197 must give higher priority to former members who have become creditors as a result of a redemption than to mere continuing members.*

55. *In terms of ranking, the outcome of the postulated claims would therefore be the same as the outcome of a successful claim under s.37(7)(a), which puts paid to the appellant's contention that it cannot have been intended that shareholders of shares redeemed under the articles without payment of the redemption proceeds could claim in the company's liquidation otherwise than under s.37(7)(a) because the outcome of such a claim would see the claimants ranking pari passu with the outside creditors."*

250. The JOLs submitted that this remark could not be taken as a determination that, as a matter of law, a redemption claim for unpaid redemption proceeds was to be treated as falling within section 37(7)(a) for priority purposes. It appeared more likely that the point that Field JA was making was simply that redemption claims and section 37(7)(a) do enjoy the same outcome to the extent that both rank above the claims of remaining shareholders. In any event, the comments of Field JA could not override the actual terms of the legislation under which it was clear that redemption claims did not in fact fall within section 37(7)(a). There was also no support for Eiffel's argument to be found in the analysis of the Privy Council in *Herald*. Furthermore, even if Eiffel's redemption claims were to be treated as if they fell within section 37(7), Eiffel had not attempted to explain how the priority rules in section 37(7)(b) applied such that its claims would have priority over the Misrepresentation.

251. The JOLs noted that the Privy Council in *Herald* had found the question of the relationship between section 37(7) and section 49(g), and the proper interpretation of section 37(7)(b)(i) and the proviso at the end of subsection 37 ("*but subject to that, any such amount shall be paid in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members*"), difficult and had not needed to (and did not) decide the point. The following extract from Lord Mance's judgment explains the approach adopted by the Privy Council:

"32. On that basis, Primeo, as a former member, ranks after creditors who were not formerly members, but ahead of all current members. The claim of a shareholder entitled to enforce terms providing for redemption or purchase to take place before the commencement of winding up would, under section 37(7)(b), rank behind (1) "all other debts and liabilities of the company (other than any due to members in their character as such)"but, subject to that: (2) "in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members."

33. This language raises some questions. Are the references to (1) debts and liabilities "due to members in their character as such" and (2) "amounts due to members in satisfaction of their rights (whether as to capital or income) as members" references to the same subject matter? Are both or either of (1) and (2) references to past and current members? The phrase "members in their character as such" in (1) might be seen as paralleling the later phrase "any member of a company in his character of a member" in section 49(g). But the two are not identical, and it should be borne in mind that ordinary redeemable shares only entered English law through section 45 of the Companies Act 1981, later consolidated as section 159(1) of the Companies Act 1985. Similarities with pre-existing language of the entirely different section 212(1) of the Companies Act may not be as significant as might at first glance appear. Further, the reasoning adopted in English authority on the English equivalent of section 49 shows that the significance of any reference to "member" is highly contextual.

34. If the answer to the questions posed in the previous paragraph is that both (1) and (2) refer to past and current members, the (on its face incongruous) result would be that section 37(7) claimants, who had not (due to the company's default) achieved redemption but were entitled to enforce it in the winding up would rank higher in priority than those like Primeo, who had achieved redemption, but had simply not been paid. The Board cannot contemplate such a result as the intended or actual effect of sections 37(7) and 49(g).

35. There are two alternative possibilities. One is to read both (1) and (2) as referring only to current members. The effect then is that section 37(7) claimants will, pursuant to (1), rank behind claimants like Primeo falling within section 49(g). That would not be incongruous. On the other hand, the Court of Appeal took a different view, considering, without detailed explanation, that claims such as Primeo's would rank equally with those of any section 37(7) claimants (see CA judgment, para 55). This could be achieved by reading (1) as referring to former as well as current members, but (2) as referring only to current members. This would involve reading in different senses two references to "members" in the same subsection, the latter of which ("members as … members") might or might not be seen as echoing, rather than differing from, the earlier ("members in their character as such"). However, the Board itself heard no detailed submissions on this possibility, and prefers in the circumstances to say no more Page 24 on the question of priorities as between section 49(g) and section 37(7) claimants.

> *The likelihood in practice of successful section 37(7) claimants may well also be slight."*

252. The JOLs also noted that in *Centaur,* there was competition between redeemed shareholders who had not been paid their redemption proceeds and the claims of continuing shareholders who had debts (in for fixed returns of dividends due in respect to their shares). The joint official liquidators argued that as both the redemption proceeds and the other debt claims by members for debts owing to them in their capacity as members were all liabilities of the company payable to them in their capacity as a member, they should be characterised in the same class of the distribution waterfall. What they were saying was that the unpaid redemption claims and other debts due to shareholders in their capacity as such all ranked in the same way, under 49(g) and, when the question of the relationship between section 37(7) and section 49(g) was raised before Mangatal J, the learned judge had, reasonably the JOLs submitted, concluded that she did not need to deal with it. She had said (at [179]) that *"…the waterfall in section 37(7) and its interaction with the balance of the* ***[Companies Act]*** *is sufficiently uncertain for it to be reasonable for the Court not to have regard to it unless a liquidator is dealing with claims within that subsection (which I have been told is not the case here)*." So she considered that where there the Court was not considering a claim falling within section 37(7) as was the position in that case and as is the position in this case, it was not necessary to resolve the difficult question of the relative priority of a claim which does fall within 37(7) to one that falls within 49(g). Her decision was set out at [180] where she said that "*On this basis, (though the question is obviously a difficult one), I consider that there remains no statutory or common law based on which to distinguish Shareholder creditor Claims within the distribution waterfall, and therefore both Redemption claims and Shareholder crystallised debt claim should fall within Class 2 of the JOLs' distribution waterfall*."

The Priority Point - discussion and decision

The ranking of the Misrepresentation Claims

253. I accept Eiffel's submissions on this issue (subject to some qualifications). I prefer and would follow the approach taken by Lord Browne-Wilkinson in *Soden*.

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254. It seems to me that section 49(g) is to be understood and interpreted as regulating the right of shareholders to prove in a winding up so as to give effect to and ensure respect of the Maintenance of Capital Rule (I note that Lord Browne-Wilkinson in *Soden* said that the "*rationale of [section 74(2)(f)] is to ensure that the rights of members as such do not compete with the rights of the general body of creditors*" and that even in the Court of Appeal in *Soden,* it was accepted that "*the underlying rationale of section 74(2)(f) is the principle of the maintenance of capital ..*" albeit that "*the legislature has imposed limiting conditions by requiring the sum due to the member to be so due in his character of a member by way of dividends, profits or otherwise*"). The claims of shareholders relating to or derived from their contribution of capital cannot compete with and must rank after the claims of non-member creditors. The damages claims of holders of redeemable preference shares must, in my view, be characterised and treated as claims relating to or derived from their contribution of capital.

255. I have already explained that I consider that the damages claim by original holders of redeemable preference shares provides them with compensation for (and to that extent can be said to represent), the value of what they paid on subscription (as the JOLs had submitted was the proper approach when arguing that admitting a claim for such damages was in substance a payment of premium on redemption and did not involve an impermissible return of capital). They are therefore seeking to recover a sum representing their capital contribution. In the absence of rescission, they remain a shareholder and receive back the value of what they paid for the shares. To allow a claim for damages for misrepresentation made by the company inducing the subscription for shares in competition with the general body of creditors would, in substance, result in a return of capital.

256. It seems to me that Mr Potts QC was right, but only in the context of a shareholder who has subscribed for his/her shares, when he submitted in *Soden* in the passage quoted at [224] above that "… *a claim is maintained in the character of a member where the claimant seeks to recover from the company the price which he has paid for his shares on the basis that such shares are not worth what they were warranted or represented by the company to be worth. The claimant who is induced to acquire his shares by*

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subscription falls within the class of those who are not allowed to compete with general creditors."

257. Lord Browne-Wilkinson's analysis at pages 322-327 of his judgment in *Soden*, quoted at [224] above, seems to me to be correct. It also seems to me that Mr Justice Robert Walker at first instance in *Soden* (a judge whose reasoning carries substantial weight) was right when he said that the right approach was to distinguish between a claim which is "*characteristically a member's claim*" and a claim which happens to be made by a member. The former, he said, must be a claim directly relating to the contractual nexus between a company and its members and between members amongst themselves. He called that nexus "*the corporate nexus*" and said at [1995] 1 B.C.L.C. 686 at, 698-699:

> "*Ultimately the point comes down to whether a claim made by an open market purchaser of shares in a company (as opposed to an original subscriber or allottee), the claim being based on negligent misrepresentation by the company as to its assets, is sufficiently closely related to the corporate nexus as to be characteristically a member's claim. Addlestone and Webb Distributors were both claims by original members. The claimants were complaining of the very transaction under which, by becoming members, they had contributed part of the company's capital…*"

258. It also seems to me that the following passage in the majority judgment in *Webb* (at page 408c-d) reflects the correct analysis (underlining added):

> *"But, in the present case, the members seek to prove in the liquidation damages which amount to the purchase price of their shares, which is a sum directly related to their shareholding. Moreover, they sue as members, retaining the shares to which they were entitled by virtue of entry into the agreement and they seek to recover damages because the shares are not what they were represented to be. Accordingly, the claim falls within the area which section 360(1)(k) seeks to regulate: the protection of creditors by maintaining the capital of the company."*

259. I accept that the Court of Appeal in *Soden* had their doubts and took a narrower view of the proper construction of section 74(2)(f). Peter Gibson LJ said that (at page 317) "*We doubt if it is right to describe a member claiming damages for misrepresentation or breach of a contractual warranty when induced to subscribe for shares as being entitled to the damages in his character as a member as his claim does not arise from a right*

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which is part of the bundle of rights and obligations which make up his shares, though we acknowledge it has a relation to what the judge called the corporate nexus."

260. This focus on the right upon which the cause of action is based reflects the analysis of both Justice Hayne and Chief Justice Gleeson in *Sons of Gwalia*. I have already set out (at [242] and [243] above) the key passages from the judgment of Justice Hayne (at [202]-[206] of his judgment) which are relied on by the JOLs. Justice Hayne considered (see [203]) that in order to decide whether a claim by a member was within section 563A of the 2001 Act it was necessary to decide whether "*the obligation which the member seeks to enforce is an obligation to members*" (by which I think he means members generally) under the statute or corporation constitution. He noted that his view on the operation of the section "*was not expressed in the terms used in Soden*" and omitted to cover what Lord Browne-Wilkinson called "*negative claims … based upon having paid money to the company under the statutory contract which the member says that he is entitled to have rescinded by way of compensation for misrepresentation or breach of contract*" (see [204]). Justice Hayne's reasoning for not treating such claims as covered by section 563A is then set out at [205]. He says that where money is paid to the company to create the relationship of member the company's obligation to pay damages for fraudulent misrepresentation inducing subscription the cause of action is based on the company's misconduct so that the company's obligation is not founded upon the legislative prescription of the rights and duties of members. There is no legislation, he says, which gives subscribing members (as members) remedies for deceit and the company's obligation "*stands altogether apart from any obligation created by the 2001 Act*" (see [206]). Chief Justice Gleeson also says (at 31]) that the key issue is whether the misrepresentation claims are "*founded upon any rights he obtained or obligation he incurred by virtue of*" the claimant's membership. This construction, if applied to section 49(g), seems to me to be too narrow. The cause of action in deceit relates to the shareholder's continuing rights as a member (since he/she is unable to rescind the subscription contract and remains a member) and seeks compensation calculated by reference to the amounts subscribed as capital. He/she is not claiming that he/she has never been a member but has suffered loss as a result of dealings with the company. The substance of the claim, as I have said, is to recover the value and financial equivalent of the shareholders' capital contribution, which contribution is an obligation derived from the company's constitution and statute and arises because of his/her status as a member.

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In any event, adopting a purposive construction of section 49(g), it seems to me that the reasoning of Lord Browne-Wilkinson and Robert Walker J is to be preferred and fits with the legislative scheme and purpose of the Companies Act.

The ranking of claims by the Late Redeemers (redemption creditors)

261. I accept the JOLs' submissions on this issue.

262. Eiffel argues that the redemption creditors rank ahead of all other shareholders who have claims subject to section 49(g) including the Misrepresentation Claimants and of unredeemed holders of redeemable shares with rights under section 37(7)(a).

263. Eiffel's main point seems to be that this conclusion follows from the conversion of holders of redeemable shares into creditors upon giving notice to redeem. This status means that in the "*final adjustment of the rights of the contributions amongst themselves*" they are entitled to a higher ranking than those who remain shareholders at the date of the winding up. Their claims should only be subordinated to those of non-member creditors. Being creditors, and having become creditors before the commencement of the winding up, they are entitled to a superior ranking and status to that of mere shareholders. Eiffel says that the priority of the redemption creditors' claims would then be the same as the outcome of a successful claim made under section 37(7)(a), which ranks ahead of other shareholder claims by virtue of section 37(7)(b).

264. I do not accept that this argument justifies giving the redemption creditors, or treating them as having, priority over the Misrepresentation Claimants. Eiffel's analysis does not apply to the Misrepresentation Claimants. The Misrepresentation Claimants' cause of action in deceit arose prior to the winding up and to that extent they were also creditors before the commencement of the winding up. I do not accept that the adjustment between member claims referred to in section 49(g) requires or permits the Court to order that the Late Redeemers rank and should be paid ahead of the Misrepresentation Claimants. Once the external non-member creditor claims have been paid in full both the Late Redeemers and the Misrepresentation Claimants are member creditors in respect of liabilities owing by DLIFF. The fact that the Late Redeemers gave notice to redeem prior to the commencement of the winding up does not justify such priority. The time at which the

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shareholder became a creditor, provided that they were a creditor before winding up, does not govern priorities (if timing were key, it could be said that the Misrepresentation Claimants' cause of action in deceit arose and was complete before the shareholders who had given notice to redeem became creditors, depending on when the Misrepresentation Claimants were able to say that they had suffered damage).

265. It seems to me that *Somers* does not support Eiffel's case. In *Somers,* four shareholders who had given notice of redemption prior to the BVI winding up of a mutual fund company claimed that they should rank ahead of the shareholders who had not done so. The trial judge had held that the claims of the redeemed members and of the continuing members ranked *pari passu* but the Eastern Caribbean Supreme Court in the Court of Appeal (in a judgment of Mitchell JA) allowed an appeal and held that the redeemed members, as deferred creditors within section 197, ranked ahead of the continuing members and must be paid before any surplus was distributed to those continuing members in the winding up. It was established law (see [20]) that a redeemed member was a creditor in respect of his redemption payment and the Court of Appeal held that section 197 (and sections 9 and 12) of the 2003 Act could not be interpreted as overruling this right. Section 197 only indicated that redeemed members could not rank *pari passu* with outside creditors and were therefore deferred to them. There was nothing in the 2003 Act that provided for redeemed members to rank equally with continuing members "*by virtue of any adjustment or any other provision*." The statements (again at [20]) that "*Any adjustment must give higher priority to former members who have become creditors as a result of a redemption than to mere continuing members. To do otherwise fails to give any weight to their rights as creditors rather than member*" must be read in this context. Mitchell JA said (at [21]) that "*Section 197 lays out a general rule that deferred creditors may not claim as ordinary unsecured creditors but with the proviso that their claims will be dealt with in the adjustment between members and former members under the second half of section 197, i.e. after the ordinary unsecured creditors have been paid in full*." Section 197 was therefore interpreted as having the same effect as section 49(g) and the process of adjusting the rights of members *inter se* was under section 197 and section 49(g) the relevant mechanism for giving effect to the priority of redeemed members as creditors over ordinary shareholders. There is no suggestion or basis for concluding that the BVI Court of Appeal relied on or sought to lay down a principle that redeemed members (redemption creditors) must always have priority over all other members, even

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members who are given special statutory rights such as those established by section 37(7). Field JA only referred to *Somers* in *Herald* for the proposition that redemption creditors rank ahead of holders of shares without redemption rights ("*As Mitchell, J.A. said in reference to s.197 of the BVI Insolvency Act in the Somers Dublin Ltd. decision, any adjustment within s.197 must give higher priority to former members who have become creditors as a result of a redemption than to mere continuing members*").

266. The JOLs, as I have noted, have said that there will in this case be no shareholders with rights under section 37(7) (so that there is no competition between the redemption creditors and unredeemed preference shareholders with rights under that subsection) but since Eiffel relied on the operation of this sub-section and I heard arguments on the question of the relationship between sections 37(7)(b) and 49(g), I shall make the following comments.

267. It seems to me that Field JA at [55] in *Herald* was simply saying that the ranking provided for under section 37(7)(b) and section 49(g) is the same in that under both provisions the holders of the redeemable shares are subordinated to the claims of non-member creditors. I do not consider that he was seeking to go beyond this and to analyse or decide the relative ranking of a claim subject to section 49(g) (the claim which was being considered by the Court in that case) and a claim under section 37(7) (albeit that Lord Mance appears to have thought that Field JA did). He only referred (in [55]) to section 37(7) to make the point that the outcome of applying section 49(g) in the manner he considered to be appropriate (namely that redemption creditors would rank after non-member creditors) would be the same as the outcome under section 37(7) (where claims to the redemption price covered by and under section 37(7)(a) would also rank only after non-member creditor claims). This was, as he said, in response to the appellant's argument that "*it cannot have been intended that shareholders of shares redeemed under the articles without payment of the redemption proceeds could claim in the company's liquidation otherwise than under s.37(7)(a) because the outcome of such a claim would see the claimants ranking pari passu with the outside creditors*."

268. The problem is that section 37(7)(b) and section 49(g) operate in parallel and the Companies Act does not deal with how they interrelate. Section 37(7)(b) stipulates that the sums due on redemption are only payable after "*all other debts and liabilities of the*

company (other than any due to members in their character as such)" but "*in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members*." Section 49(g) stipulates that the sums due on redemption are not to be treated as ("*deemed to be*") a debt payable in competition with any non-member creditor but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves.

269. The Privy Council rejected a construction of section 37(7)(b) that resulted in unredeemed preference shareholders ranking higher in priority than preference shareholders who had achieved redemption but had simply not been paid (which must be correct) but left open the possibility that (a) the unredeemed preference shareholders (being section 37(7) claimants) would rank behind the redeemed shareholders falling within section 49(g) (which they considered would not be incongruous) or (b) that the claims of both categories (both the redeemed preference shareholders with claims subject to section 49(g) and the unredeemed shareholders with rights under section 37(7)) would rank *pari passu* as the Privy Council thought that the Court of Appeal had held to be the case).

270. Sections 37(7) and 49(g) take effect according to their terms as follows:

(a). in terms of subordination, the special category of unredeemed preference shareholders are not (under section 37(7)(b)) explicitly subordinated to the redeemed preference shareholders (the latter are carved out from the subordination in section 37(7)(b)(i) as they are owed debts due to them as members).

(b). in terms of subordination, the redeemed preference shareholders who have given notice to redeem before the winding up are not (under section 49(g)) explicitly subordinated to the unredeemed preference shareholders with rights under section 37(7)(a) (because section 49(g) limits the subordination to the claims of non-member creditors).

(c). in terms of priority, the deferred debt owed to the redemption creditors "*may*" under section 49(g) "*be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves*."

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(d). in terms of priority, the redemption price due to the unredeemed preference shareholders with rights under section 37(7)(a) is to "*be paid in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income as members)*."

271. Lord Mance summarised the construction conundrum to which these provisions give rise and in particular whether it was intended that the unredeemed preference shareholders with rights under section 37(7)(a) are to be subordinated to the redemption creditors because the latter do not have claims as "*members in their character as such*" (or whether it was intended that redemption creditors should be given priority and a higher ranking in the final adjustment of the rights of the contributories amongst themselves, as referred to in section 49(g)).

272. I am inclined to think, but do not need to decide, that the legislation intended to give both sets of rights *pari passu* treatment in circumstances where the legislation permits (some) holders of redeemable shares to enforce their right to be paid the redemption price despite the commencement of the winding up (and to that extent treats them as being able to exercise their right to become and be paid as creditors) and stipulates that these rights and the rights of redemption creditors are both subordinated to non-member creditors but does not go further and state that the section 37(7)(a) rights are to rank after the rights of redemption creditors.

273. It is true that the redemption creditors have become creditors before the winding up and that the unredeemed shareholders with section 37(7)(a) rights are not creditors at the commencement of the winding up. This is not insignificant and does weigh in favour of giving the redemption creditors priority. But their relative ranking has to be determined by reference to and in light of the statutory regime. The effect of section 37(7)(a) is, as I have said, to treat them as entitled to enforce their right to become creditors and therefore treats them as equivalent to creditors.

274. This construction would put shareholders who have redeemed before the winding up in the same position and give them the same ranking as the limited class of unredeemed shareholders who come within section 37, namely shareholders with redeemable preference shares which provided for redemption to take place prior to or on the date of

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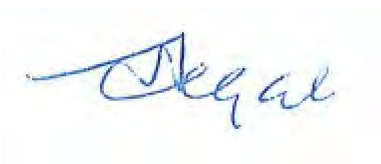
the commencement of the winding up and who satisfy the requirements of section 37(a)(ii) (that the company could lawfully have made a distribution equal to the redemption price for the shares at that date). They are a limited class whose redemption was due to take place before the commencement of the winding up in circumstances where the company was permitted to make the distribution in the period up to the commencement of the winding up. I can see that this approach limits the benefits to be derived from giving notice of redemption before the winding up but only with respect to a very small class who were otherwise entitled to redeem and receive the redemption price (so that giving notice to redeem retains substantial advantages). It can however be said to avoid the unfairness of differentiating between those who did give notice and those whose shares were to be redeemed before the winding up at a time when the company was permitted to pay over the redemption price. This approach also has the merits of being consistent with the decision of Justice Mangatal in *Centaur* (which for the reasons I have given when reviewing Eiffel's submissions, seems to me to produce the right result) and with Lord Mance's understanding of the approach approved by the Court of Appeal in *Herald*.



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The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
13 March 2024

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IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 231 OF 2022 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION) (AS AMENDED)

AND IN THE MATTER OF ORIENTE GROUP LIMITED

IN COURT

Appearances:

Mr Matthew Goucke, Ms Siobhan Sheridan and Ms Fiona MacAdam of Walkers on behalf of Oriente Group Limited (the "Company"/the "Petitioner")

Mr Jamie McGee of Bedell Cristin on behalf of Liu Chak Kwan Kelvin and Tsangs Group Holdings Limited (the "Creditors")

Before: **The Hon. Justice Kawaley**

Heard: **11 November 2022**

Date of decision: **11 November 2022**

Draft Judgment: Circulated **28 November 2022**

Judgment Delivered: **8 December 2022**

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HEADNOTE

Petition to appoint restructuring officers presented by company-whether prior filing of creditor's petition within the jurisdiction deprived the company of the right to commence and/or prosecute a restructuring petition-automatic stay triggered by presentation of restructuring petition-implications of creditor commencing foreign winding-up proceedings after the commencement of local restructuring proceedings-requirements for appointing restructuring officers- Companies Act (2022 Revision) as amended by Companies (Amendment) Act, 2021, sections 91A-91J, 94(a)-Companies Winding Up Rules 2018, as amended by Companies Winding Up (Amendment) Rules 2022, Order 1A

Introduction and Summary

1. The Company's Petition was presented on 21 October 2022 pursuant to section 91B of the Companies Act (2022 Revision) as amended by the Companies (Amendment) Act, 2021 (the "Act"). It was said to be the first petition to seek the appointment of restructuring officers under the new Part V of the Act[1]. According to the Petition, the Company was the parent company of a group of companies which was "*a leading Southeast Asian financial technology platform established by the co-founders of revolutionary internet companies Skype and Lu.com (NYSE: LU), and also Atomico, one of the leading global venture capital firms*" (paragraph 2). It sought the appointment of restructuring officers on the grounds that the Company:

> "*(a) is presently unable to pay its debts and is therefore insolvent within the meaning of section 93 of the Act; and*
>
> *(b) intends to present a compromise or arrangement to its creditors (or classes thereof) pursuant to section 86 and/or section 91I of the Act, the law of a foreign country, or by way of a consensual restructuring*" (paragraph 5).

[1] The new Part V of the Act introduced by the Companies (Amendment) Act, 2021 entered into force on 31 August 2022 under the Companies (Amendment) Act, 2021, (Commencement) Order, 2022.

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2. In the Company's Written Submissions, it was asserted that the "*Company has taken steps to, and intends to take further steps with the assistance of the Proposed Restructuring Officers, to develop and propose a holistic and viable restructuring plan to restructure the Group's financial indebtedness*"[2]. In the Company's evidence, the broad parameters of the "*Proposed Restructuring*" were sketched out and it was confidently asserted that this would generate a better return for unsecured creditors than would be yielded through a traditional liquidation. It was also submitted (and supported through evidence) that "***24 Noteholders** (representing approximately **46% by value of the Notes**) have expressed their support for the Proposed Restructuring*".[3] This evidence was not challenged by the Creditors, who appeared in opposition to the Petition. However, the Creditors noted that one of the 24 Noteholders was a related party as he was a director of the Company. The Proposed Restructuring appeared to have attracted at a very early stage very significant creditor support, a factor which provided powerful support for the application to appoint restructuring officers to be granted. It was clear from Mr Goucke's clear, comprehensive yet concise Written Submissions and the supporting evidence that the legal and evidential requirements for granting the Company's application had been met.

3. The only opposition which was ultimately advanced rested on a technical jurisdictional challenge which seemed to me to be a tactical ploy. The point seemed designed to discredit the apparently straightforward proposition that the Creditors' filing of a winding-up petition in Hong Kong the day before the present hearing (seemingly without the knowledge of local counsel) was a flagrant breach of the automatic stay triggered by the filing of the present Petition. Be that as it may, I concluded that the jurisdictional challenge was clearly misconceived and, having rejected it, the sole objection raised by the Creditors to the substantive application to appoint restructuring officers fell away. I accordingly granted the Company's application on 11 November 2022 in the following terms substantially based on the draft form of order submitted by counsel to the Court and set out in full by way of appendix to this Judgment.

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[2] Paragraph 30.
[3] Written Submissions, paragraph 40(a).

4. These are the reasons for that decision to appoint Mr Kenneth Fung of FTI Consulting (Hong Kong) and Mr Andrew Morrison and Mr David Griffin of FTI Consulting (Cayman) Limited as joint restructuring officers ("JROs") of the Company.

The jurisdiction to appoint restructuring officers

<u>The statutory regime</u>

5. Section 91B of the Act so far as is relevant provides as follows:

> "*1) A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company:*
>
> > *a) is or is likely to become unable to pay its debts within the meaning of section 93; and*
> >
> > *b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to [the Companies Act], the law of a foreign country or by way of a consensual restructuring.*
> >
> > …
>
> *(3) The Court may, on hearing a petition under subsection (1) —*
>
> > *(a) make an order appointing a restructuring officer;*
> >
> > *(b) adjourn the hearing conditionally or unconditionally;*
> >
> > *(c) dismiss the petition; or*

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> *(d) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.*

> *(4) A restructuring officer appointed by the Court … shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the powers to act on behalf of the company.*"

6. The only issues which arose for consideration as regards these statutory provisions were: (a) whether the two preconditions for presenting a petition had been met; (b) whether restructuring officers should be appointed; and, if so, (c) what powers should be conferred on them. The Companies Winding Up Rules, 2018 as amended by the Companies Winding Up (Amendment) Rules, 2022 (the "CWR") introduce, inter alia, the following new procedural requirements applicable to restructuring petitions:

> "***Presentation, Filing and Advertisement of Petition (O.1A, r.1)***
> *1. (1) A petition by the company for the appointment of a restructuring officer pursuant to section 91B of the Act shall be presented by filing it in Court in accordance with GCR Order 9.*

> *(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.*

> *(3) Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.*

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(4) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries).

(5) The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court and not less than 7 business days before the hearing date.

(6) Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed in Court.

(7) An office copy of every petition presented under this Rule shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

(8) Every petition under this Rule shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers."

<u>Practical application of the statutory regime</u>

7. In the Company's Written Submissions, the following important argument was advanced:

"*43. It is respectfully submitted that given that certain of the statutory provisions regarding the appointment of restructuring officers in the Cayman Islands are substantially similar to the statutory provisions previously in force regarding the appointment of provisional liquidators for the purposes of implementing a compromise or arrangement with creditors (or classes thereof) (that is, 'light touch' provisional liquidation proceedings), case law*

authorities in respect of restructuring or 'light touch' provisional liquidation are likely to be both relevant and persuasive."

8. I gratefully adopt those submissions for two principal reasons. Firstly, the grounds upon which a restructuring petition may be presented under section 91B (1) are expressed in the same terms as the grounds for appointing provisional liquidators for restructuring purposes under the former provisions of section 104(3) of the Companies Act (2022 Revision) before the restructuring officer regime became operative on 31 August 2022. The solvency test for restructuring purposes is the same as that applicable to winding-up proceedings as well (section 93 of the Act, "*Definition of Inability to pay debts*"). Secondly, and less technically and more practically, the cases under the former regime record valuable judicial and legal experience in essentially the same commercial sphere. Lady Mary Arden, delivering a Distinguished Guest Lecture in the Cayman Islands earlier this year, sagely stated:[4]

> "*The common law is the language of commerce. Commercial law is widely considered to be much more flexible and facultative under the common law system because under that system the courts take one case at a time and focus on the facts to see if the rule that was laid down in case A applies in case B. There is a constant process of refining the law in the light of experience, not of refining the law in terms of abstract intellectual analysis. Or as one of my former colleagues recently put it, as a broad generalisation, the courts tend to oil the wheels of commerce rather than throw grit in the engine*[5]." [Emphasis added]

9. Two passages from cases under the old 'light-touch' provisional liquidator regime, which were placed before me, I considered to be of particular assistance in the present case. Firstly, and most authoritatively as regards the governing legal principles, the following dicta of Anthony Smellie CJ (as he then was) in *In re Sun Cheong Holdings* [2020 (2) CILR 942] lucidly paints an instructive

[4] '*Taking Stock of Recent Case Law of the Judicial Committee of the Privy Council –its Breadth and Depth'*, 25 March 2022, paragraph 84: https://www.judicial.ky/news-publications/speeches.
[5] *Procter v Procter* [2021] EWCA Civ 167, [2021] Ch 395 para 8 per Lewison LJ.

portrait of the old statutory scheme which applies with equal force to the restructuring officer regime:

> "*35 Under ss. 104(3) and 95(1) of the Companies Law, the court has a broad and flexible discretion. The breadth and flexibility of this discretion was first described by this court in In re Fruit of the Loom (11) ("Fruit of the Loom"). The breadth of the court's discretionary power under s.104 (3) to facilitate the rescue of a company was described as follows (Cause 823 of 1999, at 7–8):*
>
> *'The discretionary power vested in the Court by section 99 [as it then was] of the Companies Law is very wide. As the orders already made herein recognise, the power admits of a discretion which the Court will be prepared to use to appoint provisional liquidators as the basis for the rescue of a company. This is subject to the Court being satisfied that such appointment would be for the benefit of those having the financial interests in the company to be rescued. This Court must be satisfied that the order would be for the general benefit of creditors and subject to creditors' prior interests, the benefit of shareholders. In the absence of jurisdiction given by specific statutory powers in the Courts for the making of administration orders over the affairs of companies, it is apt that the flexible discretionary power given in section 99 for the appointment of provisional liquidators be used to enable the rescue of a company where it is just to do so in the sense described above.' [Emphasis added.]*
>
> *36 This discretion was affirmed more recently by Parker, J. in CW Group Holdings Ltd. (4) (Cause No. FSD 113 and 122 of 2018, at para. 36) ('CW Group Holdings'), and by Kawaley, J. in In re ACL Asean Towers Holdco Ltd. (1) ('ACL Asean') (Cause No. FSD 171 of 2018, at para. 11).*
>
> *37 As to how the court's broad discretion is to be exercised, there is no prescriptive list of factors to be taken into consideration. However, matters to which the court may have regard include:*

(a) The express wishes of creditors (though the court should be cautious not to 'count up the claims of supporting and opposing creditors,' per Segal, J. in In re Grand TG Gold Holdings Ltd. (12) ("Grand TG Gold") (Cause No. 84 of 2018, at para. 6(f) (iv));
(b) Whether the refinancing is likely to be more beneficial than a winding-up order (Fruit of the Loom (Cause 823 of 1999, at 9–10));
(c) That there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors (Fruit of the Loom (ibid.)); and

(d) The considered views of the board as to the best way forward (CW Group Holdings (Cause No. FSD 113 and 122 of 2018, at para. 72))."

10. Secondly, and more recently, helpful practical guidance as to how to evaluate the evidence relating to a proposed restructuring was given by Nicholas Segal J in *In re Midway Resources International*, FSD 51 of 2021, Judgment dated 30 March 2021 (unreported):

"*65. As I have noted, I am satisfied that the evidence now shows both that the Company intends to present a compromise or arrangement to its creditors and to promote a restructuring of the Group… There appears to be a rational basis for accepting the Restructuring Proposals, provided that the assumptions on which they were based were validated…*

66. As I have noted, the restructuring negotiations are at a relatively early stage. Indeed, in view of the recent developments in Kenya, they are currently at a particularly precarious point…These problems…give rise to serious doubts and concerns as to the prospects of success of the Restructuring Proposals. Nonetheless, I am satisfied that all is not yet lost and there remain a number of ways in which the restructuring negotiations could be put back on track…

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67. In the circumstances, it seems to be right and appropriate to appoint the PLs in order to assist in and facilitate the restructuring negotiations and to give the Company and them the opportunity to stabilize the position and to seek to have constructive discussions with the creditors…"

11. Construing the terms of section 91B (1), (3) and (4) in light of previous cases dealing with the largely similar now-repealed provisional liquidation for restructuring regime, it may confidently be stated that the jurisdiction to appoint restructuring officers is a broad discretionary jurisdiction to be exercised where the Court is satisfied that:

    (a) the statutory preconditions of insolvency or likely to become insolvent are met by credible evidence from the company or some other independent source;

    (b) the statutory precondition of an intention to present a restructuring proposal to creditors or any class thereof is met by credible evidence of a rational proposal with reasonable prospects of success; and

    (c) the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding-up of the company petitioning for the appointment of restructuring officers.

The effect of the statutory stay on other proceedings and related procedural concerns

12. The new '*Company Restructuring*' section in Part V of the Act contains statutory stay provisions which might be said to turbo-charge the degree of protection filing a restructuring petition affords to the petitioning company in contrast with the former remedy of presenting a winding-up petition for restructuring purposes. The presentation of a winding-up petition only definitively stays

proceedings (and dispositions of company property etc.) when a provisional liquidator is appointed or a winding-up order is made. When a restructuring petition is presented and has not been withdrawn or dismissed, all civil proceedings against the petitioning company are stayed even before a restructuring officer has been appointed. Section 91G provides:

> "***Stay of proceedings***
>
> *91G. (1) At any time —*
>
> *(a) after the presentation of a petition for the appointment of a restructuring officer under section 91B, but before an order for the appointment of a restructuring officer is made, and when the petition has not been withdrawn or dismissed; and*
>
> *(b) when an order for the appointment of a restructuring officer is made, until the order appointing the restructuring officer has been discharged,*
>
> *no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose.*
>
> *(2) Where at any time referred to in subsection (1), there are criminal proceedings pending against the company in a summary court, the Court, the Court of Appeal or the Privy Council —*
>
> *(a) the company acting by its directors;*

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(b) a creditor of the company, including a contingent or prospective creditor;

(c) a contributory of the company; or

(d) the Authority, in respect of any company which is carrying on regulated business, may apply to the court in which the proceedings are pending for a stay of the proceedings and the court to which the application is made, may stay the proceedings on such terms as it thinks fit.

(3) In this section —

(a) references to a suit, action or other proceedings include a suit, action or other proceedings in a foreign country; and
(b) references to other proceedings include any court supervised insolvency or restructuring proceedings against the company." [Emphasis added]

13. On a preliminary analysis it seems clear that once a petition is presented under section 91B (1) of the Act, "*no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company*" here or abroad. Because section 91G (1) adds to these words "*and no winding up petition may be presented against the company*", this initially suggests that the "*other proceedings*" previously referenced do not include a winding-up petition presented within the jurisdiction against the restructuring petitioning company. Yet section 91G (3) explicitly provides that "*In this section…other proceedings include… any court supervised insolvency or restructuring proceedings*" [Emphasis added].

14. Mental gymnastics appeared to be required to construe the section as providing by necessary implication, as the Creditors contended, that either:

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(a) a section 91B petition cannot validly be presented when a creditor's winding-up petition is already pending before this Court; or

(b) the section 91G stay of proceedings simply does not 'bite' on winding-up proceedings previously commenced against the restructuring petitioner.

15. The new procedural regime introduced by Order 1A (enacted by the Rules Committee chaired by the Honourable Nicholas Segal) in two notable respects appears to recognise the need to mitigate the potentially extensive reach of the new statutory stay provisions. Order 1A provides:

"***Presentation, Filing and Advertisement of Petition (O.1A, r.1)***
1. (1) A petition by the company for the appointment of a restructuring officer pursuant to section 91B of the Act shall be presented by filing it in Court in accordance with GCR Order 9.

(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.

(3) Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.

(4) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries).

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(5) <u>The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court</u> and not less than 7 business days before the hearing date.

(6) <u>Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed</u> in Court.
(7) An office copy of every petition presented under this Rule shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

(8) Every petition under this Rule shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers."
[Emphasis added]

The Company's factual case

16. The Company's primary substantive evidence was provided through the First Affirmation of Chu Lawrence Sheng Yu affirmed on 21 October 2022 ("First Chu"). The affiant is a co-founder of the Company and its direct and indirect subsidiaries and also a director of, *inter alia*, the Company's corporate director. He avers that the Company is the parent company of a group of companies incorporated in, *inter alia*, the Philippines, Indonesia and Vietnam. The main business is financial technology and microfinance sold through cash lending and buy-now-pay-later products. Since the Company's incorporation on 15 March 2017, its technology platform has acquired more than 8 million registered users, 1000 merchant partners and transacted business worth more than US$350 million. The Company and the Group have been adversely affected by the impact of the Covid-19 pandemic on Southeast Asian economies and consumers and, more recently, global negative factors including rising interest rates.

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17. As regards the Company's financial position, it is averred in First Chu that it is balance sheet solvent. The Company has issued 34 Convertible Notes to 34 holders with the latest maturity date being 23 February 2023. As at 30 June 2022, US$36,657,567 was due and outstanding to Convertible Noteholders. In addition, 69 Promissory Notes were issued to Promissory Noteholders to whom US$54,154,067 was due and outstanding as at 30 June 2022. Roughly US$3 million is owed under separate notes and the affiant himself is owed US$3 million under a shareholder loan. The Company and certain members of the Group have defaulted on certain secured and unsecured loans. Various statutory demands have been served under Cayman Islands and Hong Kong law, winding-up proceedings commenced in the Cayman Islands and arbitration proceedings commenced in Hong Kong, by various Noteholders.

18. The Company addressed the need for a Note Restructuring in May 2022 and the Board initially hoped an out of Court resolution could be found. However, the various payment demands caused the Board to seek the assistance of the Court. The Board believes (for reasons which the affiant plausibly explains) that the Company can continue as a going concern and return to profitability if a restructuring occurs. Although the precise legal vehicle for implementing the restructuring has not yet been worked out, the broad outlines of the proposal (as set out in First Chu) were summarized in the Company's Written Submissions (at paragraph 32) as follows:

> "…
> *(a) a debt for equity swap: 60% of all outstanding principal, accrued interest and late penalty fees on the Notes will be converted into new preferred shares in the capital of the Company;*
>
> *(b) revision to certain key terms and conditions of the Notes, including extensions to principal and interest payment schedules and applicable interest rates: 20% of all outstanding principal, accrued interest and late penalty fees on the Notes shall be subject to a 2 year extension of the maturity date with the applicable interest rate being 8% per annum. Additionally, relevant noteholders will also have the option to convert their*

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interest into new preferred shares in the capital of the Company (at a discount of 25%); and

(c) payment in cash: 20% of all outstanding principal, accrued interest and late penalty fees on the Notes will be repaid in cash (if available following completion of the latest fundraising round…"

19. In October 2022, the Company informed Noteholders (except those who had taken actions against the Company, who represent only 1.7% of all Notes) of their plans to file the Petition and of the Proposed Restructuring: "*in response, twenty-four Noteholders expressed support for the Proposed Restructuring generally and the appointment of the JROs, representing approximately 46% of the Notes*" (First Chu, paragraph 59 (a)). The affiant also deposes that "*advanced discussions have occurred and are ongoing with a strategic investor to fund the cash element of the Proposed Restructuring and inject capital for the future business operations*" (paragraph 66 (c)). Because of, *inter alia*, existing management's strong connections with both customers and founders and financial interest in the success of the Group, the best interests of creditors lay in a restructuring taking place " *under the control of existing management with the assistance of, and subject to the supervision of, the proposed JROs and this Honourable Court*" (paragraph 67).

20. The First Affirmation of Geoffrey Prentice, another director, explained advertisement of the Petition and also how a circular was sent directly to all creditors of the Company between 31 October 2022 and 7 November 2022 including a link to the Petition.

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Findings on Creditors' preliminary point: was the Petition improperly presented by the Company because a winding-up petition was pending before the Court?

21. The Creditors' Skeleton Argument summarized their preliminary objection as follows:

> "*3. It is the Creditors' position that the provisions of the Companies Act (2022 Revision) (the 'Act') and the Companies Winding Up Rules (the 'Rules') do not permit the presentation of an RO Petition in circumstances where a Winding Up Petition in respect of the Company has already been presented, served and advertised by a creditor and is extant.*
> *4. Alternatively, even if an RO Petition could be presented in such circumstances, the Court should not in any event permit an RO Petition to be presented in circumstances where (i) the Company has failed to respond to a statutory demand validly served; (ii) has failed to make any offer, compromise or arrangement for its debts; (iii) the Winding Up Petition has been presented, a hearing date has been appointed, and it has been advertised in accordance with the Rules; and (iv) where it is therefore plain that the filing of the RO Petition has been undertaken for the purpose of obstructing the Winding Up Petitioner by improperly obtaining the benefit of the moratorium conferred by section 91G of the Act.*"

22. It was easy to accept that if a petition could validly be filed for restructuring purposes while the petitioning company was itself the respondent to an extant winding-up petition, this would interfere with the winding-up proceedings in a significant way which was unthinkable under the longstanding pre- 31 August 2022 legal position. This point was vividly supported by the following submission about the timing of the Company's filing:

> "*14.…It is not appropriate because the petitioning creditor is put to the costs of the Winding Up Petition, on which he is ordinarily entitled to a winding up order as of right (Re Demaglass Holdings Ltd (Winding Up Petition: Application for Adjournment) [2001]*

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2 B.C.L.C. 633), and the Winding Up Petition is left in a state of limbo in direct contradiction of the Rules, which require the Winding Up Petition to proceed to hearing on the appointed hearing date."

23. This was, forensically, an effective way of advancing a difficult point. It encouraged one to begin the statutory analysis on the well-trodden terrain of winding-up law as it has always been rather than to tread gingerly on the unfamiliar statutory path of the new legislative regime. When one focusses on the new legislative provisions as a whole, it is difficult to find any literal or contextual support for the proposition that a restructuring petition was not intended to be presented when a winding-up petition was already before the Court. Mr McGee correctly identified the best possible textual support for his client's construction of section 91G:

> "*17…The Company asserts that 'no suit, action or other proceedings … shall be proceeded with' captures the Petition filed by the Creditors. That is plainly wrong. If 'suit, action or other proceedings' was meant to include winding up petitions presented in this Court then the words 'no winding up petition may be presented against the company' would be wholly redundant. Therefore, the moratorium conferred by section 91G clearly only applies to restrain winding up petitions being presented 'after the presentation of a petition for the appointment of a restructuring officer under section 91B' and not one presented before the presentation of an RO Petition.*"

24. It is tempting to allow the tail of the past to wag the dog of the present; but that would involve abandoning all attempts to undertake any recognised form of statutory interpretation. It is clear that section 91G imposes a stay on broadly defined civil proceedings which have already been commenced against a company which subsequently petitions to appoint restructuring officers. The primary question of construction is whether the term "*other proceedings*" expressly or by necessary implication includes winding-up proceedings. Mr Goucke submitted that it was clear that this included winding-up proceedings. I agreed, because that term is itself expressly defined by section

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91G (3) in terms which include winding up proceedings: "*references to other proceedings include any court supervised insolvency or restructuring proceedings against the company.*"

25. The second question of construction is why section 91G (1), after stating in general terms that no proceeding shall be continued or commenced against the company petitioning for restructuring officers, goes on to further state "*and no winding up petition may be presented against the company*". It is true that these words may be viewed as superfluous if the earlier term "*other proceedings*" is read as already capturing winding-up proceedings. But this potential ambiguity was in my judgment insufficient to override the clear terms in which the word "*other proceedings*" are explicitly defined.

26. In fact, the 'superfluous' express reference to the prohibition on presenting winding-up proceedings after the filing of restructuring petition may also be seen as reinforcing the legislative intention that once a restructuring petition has been filed (and not withdrawn or dismissed), it takes precedence over the traditional creditor's remedy of presenting a winding-up petition, even if the character of the proceeding is restructuring in nature. The words may therefore be understood as added for emphasis, and perhaps in part to meet the point Mr McGee validly made about the traditional expectations of unpaid creditors in relation to petitioning to wind-up an insolvent company. This would also be consistent with the drafters of the restructuring officer regime being mindful of the sea change the new stay provisions were introducing. A winding-up petition's presentation does not trigger the protection of an automatic stay of proceedings; this only occurs when a provisional liquidator is appointed or a winding-up order is made under section 97 (1) of the Act. An automatic stay on filing a section 91B petition is a significant innovation.

27. The Creditors' counsel also sought to deploy alleged inconsistencies between the Rules and the construction of section 91G for which the Company contended. It is rarely possible to use subsidiary legislation as an aide to construing primary legislation. But if one is anxiously searching

for some sense of legislative purpose which may be reflected in the CWR, it is to the new provisions of Order 1A that one must turn. The following arguments were advanced in this regard:

> "*18. The Rules also support the Creditor's contended interpretation of the RO Regime:*
>
> *a. O.1A, r5 sets out the procedure that applies where a winding up petition is presented after an RO Petition is presented. That rule is quite clear in its terms and could not be interpreted as applying to the converse situation that exists here.*
>
> *b. Notwithstanding the detailed provisions of O.1A, r5, there is absolutely nothing in the Rules that refer to, or set out, the procedure that applies where a winding up petition is presented before an RO Petition. If it was intended that an RO Petition could be filed after a winding up petition had been presented then the absence of any provision whatsoever for the procedure that is to apply would be extraordinarily remiss.*"

28. CWR Order 1A provides as follows:

> "***Concurrent Petitions (O.1A, r.5)***
>
> *5. (1) An application for leave to present a winding up petition in respect of a company to which section 91G of the Act applies shall be made by summons and heard by the judge assigned to the proceedings commenced under section 91B of the Act.*
>
> *(2) If leave is granted to present a winding up petition pursuant to section 91G of the Act, the winding up petition will be assigned to the same judge assigned to the proceedings commenced under section 91B of the Act.*
>
> *(3) In circumstances where leave to present a winding up petition has been granted pursuant to section 91G of the Act and the petition for the appointment of a restructuring*

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officer has not been heard, the Court may hear the winding up petition and the petition for the appointment of a restructuring officer at the same time.

(4) In circumstances other than those specified in Order 1A, rule 5(3), the Registrar shall fix a date for the hearing of the winding up petition in consultation with the judge assigned to the proceedings commenced under section 91B of the Act.

(5) Where a petition for the appointment of a restructuring officer has been presented and a restructuring officer (or an interim restructuring officer) has not been appointed under section 91B or 91C of the Act, the company shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to the directors to be most expedient for the purpose of bringing the petition to the notice of such parties.

(6) In circumstances other than those specified in Order 1A, rule 5(5), the restructuring officer (or interim restructuring officer) as applicable, shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to him to be most expedient for the purpose of bringing the petition to the notice of such parties.

(7) In circumstances where a petition for the appointment of a restructuring officer has been presented or a restructuring officer (or an interim restructuring officer) has been appointed pursuant to section 91B or 91C of the Act, the Court may give directions as to

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the manner in which the winding up petition is to be advertised or dispense with the requirement to advertise the winding up petition."

29. It is obviously correct that Order 1A, rule 5 deals exclusively with the procedure for obtaining leave to "present" a winding-up petition and does not explicitly deal at all with applications for leave to continue winding-up petitions presented before a petition to appoint restructuring officers was filed. Taking this point at its highest, it supported the following potential conclusions about the legislative policy underpinning the relevant rules: the drafters of Order1A must have assumed that there was no need to deal with applications for leave to continue winding-up petitions presented before a section 91G petition was filed, because it was not legally possible for a restructuring petition to be filed once a winding-up petition had been presented against the same company. It is precisely to avoid Evel Knievel-scale leaps of logic such as this, that subsidiary legislation must be construed in conformity with the primary legislation under which the subsidiary legislation was made and cannot be used as aide for ascertaining the meaning of the primary statute. In any event, Order 1A must be read as a whole.

30. The tight default time limits for advertising under Order 1A, rule 1 mandate: (a) advertising within 7 business days after filing; and (b) a hearing 21 days after filing are not applicable to winding-up petitions. This suggests that the learned drafters of the new CWR provisions were keenly aware of the practical implications of the broader stay provisions applicable to restructuring petitions. These provisions appear to be designed to protect the rights of creditors by conferring an opportunity to be heard in relation to a restructuring petition as soon as possible. The need to consider introducing such safeguards which are not found in the procedural regime for winding-up petitions only arises because the section 91G stay (unlike the winding-up stay) operates from the date of filing of a petition to appoint restructuring officers.

31. In my judgment construing the intended scope of section 91G according to the natural and ordinary meaning of the words in their context does not result in any absurdity and is not inconsistent with

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the entirely rational legislative purpose of ensuring that any pending civil proceedings should be stayed if a section 91B petition is filed. The legal effect of the unambiguous provisions of section 91G (1): "*no suit, action or other proceedings…shall be proceeded with…against the company…except with the leave of the Court…*", cannot be nullified because no express provision is currently made in the CWR for an application for leave to proceed with proceedings which are clearly intended by the terms of the Act to be automatically stayed when a restructuring petition is filed. Seeking to construe Order 1A, rule 5 in conformity with the primary legislation under which it was made, rather than with a view to undermining the primary legislative scheme, it seemed reasonable to assume that section 91G in any event confers a sufficient statutory power on the Court to grant leave for pre- section 91B petition proceedings to be proceeded with against the relevant company irrespective of any governing rules under Order 1A, rule 5 of the CWR. Further and in any event, in my experience it is entirely unremarkable for there to be changes introduced by primary legislation that are not comprehensively dealt with in the related rules[6].

32. For these reasons I ruled before considering the merits of the present application that the presentation of the Company's Petition was not invalidated because it was presented after the Creditors' winding-up petition had been filed.

[6] In *New Skies Satellite BV-v- FG Hemisphere Associates LLC* [2005] Bda L.R. 59, the Court of Appeal permitted enforcement of a foreign arbitral award under a 1993 statute despite the absence of any rule of court permitting leave to serve out in respect of such awards.

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Findings: the merits of the Company's section 91B Petition

Advertising requirements

33. The Company was unable to comply strictly with the requirement under Order 1A, rule 1 (5) that the Petition be advertised within 7 business days of the date of filing and not less than 7 business days due to delays on the part of the Court. It was submitted:

> "*12. In our respectful submission, the creditors and shareholders of the Company have not been unfairly and/or unduly prejudiced as a result of the failure to strictly comply with the requirement to advertise the RO Petition 'not more' than 7 business days following the filing of the RO Petition and 'not less' than 7 business days before the hearing of the RO Petition in circumstances where the Company distributed a detailed circular to all creditors and shareholders of the Company variously between 31 October and 7 November 2022, which included details of the hearing of the RO Petition.*"

34. I had little difficulty in accepting that since the Company had directly notified all unsecured creditors of the Petition and its contents together with the hearing date at least 7 calendar days before the hearing, no material prejudice was caused by the failure to comply with the formal advertising requirements. The manifest legislative function of the advertising requirements is to bring the proceedings to the attention of as many creditors as possible; it is inherently improbable that each creditor in every case will read the prescribed notice. The actual notice given to each creditor through the emailed Circular in the present case was in real world terms more effective notice than would have been achieved through strict compliance with the advertising requirements.

35. Advertising is a default notice requirement, not an inflexible rule and the Court is expressly empowered to dispense with advertising a restructuring petition. The purpose of the rule is to ensure that creditors are aware that a petition has been filed and when it will be heard. Advertisements do not serve any abstract ritual function in and of themselves. Where petitioners have reliable

electronic contact information for creditors, it may well be appropriate for applications to be made on the papers to dispense with the need for advertising in whole or in part. Had it been necessary to do so in the present case, I would have retrospectively waived the advertising requirements under the relevant rule. In the event, I simply accepted the submission that the failure to comply strictly with advertising requirements in relation to the Petition provided no grounds for declining to proceed with the hearing on its merits.

Was the company unable to pay its debts or likely to become unable to pay its debts?

36. Section 91B petitioners are likely in most cases to have little difficulty in establishing this limb of their petitions. It is unlikely that management's admissions as to cash-flow or balance sheet insolvency will lack credulity. Typically it is petitioning creditors' assertions of insolvency which are denied by overly optimistic and/or unrealistic managers. There is rarely any commercial advantage to be gained by a solvent company falsely professing its insolvency. In the present case the Company's own detailed disclosures of its financial difficulties were not only entirely credible but corroborated by the fact that, *inter alia*, the Creditors had presented a winding-up petition based on an unsatisfied statutory demand to this Court. The Company was accordingly deemed as a matter of law to be insolvent under section 93(a) of the Act.

Did the Company intend to propose a compromise or arrangement to its creditors?

37. Although the Creditors' Skeleton Argument suggested that they proposed to oppose the Petition on its merits, Mr McGee realistically abandoned any opposition after his clients' technical objection to the Petition had been rejected. The Creditors being in breach of the section 91G stay through presenting a second winding-up petition against the Company in Hong Kong, it would have been difficult for the Court to hear them or place much reliance on their objections as to the merits of the Petition.

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38. The Company's unchallenged evidence was in any event compelling. A coherent proposal, admittedly only in outline at this stage, had already been put to the Noteholders and nearly 50% of all Noteholders had already communicated positive support for the idea of a restructuring and the appointment of the JROs. This preliminary support lent further credence to the Company's management's view that value for creditors would most likely best be served by ensuring that the Company and the Group continued as a going concern rather than being wound-up. It also supported the inferential conclusion that the Restructuring Proposal had realistic prospects of success. The fact that the Company was facing individual debt collection proceedings tangibly demonstrated the practical need for the protection of the section 91G stay which a restructuring under the supervision of the JROs and this Court would provide.

<u>Summary of findings on merits of Petition</u>

39. In summary, I considered that the grounds for appointing restructuring officers were very strongly made out in a case where the evidence showed that all Noteholders (the main unsecured creditor class) had been notified of the hearing and:

(a) 46% in value had signified their positive support for the application; and

(b) 0% (save for the Creditors) positively opposed the application on its merits.

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Conclusion

40. For the above reasons on 11 November 2022, I made an Order appointing the JROs in the terms set out in the Appendix hereto.

____

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

APPENDIX

(body of Order dated 11 November 2022)

"***IT IS ORDERED** that:*

1 Mr Kenneth Fung of FTI Consulting (Hong Kong) Limited of Level 35, Oxford House, Taikoo Place, 979 King's Road, Quarry Bay, Hong Kong, and Mr Andrew Morrison and Mr David Griffin, both of FTI Consulting (Cayman) Ltd, Suite 3212, 53 Market Street, Camana Bay P.O. Box 30613, Grand Cayman KY1-1203, Cayman Islands be appointed as Restructuring Officers of the Company.

2 The Restructuring Officers shall not be required to give security for their appointment.

*3 The Restructuring Officers, acting jointly and severally, and without prejudice to the powers retained by the Company's board of directors (the '**Board**') pursuant to paragraph 5 below, are hereby, until further Order, authorised to take the following actions, within and outside of the Cayman Islands, without further sanction by the Court:*

3.1 monitor, oversee and supervise the Board in its management of the Company, and take all necessary steps to develop and implement a restructuring of the Company's financial indebtedness in consultation with the Board and under the general supervision of the Court:

(a) in a manner designed to allow the Company and its subsidiaries or such joint-ventures, associated company or other entities in which
*the Company has an interest (the '**Group**') to continue as a going concern;*
(b) with a view to making a compromise or arrangement with the Company's creditors or any class thereof and any corporate and/or capital reorganisation of the Company and/or the Group (including but not limited to any share subscription and placement of shares in the Company and/or the Group); and
*(c) including (without limitation) by way of a scheme of arrangement between the Company and its creditors or any class thereof pursuant to section 86 and/or 91I of the Companies Act (2022 Revision) (the '**Act**' and a '**Scheme**') and/or by way of an analogous process available in any other foreign jurisdiction and/or by way of a consensual process which may include disposal of certain of the assets of the Company and/or the Group with a view to maximising value and returns for the creditors of the Company,*
*(the '**Restructuring**');*

*3.2 seek recognition of these proceedings (the '**Restructuring Proceedings**') and/or the appointment of the Restructuring Officers in any jurisdiction that the Restructuring Officers consider necessary, together with such other relief as they may consider necessary for the proper exercise of their functions within that jurisdiction;*

3.3 review the actions and activities of the Board and the continuation of the business of the Company and/or the Group (and attend Board meetings of Group entities) so as to ensure that the Board is acting

with a view to protecting the position of, and maximising returns to, the creditors and other stakeholders of the Company;

3.4 review and approve in advance filings to be made by the Company with regulatory bodies, and responses to quasi-governmental bodies as appropriate;

3.5 seek out investors and financiers for the purpose of investing in and/or providing finance to the Company;

*3.6 monitor, consult with and otherwise liaise with the creditors and shareholders of the Company to determine whether the Restructuring will be successfully approved and implemented, including the establishment of a creditors' committee if deemed appropriate by the Restructuring Officers (in their absolute discretion) with such committee to operate as if it were a creditors' committee under Order 9 of the Companies Winding Up Rules, 2018 (as amended) (the '**Rules**');*

3.7 review the financial position of the Company and the Group, and, in particular, assess the feasibility of proposals for the Restructuring;

3.8 operate and open or close any bank accounts in the name of and on behalf of the Company and to be joint (and not several) signatories on such bank accounts should the Restructuring Officers determine that it is appropriate or necessary to do so, and to receive funds for the purpose of paying the costs and expenses of the Restructuring Proceedings and the related Restructuring;

3.9 act in the name and on behalf of the Company, and execute all agreements, deeds, receipts and other documents and, for that purpose, to use the Company seal when necessary;

3.10 subject to the sanction of the Court for transactions in excess of US$1 million, draw, accept, make and endorse any bill of exchange or promissory note or borrow funds for the purpose of the day to day expenses of the
Restructuring Proceedings, in the name and on behalf of the Company, with the same effect in respect of the Company's liability as if the bill or note had been drawn, accepted, made or endorsed or the loan had been entered into by or on behalf of the Company in the course of its business;

3.11 prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against the estate of such contributory, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt, insolvent or sequestrated contributory and rateably with the other separate creditors;

3.12 make payments to creditors which may have the effect of preferring such creditors, in order to minimise the interruption to the day to day activities of the Company;

3.13 to authorise the Board to exercise such of the above powers relating to the Company on such terms as

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the Restructuring Officers consider fit;

3.14 to take such steps as the Restructuring Officers may consider necessary or appropriate in respect of any and all proceedings to which the Company is party in the Cayman Islands and/or elsewhere, including but not limited to, the proceedings in respect of the Cayman Islands Winding Up Petition, the Hong Kong Winding Up Petition and the arbitration commenced on or about 27 May 2022 at the Hong Kong International Arbitration Centre; and

3.15 do all other things which are incidental to the exercise of the powers set out above.

4 The Restructuring Officers are hereby directed to:

4.1 notify all known creditors and shareholders of the Company, of their appointment in such manner as the Restructuring Officers shall determine in accordance with Order 1A, rule 7(3) of the Rules;

*4.2 prepare a report about the financial condition of the Company within 28 days of the date hereof and at least every three months thereafter or as the Court may otherwise request from time to time (the '**Reports**'), including but not limited to the matters in Order 1A, rule 8(2) of the Rules;*

4.3 file the Reports with the Court, and serve the Reports on all known creditors and shareholders of the Company, in a manner to be determined by the Restructuring Officers in their absolute discretion;

4.4 if deemed appropriate by the Restructuring Officers, to enter into a protocol with a foreign officeholder and/or the Board which sets out the terms upon which the foreign officeholder/Restructuring Officers and/or the Board shall cooperate with respect to the management of the Company. If entered into, such protocol to be included with the Restructuring Officers' next Report to the Court;

4.5 prepare and advise upon the Restructuring, including a Scheme if appropriate and/or in respect of any other proposal in respect of the Company's indebtedness; and

4.6 without limiting their powers hereunder, to discuss and consult with the Board (or any relevant sub-committee thereof) in respect of the exercise of the powers conferred on them pursuant to this Order relating to matters concerning the Company and/or the Group prior to the exercise of the same (if circumstances permit).

*5 The Board is hereby authorised to continue to manage the Company's day-to-day affairs in all respects and exercise the powers conferred upon it by the Company's Memorandum and Articles of Association ('**M&A**'):*

5.1 subject to the Restructuring Officers' oversight and monitoring of the exercise of such powers in relation to matters relating to the ordinary course of business of the Company pursuant to paragraph 3 hereof;

5.2 subject to the Restructuring Officers granting prior approval of the exercise of such powers and to matters outside the ordinary course of business of the Company;
provided always that should the Restructuring Officers consider at any time that the Board is not acting in the best interests of the Company and its creditors, the Restructuring Officers shall have the power to report the same to the Court and seek such directions from the Court as the Restructuring Officers are advised to be appropriate;

5.3 save that, for so long as the Restructuring Officers are appointed:

(a) any change to the members of the Board and the members of the Board's subcommittees, other than by resignation, shall be approved by the Restructuring Officers before such change becomes effective, provided that the Restructuring Officers shall not unreasonably withhold their approval; and
(b) no new shares shall be issued nor shall any rights attaching to shares be altered without the prior approval of the Restructuring Officers in relation to the Company;

5.4 without limitation to the foregoing, the Board continues to retain the following powers:

(a) to continue to conduct the ordinary, day to day, business operations of the Company;
(b) subject to paragraph 3.8 above, to continue to operate the bank accounts of the Company in the ordinary course of the Company's business; and
(c) subject to the approval and consent of the Restructuring Officers (which will not be unreasonably withheld), to open and close bank accounts on behalf of the Company.

6 The Board is hereby directed to:

6.1 provide the Restructuring Officers, within 3 business days of a request for the same, with such information as they may require in order that the Restructuring Officers should be able to properly carry out their duties and functions and exercise their powers under this Order and as officers of the Court, without purporting to impose any conditions as to the confidentiality of such information or its use, including, without limitation, such information as the Restructuring Officers may reasonably require to enable them to monitor the cash-flow of the Company and the Group and to prepare the Report; and

6.2 provide the Restructuring Officers with advance materials, advance notice of all of the Company's Board meetings and such meetings of management or subcommittees of the Board as the Restructuring Officers may request, and to permit the Restructuring Officers to attend such meetings at their discretion and to provide promptly upon their request copies of the minutes of all such meetings.

7 That notwithstanding the presentation of the Petition and the Winding Up Petition, in the event an Order for the winding up of the Company is subsequently made on the Winding Up Petition:

7.1 payments made into or out of the bank accounts of the Company;

7.2 dispositions of the property of the Company; and

7.3 any transfer of shares or alteration in the status of the Company's members,
in each case, by or with the authority of the Restructuring Officers (made between the date of presentation of the Winding Up Petition and the date of any winding up order), and in the course of the Restructuring Officers carrying out their duties and functions and/or the exercise of their powers under any Order granted pursuant to the Petition, shall not be voided by virtue of section 99 of the Act.

8 Pursuant to section 91G of the Act, no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the Company, no resolution shall be passed for the Company to be wound up and no winding up petition may be presented against the Company, except with the leave of this Honourable Court and subject to such terms as this Honourable Court may impose.

*9 With respect to liabilities incurred and falling due during the period in which the Restructuring Officers are in office, in addition to the powers at paragraph 3 above, the Restructuring Officers are hereby be empowered to (subject to sections 91D and 109 of the Act, Order 20 of the Rules and the Insolvency Practitioners' Regulations 2018 (as amended) (the '**Regulations**')):*

9.1 discharge debts incurred by the Company (acting by the Board and/or the Restructuring Officers) after the commencement of these Restructuring Proceedings (including those of the Company's legal and professional advisors) as expenses or disbursements properly incurred in the Restructuring Proceedings;

9.2 render and pay invoices with respect to the Restructuring Officers' remuneration at their usual and customary rates on account out of the
assets of the Company on the basis of and subject to the requirements of the Regulations;

9.3 appoint and engage clerks, servants, employees, managers and agents (whether or not as employees of the Company and whether located in the Cayman islands or elsewhere) to assist them in the performance of their duties for the purpose of the Restructuring Proceedings, and to remunerate them out of the assets of the Company as an expense of the Restructuring Proceedings on the basis of and subject to the requirements of the Regulations; and

9.4 appoint, retain and employ attorneys, barristers, solicitors or other lawyers and professional advisors either (a) jointly with the Board for and on behalf of the Company; or (b) by the Restructuring Officers personally, in the Cayman Islands, Hong Kong and/or elsewhere as the Restructuring Officers may consider necessary the purpose of advising and assisting the Restructuring Officers in the execution of their powers and the performance of their duties in accordance with Order 25 of the Rules, and to remunerate such attorneys, barristers, solicitors or other lawyers and professional advisors for their reasonable fees and expenses out of the assets of the Company as an expense of the Restructuring Proceedings on the basis of and subject to the requirements of the Regulations.

10 The title of these proceedings be appended with the words '(Restructuring Officers Appointed)'.

11 The costs of and incidental to this Petition shall be paid forthwith out of the assets of the Company as an expense of the Restructuring Proceedings.

12 The Restructuring Officers be at liberty to apply generally.

13 A case management conference shall be listed for hearing on or about 11 March 2023 for the purpose of the Court assessing the progress made with respect to the formulation of any compromise or arrangement."

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD 240 of 2023 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF AUBIT INTERNATIONAL

Before:	Justice David Doyle
Appearances:	Sarah Dobbyn and Cameron Thomson of Sinclairs attorneys for Aubit International Erik Bodden and Alecia Johns of Conyers Dill & Pearman LLP attorneys for LedgerScore Pte Ltd, LS Litigation Holdings LLC and Earn Guild Pte Ltd
Heard:	6 September 2023
Date of Decision:	6 September 2023
Draft Reasons Circulated:	2 October 2023
Reasons delivered:	4 October 2023

HEADNOTE

Dismissal of petition for the appointment of restructuring officers pursuant to section 91B of the Companies Act (2023 Revision) – need to produce a rational and credible restructuring plan, even if only provided in outline – there must be a real prospect that the restructuring plan, with reasonable prospects of success, will be effected for the benefit of the general body of creditors – a two-phase approach of firstly gathering in assets, documentation and information, commencing legal proceedings for recovery of the same if necessary and undertaking forensic investigations and then presenting a restructuring plan many months or some years later will not usually be appropriate – observations as to the jurisdiction and discretion of the Court under section 91B

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JUDGMENT

Introduction

1. On 6 September 2023 after considering all relevant documentation and hearing oral submissions I dismissed a petition for the appointment of restructuring officers ("ROs") and provided brief reasons. I indicated I would provide detailed reasons in due course which I now do.

2. In this matter Aubit International (the "Company") presented a petition dated 23 August 2023 (the "Petition") pursuant to section 91B of the Companies Act (2023 Revision) (the "Act") seeking the appointment of two individuals of Grant Thornton Specialist Services (Cayman) Limited as ROs of the Company. Sarah Dobbyn and Cameron Thomson of Sinclairs are the attorneys for the Company. At paragraph 17 of their concise written submissions dated 30 August 2023 they said that "the Company's only creditor in the Cayman Islands is the law firm Sinclairs (which is intimately familiar with the Petition)". At paragraph 4 of the written submissions they rightly confessed that:

> "The Company's restructuring is unusual, if not unique, since it needs to take place in two phases: first, an asset and information gathering phase in order to be able to formulate the terms of recovery or restructuring plan, followed by a more typical restructuring phase once the exact financial position of the Company and its potential asset recoveries have been ascertained."

3. On 4 September 2023, two days before the hearing, Conyers Dill & Pearman LLP provided notice (the "Notice of Appearance") that LedgerScore Pte. Ltd., LS Litigation Holdings LLC and Earn Guild Pte Ltd described as creditors to whom the Company owes US$6,324.901.77 "intend to appear on the hearing of the petition to support the appointment of a restructuring officer to [the Company] and to oppose the appointment of Margot MacInnis and John Royle of Grant Thornton Specialist Services (Cayman) Limited … as restructuring officers." At that stage no alternative nominees were proposed. Such notice did not comply with Order 1A rule 3 (3) of the Companies Winding Up Rules (2023 Consolidation).

4. Sadie Hutton says that she is a director, Chief Executive Officer and founding shareholder of the Company and is authorised by the Board of Directors of the Company to make her affidavits on its behalf. In her second affidavit sworn on 30 August 2023 for the first time she refers to the "Atypical Nature of the Proposed Restructuring". This was not highlighted in her first affidavit sworn on 24 August 2023. She puts no meat on the bones of the proposed restructuring plan in either of her two affidavits. At paragraph 8 of her second affidavit she states her belief that "the typical nature of a restructuring or scheme of arrangements involves a Company which has a known, quantified amount of assets which are insufficient to pay all its liabilities, and seeks either (a) a breathing space to trade through its difficulties to arrive at a better financial outcome for all creditors through a recovery plan being agreed with creditors; or alternatively, (b) to come to some negotiated consensual arrangement or formal scheme of arrangement with creditors/stakeholders to restructure the Company's financial indebtedness".

At paragraph 9 of her second affidavit she adds:

> "The Company's restructuring is atypical in that it will need to be conducted in two distinct phases: first, an asset and information gathering phase in order to be able to formulate the terms (sic) a recovery or restructuring plan, followed by a more typical restructuring phase once the exact financial position of the Company and its potential asset recoveries are known."

<u>Grounds of the Petition</u>

5. At paragraph 52 of the Petition it is stated that the Company seeks the appointment of ROs on the grounds that the Company:

> "a. is presently unable to pay its debts due to the unexplained delay or alternatively, refusal by Ardu Prime to release any of the approximately US$60.4 million in fiat currencies and cryptocurrencies (as at 31 May 2023) held in the Company's brokerage accounts in Greece, and for this reason is insolvent within the meaning of section 93 of the Act; and

b. intends to present a compromise or arrangement to its creditors (or classes thereof) pursuant to section 86 and/or section 91I of the Act, or alternatively to present a consensual restructuring plan once all available assets have been recovered by the Restructuring Officers from the Company's accounts at Ardu Prime, to allow time for the Company's new business opportunities to generate sufficient income for all creditors to be paid in full; and

c. intends to present a related compromise or arrangement under the laws of the Republic of Seychelles to the creditors and other interested parties of Freeway (as the Company's majority creditor), or alternatively, to present a consensual restructuring plan once all available assets have been recovered by the Restructuring Officers from the Company's accounts at Ardu Prime, to allow the Company's new business opportunities to generate sufficient income to repay Freeway as its major creditor, so in turn Freeway's creditors may be paid in full as well as to fund Freeway's capital requirements to recommence the buyback of Freeway's Supercharger digital simulation products and related accrued rewards on such products."

The Petition and the affidavit evidence in support

6. The following further information is taken from the Petition. I am conscious that I have not heard from any of the entities against which the Company makes serious allegations in the Petition. I did however briefly hear from the entities specified in the Notice of Appearance.

7. The Company was incorporated under the laws of the Cayman Islands as an exempted company on 21 March 2019 and its registered office is located at Sinclair Corporate Services Ltd in George Town, Grand Cayman.

8. The Company says that AIP Management ("AIP") is "affiliated with the Company". Freeway Operations Inc ("Freeway") is a wholly owned subsidiary of AIP and was incorporated in the Republic of Seychelles on 27 January 2021.

9. Freeway is stated at paragraph 5 of the Petition to be "the Company's majority creditor with a debt or alternatively a potential claim, of up to US$122 million in relation to funds transferred to the

Company acting as investment manager for investment between March 2021 and October 2022. The Freeway indebtedness or potential claims includes significant personal investments made by the founders, management and staff of the Company as well as their respective friends and families and other affiliated entities in Freeway's "*Supercharger*" digital networked products ..."

10. Freeway operated as "an online business, operating a retail, gamified trading platform of virtual simulations demonstrated in various currencies called "Superchargers"" (paragraph 10 of the Petition).

11. Between March 2021 and 13 October 2022 Freeway's income from Supercharger purchases and Freeway Token ("FWT") staking amounted to US$252,481.265. Freeway also "redeemed and bought back a total of US$102,237,140 in Superchargers ... The cash amount of "rewards" taken out by the platform by its users ... prior to 12 October 2022 amounted to US$11,953,393." (paragraph 14 of the Petition).

12. The proceeds of sales of Freeway's Superchargers and FWT were transferred to the Company's regulated brokerage accounts at Ardu Prime Investments SA incorporated and registered under the laws of Greece ("Ardu Prime").

13. On 17 October 2022 Freeway suspended all buy-backs of Superchargers (paragraph 16 of the Petition).

14. It is stated that "as interested parties in Freeway ... Supercharger and FWT holders' views are to be ascertained and taken into account whether by means of a formal Scheme of Arrangement in the Republic of Seychelles or other consensual restructuring in parallel with the Company's own restructuring plan" (paragraph 17 of the Petition). No details are given as to the proposed restructuring in the Seychelles and counsel for the Company stated that no legal proceedings had been commenced in the Seychelles in respect of any proposed restructuring.

15. On 4 January 2021 the Company agreed to Ardu Prime's terms and conditions for regulated brokerage services and opened brokerage accounts. Clause 28 refers to Greece as the relevant law and jurisdiction.

16. On 19 March 2021 the Company and Ardu Prime signed an Acknowledgement of Understanding which contemplated a form of joint venture cooperation. On 11 August 2021 the parties entered

into a Strategic Cooperation Agreement. There is reference in clause 10 to the governing law being English and at clause 11 the parties submit to the exclusive jurisdiction of the English courts.

17. On 13 June 2022 the Company agreed a US$40 million credit line a term of which was that the Company was not permitted to "remove or withdraw the equivalent value in assets (i.e. US$40 million) from its Ardu Prime accounts." (paragraph 31 of the Petition). The credit line and restrictions were subsequently increased to US$50 million on 22 July 2022 (paragraph 33 of the Petition) and US$60 million on 14 August 2022 (paragraph 34 of the Petition).

18. On 13 October 2022 the Company's management was informed that the Company had suffered "an unrealised loss of US$70 million" (paragraph 35 of the Petition). On the same day the Company agreed a new credit line of US$130 million and the prohibition on "the withdrawal or removal of all assets from the Company's brokerage accounts at Ardu Prime, since all assets were held as collateral." (paragraph 36 of the Petition).

19. On 22 or 23 December 2022 the Company agreed to reduce the credit line from US$130 million to US$70 million on the condition that "the $70 million of credit would be tradeable" (paragraph 37 of the Petition).

20. In order to, amongst other things, ascertain the causes and quantum of the significant losses incurred in the Ardu Prime accounts on 13 October 2022 the Company engaged an FX Expert (unnamed in the Petition but in the evidence referred to as Paul Allmark) in late October 2022. The FX Expert produced an interim findings report in November 2022, a draft interim report in January 2023 and further draft reports in April and August 2023. It is stated that the FX Expert has been hindered in completing his investigations and forensic analysis by lack of access to relevant documentation. The preliminary conclusions of the FX Expert include references to a "reconcilable loss of US$22,106,000 in the timeframe to 13 October 2022" and "More than US$60 million in losses reported by Ardu Prime cannot be verified or accounted for in the available trading reports and data", "the Company had no need for *any* credit line of US$40 million in June 2022 …". The "necessity of further credit lines … is also doubtful, and appears to have been a tactic by which Ardu Prime sought (and still seeks) to prevent the Company from removing its assets from the brokerage accounts." (paragraph 44 of the Petition).

21. Paragraph 45 of the Petition perhaps reveals the main thinking behind the somewhat unusual relief requested at paragraph 57-59 of the Petition. Paragraph 45 states:

> "The preliminary findings and draft reports of the FX Expert show a compelling need for Restructuring Officers, as independent insolvency practitioners and officers of the court, to undertake their own forensic investigations into all activities relating to the Company's brokerage accounts at Ardu Prime, and to report to the Court their findings as to the causes and quantum of the losses on the said brokerage accounts."

22. The Company is concerned that an individual (who it describes as Anthony Constantinou a.k.a. Anthony Kent) who it says was convicted on 9 June 2023 of "defrauding investors in a London FX investment firm, Capital World Markets of GBP 50 million by operating a ponzi scheme" (paragraph 48 of the Petition) was a key individual "with a significant influence over operations at Ardu up to the recent past" (an email dated 13 June 2023 from Sadie Hutton, wrongly described in paragraph 49 of the Petition as a letter dated 14 June 2023 from "the Company's management").

23. Paragraph 51 of the Petition also perhaps reveals the main motivation behind the relief sought in that it refers to the need for further "forensic investigations":

> "Anthony Constantinou's involvement with Ardu Prime and ClearTech gives rise to a compelling need for Restructuring Officers, as independent insolvency practitioners and officers of the court, to undertake their own forensic investigations into all activities relating to the Company's brokerage accounts at Ardu Prime, and to report to the Court their findings as to any involvement, activities or dealings of the convicted fraudster, Anthony Constantinou (a.k.a Anthony Kent) in relation to the said brokerage accounts."

24. In fairness, I should record that at paragraph 50 of the Petition there is reference to an email dated 15 June 2023 from Sotiris Botsios, stated elsewhere to be "shareholder/owner of ClearTech Industries DMCC" ("ClearTech") where it is stated that:

> "No one other than myself and our employees have access to any part of the technology and software we own. Also every aspect of the business is managed internally. No other person has any influence or control."

25. Sadie Hutton in her second affidavit at paragraph 6 (v) refers to information which she says "provide[s] the overall context for the concerns the Board now have about the close involvement of Anthony with both Ardu Prime and ClearTech" and adds:

> "This is one of the main reasons for the Company's request that if the Court appoints Restructuring Officers as sought, they should have the power to undertake a full investigation into the Company's activities and all dealings with Ardu Prime and ClearTech and all transactions on the Company's brokerage accounts at Ardu Prime."

26. At paragraph 6 (viii) Sadie Hutton adds:

> "The appointment of Restructuring Officers will allow the actual truth of the Company's business dealings and the causes of the losses in its Ardu Prime brokerage accounts to be thoroughly investigated and reported to the Court ..."

27. At paragraph 40 she says that: "One key role for the Restructuring Officers if appointed, will be to terminate the unwanted credit line (which in any event will expire on 20 October 2023 ... investigate whether such credit lines were ever needed or indeed traded for the benefit of the Company."

28. At paragraph 42 she says that the close involvement of Anthony Constantinou "needs thorough investigation by independent Restructuring Officers as experienced insolvency professionals and officers of the Court."

29. At paragraph 43 she refers to adverse comments from online commentators alleging that the Company/Freeway must have been operating "a scam" adding:

> "The Board would welcome a thorough independent investigation by Restructuring Officers, so such rumours and speculative gossip (directed in particular to the Board and management of the Company and Freeway) may be quashed, and the truth about any losses suffered by the Company in its brokerage accounts may be reported to the Court ..."

30. Sadie Hutton at paragraph 44 asks the Court to confer on the ROs "the power to investigate the causes of any or all losses on the Company's brokerage accounts at Ardu Prime and to investigate generally the business, dealings, finances and affairs of the Company."

31. It appears that the main thrust of the Petition was to obtain the appointment of ROs for them to undertake an investigation on behalf of the Company.

32. At paragraph 55 of the Petition the Company says that it is working with "independent professional advisors to formulate the potential terms of a restructuring with the intention of presenting a compromise or arrangement to its creditors (or classes thereof) pursuant to section 86 and/or section 91I of the Act or the Law of a foreign country, by way of a consensual restructuring."

33. At paragraph 56 of the Petition the Company says that it also is also working with its independent advisors including Appleby as its legal counsel in the Republic of Seychelles "in order to formulate the potential terms of a restructuring of Freeway, as an affiliate and major creditor of the Company, with the intention of presenting a compromise or arrangement to Freeway's creditors (or classes thereof) and interested parties such as Supercharger holders FWT holders, pursuant to section 211 of the International Business Companies Act of the Republic of Seychelles or by way of a consensual restructuring."

34. Paragraphs 57-59 seek unusual relief in the context of a petition for the appointment of ROs.

35. At paragraph 57 of the Petition the Company requests that a power to recover all assets of the Company is conferred on the proposed ROs and for that purpose they be authorised to take all such proceedings as they consider necessary.

36. At paragraph 58 of the Petition the Company requests that a power be conferred on the proposed ROs to take all necessary steps to take possession of, collect and get in documents, reports, brokerage statements, daily trading reports and any other accounting records, data and information and for that purpose to take all such proceedings as they consider necessary.

37. At paragraph 59 of the Petition the Company requests that a power be conferred on the proposed ROs to take all steps necessary to investigate the causes of any and all losses on the Company's brokerage accounts at Ardu Prime Investment Services SA and to investigate generally the business

dealings, finances and affairs of the Company and to analyse all documentation and data recovered as part of such investigation and for that purpose to engage the services of an FX algorithmic expert or other advisors and to take all such proceedings as the ROs consider necessary.

38. Sadie Hutton at paragraph 16 of her first affidavit states:

> "... of course the Board recognises that it made a poor choice in service provider when choosing to pursue a form of joint venture cooperation with Ardu Prime, and its affiliate ClearTech..."

39. I noted the recent evidence provided in respect of creditor support.

40. I record that I considered all the affidavit evidence presented to the Court in respect of the Petition.

Submissions

41. I record that in addition to the oral submissions I also considered:

(1) the written submissions of the Company dated 30 August 2023;
(2) the written submissions dated 5 September 2023 of those specified in the Notice of Appearance referred to below; and
(3) the additional written submissions of the Company dated 6 September 2023 and filed by email on the day of the hearing at 9.41a.m.

The position of the Company

42. In its initial written submissions dated 30 August 2023 the Company submitted that it was insolvent in that it was unable to pay its debts. It was further submitted that an outline of a restructuring plan had been provided.

43. The Company's position was that it had been significantly hindered in its efforts to develop the terms of a restructuring with its creditors as there was missing information and documentation and this is why the matter had to proceed in two phases and "this is why the second phase of the proposed restructuring will focus on the development of such plan" (paragraph 13 of the Company's written submissions).

44. In its additional written submissions filed at 9.41a.m. on the morning of the hearing the Company only devoted 4 lines in 12 pages in answer to its question "Should an order be made appointing restructuring officers." It simply stated that it was common ground between the Company and the entities specified in the Notice of Appearance that ROs should be appointed, and it was submitted that "the Court should make an order appointing restructuring officers." (paragraph 28)

45. In Sarah Dobbyn's oral submissions on behalf of the Company the following points, amongst others, were made (some in response to questions from the bench):

(1) the Company is unable to pay its debts and therefore the first ground is satisfied;

(2) it is accepted that the Company has not started legal proceedings against Ardu Prime but it intends to do so;

(3) the largest creditor is Freeway;

(4) the best estimate of the management of the Company is that in a liquidation scenario no creditor could expect better than something in the region of 40 to 45% of any claims in a liquidation. Ms Dobbyn referred to no evidence in support of this submission;

(5) in respect of the second hurdle all that the Company has to satisfy the Court upon is that it simply has an intention to present a restructuring plan or arrangement;

(6) most companies when presenting restructuring plans know the launching point, in this case the Company "does not know where it is at";

(7) Ardu Prime are uncooperative at the moment and the appointment of ROs will facilitate obtaining information from them;

(8) the petition is not premature as the only other alternative would be to present a winding-up petition. The binary options are a winding up or a restructuring. Kawaley J in his "very helpful decision in setting out the legal landscape" in *Re Oriente* teaches us that we must look at the best interests of the creditors as a whole including Freeway which is the largest creditor in this case. In a liquidation scenario the branding, the goodwill, the intellectual

property "everything becomes tarnished." Everything that is valuable is destroyed. Maximum 40% recovery and minimum 60% complete loss. There are 126 letters of support from creditors (including management connected creditors) and those who are beneficially interested in recoveries because they are Freeway Supercharger holders;

(9) Looking at the case law it starts with *ICU Communications* in respect of the provisional liquidation statutory framework and then *Fruit of the Loom*. There was a dual nature of provisional liquidations including the need for investigations in for example misfeasance cases and also the need to restructure to live to trade another day. The Court should take into account the common history of this new statutory restructuring regime and the history of provisional liquidations in the Cayman Islands. The Court should "take the current framework of legislation into an additional dimension.";

(10) Under section 91B(4) of the Act the Court may confer on the ROs broad functions and powers necessary to accomplish the Company's intention of presenting a restructuring plan. Order 1A rule 6(3)(j) provides that the Court may also make orders and directions for "such other matters as the Court thinks fit". The Court could exercise its discretion and give the ROs a broad range of powers where the finalisation of a restructuring plan is being hindered by an absence of information. It is realistically accepted that in this case the Order sought would be in "the widest scope of powers that any Court has ordered to date". No Order has previously been made that includes the wide relief claimed in this case. The Order in *Oriente* at paragraph 3.14 however gave the ROs power to take such steps as they may consider necessary or appropriate in respect of any and all proceedings to which the Company is a party including but not limited to the proceedings for winding up in the Cayman Islands and Hong Kong and the arbitration in Hong Kong. If there is power to continue existing proceedings there should, in principle, be no lesser scope for a power to commence litigation. There is no judgment on the website in respect of *Carbon Holdings* but in that case it is apparent from the petition that an Order was sought that the ROs have power to request and receive from third parties documents and information concerning the company and its promotion;

(11) the key part of phase one could be concluded "by the end of the year";

(12) no legal proceedings have been commenced in the Seychelles to progress a restructuring;

(13) in respect of the 127 letters from creditors in support, the first ten or so are from creditors of the Company and all the remaining 116 letters are from clients or "interested parties" who are Supercharger holders;

(14) there is no evidence that the creditors of the Company have been presented with the very outline restructuring plan and the reason is "those same creditors are … I don't say the word "insider", sounds pejorative, but they are team members. They are the ones who are working with the management to create this. The other largest creditors apart from Freeway are also the management, it is Graham Doggart and Sadie Hutton, and Peter Neilson ... They are otherwise the largest creditors of this Company and it would be somewhat self-serving for the management …". Sinclairs are an independent creditor. The main creditors are internal creditors;

(15) in respect of management creditors' views the Court should attach weight to them as they have bothered to write letters and invited the Court to appoint ROs. There are no letters from a single creditor or contingent creditor saying "We do not want a restructuring";

(16) it is difficult to begin the process of fully engaging with creditors when you have only got half the pieces of the jigsaw puzzle. The problem is it is a Catch 22 situation. The appointment of ROs will massively expedite and facilitate the gathering in of the missing jigsaw puzzle pieces. The jigsaw will be completed in three months. The additional authority of ROs will make a big difference;

(17) if further consultation with creditors is necessary the Court could grant an adjournment;

(18) the Court has a broad and flexible discretion to facilitate the rescue of a company if such would be for the benefit of those having a financial interest in the company to be restructured;

(19) in respect of the moratorium it only applies unless the Court orders otherwise;

(20) the key factor is that one has to be mindful of the nature of the Company's business. "This is a new world.", "It's very unique and a new paradigm. It's the new world."; and

(21) there is no dispute that the Company is insolvent and has been unable to pay its debts since June 2023 when Ardu Prime stopped releasing any funds from the accounts and the Company does intend to present a restructuring. The very outlined plan is "more outline than normal." There are two phases but they can run "to some extent in parallel." The Company may not have the complete jigsaw puzzle by the end of the year but it will have the key features of the jigsaw. The key data and key information about its assets will be provided "pretty quickly" if ROs with wide powers are appointed. The creditors support the appointment of ROs and a restructuring will be more beneficial than a winding up. The statutory limb in respect of a restructuring being effected for the general body of creditors "is not at the moment capable of being fully satisfied". The wide powers sought are "just at the furthest reaches of the scope of powers" that may be granted but the Court should grant them in this case.

The position of those specified in the Notice of Appearance

46. In Nathan Christian's affidavit reference was made to the claim filed by LedgerScore Pte Ltd ("LedgerScore") stated to be a creditor in the sum of US$3,205,276.96, and LS Litigation Holdings LLC stated to be a creditor in the sum of US$50,000 by way of assignment of part of Ledger Score's claim in the District Court of Wyoming on 3 August. The claim alleges that the Company and others orchestrated an investment scam by which investors were wrongly fleeced of over US$160 million under false pretences.

47. It is stated that Earn Guild Pte Ltd's current balance at "Aubit/Freeway's online customer portal [is] ..." USD 3,119,624.81.

48. At paragraph 40 Nathan Christian says that the appointment of restructuring officers of their choice is also supported by "a group of stakeholders who are collectively creditors of the Company in the amount of approximately US$20m." Jordan McErlean of Conyers in an affidavit sworn on "5 September 2022" (I assume that is an error for 2023) exhibits the letters of support at pages 1-76 of JM-1 (paginated pages 462-537).

49. At paragraph 5 of the written submissions of these three entities dated 5 September 2023 from Erik Bodden and Alecia Johns of Conyers it is stated that "it is critically important that independent

officeholders are appointed to the Company without delay, and that they are granted full powers to investigate and take control of the affairs of the Company." At paragraph 7 they add:

> "The Creditors are not in a position to assess the feasibility of any plans which are being explored in the Cayman Islands and/or elsewhere. As far as the Creditors have seen, there is very little detail or substance included with the Company's application."

50. At paragraph 9 they add:

> "... provided that independent officeholders are appointed as a matter of urgency and stakeholders' interests are protected by an order granting any such officeholders extensive powers, the Creditors do not wish to focus on technical defects or the Company's motivations at this stage. Further, the Creditors are open to exploring in the first instance whether a compromise can be reached regarding their outstanding debts. They are therefore in agreement with the appointment of restructuring officers in furtherance of that purpose."

51. At paragraph 26 they state:

> "Further, given the matters set out in the RO Petition, it is probable that this matter may transition into Provisional or Official Liquidation in due course if a compromise cannot be reached ..."

52. Conyers in a letter dated 4 September 2023 to Sinclairs state "... our clients agree with the Company's position, as pleaded in the Petition, that there is a need for investigation and that the Company is, or likely to become, insolvent."

53. Sinclairs' response of 5 September 2023 makes reference to the section 91G moratorium and declines to provide copies of the first and second affidavits of Sadie Hutton.

54. Nathan Christian at paragraph 41of his first affidavit stated:

> "As set out above, the Creditors' present agreement to the appointment of Restructuring Officers is entirely without prejudice to their right to later seek to wind up the Company if

so advised. The Creditors agree to the need for the appointment of independent officeholders as soon as possible with full powers to investigate and take control of the Company's affairs (we note the wide powers included in the RO Petition to this effect). The Creditors are also open to exploring in the first instance whether a compromise can be reached regarding their outstanding debts."

55. In his oral submissions, and having heard my exchanges with counsel for the Company, Erik Bodden (counsel for those specified in the Notice of Appearance) accepted that the approach of the Company in this case, which in effect was seeking to add a preliminary stage to the new statutory regime, was not a proper use of section 91B of the Act. In particular the 2-stage approach was not contemplated by the Act or the Rules.

56. Mr Bodden submitted that the directors had known of substantial losses for a long time. The Company's business is in "new territory" and the directors do not know where the money is and they know the Company is insolvent. They now seek full investigative powers to be given to ROs. They say they need that before they can put forward a restructuring plan and during the entire period the Company would benefit from a moratorium with the board still in place.

57. Mr Bodden attractively submitted that you have to have your restructuring house in order before you even consider filing the petition for the appointment of ROs. You have to have consulted with the creditors. The whole purpose of the regime is to come to a compromise with creditors. The moratorium kicks in immediately as the petition is filed and that can be susceptible to abuse.

<u>Law and procedure</u>

58. I now turn to the relevant law and procedure.

Section 91B

59. Section 91B (1) of the Act provides that:

> "A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company –

(a) is or is likely to become unable to pay its debts within the meaning of section 93; and

(b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Law, the law of a foreign country or by way of a consensual restructuring."

60. Section 93 of the Act provides:

> "Definition of inability to pay debts 93. A company shall be deemed to be unable to pay its debts if — (a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under that person's hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor; (b) execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

61. Under section 91B (4) of the Act a restructuring officer appointed by the Court shall have the powers and carry out only the functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the Company. Under section 91C (5) (b) of the Act the Court shall set out in the order "the manner and extent to which the powers and functions of the restructuring officer shall effect and modify the powers and functions of the board of directors." Section 91C (5) (c) of the Act also requires the Court to set out in the order "any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions."

The Rules

62. Under Order 1A rule 1 (5) of the Companies Winding Up Rules (2023 Consolidation) (the "Rules") any advertisements shall be made to appear not less than 7 business days after the petition for the appointment of a RO is filed in Court and not less than 7 business days before the hearing date.

63. Under Order 1A rule 1 (6) of the Rules unless the Court otherwise directs, the petition for the appointment of a RO will be heard within 21 days of the petition being filed in Court.

64. Under Order 1A rule 1 (8) of the Rules every petition shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers.

65. Order Rule 1A rule 2 (1) of the Rules specifies the information which must be contained in the petition.

66. Order 1A rule 2 (2) of the Rules requires the petition to be supported by an affidavit sworn by or on the authority of the company's board containing certain specified information including:

   (1) a statement that, having made due enquiry and taken appropriate advice, the company's board of directors believe that the company is or is likely to become unable to pay its debts within the meaning of section 93 and the reasons for their stated belief (O1A rule 2(2)(b));

   (2) a statement of the company's financial position, specifying to the best of the directors' belief details of the company's assets and liabilities, including contingent and prospective liabilities and an explanation of how the company will be funded in the event and during the period of the RO's appointment (O1A rule 2(2)(c)); and

   (3) a statement of the reasons why the company's directors believe that the appointment of a RO and the moratorium would be in the best interests of the company and, in appropriate circumstances, its creditors (or classes thereof) (O1A rule 2 (2)(e)).

67. Under Order 1A rule 3(1) of the Rules every person who intends to appear and be heard on the hearing of a petition for the appointment of a RO shall give 3 days' notice of that person's intention in accordance with the requirements of the Rule. Rule 3(2) provides that the notice shall be in

CWR Form 4A and should specify certain matters detailed at (a)-(e). Rule 3(3) provides that if a party intends to oppose the appointment of the petitioner's nominee that person must (a) nominate an alternative qualified insolvency practitioner who is willing to act as RO if so appointed by the Court; (b) file a supporting affidavit; (c) serve a notice of appearance and support affidavit upon (i) the company, (ii) the petitioner's attorney and (iii) in the event that the company is carrying on a regulated business, the Cayman Islands Monetary Authority (the "Authority") not less than 3 days before the hearing date.

68. Under Order 1A rule 6 (1) of the Rules it is provided that every order for the appointment of a RO made on the application of the company "shall be in CWR Form No 8A." It is important in the context of the case before the Court to note that CWR Form 8A makes no reference to powers being given to the ROs to collect in assets and documents of the company and undertaking a forensic investigation. There is reference to the ROs preparing a report about the financial condition of the company and preparing and advising upon a scheme of arrangement or other proposal in respect of the company's indebtedness. There is also reference to a provision in respect of the scope of the powers which the directors are authorised to continue to exercise. There is reference to provisions in respect of a further hearing for the purpose of the Court assessing the progress made by the restructuring officers with respect to any compromise or arrangement.

69. Under O1A rule 6 (2) of the Rules the Order shall state:

(a) the full name, address and contact details of the RO;
(b) the powers and functions of the restructuring officer; and
(c) the manner and extent to which the powers and functions of the RO shall affect and modify the powers and functions of the board of directors in relation to the exercise of its powers.

70. Order 1A rule 6 (3) of the Rules provides that the Court may also make orders and directions in respect of certain specified matters including at (j) such other matters as the Court thinks fit.

71. Order 1A rule 8 of the Rules places an obligation on the RO, unless the Court orders otherwise, to send a report to every creditor and contributory of the company and where appropriate to the

Authority within 28 days of that RO's appointment. Under Order 1A rule 8 (2) of the Rules and subject to any order of the Court to the contrary the report must include details of:

(a) the steps taken in the restructuring and the further steps intended to be taken in the restructuring generally;
(b) the financial position of the company at the latest practicable date;
(c) the work done by or on behalf of the RO and the amount of remuneration claimed by the RO;
(d) such other information which is required in order to provide the contributories and creditors (and, where the company is carrying on a regulated business, the Authority) with a proper understanding of the company's affairs, financial position and proposed restructuring; and
(e) such other matters as the Court may direct.

Some earlier cases on Cayman corporate restructurings

72. I provide below a review of some earlier cases on Cayman corporate restructurings. These earlier cases assist in informing the Court as to the proper approach to be taken in respect of the determination of applications for the appointment of ROs.

ICO Global (Kipling Douglas J)

73. The petition of ICO Global Communications (Operations) Limited ("ICO") was dated 27 August 1999 and indicated that on the same day it filed "under chapter 11 of title 11 of the U.S. Bankruptcy Code" to allow it "to consider a refinancing/reorganisation which would result in the Company continuing business." (paragraph 7 of the petition). ICO stated that "in order to assist the refinancing/reorganisation process, it would be in the Company's interests to file a petition for winding up in the Cayman Islands (the place of incorporation of the Company), and to seek the appointment of provisional liquidators and an injunction restraining any and all proceedings against the Company pursuant to section 99 of the Companies Law." (paragraph 8 of the petition). It was noted that there had been success in negotiating a deferment of payment to suppliers but there was a liability in respect of interest payable to bondholders. It was further stated that the Company "is not presently solvent and is unable to pay its debts." (paragraph 9 of the petition). The board of directors considered that ICO needed a period of time to "ascertain whether further financing is available with a view to moving forward to profitability" and in the event that it was not and that

any proposed reorganisation was not successful "ICO will seek a winding-up order on the basis that it is unable to pay its debts." (paragraph 13 of the petition).

74. The Order made on 27 August 1999 (the same day the petition was presented) by Kipling Douglas J, appointed joint provisional liquidators ("JPLs") with powers:

(1) to oversee the continuation of the business of ICO under the control of the board of directors and under the supervision of the courts in the Cayman Islands and the US Bankruptcy Court for the District of Delaware in the United States of America;

(2) to oversee and otherwise liaise with the board of directors in effecting a reorganisation/refinancing of ICO under the supervision of the courts;

(3) to assist ICO as a debtor in possession in the strategy of the Chapter 11 reorganisation;

(4) to consult with ICO regarding the strategy of the Chapter 11 reorganisation;

(5) to receive notices and to be heard on the Chapter 11 case;

(6) to be consulted prior to and have the powers to authorise (i) the disposition of any significant asset of ICO (ii) the incurrence of indebtedness and (iii) the filing of any plan of reorganisation in the Chapter 11 case;

(7) to provide written reports to the Court on the process of the Chapter 11 case;

(8) to retain lawyers;

(9) to render and pay invoices out of the assets of ICO;

(10) to draft any appropriate scheme of arrangement;

(11) if appropriate to seek the assistance of the High Court in England and Wales under the provisions of section 426 of the Insolvency Act 1986; and

(12) to seek to enter into any protocols deemed appropriate for the coordination of legal proceedings and the restructuring of ICO.

75. The Order also refers to sections 99 and 156 of the Companies Law. It provides that the JPLs "will have no general or additional powers or duties with respect to the property or records of" ICO and "the board of directors of the Company shall continue to manage the Company's affairs in all respects". The JPLs were given power to report to the Court if they considered at any time that the board of directors was not acting in the best interests of ICO. ICO was required to provide the JPLs with such information as they may reasonably require and the JPLs were at liberty to submit bills of costs for taxation to the Court. Finally it was ordered that the costs of the petition be paid out of the assets of ICO on a solicitor and own-client basis.

76. No judgment appears to be available.

Fruit of the Loom (Smellie CJ as he then was)

77. Former Chief Justice Smellie in his reasons delivered on 30 October 2000 in *Fruit of the Loom Ltd (in provisional liquidation)* 2000 CILR N-7 referred to the relevant company, which was incorporated in the Cayman Islands, filing for protection under Chapter 11 of Title 11 of the United States Bankruptcy Code to enable the company to continue its business. The company obtained advice that in order to assist the refinancing process it would be in its best interests to file a petition for winding up in the Cayman Islands and to seek the appointment of provisional liquidators and an injunction restraining any and all proceedings against the company pursuant to section 99 of the Companies Law (1998 Revision). The objective was for the group to emerge with a "fresh start" and continue to operate as a going concern. On 30 December 1999 the Grand Court (Graham J) made orders appointing JPLs and vesting them with various powers including (a) to oversee the continuation of the business of the company under the control of the company's directors (b) to oversee and liaise with the directors in effecting a refinancing (c) to provide written reports in respect of the refinancing and (d) if appropriate to prepare and present to the Court for approval a draft scheme of arrangement with the company's creditors to give effect to a refinancing. If these objectives failed the company could be wound up. There had been various adjournments and copies of reports prepared for creditors had been filed with the Court. The former Chief Justice referred to the Court's powers under section 99 of the Companies Law stating:

"This is not the first case in which these powers have been invoked by this Court. Similar orders were made in The Matter of ICO Global Communications (Operations) Limited to allow that Cayman Islands company during provisional liquidation a moratorium on enforcement procedures to be able to refinance and restructure its financial affairs. (See Cause 508 of 1999; Order made on the 27th August 1999)."

78. Former Chief Justice Smellie added at pages 7-8 of his reasons:

> "The discretionary power vested in the Court by section 99 of the Companies Law is very wide. As the orders already made herein recognise, the power admits of a discretion which the Court will be prepared to use to appoint provisional liquidators as the basis for the rescue of a company. This is subject to the Court being satisfied that such appointment would be for the benefit of those having the financial interests in the company to be rescued. This Court must be satisfied that the order would be for the general benefit of creditors and subject to creditors prior interests, the benefit of shareholders."

79. The former Chief Justice at page 8 felt that it was possible to use "the flexible discretionary power" to "enable the rescue of a company where it is just to do so." He prayed in aid the English first instance authority of *Re English & American Insurance Co Ltd* [1994] 1 BCLC 649 and Harman J's comment at page 650 that it was a "good system" particularly in cases where "there is a hope that in the future there will be a scheme of arrangement."

80. Former Chief Justice Smellie, in a balanced approach, at page 9 added:

> "It must be in the nature of the discretion to be exercised that the Court will be concerned to ensure that the protective orders are not abused by a company which is hopelessly insolvent to be allowed to continue to trade."

81. On the evidence before him former Chief Justice Smellie felt that the financial position of the group appeared "to be improving. It is currently the JPLs' view that the creditors' position is being enhanced in the arrangements for refinancing now underway. Liquidation outright is not now indicated to be the advisable route."

82. The former Chief Justice referred to a "three stage test":

(1) the JPLs should be satisfied that a refinancing and/or sale of the business as a going concern is likely to be more beneficial to the creditors than a liquidation realisation of the assets;

(2) there is a real prospect of a refinancing and/or sale as a going concern being effected for the benefit of the general body of the creditors;

(3) that in all the circumstances it is in the best interest of the creditors to try and achieve such a refinancing and/or sale as a going concern.

CW Group (Parker J)

83. In *CW Group Holdings Ltd* (FSD unreported judgment 3 August 2018) Parker J dealt with submissions of counsel in respect of section 104 (3) of the Companies Law pursuant to which a provisional liquidator could be appointed on the grounds that (a) the company is or is likely to become unable to pay its debts and (b) the company intends to present a compromise or arrangements to its creditors. At paragraph 35 Parker J recorded a submission of counsel that "the language of subsection 3(b) only requires that the company 'intends' to present a compromise arrangement to its creditors, not that it has done so, or will do so in the immediate future." Counsel argued that the rationale for that language was to give effect to the practice which had developed of appointing provisional liquidators to provide companies with "breathing space" before the actions of creditors, acting in their own interests, might interfere with its attempts to reach a consensual restructuring or if that should prove not to be possible a scheme of arrangement. Reference was made to *Fruit of the Loom* as "an early example."

84. Parker J in *CW Group* at paragraph 70 accepted counsel's "submission that it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators on behalf of the company …"

85. Parker J at paragraph 74 noted that there had "already been some engagement with creditors with a view to developing the terms of a proposed restructuring. The board wishes to work with restructuring professionals, who, as I say, could importantly also be independent officers of this

Court, to pursue a proposed restructuring which would be likely to involve parallel schemes of arrangement in due course …"

86. At paragraph 76 Parker J on the facts before him felt that to allow the company to continue as a going concern and to have the best opportunity to secure a favourable restructuring was "in the best interests of the body of general creditors as a whole" adding at paragraph 77 that a winding up "is likely to have an adverse impact on the business: on contractual and other relationships; future trading prospects; market reputation and position, and regulatory relationships, all of which would adversely affect the value of the company." At paragraph 78 Parker J referred to the board "with professional advice" warning of a materially worse outcome if there was an insolvent liquidation.

ACL Asean Tower (Kawaley J)

87. In *ACL Asean Tower Holdco Limited* (FSD unreported reasons for decision delivered 8 March 2019) Kawaley J dealt with a winding-up petition and a request to adjourn to explore a restructuring. In that case Ms Dobbyn of Sinclairs appeared for Messrs Kabbani, Al-Ken and Darwish, creditors. JPLs had been appointed and they were "charged with reporting to the Court at the next hearing of the Petition on whether or not the best interests of creditors would be served by pursuing a restructuring in provisional liquidation rather than immediately winding up the Company" (paragraph 5). The JPLs reported with the view that a restructuring of the company's financial obligations within the provisional liquidation was no longer "a viable course of action and recommend that the Company be placed into official liquidation at the earliest opportunity" (paragraph 7). The majority directors and "three past or present directors" opposed the petition and the majority shareholder sought an adjournment. The adjournment was refused and a winding-up order was granted (paragraph 9). Kawaley J in his summary reasons felt that there was no "sufficiently cogent justification for granting the adjournment sought." He felt that the critical question was where do the interest of the unsecured creditors "who do not have any other significant interests which might impact on the position they adopt" lie. Kawaley J felt that the majority shareholder who was also a secured creditor had "commercial interest that is likely to colour the position." (paragraph 10). At paragraph 14 Kawaley J referred to "an important underlying theme of insolvency law" namely "that the wishes of creditors are relevant to any decision this Court may make about the administration of an insolvent company."

88. Kawaley J dealt with an argument that "it is commonplace for winding-up petitions to be adjourned to facilitate restructurings." At paragraph 18 Kawaley J referred to the judgment of Park J in *Re Lummus Agricultural Services Ltd* [2001] 1 BCLC 137 where he brushed aside the opposition of a Mr Koshy, a director of the company and a majority shareholder, and four other creditors to a winding-up order, stating at page 143 d-e:

> "three of the four opposing creditors are associated companies … The fourth are auditors, who are in any event creditors only for a small amount. It would be different if they were independent outside creditors, but, given that they are not, I do not think that their opposition to the petition adds anything much to the opposition of Mr Koshy himself …"

89. At paragraph 19 Kawaley J referred to the argument "that no weight should as a matter of principle ordinarily be given to the views of parties connected to a Company who oppose a winding-up order."

90. Kawaley J at paragraph 21 noted that it was unprecedented for "a common law court to adjourn a winding-up petition to permit the company's management to initially explore the possibility of hypothetical restructuring" in circumstances where JPLs had (a) carried out a preliminary assessment of restructuring prospects and (b) had advised the Court that a winding-up order should be made immediately.

91. Kawaley J at paragraphs 23 and 24 referred to *Re TG Gold Holding Limited* and stated that in that case the company was in the process of developing "a tangible restructuring proposal" with support "from at least some unconnected creditors".

92. Kawaley J at paragraphs 25 and 26 referred to *Re CW Group Holdings Limited* and concluded that "where an insolvent company takes the initiative and seeks to implement a court-supervised restructuring, this Court will accord the company's management a generous margin of appreciation when faced with attempts by creditors to impose a 'full-blown' provisional or official liquidation instead."

93. At paragraphs 27 and 28 Kawaley J referred to *Re Abraaj Holdings* and described it as "a case where the adjournment granted was positively sought by both the joint provisional liquidators and

the majority of creditors in circumstances where active pursuit of a possible restructuring had already been judicially approved."

94. At paragraph 29 Kawaley J referred to the need for "tangible grounds" for an adjournment such as (a) support from the majority of creditors or (b) proactive restructuring steps taken by the company's management.

95. Kawaley J felt at paragraph 30 that Mr El Ard's (the majority shareholder) first opportunity to investigate the company's financial position was when he was formally notified of the appointment of the JPLs. At paragraph 31 Kawaley J felt that Mr El Ard and the company's management had many prior opportunities to "turn their minds to these important matters." Kawaley J did not feel that there was any rational basis to afford the company and Mr El Ard "an opportunity to begin their own investigation into a restructuring proposal at the end of the period fixed by the Court for the JPLs to carry out that very investigation." (paragraph 32).

96. At paragraph 37 Kawaley J, in the context of the adjournment application before him, referred in effect to the need for management to demonstrate "a serious commitment to protecting the interests of unsecured creditors" and the formulation of "at least the broad outline of a credible plan."

Sun Cheong (Smellie CJ as he then was)

97. Former Chief Justice Smellie in *Sun Cheong Creative Development Holdings Limited* 2020 (2) CILR 942 provided helpful guidance.

98. In that case the company was incorporated in the Cayman Islands and was registered in Hong Kong and listed on the Hong Kong Stock Exchange. The company petitioned for its own winding up but on the same date also filed a summons for the postponement of its petition and for the appointment of JPLs to give the company an opportunity to restructure its assets and liabilities under the supervision of the Grand Court instead of being placed into official liquidation by the High Court of Hong Kong. On 31 July 2020 the Grand Court acceded to the company's application. In that case there was before the Court evidence of a "white knight" investor in place willing to inject funding, a wholescale change of the board of directors providing independent, as well as significant financial and distressed asset expertise at Board level, and an independent financial report that

estimated that, on the basis of an immediate winding up, creditors would be unlikely to receive a return of any more than 1 cent on the dollar had been provided (paragraph 4 of the judgment).

99. From paragraph 16 of the judgment there was reference to the details of the restructuring proposals and the existence of the "white knight" investor.

100. From paragraph 27 of the judgment there was reference to the viability of the restructuring proposal.

101. Former Chief Justice Smellie at paragraph 35 stated that under section 104 (3) (appointment of provisional liquidators) and 95 (3) (power to adjourn) of the Companies Law as it then was "the Court has a broad and flexible discretion." Reference was made at paragraph 35 to *Fruit of the Loom*, and at paragraph 36 to *CW Group* and *ASL Asean*. It was indicated at paragraph 37 that there is no prescriptive list of factors to be taken into consideration when considering how the Court's "broad discretion is to be exercised" but matters which the Court may have regard to include:

(1) the express wishes of the creditors (although the Court should be cautious not to "count up the claims of supporting and opposing creditors" per Segal J in *Grand T G Gold Holdings Limited* (unreported 21 August 2016 at 6 (f) (iv));

(2) whether the refinancing is likely to be more beneficial than a winding-up order;

(3) that there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors;

(4) the considered views of the board as to the best way forward.

102. Former Chief Justice Smellie at paragraph 41 took care to stress that there was "independent evidence before the Court that refinancing is likely to be more beneficial than a winding up order and that there is a real prospect of such a refinancing being effected. There is no better evidence of this than the willingness of the Cachet Group, an experienced distressed debt investor, to invest HK$75m in the proposed restructuring".

103. At paragraph 47 of the judgment it was stated that "the language of s.104 (3) does not impose a requirement on the Company to already have a pre-formulated restructuring plan. Nor does it require the Company to provide evidence of the viability of its restructuring plan", adding at paragraph 49 "Where the Court is in any doubt as to the viability of such a restructuring plan, it is also well accepted it can appoint JPLs for the purpose of preparing a report on the prospects of success of a restructuring plan."

104. At paragraph 50 the well experienced judge noted that there was no reason to doubt the viability of the proposed restructuring and the existence of a "white knight" investor, together with confirmation from independent financial advisors that the proposed restructuring was both viable and in the best interests of the creditors.

105. At paragraph 51 the judge recorded his acceptance that it was appropriate in the circumstances for the Court to exercise its "broad discretion" to adjourn the winding-up petition and appoint JPLs to facilitate the restructuring of the company.

106. I should add that in the context of the Court's discretion to wind up a company it is well established that the decision is not made on the majority decision of creditors. The views expressed by the creditors have to be sound. Snowden J, as he then was, put the position well in *Re Maud* [2020] EWHC 974 (Ch) [2020] Bus. L.R. 1533 where at paragraphs 78 and 79, having summarised the competing submissions at paragraph 73, he stated that the starting point for the Court in determining whether to give effect to the right of the class *ex debito justitiae* to a bankruptcy order or a winding-up order, is to look at the value of debts of the creditors on each side of the disagreement. The Court's role in determining whether or not to give effect to the class remedy is not limited to a question of simple mathematics. The Court will also look at the reasons advanced by the creditors on each side of the debate in order to assess whether those reasons are commercially rational and will have regard to other evidence to assess whether the weight and rationality of a particular creditor's approach is diminished by any extraneous factors such as personal antipathy or affection on the part of the creditor for the debtor (or those connected with it in the case of a company).

107. In the context of applications to adjourn a winding-up petition Neuberger J, as he then was, in the well-known English authority *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633 at 637-639 set out various factors to consider and stressed that the Court will give greater weight to the views of

independent creditors as opposed to creditors connected to the company and the Court's discretion will not normally be dependent on mathematical niceties.

Midway (Segal J)

108. Segal J's judgment in *Midway Resources International* (FSD unreported judgment 30 March 2021) is also worthy of attention in particular at paragraphs 65 to 67. In *Midway* Segal J dealt, on the papers, with an application for the appointment of provisional liquidators under section 104(3) of the Companies Act on a light-touch basis and the headnote confirmed that the judgment dealt with the evidence that a company needs to file concerning the proposed compromise or arrangement, the need to provide evidence of the views of creditors and the impact of challenges by creditors to the credibility of the proposed compromise or arrangement and of foreign proceedings which might interfere with the ability of the company's subsidiary to have its restructuring approved by creditors. In that case there had plainly been discussions with creditors and an Administrator's report provided to creditors of the company's operating subsidiary ("Zarara") (see for example paragraphs 17 and 28 of the judgment). The Administrator had concluded that Zarara's creditors should be given an opportunity to consider detailed restructuring proposals which it was in their best interests to accept and approve.

109. In paragraph 65 Segal J noted that there appeared to be a "rational basis" for accepting the Restructuring Proposals.

110. At paragraph 66 Segal J noted that the restructuring negotiations were at a relatively early stage and in view of recent developments in Kenya serious doubts and concerns as to the prospects of success of the Restructuring Proposals had arisen but he was "satisfied that all is not yet lost and there remains a number of ways in which the restructuring negotiations could be put back on track ..."

111. At paragraph 67 Segal J, in the circumstances of the case before him, thought it seemed "right and appropriate to appoint PLs in order to assist in and facilitate the restructuring negotiations and to give the Company and them the opportunity to stabilize the position and to seek to have constructive discussions with the creditors."

112. Segal J at paragraph 49 referred to section 104(3) of the Act (which was in similar terms to section 91B(1) of the Act) and stated:

> "49. The two sub-paragraphs of section 104(3) establish what must be shown to give the Court the statutory power to appoint JPLs on an application by the Company. They go to jurisdiction. If satisfied, the Court has a wide discretion as to whether to appoint JPLs having regard to the purpose of section 104(3) of the Act and the circumstances of the case."

113. At paragraph 50 Segal J referred to *Sun Cheong* and underlined the need for "a real prospect" of a restructuring being effected for the benefit of the general body of the creditors.

114. At paragraph 51 Segal J referred to *Fruit of the Loom* and again underlined the need for there to be a real prospect of restructuring.

115. At paragraph 52 Segal J noted that section 104(3) did not impose a requirement on the company that it already have a pre-formulated restructuring plan and nor does it require the company to provide evidence of the viability of its restructuring plan. Segal J also underlined the fact that where the Court was in any doubt as to the validity of a restructuring plan it could appoint joint provisional liquidators for the purpose of preparing a report on the prospects of the success of a restructuring plan.

116. Segal J at paragraph 56 referred to the importance of the views of the creditors stating:

> "Creditors' views are relevant and important for determining the prospects of the proposed compromise or arrangement (are key creditors supportive or likely to support the proposed compromise or arrangement?) and as the Chief Justice said in *Sun Cheong* the wishes of creditors are one of the matters to be taken into account when the Court is exercising its discretion under section 104 (3) and deciding whether to appoint JPLs."

Silver Base (Doyle J)

117. In *Silver Base Group Holdings Limited* (FSD unreported judgment 22 November 2021), in the context of an application to appoint provisional liquidators for restructuring purposes, I also relied

upon, amongst other authorities, *Sun Cheong* and *Midway*. At paragraph 3 I referred to the developing case law which stressed the importance of the court taking into account the position of creditors when a company is in the zone of insolvency. Consider now *BTI* v *Sequana* [2022] UKSC 25. In *Silver Base* I was concerned over the lack of notice to the creditors (paragraph 5) and I felt that the creditors should be given more time within which to communicate their views (paragraph 7). I also added that "the Company should positively and constructively engage with all creditors." In a subsequent judgment delivered on 8 December 2021 I again stressed the need to take into account the position of creditors. At paragraph 21 I stated:

> "I cannot see any prejudice to the creditors in appointing JPLs at this stage to monitor the Board, conduct investigations and to consult with creditors in respect of the feasibility of a debt restructuring plan and then to report to the Court in that respect …"

118. At paragraph 24 (2) of *Silver Base* I concluded that the Company was or was likely to become unable to pay its debts and that it intended to present a compromise or arrangement to its creditors. At paragraph 24 (3) I recorded that "there is a plan and information has been provided about the past and potential future of the Company".

119. I required the JPLs to report, after consultation with the creditors, on the feasibility of a debt restructuring before 2pm on 27 January 2022 and if such was not feasible stated that the Court could make a winding-up order on 11 February 2022.

120. On 11 February 2022 I was persuaded to grant a further adjournment and at paragraph 11 noted that "I am willing to provide one further adjournment but, as indicated during my exchanges with counsel this morning, this matter cannot drag on indefinitely and minds need to be focused as to future progress."

121. On 5 May 2022 I refused a request for another adjournment and made a winding-up order stating at paragraph 25:

> "I am not willing to grant a further adjournment. The Company has had plenty of time to progress matters in respect of a restructuring."

Oriente (Kawaley J)

122. Kawaley J in *Oriente Group Limited* (FSD unreported judgment 8 December 2022) gave some very helpful guidance in respect of the new restructuring officer regime. At paragraph 2 Kawaley J, reflecting the importance of creditor involvement, stated:

> "… The Proposed Restructuring appeared to have attracted at a very early stage very significant creditor support, a factor which provided powerful support for the application to appoint restructuring officers to be granted."

123. At paragraph 8 of his judgment Kawaley J adopted counsel's submissions to the effect that the case law authorities in respect of the appointment of restructuring or 'light touch' provisional liquidators are likely to be both relevant and persuasive in respect of the appointment of restructuring officers. Kawaley J did so for two principal reasons. Firstly, the grounds upon which a restructuring petition may be presented under section 91B (1) are expressed in the same terms as the grounds for appointing provisional liquidators for restructuring purposes under the former provisions of section 104 (3) before the restructuring officer regime became operative on 31 August 2022. The solvency test for restructuring purposes is also the same as that applicable to winding-up proceedings (section 93). Secondly the cases under the former regime record valuable judicial and legal experience in essentially the same commercial sphere.

124. In the case before him Kawaley J felt that the dicta of Smellie CJ (as he then was) in *Sun Cheong Holdings* 2020 (2) CILR 942 at paragraphs 35-37 "applies with equal force to the restructuring officer regime". The dicta cited by Kawaley J emphasised:

(1) the Court has a broad and flexible discretion;

(2) it is subject to the Court being satisfied that such appointment would be for the benefit of those having the financial interests in the company to be rescued. The Court must be satisfied that the order would be for the general benefit of creditors and subject to creditors' prior interests, the benefit of shareholders;

(3) matters to which the Court may have regard include:

(a) the express wishes of creditors (though the Court should be cautious not to "count up the claims of supporting and opposing creditors");
(b) whether the refinancing is likely to be more beneficial than a winding-up order;
(c) that there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; and
(d) the considered views of the board as to the best way forward.

125. Kawaley J at paragraph 11 of his judgment in *Oriente* stated that the jurisdiction to appoint ROs is a "broad discretionary jurisdiction" to be exercised where the Court is satisfied:

(1) the statutory pre-condition of insolvency or likely to become insolvent is met by credible evidence from the company or some other independent source;
(2) the statutory pre-condition of an intention to present a restructuring proposal to creditors or any class thereof is met by credible evidence of a rational proposal with reasonable prospects of success; and
(3) the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding up of the company.

Summary of the relevant law and procedure

126. From a review of this useful prior case law and noting the express provisions of section 91B I would suggest that the courts when considering applications for the appointment of ROs should consider, amongst other issues, the following:

(1) the previous case law authorities in respect of the appointment of restructuring or "light touch" provisional liquidators are likely to be both relevant and persuasive (*Oriente*);

(2) before the Court has jurisdiction to exercise its discretion to appoint ROs both statutory limbs in section 91B(1)(a) and (b) must be satisfied. The burden is on the petitioner to satisfy the Court on a balance of probabilities that it (a) is or is likely to become unable to pay its debts and (b) it intends to present a restructuring plan to its creditors (or classes thereof) (section 91B(1) and *Midway*);

(3) the discretionary power vested in the Court is very wide but is subject to the Court being satisfied that the appointment would be for the benefit of those having the financial interests in the company to be rescued. The Court may use this flexible discretionary power to enable the rescue of a company where it is just to do so. The Court should ensure that the position is not abused by a company which is hopelessly insolvent and continues to trade. The Court must consider whether (a) the restructuring is likely to be more beneficial to creditors than a winding up (b) there is a real prospect of a restructuring being effected for the benefit of the general body of creditors and (c) that in all the circumstances it is in the best interests of the creditors to try and achieve a restructuring (*Fruit of the Loom)*;

(4) the Court has a broad and flexible discretion subject to it being satisfied that the appointment would be for the benefit of those having the financial interests in the company to be rescued. The Court must be satisfied that the appointment would be for the general benefit of creditors and, subject to creditors' prior interests, the benefit of shareholders. Matters to which the Court may have regard include (a) the express wishes of creditors (b) whether the refinancing is likely to be more beneficial than a winding-up order (c) that there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors and (d) the considered views of the board as to the best way forward (*Sun Cheong*);

(5) the company should positively and constructively engage with all creditors. Creditors' views are relevant and important (*Midway*; *Silver Base*);

(6) the Court can exercise its broad discretionary jurisdiction where it is satisfied (a) the statutory pre-condition of insolvency or likely to become insolvent is met by credible evidence from the company or some other independent source (b) the statutory pre-condition of an intention to present a restructuring proposal to creditors or any claims thereof is met by credible evidence of a rational proposal with reasonable prospects of success and (c) the proposal has or will potentially attract the support of the majority of creditors as a more favourable commercial alternative to a winding up of the company (*Oriente*);

(7) the petitioner must first, on credible evidence, establish that it (a) is or is likely to become unable to pay its debts and (b) intends to present a compromise or arrangement to its creditors (or classes thereof) (*Oriente*);

(8) the intention to present a restructuring plan must be a realistic, genuine, *bona fide* held intention on adequate grounds. The Court will need to be persuaded that there is a rational and credible restructuring plan, even if only provided in outline. The Court does not have to be provided with the finished fully grown plant but the seeds must be sufficient to suggest that it is likely the plant will bear some fruit before too long;

(9) there is no need for a detailed pre-formulated or finalised restructuring plan. Entirely abstract or hypothetical restructurings are not however sufficient. There must normally be tangible restructuring proposals with support from at least some unconnected creditors. Management, in an insolvency situation, must normally demonstrate a serious commitment to protecting the interests of unsecured creditors and the formulation of at least the broad outline of a credible plan (*CW Group*, *ACL Asean Tower*, *Sun Cheong* and *Midway*);

(10) in some cases the bare genuine bones of a restructuring plan may suffice or at least be persuasive enough to permit the appointment of ROs to report on the viability of a plan but in some cases in the absence of (a) meaningful consultation with outside creditors and their support and (b) independent confirmation from third-party professionals of the viability of the potential plan and the benefits of restructuring as opposed to a winding up, the Court may conclude that there is no genuine intention to move forward with a credible plan that has a reasonable chance of success. In such circumstances the Court will rightly decline to appoint ROs;

(11) in most cases the Court will find a two-phase process (phase (i) gathering assets, information and documents, commencing legal proceedings in that respect if necessary and a forensic investigation and then phase (ii) presenting an informed restructuring plan) unattractive especially if phase (i) would take many months or even years to complete which could be likely if litigation to gather assets, information and documents was vigorously contested;

(12) the Court would normally expect to see evidence of some form of engagement with creditors prior to the petition being presented with a view to developing the terms of a proposed restructuring. In an insolvency situation the position of unsecured independent creditors is often paramount. Prior to presenting petitions for the appointment of ROs companies would be well advised, where circumstances permit, to consult with creditors and provide creditors with advance notice of an intention to make the application and of the date of the hearing (*Sun Cheong*, *Midway* and *Silver Base*);

(13) the Court would normally benefit from some independent evidence on the benefits of a restructuring as against a winding-up order and may be sceptical about the views of management in this respect where if a winding-up order was made management's conduct would come under close scrutiny;

(14) the management of a company should normally be on top of the company's financial position and be in a position to provide the Court with accurate (ideally independently verified) information in respect of the company's financial position;

(15) the Court would normally benefit from up-to-date copies of the company's financial statements (preferably audited or otherwise independently verified) and a list of creditors, specifying whether they are secured or not and if secured the extent of the security and whether the creditors have any connection with the management of the company, their locations, the amounts outstanding and an indication of the extent of the consultation with them and whether they support or oppose the appointment of ROs;

(16) the views of "insider" or management-associated creditors in respect of the appointment of ROs will be considered but normally more weight would be attached to the views of "outside" independent third-party creditors. The Court will obviously have regard to express wishes of creditors but should be cautious not to simply count up the claims of supporting and opposing creditors. The basis on which the creditors' views are expressed should be considered. The Court will have regard to the views of management and the views of creditors but their views have to be sound (*Sun Cheong*, *ACL Asean Tower* and *Maud*);

(17) the Court must be astute to guard against any potential abuse of the new restructuring regime especially insofar as the automatic statutory moratorium is concerned. It would be useful if the petitioner could provide evidence in respect of any actual or pending legal proceedings against the company;

(18) the Court will need to be satisfied that management genuinely require and deserve a "breathing space" to finalise a restructuring plan with creditors which has a reasonable chance of success and would be in the best interests of creditors and enable the company to continue as a going concern. The Court needs to guard against placing any emphasis on any unrealistic "wishful thinking" by management;

(19) a core requirement is that there needs to be a real prospect of a restructuring being effected for the benefit of the general body of the creditors (*Fruit of the Loom*, *Sun Cheong*, *Midway* and *Oriente*);

(20) it is important that petitioners seeking the appointment of ROs should have all their ducks in a row before filing the petition and they should not assume that if their evidence is inadequate the Court will grant them an adjournment;

(21) even if the company and all creditors agree to the appointment of ROs the Court must, nevertheless, of course, be satisfied that it has jurisdiction to make the Order and that making the Order would, in its discretion, be a proper exercise of such jurisdiction. Companies and creditors cannot confer jurisdiction on the Court to appoint ROs simply by consent;

(22) the applicant company has to jump both statutory jurisdictional hurdles before the Court can consider whether in its discretion it is just, fair and appropriate to appoint ROs and if so what functions and powers to give them and the contents of any Order generally and specifically in respect of the circumstances of the case before the Court;

(23) once the two statutory grounds have been satisfied ((a) inability to pay debts and (b) intention to present a restructuring plan) the Court has jurisdiction to make an Order appointing ROs. Once jurisdiction has been established the Court must then consider how to exercise its discretion and if it decides to exercise its discretion in favour of appointing ROs it must consider the appropriate terms of the Order and what powers and functions

should be conferred on the ROs. The Court must also consider what conditions should be imposed on the board of directors in relation to the exercise by the board of directors of its powers and functions;

(24) the petition should contain the information required by the Act, Rules and case law and should clearly specify the grounds of the application. The petition will normally be heard in open court. Sealing orders would not normally be appropriate but may in some exceptional cases be justified. Commercial embarrassment or sensitivity would not normally trump the fundamental principle of open justice (see, albeit in the different context of a winding-up hearing, *Silicon Valley Bank* FSD unreported judgment 29 June 2023, Doyle J). Accompanying the petition should be a draft Order and the petition must be supported by an affidavit or affirmation containing the required information. The affidavit or affirmation should stick to the facts and not contain comments, submissions or arguments. The Company should also file a concise and focused skeleton argument which should simply contain the relevant legal arguments cross-referenced to the paginated hearing bundle. Copies of the core authorities (the Act, the Rules and the case law) should also be provided. A duly paginated hearing bundle should be filed together with a reading list and realistic time estimates for the reading and the hearing. In most cases the Court would also benefit from a chronology, *dramatis personae* and a concise case summary. Anything that can help busy judges to quickly absorb the relevant information, which sometimes arises as a matter of urgency, would normally be of assistance. Late filings will not assist the Court in its preparation for the hearing; and

(25) every case, of course, must be dealt with on its own facts and circumstances.

<u>The need to guard against potential abuse</u>

127. There is a need to guard against potential abuse of the new restructuring regime. It seeks to strike the appropriate balance between relevant stakeholders including the management of the relevant company, its shareholders and creditors. In addition to the safeguards and protections provided for in the new statutory provisions the judiciary has an important role to continue to ensure that the new regime is not abused and that the relevant competing interests are duly balanced. This will also assist in enhancing confidence in the new regime and facilitating the recognition of Orders appointing ROs in relevant foreign jurisdictions. It is important that foreign courts readily provide

recognition and assistance. The protection of the new regime by the judiciary from potential abuse should enhance international judicial cooperation from other countries.

128. There is no doubt that these new statutory provisions enhance the financial services offering of the Cayman Islands.

129. The legitimate and thriving financial services economy of the Cayman Islands is well recognised locally and internationally. It is an economy that is assisted by the existence of appropriate statutory provisions, a competent, independent and impartial judiciary, a professional and highly skilled legal profession and top-quality insolvency and restructuring officers.

130. Lord Reed, the President of the UK Supreme Court and lead Justice on the Judicial Committee of the Privy Council ("JCPC"), in his oral evidence to the Constitution Committee of the House of Lords on 4 July 2023 (the day after Cayman's Constitution Day) stated:

> "The Cayman Islands, for example, is a British Overseas Territory. Its economy is based on international legal and financial services. The prosperity and way of life of the people there depend on their success in attracting enterprises from ... China and all over the world to set up their businesses there. For that to be a feasible operation, they have to have high-quality courts to deal with disputes, because colossal amounts of money are being invested. In financial terms, the biggest cases that we deal with are mostly Privy Council cases rather than Supreme Court ones. The Cayman Islands has very good first-instance judges, some of them British and some local. Its Court of Appeal is manned by retired Court of Appeal judges, mostly with a commercial background. Its final court of appeal is of course with us."

131. During the JCPC's visit to the Cayman Islands in November 2022 Lord Reed stressed the importance of the Cayman Islands when he stated in his ceremonial opening remarks on 15 November 2022:

> "... some of the most important cases for the development of the common law around the world, in countries such as Australia, Canada, Hong Kong, New Zealand and Singapore, as well as the UK, are decided by the Privy Council on appeal from the Cayman Islands .... Judgments that we issue in cases from these islands are cited by lawyers and courts around the world, demonstrating the quality of justice available on these islands, and

supporting the excellent work done by the judiciary in the Islands themselves. This is particularly important to the prosperity of the Islands, as confidence in the legal system is an important factor in supporting international investment and the financial services industry."

132. Lady Arden in her speech on *The Judicial Committee of the Privy Council as an important source of financial services jurisprudence* (The Peace Palace 3 February 2020) acknowledged the "importance in today's world in commercial terms" of the Cayman Islands and its "maturity" in terms of financial services law.

133. Lady Arden in her 2022 Guest Lecture delivered on 25 March 2022 in the Grand Court of the Cayman Islands again stressed the issues of international importance dealt with by the JCPC "in relation to cases in the financial services field, particularly from this jurisdiction." (paragraph 85).

134. I note in passing the striking statistic published by Bloomberg as of 26 September 2023 that companies incorporated in the Cayman Islands amount to 61% of the companies where Hong Kong is the primary listing (with a Main Board share at 58% and a GEM share at 82%). It is especially important to the Cayman Islands that the Hong Kong judiciary recognise and provide assistance to ROs appointed by the Grand Court of the Cayman Islands. To enhance confidence in such appointments it is equally important that the Grand Court guard against any potential abuse of the restructuring officer regime.

135. Jurisdictions around the world can have confidence in the judiciary of the Cayman Islands to appropriately consider and balance the interests of all concerned in respect of applications for the appointment of ROs. Foreign jurisdictions should not hesitate to recognise and provide assistance to ROs appointed by the Financial Services Division of the Grand Court of Cayman Islands. They may rest assured that Cayman judges at first instance in the Financial Services Division, reinforced by a strong and internationally well-regarded Court of Appeal and the JCPC, will be vigilant to guard against any potential abuse of the restructuring officer regime.

Moratorium

136. The need to guard against potential abuse is particularly acute in the context of the statutory moratorium.

137. Section 91G of the Act concerns provisions in respect of a stay of proceedings otherwise known as the "statutory moratorium".

138. Section 91G (1) of the Act provides that at any time (a) after the presentation of a petition for the appointment of a restructuring officer under section 91B, but before an order for the appointment of a restructuring officer is made, and when the petition has not been withdrawn or dismissed; and (b) when an order for the appointment of a restructuring officer is made, until the order appointing the restructuring officer has been discharged, no suit or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution shall be passed for the company to be wound up and no winding-up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose.

139. Section 91G (3) of the Act provides that in section 91G of the Act (a) references to a suit, action or other proceedings includes a suit, action or other proceedings in a foreign country; and (b) references to other proceedings include any court-supervised insolvency or restructuring proceedings against the company.

140. It can be seen from section 91G(1) of the Act that the statutory moratorium kicks in upon the presentation of the petition for the appointment of ROs unlike the position under section 97 (1) of the Act which provides that when a winding-up order is made or a provisional liquidator is appointed no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company except with leave of the Court and subject to such terms as the Court may impose. There is no automatic statutory stay upon the presentation of a petition for a winding-up order or an upon an application for provisional liquidators to be appointed, whereas there is after the presentation of a petition for the appointment of ROs.

141. In the case which was before me on 6 September 2023 there was no reference in the Petition to claims against the Company.

142. In the first affidavit of Sadie Hutton sworn on 24 August 2023 there is reference to suggestions from others that the Company was engaged in a "ponzi scheme" and alleged misappropriation of funds but the deponent dismissed these allegations as being made "without a shred of evidence". At paragraph 12 of her first affidavit she says:

> "The Board is certain that the appointment of the restructuring officers and the automatic moratorium is in the best interests of the Company and, (sic) its creditors, and also those with an interest in Freeway as the Company's major creditor (such as the holders of the Supercharger Virtual simulations products)."

Adding:

> "… any adverse proceedings whether litigation or provisional liquidation or full winding up proceedings that would bring the Aubit-Freeway brand into disrepute and tarnishes the reputation of the Board and its independent consultants and advisors, would destroy the trust of our business network, who would likely lose all confidence in the Company and the future products we are in the process of developing …"

143. In her second affidavit sworn on 30 August 2023 Sadie Hutton at paragraph 6 (viii) refers to what she describes as "a civil action filed in Wyoming on 9 August 2023, and which was served on the Company (as well as the Freeway Reserves Foundation and Freeway Future Foundation) through Hague Convention channels at its registered office at Sinclair Corporate Services Ltd on Monday 28 August 2023" (the registered office of the Company). She robustly adds that this demonstrates "why a moratorium is needed to prevent further vexatious, speculative lawsuits based only on irresponsible gossip and unfounded allegations from on-line commentators (without a shred of any genuine evidence) asserting among other things that the Company itself was operating a "scam" through Freeway."

144. I simply noted the Company's position in respect of the proceedings in Wyoming and the position of Mr Bodden's clients in that respect. His clients say that they have a good claim against the Company. The Company says otherwise.

145. Having considered the position in respect of the statutory moratorium, I now turn to the evidence before the Court in respect of the two statutory factors in section 91(B)(1) of the Act.

The financial position of the Company – section 91B(1)(a)

146. In respect of section 91(B)(1)(a), there was very limited information concerning the financial position of the Company. No audited financial statements were produced but a couple of pages of somewhat flimsy draft management accounts for March 2022 and December 2022 were amongst the exhibited voluminous documentation.

147. Sadie Hutton in her first affidavit sworn on 24 August 2023 refers at paragraph 6 to Company's assets in the sum of US$60,476,053 as at 31 May 2023. At paragraph 7 based on information provided to her by Bradley Hunt (who has not provided evidence) she refers to the Company's current liabilities which include the amount of US$122,000,000 said to be due to Freeway, US$302,071 fees for legal services (entities not specified), US$11,531 for marketing fees and expenses (entities not specified), US$527,117 for professional advisors including Paul Allmark and other independent contractors (entities not specified), US$291,750 in respect of loans from 3 founding shareholders and directors (herself, Graham Doggart and Peter Neilson) (the "Founders"), US$251,888 in respect of travel and other expenses incurred by the Founders and US$1,800,000 stated to be due to Graham Doggart. The three entities specified in the Notice of Appearance and stated to be owed US$6,324,901.77 were not listed.

148. Sadie Hutton provides some information in respect of liabilities in her first affidavit but does not provide a total figure for the outstanding indebtedness. At paragraph 8 she says that no security is held by any creditor of the company. It is implicit in paragraph 9 of her second affidavit that she is of the view that the "exact financial position of the Company and its potential asset recoveries" are not known.

149. Ms Dobbyn in her oral submissions was at pains to stress that the Company was operating in "a new world". It may be a "new world" but it is still one where the rule of law and good corporate governance should prevail. Those managing companies (such as directors) need to be aware of the financial position and assets of the companies they are managing. That is a very basic principle of good corporate governance. The management of the Company appeared to be unaware of the precise financial position of the Company.

150. In the case presently before the Court inadequate evidence as to the financial position of the Company was provided but the Company conceded that it was unable to pay its debts within the meaning of section 93 of the Act and that section 91B(1)(a) of the Act was duly satisfied.

The "restructuring plan" – section 91B(1)(b)

151. In respect of section 91B(1)(b), there was extremely limited information concerning the proposed "restructuring plan". Paragraph 54 of the Petition simply records that the directors have been actively considering:

> "(a) the options for launching new business lines and digital products (utilizing AIP's proprietary technology including the *Aubit Edge Protocol*) which, depending on the value of all assets recovered by the Restructuring Officers from Ardu Prime, could in due course allow all creditors including Freeway, to be repaid in full; and
>
> (b) alternatively, the potential terms of a proposed consensual restructuring of the Company's financial indebtedness."

152. No detail was provided.

153. In her first affidavit sworn on 24 August 2023 Sadie Hutton provides no meaningful evidence as to any proposed restructuring. She admits at paragraph 17 that:

> "At this juncture, we have only been able to put together a very outline plan which is exhibited at pages 30-35 of the Exhibit SH-1".

154. I studied those pages entitled "Short Restructuring Plan // Confidential". The document is not dated and no one has, understandably, had the courage to identify themselves as the author of the document.

155. On page 1 there is reference "1 Situation" and the following wording appears "Through a lack of capital to maintain cash flow and a lack of information to reconcile profits and losses Aubit International has made the decision to initiate a voluntary restructuring process."

156. It says that the Company "will bring in court authorised professionals from Grant Thornton – Court Restructuring Officers (CROs) to actively recover assets and investigate events to determine the truth, size and nature of the losses as well as to determine what claims may be brought by Aubit International."

157. On page 2 there is a reference to a "2. Restructuring Plan". It states that the Company "proposes to be placed under a Cayman court restructuring regime with Grant Thornton teams in Cayman and Greece as Restructuring Officers." I should record that the proposed ROs gave addresses in the Cayman Islands and not in Greece. It is stated that the Company "proposes to focus itself on recovery of assets through aggressive recovery actions and pursuance of claims." It is not explained why the Company has not focused on this to date or why it needs ROs to commence and pursue claims. It is stated that the Company "will focus future operations on new products." There is reference to the establishment of "Thrivefi"

158. On page 4 there is a heading "7. Funding Plan". The previous heading was "2. Restructuring Plan." There are no headings under numbers 3, 4, 5 or 6 but Ms Dobbyn assured the Court that it had the complete "restructuring plan" before it. There is reference to funding being sought through three routes:

(a) users and shareholders will be contacted and offered the opportunity to lend money ($1 million) to the Company to cover legal and restructuring costs;

(b) investment will be sought to establish "Thrivefi"; and

(c) litigation funding through "traditional means".

That is the "restructuring plan". It is devoid of any meaningful detail. In the circumstances of this case it was difficult to come to the conclusion that there was a genuine intention to present, at least in the near future, a meaningful restructuring plan which would have reasonable prospects of success. I accept that the previous case law acknowledges that in some cases an intention to present a restructuring plan in the near future is not essential. But in a case where a plan may not be produced until many months or some years have elapsed, the Court is right to scrutinise whether there is, on the evidence before the Court, a genuine and realistic intention to present a credible restructuring plan.

159. The 4 slim pages produced in this case did not include a meaningful outline restructuring plan and I doubt any reputable and competent professional accountants would put their names to it as a realistic plan or confirm it as being in a form which could properly be submitted to the Court by way of a credible, meaningful restructuring plan which had reasonable prospects of success.

160. I was not persuaded that the provisions of section 91B(1)(b) had been satisfied.

Reasons for dismissing the Petition

161. I now turn to my reasons for dismissing the Petition.

162. As Ms Dobbyn astutely recognised, this was very much an unprecedented and extreme case. She was trying to push out the boundaries of the new regime in what she considered were the best interests of her client. Ms Dobbyn submitted that this case was unusual in that the Company was not fully aware of its financial position as most companies are when presenting restructuring plans. She submitted that the Company operated in the "new world" and that she was seeking to take the Court into "an additional dimension" and she acknowledged that the wide powers sought had never been granted before.

163. The burden was on the Company under section 91B(1) of the Act to satisfy the Court as to the two statutory grounds for the appointment of ROs namely (1) that it was or is likely to become unable to pay its debts within the meaning of section 93 of the Act and (2) that it intends to present a compromise or arrangement to its creditors (or classes thereof) either pursuant to Cayman law, the law of a foreign country or by way of a consensual restructuring.

164. The Company admitted that it was unable to pay its debts so the first statutory ground was not in issue. In respect of the second statutory ground in my judgment there needed to be a credible intention to present a plan at the time of the presentation of the petition and at the time of the hearing. For reasons which follow I was not satisfied that the second statutory ground had been established by the Company.

165. I was not satisfied that the two-phase process advocated by the Company was appropriate in the circumstances of this case.

166. Considering the former Chief Justice's guidance in *Sun Cheong* (at paragraphs 35-37 of his judgment) I comment as follows:

(1) I noted the Court's broad and flexible jurisdiction once the statutory grounds are established;

(2) I was not satisfied that the appointment of ROs would be for the general benefit of the creditors;

(3) I noted the wishes of the creditors;

(4) I noted the Company's generalised evidence (unsupported by any third-party independent evidence) that a restructuring is likely to be more beneficial than a winding-up order;

(5) I was not persuaded that there was a real prospect of a restructuring being effected for the benefit of the general body of the creditors;

(6) I noted the views of the board as to the best way forward.

167. I deal with the guidance highlighted by Segal J in *Midway* by stating in the case before me that I was not persuaded that there was a real prospect of restructuring being effected for the benefit of the general body of the creditors. Moreover I was concerned that the Company's two-phase approach in this case was not a proper use of the new restructuring officers regime. I did not think it appropriate, in the particular and somewhat unusual circumstances of this case, to appoint ROs to prepare a report on the prospects of success of a restructuring plan. In reality there was no meaningful plan to report upon. There was plainly, on the Company's own evidence, insufficient information available for even an outline plan to be taken forward at this stage.

168. I deal with Kawaley J's guidance in *Oriente* (at paragraph 11 of his judgment) as follows:

(1) I had some doubts as to whether there was credible evidence as to the financial position of the Company but accepted the Company's view that it is insolvent;

(2) there was no credible evidence of a rational restructuring proposal with reasonable prospects of success;

(3) on the evidence before the Court I noted the support of the creditors for the appointment of ROs with wide powers but I was not in a position to conclude that there was a meaningful proposal before creditors or the Court which could lead to a finding that such would be a more favourable commercial alternative to the winding up of the Company.

169. I deal with my creditor notification and consultation points made in *Silver Base* by noting in this case that, although there appeared to be creditor support for the appointment of ROs, it could not be said that they supported a restructuring plan as no meaningful outline plan had been produced.

170. In the case presently before me the main intention appeared to be for ROs to be appointed for the purposes of collecting in assets and documents and to take legal proceedings to facilitate that and to undertake further forensic investigations. Sadie Hutton in her first affidavit at paragraph 13 refers to ROs using "the authority of their positions as officers of the Court to recover the Company's assets from Ardu Prime." She adds at paragraph 15 that giving the ROs powers to "collect all documentation, data and information about the company from Ardu Prime, ClearTech and anyone else, and to conduct a thorough investigation into the affairs of the Company and its dealings with Ardu Prime and ClearTech, the Board wishes to demonstrate to its business network, the good faith, transparency and integrity with which the Company has been managed." Ms Dobbyn in her oral submissions also raised the point that the appointment of ROs would add additional authority to gathering together further pieces of the evidential jigsaw of the Company's financial position. It seemed that the Company wanted the appointment of an officer of the court to assist it in continuing forensic investigations, commencing legal proceedings and obtaining assets, documentation and information and to add respectability and credibility to the management of the Company. This is not a proper use of the restructuring regime.

171. Great care must be taken to ensure that the recently introduced restructuring officer regime is not abused. It should only be used for proper purposes. The clue as to its proper purpose is in the name. It is intended to provide a regime whereby ROs may be appointed to facilitate and finalise a financial restructuring. It is not intended to provide a mechanism whereby the ROs' main role is to recover assets, data, documentation and records of the company (if need be by commencing legal proceedings) and to undertake a forensic investigation into the affairs of the company. To attempt to abuse it in that way risks bringing it into disrepute and adversely affecting the credibility of the new regime internationally. Moreover the restructuring regime is not intended to be used simply to obtain the statutory moratorium and to add credibility and respectability to the company's management.

172. Ms Dobbyn was correct in her written submissions to note that the relief claimed in this case was "unusual, if not unique". Sadie Hutton was right in her second affidavit to acknowledge the "atypical" nature of what was being proposed by the Company in the Petition.

173. Whether one believes the Company and accepts that the financial difficulties arose because of management's engagement of and over reliance upon Ardu Prime or whether one believes Mr Bodden's clients, who allege serious wrongdoing against the management of the Company, management must accept some responsibility for their inability to present a clear picture of the Company's financial position as at 6 September 2023. The Company's management appeared to blame Ardu Prime but Mr Bodden's clients suggested otherwise. Whatever the true position and whoever is responsible for the present unsatisfactory state of the Company's finances I did not accept Ms Dobbyn's invitation to permit a two-phase approach in the circumstances of this case.

174. The major part of the relief sought in the Petition, described as the phase one relief, was plainly inappropriate. It mattered not that those entities specified in the Notice of Appearance (who also recognised that it was probable that this matter "may transition into Provisional or Official Liquidation") also supported the appointment of ROs to "investigate and take control of the affairs of the Company". It also mattered not that other creditors (including many "in-house" creditors connected with management) supported the appointment of ROs with very wide powers. I should also record that Sinclairs were relied upon by the Company as "an independent creditor" and yet Sinclairs were also acting for the Company and seeking relief on its behalf. Mr Bodden raised no conflict of interest points in respect of the involvement of Sinclairs but I have to say I found it difficult to see how Sinclairs could be treated as wholly independent in the circumstances of this case. Even if the Company and all its creditors had, on an informed basis, agreed to the appointment of ROs with very wide powers that would not have made a difference in this case, where no credible outline restructuring plan had been provided and section 91B(1)(b) of the Act had not been satisfied. The Company and its creditors cannot confer jurisdiction on the Court. The Court must itself be satisfied that both statutory grounds in section 91B(1) are met before it can go on to exercise its discretion and appoint ROs and determine the extent of their powers. I was not so satisfied.

175. Reference was made to (a) s 91B(4) of the Act and (b) Order 1A rule 6(2)(c) of the Rules and (c) paragraph 3.14 of the Order in *Oriente* which empowered the ROs to take such steps as they consider necessary or appropriate in respect of any and all proceedings to which the company in

that case was a party and counsel for the Company submitted that it was appropriate in this case to give the ROs wide powers to commence legal proceedings on behalf of the Company. Counsel submitted in effect that the appointment of ROs with additional clout as officers of the Court would speed things up in Greece and encourage the involvement and assistance of the regulators in that jurisdiction. These submissions were insufficient to persuade me that I had jurisdiction to appoint ROs.

176. Counsel for the Company also made reference to a restructuring petition (not included in any of the 7 bundles of material put before the Court) in *Carbon Holdings Limited* FSD 4 of 2023(DDJ) in an endeavour to garner some support for the wide relief the Company sought in this case. I have accessed a copy of the petition counsel referred to. In its petition dated 10 January 2023 Carbon Holdings Limited sought the appointment of ROs. There was reference to the company having negotiated a compromise with creditors. It is correct that in the prayer of the petition a wide power was sought "to request and receive from third parties documents and information concerning the Company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs" (paragraph 4.7 of the petition). No powers were however sought to permit the ROs to commence legal proceedings or to conduct forensic investigations as was requested in the case before me. Moreover in *Carbon Holdings Limited,* as is clear from paragraph 8 of the petition, an "in-principle agreement" had been reached with the creditors. Having checked the court records I note also that on 9 February 2023 I made an order that the company had leave to withdraw the petition and vacated the hearing. That explains why Ms Dobbyn could find no judgment on the judicial website. No judgment was delivered. *Carbon Holdings Limited* did not proceed to a hearing and is of no assistance whatsoever to the Company.

177. I was not persuaded in the circumstances of this case that the Court had jurisdiction to appoint ROs at all never mind ROs with the extremely wide powers sought by the Company. The Company had failed to get out of the starting blocks as in effect on its own admission it could not "at the moment" satisfy the statutory condition in section 91B(1)(b) of the Act. The main purpose of the first phase appeared to enable the Company to satisfy the Court on this condition. Faced with concern from the Court as to how long phase 1 would take to complete, Ms Dobbyn submitted in effect that phases 1 and 2 could progress in parallel. This submission flew in the face of the evidence of Sadie Hutton for the Company who had referred to "two distinct phases" (paragraph 9 of her second affidavit). I found it difficult to see how phase 2 could be properly progressed until phase 1 had

been completed and the Company's financial position was ascertained. If the legal proceedings were vigorously contested phase 1 could plainly take a great deal of time to complete.

178. None of the matters specified in Order 1A rule 6 (3) of the Rules include powers to recover the company's assets, powers to recover the company's data, documentation and records or the power to undertake a forensic investigation as sought in this case which again confirms the inappropriateness of the relief sought in the case. The wide powers sought by the Company were extraordinary.

179. I appreciate the standard Order may have to be varied in some cases and there may be cases where wide powers would be appropriate but the Order sought in this case was in a very different format to the Order at Form No 8A and the Order helpfully attached to Kawaley J's judgment in *Oriente*. This also confirmed the inappropriateness of the relief claimed in this case.

180. Furthermore, the relief sought in the Petition, described as the phase two relief, was seriously premature. The Company provided insufficient evidence as to its financial position and its assets and liabilities. On its own admission it was unable at this stage to provide full and accurate information in that respect. I was concerned that, on their own admission, the directors could not say with any certainty and clarity what the financial position of the Company was. It was difficult to conclude on the basis of the "very outline plan" that had been produced, or as counsel put it in her oral submissions "more outline than normal," that there was any realistic intention to come up, in the reasonably near future, with a rational plan. The financial position must be ascertained before such can be properly progressed. The Company can take steps to do that without the appointment of ROs.

181. Each case is, of course, fact sensitive but in the case currently before me unlike the case before Segal J in *Midway* no restructuring negotiations have even begun and no restructuring proposal with a rational basis had yet been produced.

182. The Company should have taken steps to recover its assets and documents and to ascertain its financial position prior to filing the Petition. If the Company required further forensic investigations to be undertaken it could have instructed independent professional investigators to conduct the same.

183. It was incumbent on the Company to provide sufficient evidence in respect of the Company's current financial position. It failed to do that. Moreover no credible outline restructuring plan was produced.

184. Although section 91B(1)(b) of the Act refers simply to an intention to present a compromise or arrangement to its creditors, it was incumbent on the Company to provide sufficient evidence in respect of the proposed restructuring. It failed to do that. The intention must be a genuine and realistic intention.

185. I accept that Smellie CJ (as he then was) at paragraph 47 of *Sun Cheong* stated that section 104(3)(b) (in substantially similar terms to section 91B(1)(b)) did not require the company to already have a pre-formulated restructuring plan or to provide evidence of the viability of its restructuring plan. He added that where the Court is in any doubt as to the viability of a restructuring plan it can appoint JPLs for the purpose of preparing a report on the prospects of success of a restructuring plan. Smellie CJ at paragraph 50 stated that in the case before him there was "no reason to doubt the viability of the proposed restructuring", noting that in the case before him "the company comes to the Court with a detailed restructuring plan." In *Sun Cheong* there was already a "white knight" investor in the wings willing to inject a significant amount of money, there had been a wholesale change of the company's board, an independent financial report had been put before the Court and there was independent evidence before the Court that the refinancing was likely to be more beneficial than a winding-up order and there was a real prospect for recovery. The same could not be said in this case on the basis of the evidence before the Court.

186. In *Midway* there had been discussions with creditors. There was reference to the appointment of administrators over the Company's principal subsidiary Zarara Oil & Gas Limited ("Zarara") in Mauritius and meetings of creditors. The administrator produced a report which explained the financial position and his findings and recommendations in respect of a deed of arrangement. Details of the proposed restructuring in respect of Zarara are referred to in the judgment. Segal J at paragraph 55 noted that "the evidence in support of what type of restructuring was envisaged at the Company level was sketchy." Segal J stated that it was clear however that "a restructuring of the Company's debt and equity was dependent on the Restructuring Proposals first being promoted and successfully implemented and on further discussions, in light of the restructuring done at the Zarara level, with creditors and shareholders of the Company". Segal J felt that "the evidence showed that the Company intended to present a compromise or arrangement to its creditors once

there had been progress in obtaining the requisite support for and approval of the Restructuring Proposals." Furthermore "two key creditors" had indicated that they would be receptive to a debt for equity swap if Zarara's Restructuring Proposals were successfully implemented. Segal J felt that at company level there was "a real (or realistic) prospect of a restructuring being agreed."

187. Segal J at paragraph 63 stated that he was satisfied that "the Company has a genuine, *bona fide*, intention to present and negotiate a restructuring both with Zarara's creditors and with its own and that the proper process for conducting those negotiations is now underway." There was also reference to a credible investor "whose involvement is critical to the credibility and viability of the Restructuring proposals." At paragraph 65 Segal J recorded his view that the proposals were "coherent" and there appeared to be a "rationale basis" for accepting them. He was also satisfied that there appeared to be a "reasonable basis for putting into place a restructuring of the Company's debt and balance sheet." The facts of *Midway* were very far removed from the facts in the case before this Court on 6 September 2023.

188. In *Oriente* Kawaley J at paragraph 2 noted that in the company's evidence the "broad parameters" of the proposed restructuring were "sketched out" and it was "confidently asserted that this would generate a better return for unsecured creditors than would be yielded through a traditional liquidation." The evidence supported the submission that approximately 46% by value of the Notes had expressed their support for the proposed restructuring. Kawaley J further noted at paragraph 3 that the only opposition "ultimately advanced rested on a technical jurisdictional challenge" which seemed to him "to be a tactical ploy". Kawaley J was persuaded that it was appropriate to appoint restructuring officers and helpfully appended to the judgment a copy of the Order made.

189. At paragraph 18 Kawaley J noted that: "The Board believes (for reasons which the affidavit plausibly explains) that the company can continue as a going concern and return to profitability if a restructuring occurs." The "precise legal vehicle for implementing the restructuring" had not "yet been worked out" but a "broad outline of the proposal" had been provided.

190. Kawaley J at paragraph 38 referred to the "Company's unchallenged evidence" as being "compelling" adding:

> "A coherent proposal, admittedly only in outline at this stage, had already been put to the Noteholders and nearly 50% of all Noteholders had already communicated positive support

for the idea of a restructuring and the appointment of JROs. This preliminary support lent further credence to the Company's management's view that value for creditors would most likely be best served by ensuring that the Company and the Group continued as a going concern rather than being wound up. It also supported the inferential conclusion that the Restructuring Proposal had realistic prospects of success."

191. Counsel for those specified in the Notice of Appearance stressed that in *Oriente* there was a credible restructuring plan which, at least, had the "preliminary support of the creditors".

192. I have to say that there appeared to have been a lot more meat on the bones in *Oriente* than was provided to me in this case. Indeed if I was left to feast on the bones of the "very outline plan" (paragraph 17 of Sadie Hutton's first affidavit) then frankly I would likely be left to starve. Again, the facts of *Oriente* were far removed from the facts put before the Court on 6 September 2023. Kawaley J had much more meat to chew on in *Oriente*, albeit not a detailed restructuring plan. In this case there was no credible outline restructuring plan placed before the Court. Indeed on the Company's own admission what was presented to the Court in respect of the restructuring was insufficient.

193. The circumstances of this case were very far removed from the circumstances in *Sun Cheong*, *Midway* and *Oriente*.

194. It is important that a company which presents an application for ROs to be appointed presents it on a solid evidential foundation. A petitioning company should not assume that a court will grant it the indulgence of an adjournment if at the hearing the evidence relied upon is inadequate. If insufficient evidence is presented at the hearing it is likely that the petition will be dismissed. The statutory moratorium cannot be allowed to continue indefinitely.

195. In my judgment the presentation of the Petition was seriously premature. Before the Company can present a credible restructuring plan, even in outline, it has a lot of further work to do. It needs to ascertain its financial position and should have done that before filing the Petition. Ms Dobbyn was right not to press for an adjournment as no valid grounds for such existed. It was incumbent on the Company to get all its evidential ducks in a row before applying for the appointment of ROs. Insufficient evidence was presented to enable the Court to conclude that it had jurisdiction and that it was appropriate in all the circumstances to appoint ROs.

196. I considered the two grounds in section 91B(1) of the Act. In respect of ground 91B(1)(a) the Company accepted that it was unable to pay its debts within the meaning of section 93. Statutory ground 91B(1)(b) was however not satisfied. There was no credible evidence of a rational restructuring proposal with reasonable prospects of success. Counsel for the Company rightly accepted that "at the moment" the Company could not satisfy the requirement that there was a real prospect of a restructuring being effected for the benefit of the general body of creditors.

197. I was not satisfied in the particular circumstances of this case that the Court had jurisdiction to grant the relief requested by the Company. I dismissed the Petition for the reasons stated in this judgment.

David Doyle

THE HONOURABLE JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT

Cause No: FSD 0056 of 2024 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF KINGKEY FINANCIAL INTERNATIONAL (HOLDINGS) LIMITED

Appearances:	**Mr Alex Potts KC and Mr Erik Bodden instructed by Conyers Dill & Pearman for the petitioner**
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**6 March 2024**
Judgment:	**12 April 2024**

CASE SUMMARY

(not part of judgment)

Appointment of provisional liquidators or restructuring officer—whether "light touch" provisional liquidators preferable in circumstances—whether power to appoint provisional liquidators broader under s.104(3) of Companies Act as amended than under previous statutory language.

- -

JUDGMENT

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A. Introduction

1. On 6 March 2024, I appointed provisional liquidators in respect of Kingkey Financial International (Holdings) Limited for the purpose of facilitating a potential restructuring of the company, which I shall refer to as Kingkey. The application to appoint provisional liquidators came before me on a summons dated 28 February 2024 issued by Kingkey. The summons was issued in connection with a winding up petition, also presented by Kingkey, on 23 February 2024, which was due to be heard on 19 April 2024.[1] Kingkey sought to make use of the "light touch" provisional liquidation approach that has been a feature of insolvency practice within the Cayman Islands for many years in preference to the appointment of a restructuring officer under s.91B of the Companies Act that came into force on 31 August 2022.

2. The application involved some discussion of the comparative merits of the "light touch" provisional liquidation and the use of the new restructuring officer regime, and the test for appointing provisional liquidators under the amended version of s.104(3) of the Companies Act introduced in 2022. Counsel for Kingkey requested that, in those circumstances, I should deliver a fully reasoned judgment.

3. Kingkey was represented by Mr Erik Bodden of Conyers, Dill & Perman led by Mr Alex Potts KC. I was shown evidence that Kingkey's directors, including Mr Chen Jiajun who has the main ownership interest in Kingkey, were notified of the hearing. I was also shown notices published via the Hong Kong Stock Exchange on 25 February 2024 confirming the fact of the petition and intention to issue the summons, and on 1 March 2024 indicating the date and time of the hearing. Nevertheless, there was no appearance by anyone other than the company.

4. In support of the summons, Kingkey primarily relied on an affirmation dated 23 February 2024 signed by Chan Ting Fung and two affirmations of Hung Wai Che signed on 26 February and 1 March 2024. The following summary of the facts is drawn from the filed evidence.

[1] Subsequently adjourned to a date in June 2024.

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B. Factual background

B.1 The Company

5. Kingkey was incorporated in the Cayman Islands on 31 March 2011 as an exempted limited liability company, with a registered office in the Cayman Islands. Kingkey's principal place of business is Hong Kong and it has been listed on the Hong Kong Stock Exchange since 20 March 2015.

6. Kingkey is a holding company for a number of subsidiaries carrying on various different businesses in Hong Kong, the People's Republic of China and Denmark. For present purposes, it is unnecessary to set out the nature of those businesses save to record that several of Kingkey's subsidiaries operate in business sectors that are regulated under the Securities and Futures Ordinance (Cap. 571 of the laws of Hong Kong) and are therefore subject to, amongst other things, minimum capital sufficiency requirements.

7. At the date of the hearing before me, Kingkey's board of directors comprised two executive directors and four independent non-executive directors, as follows:

   a) Mr Chen Jiajun, an executive director and ultimate beneficial owner of approximately 37.18% of Kingkey's issued shares;

   b) Mr Mong Cheuk Wai, an executive director;

   c) Ms Mak Yun Chu, an independent non-executive director;

   d) Mr Chan Ting Fung, an independent non-executive director;

   e) Mr Leung Siu Kee, an independent non-executive director; and

   f) Mr Hung Wai Che, an independent non-executive director.

8. However, since 12 February 2024, key management decisions regarding Kingkey have been made by a Special Committee comprising the four independent non-executive directors, with Mr Leung as chairman, in light of conflicts that have arisen amongst members of Kingkey's board of directors, as summarised below.

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B.2 Management attempts to address the deterioration in Kingkey's financial position

9. Kingkey's businesses have suffered in recent years due to the economic challenges generated by the COVID-19 pandemic, the war between Russia and Ukraine and rises in interest rates. The evidence is that, as at 30 September 2023, the Kingkey group's current liabilities totalled more than HK $388 million, with Kingkey's own current liabilities being nearly HK $116 million.

10. During 2023, Kingkey's management sought to explore options for raising funds and settled on a proposal to issue convertible bonds. In September 2023, Kingkey concluded an agreement with DC Universe Investment Ltd to subscribe for the bond issue. Kingkey's share price then suffered a significant unexpected fall, and DC Universe tried to renegotiate the terms of the bond issue. Kingkey's share price had not improved by 4 December 2023, and Kingkey and DC Universe agreed to treat the agreement as void.

11. Kingkey still had a pressing need to improve its short-term liquidity and long-term working capital but struggled to secure new financing from other sources. Kingkey therefore re-opened discussions with DC Universe at the end of December 2023 on the basis of a potential share subscription, which Kingkey's management believed would be a less costly and more efficient method to raise further capital than a bond issue. In its final form, the transaction was intended to raise approximately HK $179.7 million to cover the Kingkey group's then current liabilities of HK $125.7 million and to provide working capital and capital reserves of approximately HK $54.0 million.

12. Kingkey's board, with the exception of Mr Chen, considered it was necessary to conclude a deal with DC Universe before share trading resumed on 15 January 2024 after the Chinese New Year holiday season. The board therefore met on 14 January 2024 and approved the proposed share subscription by DC Universe, with Mr Chen dissenting. Mr Chen appears to have taken the view that Kingkey did not need to raise outside finance and that it had sufficient resources to meet its outgoings, but that if additional funding were required then the deal with DC Universe was not the way forward and Kingkey could raise money in other ways, for example, from him.

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13. Following the approval by the majority of Kingkey's board, the share subscription agreement was concluded on 15 January 2024. However, on 22 January 2024, Mr Chen instigated proceedings in Hong Kong to restrain Kingkey and the other board members from completing the share subscription and obtained an interim injunction on 26 January 2024, with the return date fixed for 8 April 2024. The share subscription agreement included an expiry clause of 5 February 2024, so that the effect of the extended return date for the injunction was that the share subscription could not be completed within the specified time and the agreement lapsed.

14. In parallel with this, since 15 January 2024 the board has received several anonymous complaints making various allegations about Mr Chen, including that he engaged in market manipulation or insider trading, which Mr Chen has strenuously denied. The other board members considered that the allegations required notification to the HKSE and that Kingkey should suspend trading in its shares pending an investigation.

15. On 25 January 2024, Mr Chen (through his corporate vehicle) requisitioned Kingkey's board to convene an EGM to approve resolutions removing all directors except Mr Chen and to appoint certain new directors. On 7 February 2024, the board received a rival requisition from another shareholder requesting an EGM to consider a resolution to remove Mr Chen as a director of Kingkey. The EGM was fixed for 8 March 2024 to consider both resolutions.

16. As at 2 February 2024, more than HK $39.6 million was overdue at group level and payment by Kingkey of HK $25 million was overdue. Demands for payment by creditors started in earnest on about 17 January 2024 and accelerated during February 2024, including service of a statutory demand on 8 February 2024 by one creditor seeking payment of HK $1 million.

B.3 Kingkey's Current Financial Position

17. Kingkey accepted before me that debts totalling approximately HK $30 million were due and owing and that it was unable to pay those debts. Kingkey's financial position at the time of the application was as follows:

    a) Almost all of the group's cash at bank, approximately HK $44.4 million, was required to be retained to satisfy minimum liquid capital sufficiency requirements of the regulated parts of the group's businesses.

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b) Against that, Kingkey was liable to pay the following sums during February 2024:

i) approximately HK $44.7 million in respect of loan and bond repayments;

ii) approximately HK $14.7 million in respect of license fees for one of its business sectors; and

iii) approximately HK $8.8 million in respect of commission, referral fees and operating expenses.

c) In addition, Kingkey forecasted future payments for March 2024 to December 2024 of approximately HK $61.9 million for loan and bond repayments.

18. The wider group companies owed further sums totalling approximately HK $110 million that were already due at the time of the hearing.

19. Unsurprisingly, Kingkey's Special Committee had concluded that Kingkey was or was likely to become unable to pay its debts within the meaning of s.93 of the Companies Act.

C. Application to wind up the company and to appoint provisional liquidators

20. The evidence was that in these circumstances, the Special Committee was aware of the need to treat the interests of Kingkey's creditors as being paramount and had determined that a restructuring was likely to provide a better outcome for creditors, and also for Kingkey's members, than insolvency. The Special Committee therefore wished to try to develop a restructuring plan as quickly as possible.

21. In addition, in light of the ongoing management disagreements between Mr Chen and the other members of Kingkey's board, the Hong Kong proceedings commenced by Mr Chen, the imminent EGM at which the resolutions to replace the directors were to be considered, and the unresolved allegations against Mr Chen, the Special Committee considered that there was merit in the involvement of neutral and independent third parties to take a role in Kingkey's management until those matters were resolved.

22. The Special Committee therefore considered it appropriate to seek the appointment of provisional liquidators and caused the winding up petition and summons to appoint provisional liquidators to be issued on 23 February and 28 February 2024 respectively.

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23. Mr Potts' submission was that in many similar cases the appointment of a restructuring officer under the new s.91B of the Companies Act might now be appropriate. However, the internal management disputes between Mr Chen and the other members of Kingkey's board and the Hong Kong proceedings instigated by Mr Chen pointed towards provisional liquidators as being of more utility than a restructuring officer because of the wider powers to take over management that are available to provisional liquidators. In addition, Mr. Potts suggested that the appointment of a restructuring officer may come with challenges, such as seeking recognition by foreign courts and making requests for assistance – difficulties which would not arise for liquidators.

24. Mr Potts' submissions that I should appoint provisional liquidators were in essence that:

   a) Kingkey is currently unable (or is likely to be unable) to pay its debts while also satisfying its working capital, capital maintenance and funding obligations;

   b) there are ongoing disputes between Kingkey's shareholders and directors, as well as the pending litigation in Hong Kong between Mr Chen, Kingkey and the other board members personally, making it difficult for Kingkey's current board of directors to function effectively; and

   c) Kingkey is unable itself to raise capital given that the recent attempt to do so by share subscription, approved by the majority of its board of directors, was frustrated by the interim injunction obtained at Mr Chen's instigation.

25. Mr Potts submitted that the evidence showed that Kingkey considered that there would be a real and tangible benefit from the appointment of provisional liquidators and that it would be in the best interests of the body of creditors, and also of shareholders. The appointment of provisional liquidators would also help to maintain Kingkey's listing status, thereby preserving value for creditors and members.

26. He continued that the appointment of provisional liquidators would enable the development of a plan to restructure Kingkey's debt, which would facilitate Kingkey and the wider group continuing as a viable going concern. It would also provide stability for the corporate group,

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while allowing the pending disputes amongst Kingkey's shareholders and directors to be addressed.

27. Mr Potts noted that the Special Committee intended that a restructuring should be pursued but there were difficulties in Kingkey advancing matters itself due to the internal management disagreements. Further, there were letters of support for the appointment of provisional liquidators from three creditors and there was no appearance by anyone, including Mr Chen, to oppose or to suggest provisional liquidators other than the individuals put forward by Kingkey. Mr Potts relied on these factors to support a decision to appoint the provisional liquidators nominated by Kingkey.

28. Kingkey argued that the application to appoint provisional liquidators was urgent for three reasons. First, because of the benefit of the statutory moratorium on other proceedings by creditors that would result, which was needed in light of the statutory demand served on Kingkey in Hong Kong. Secondly, because someone independent was needed to manage the company's position regarding Mr Chen's proceedings in Hong Kong, which were to be excluded from the moratorium. Thirdly, independent management was needed to conduct and deal with the outcome of the EGM (fixed for the week following the hearing), and to develop a plan to raise capital.

29. Mr Potts conceded that there is no developed restructuring plan yet, at least in part because of the failure of Kingkey's most recent attempt to raise cash through the share subscription described earlier in this judgment. Nevertheless, he argued that the absence of a detailed or developed restructuring plan was not an impediment. He said that it is likely that a restructuring plan would be put forward and that I should infer an intention on the part of Kingkey to do so because:

a) Kingkey has a number of valuable subsidiaries with a reasonably healthy balance sheet if the immediate cash requirement could be met, so that there should be a way to satisfy creditors and save the businesses;

b) relying on *Re CW Group Holdings* (Parker J, unreported 3 August 2018), it is not a threshold condition that there must be a formulated restructuring plan before the court; and

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c) the amended version of s.104(3) of the Companies Act, in force since 31 August 2022, arguably gives the court a broad discretion to appoint provisional liquidators that may be wider than the approach applied under the previous wording of s.104(3).

30. Mr Potts noted that the fact that the application was made by Kingkey itself is significant, relying on *Re London, Hamburg and Continental Exchange Bank* (1886) LR 2 Eq 231, *Re United Medical Protection Ltd* (2002) 41 ACSR 623, [2002] NSWSC 413, *CW Group Holdings* and *Re Oriente Group* (Kawaley J, unreported 8 December 2022).

31. Finally, Mr Potts made clear that the provisional liquidators were to be appointed at Kingkey level only, and that Kingkey's position was that their appointment should not be allowed to impact the normal operation of the subsidiary businesses: they should be allowed to continue to trade under the management and control of their existing directors and executive management teams, subject to the normal monitoring by Kingkey as parent entity, albeit through the provisional liquidators instead of through Kingkey's board.

D. Discussion and decision

32. Article 162(1) of Kingkey's Articles of Association expressly empowers its board of directors to present a winding up petition. The board passed resolutions to present the winding up petition and to make an application for the appointment of provisional liquidators at a board meeting held on 23 February 2024. The relevant Article and the minutes of that meeting were exhibited. The winding up petition was therefore validly presented on behalf of Kingkey.

33. I accept Mr Potts' submission that it is likely to be of more utility in this case to appoint provisional liquidators rather than a restructuring officer. Section 91B(4) of the Companies Act allows the court to clothe the restructuring officer with appropriate powers and functions, seemingly unlimited in scope:

> *"(4) A restructuring officer appointed by the Court under subsection (3)(a) shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company."*

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34. However, this must be read in conjunction with s.91B(5)(b) and (c), as follows:

> *"(5) Where the Court makes an order under subsection (3)(a), the Court shall set out in the order —*
>
> *(a) …*
>
> *(b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; and*
>
> *(c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions."*

35. It seems to me to be implicit from the wording of these subsections that there is a built-in presumption in s.91B that the company's board of directors will retain at least some powers and functions to continue to control the company. This is consistent with the purpose of the restructuring officer regime being for the restructuring officer to develop a compromise or arrangement between the company and its creditors and to obtain their agreement or court approval, see ss.91I and 91J of the Companies Act. The directors of the company can, in the meantime, continue with its day to day operation.

36. In addition, I accept Mr Potts' submission that there may be difficulties in obtaining recognition in other jurisdictions of the appointment of a restructuring officer and in obtaining any assistance from a foreign court for such an office holder.

37. In this case, there are ongoing unresolved disputes within Kingkey's management which mean that it is unrealistic to proceed on the basis that the directors will be able to continue to manage the day-to-day operations of the company. The appointment of a restructuring officer is therefore likely to be inadequate to address the current issues within Kingkey.

38. Section 104 of the Companies Act (2023 Revision) provides the jurisdiction to appoint provisional liquidators and sets out the criteria for appointment as follows:

> *"104. (1) Subject to this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up*

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petition but before the making of a winding up order, appoint a liquidator provisionally.

...

(3) *An application for the appointment of a provisional liquidator may be made under subsection (1) by the company and on such an application the Court may appoint a provisional liquidator if it considers it appropriate to do so."*

39. For comparison, the language of s.104(3), before 31 August 2022, was:

"(3) An application for the appointment of a provisional liquidator may be made under subsection (1) by the company ex-parte on the grounds that —

(a) the company is or is likely to become unable to pay its debts within the meaning of section 93; and

(b) the company intends to present a compromise or arrangement to its creditors."

40. The language formerly used in s.104(3) was arguably more prescriptive as to the situations in which provisional liquidators can be appointed on the application of the company itself than the broader language in the current iteration of s.104(3). However, as I find below, the factual situation in this case is that Kingkey is or is likely to be unable to pay its debts and Kingkey intends that a restructuring plan is prepared and presented to the court. This application is therefore squarely within the terms of the previous wording of s.104(3) and would have been granted even if the more restrictive language of the former version of s.104(3) still applied. I therefore decline the invitation from counsel to address the interaction of the new regime in s.104(3) with the restructuring regime under s.91B and whether the new wording of s.104(3) expands the circumstances in which the court will be willing to appoint provisional liquidators, since it is unnecessary to do so in order to decide in this case that it is appropriate to appoint provisional liquidators. It seems to me that it is better to leave consideration of that interesting question until a case which squarely raises it and where there has been detailed argument on the point.

41. Turning then to the specifics of this case, I am completely satisfied on the evidence presented that Kingkey's financial position is perilous, and that it is facing an imminent risk of insolvency, as described earlier in this judgment. This is most obviously exemplified by the unpaid statutory demand filed during February 2024 by one of its creditors. I also find

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that Kingkey is very unlikely to be able to continue as a going concern unless it is able to complete a successful restructuring, which is an easy conclusion to draw.

42. Secondly, it is easy to infer that a successful restructuring is likely to provide a better outcome for creditors and members than allowing Kingkey to become the subject of insolvency proceedings, which is likely to be value destructive.

43. Thirdly, I accept Mr Potts' submission that it is not necessary that there be a detailed restructuring plan before the court can determine that it is appropriate to appoint provisional liquidators to pursue a proposed restructuring. This was recognised by Justice Parker in _CW Group Holdings_, where he said:

> *"70. I accept Mr Allison QC's submission that it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators on behalf of the company. That much is clear from the language of section 104(3) of the Companies Law and the four recent authorities he referred me to: _Arcapita_[2], _Trident_[3], _Suntech_[4] and _LDK Solar_[5] …"*

44. It is clear from the approach taken by judges in a number of other cases under the previous version of s.104(3)(b) that the existence of a restructuring plan, and the extent to which that plan has been developed, are simply pieces of evidence for the court to take into account, albeit they are important evidence, in deciding whether the court is satisfied that the company *"intends to present"* a restructuring plan.

45. In this case, I am satisfied by the evidence presented by Kingkey that, notwithstanding the current absence of a detailed restructuring plan, Kingkey does intend to present such a plan once it can be developed with the input of the intended provisional liquidators, and that it intends to do so promptly in order to save the underlying businesses. That is consistent with Kingkey's management's attempts to raise additional capital during the latter part of 2023 and by the share subscription agreement in January 2024, which was unsuccessful only because of the effect of the Hong Kong proceedings initiated by Mr Chen. In addition, as mentioned during argument, it is even possible that the provisional liquidators might take up Mr Chen's offer to be the source for the additional funding apparently required by Kingkey.

[2] _Arcapita Investment Holdings_ (unreported)

[3] _Trident Microsystems (Far East) Limited_ [2012 (1) CILR 424]

[4] _Suntech Power Holdings Co., Ltd_ (unreported)

[5] _LDK Solar Co Ltd_ (unreported)

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46. Fourthly, I also accept Mr Potts' submission that the court should give weight to the fact that the summons is on the initiative of Kingkey itself. In *Re United Medical Protection Ltd*, having decided he should appoint provisional liquidators, Justice Austin said:

> *"16. In reaching this conclusion I take into account the fact that the appointment of a provisional liquidator was approved by a resolution of the board of directors of United Medical Protection. The fact that a provisional liquidator is sought by the company is not conclusive in favour of appointment, but it is a relevant and frequently a persuasive consideration:* Re London, Hamburg and Continental Exchange Bank *(1886) LR 2 Eq 231;* Re T & L Trading (Aust) Pty Ltd*, at 389."*

47. Justice Parker endorsed that approach in the Cayman Islands, commenting in *CW Group Holdings*:

> *"31. Mr Allison QC referred me to authorities which establish that applications by the company for the appointment of JPLs will normally be subjected to less anxious consideration by the court than will creditors' applications which are opposed by the company itself: see* Re London *(1886) LR 2 Eq 231 and* Re United Medical *(2002) 41 ACSR 623. …*
>
> *72. … the court is prepared to accept the considered views of the board of the company, having taken advice, as to the best way forward which involves appointing provisional liquidators to provide the necessary breathing space from the actions of creditors where there is a prospect of promoting a restructuring. …"*

48. This approach was echoed by Justice Kawaley in *Re Oriente Group*, albeit in the context of an application to appoint a restructuring officer, when he made the following preceptive comment, which applies with equal force in the context of a company's summons to appoint provisional liquidators:

> *"36. Section 91B petitioners are likely in most cases to have little difficulty in establishing this limb of their petitions. It is unlikely that management's admissions as to cash-flow or balance sheet insolvency will lack credulity. Typically, it is petitioning creditors' assertions of insolvency which are denied by overly optimistic and/or unrealistic managers. There is rarely any commercial advantage to be gained by a solvent company falsely professing its insolvency. In the present case the Company's own detailed disclosures of its financial difficulties were not only entirely credible but corroborated by the fact that, inter alia, the Creditors had presented a winding-up petition based on an unsatisfied statutory demand to this Court. The Company was accordingly deemed as a matter of law to be insolvent under section 93(a) of the Act."*

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49. Fifthly, I find that:

    a) there are ongoing disagreements amongst Kingkey's management as to the steps to be taken to address its precarious financial position;

    b) there are wider disputes between Mr Chen and other members of Kingkey's board as demonstrated by the Hong Kong proceedings; and

    c) there are unresolved allegations about Mr Chen's conduct;

and that these factors make it expedient that independent management, in the form of provisional liquidators, should become involved to manage the current situation and to provide stability to Kingkey and the wider group whilst they are resolved.

50. Sixthly, I accept that it is necessary that provisional liquidators are appointed now, both because of the urgency of addressing Kingkey's cash flow issues, to provide it with the benefit of the statutory moratorium, and so that the provisional liquidators can manage the imminent EGM and its outcome.

51. Finally, I infer that there is no active opposition to appointing provisional liquidators in light of the non-appearance of Mr Chen or any creditors, despite notice of the hearing having been publicised.

52. Accordingly, for the reasons set out in detail above, in my judgment it is appropriate to appoint provisional liquidators in respect of Kingkey.

E. Potential issue regarding identities of provisional liquidators

53. A subsidiary point arose regarding the identity of the provisional liquidators to be appointed. Mr Potts properly brought to my attention that the two proposed provisional liquidators based in Hong Kong had been the subject of trenchant criticisms by Justice Linda Chan in Hong Kong in a case in 2022. Whilst Mr Potts indicated that he did not represent the provisional liquidators, he argued that I should not allow those criticisms of them to affect my decision to appoint them. He put forward the following reasons to support that position:

    a) the provisional liquidators' curricula vitae indicate that they are properly qualified and have extensive experience of acting as provisional liquidators;

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b) Justice Linda Chan's judgment appears to have been based on a difference of opinion over the respective roles of the Cayman court and the Hong Kong court in respect of a cross-border insolvency;

c) Justice Linda Chan's judgment is under appeal, and judgment on the appeal is currently awaited;

d) there have been no professional conduct or disciplinary consequences for the provisional liquidators, so far as Mr Potts is aware;

e) the provisional liquidators have continued to be appointed in other cases in Hong Kong, and I was shown an example;

f) Kingkey was content to put them forward as suitable provisional liquidators and their identities had been included in the publicity regarding the hearing and no one had appeared to oppose their appointment or to propose alternatives; and

g) Mr Martin Trott, the intended Cayman-based provisional liquidator, was content to work with them.

54. I was persuaded that these considerations meant it was appropriate to appoint the provisional liquidators nominated by Kingkey. If there is any subsequent concern about them on the part of Mr Chen or creditors then they can apply to appoint alternative liquidators, if so advised.

Dated 12 April 2024

THE HONOURABLE JUSTICE ASIF KC
JUDGE OF THE GRAND COURT

In The Supreme Court of Bermuda

Civil Jurisdiction 1999 No. 288

In the Matter of the Companies Act 1981

RE ICO GLOBAL COMMUNICATIONS (HOLDINGS) LIMITED

Dated the 26th November 1999

Mr N Hargun and Mrs R Mayor for the Applicant

Mr R Attride-Stirling and Ms K George for Satfonico

10 Mr D Kessaram for the Joint Provisional Liquidators

Cross-border insolvency - Cooperation with courts in other jurisdictions

The following cases was referred to in the judgment:

Barclays Bank plc v Homan [1993] BCLC 680

RULING of WARD, CJ

1. By Summons dated 5th November 1999, Satfonico Investments SA which described itself as a shareholder of ICO Global Communications (Holdings) Limited, and His Royal Highness Prince Moulay Omar Cherkaoui of the Kingdom of Morocco, a director of the company applied for:-

    a. A declaration that the proceedings at the Board Meeting of ICO held on 30th
20 October 1999 at the Hilton Amsterdam Airport Schipol and all resolutions purportedly passed at the said meeting are invalid and of no effect.

    b. An injunction restraining ICO, its agents or the joint provisional liquidators from taking any action to give effect to any of the resolutions purportedly passed at the said meeting.

    c. An order restoring the company to the position it was in before the said meeting.

    d. An order for the convening of a further meeting to reconsider the matters on the agenda at the meeting of 30th October 1999.

    e. An order for the discharge or variation of the Order dated 27th August 1999 and that directions be given regarding the conduct of the provisional liquidation.

30 2. As regards the application for an injunction, no undertaking as to damages was given and on objection being taken the application was withdrawn.

3. It was submitted that the judge had no jurisdiction to make the Order of 27th August 1999 and that the Order failed to provide protection for creditors and contributories. Further, that no scheme of arrangement had been distributed and no meetings of creditors and contributories had been held under the supervision of the Bermuda Courts. It was further argued that as the company is a Bermuda company, the Bermuda Court should have primacy in the winding-up proceedings.

4. On the basis of the affidavit evidence before me I am satisfied that at the time of the filing of the Summons on 5th November 1999, Satfonico Investments SA was not a registered
40 shareholder of the company and as such had no right to present the application and be heard. (Section 65(7) Companies Act 191 as read with section 19.)

5. A look at the background to the application may be instructive. On 27th August 1999 a Petition was filed by the company which was insolvent seeking the appointment of joint provisional liquidators. There was no prayer that the company be wound up immediately. On the same date the company filed for protection under Chapter 11 of the US Federal

Bankruptcy Code to allow it to consider a re-financing/re-organisation which, if successful, would result in the company continuing business.

6. An Order was made that Messrs Wallace and Butterfield be appointed joint provisional liquidators. I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court.

7. I do not accept that because the company is a Bermuda registered company therefore the Bermuda Court should claim primacy in the winding-up proceedings and deny the joint provisional liquidators the opportunity of implementing a US Chapter 11 re-organisation. Nor do I accept that a Chapter 11 re-organisation will, of its very nature, destroy the rights of creditors and contributories under the regime being established. Such an approach would be to deny the realities of international liquidations where action must be taken in many jurisdictions simultaneously. In this case proceedings are being conducted in the USA and in the Cayman Islands as well as in Bermuda. The aim of the proceedings is to enable the company to re-finance in the sum of $1.2 billion or to re-organise so as to continue in operation. Under such circumstances this Court should co-operate with Courts in other jurisdictions which have the same aim in relation to the affairs of the company. It is not a question of surrendering jurisdiction so much as harmonisation of effort. Moreover, the joint provisional liquidators are officers of this Court who submit Confidential Reports informing the Court of progress being made in the liquidation from time to time. I am satisfied that proceedings in many jurisdictions relating to the same subject matter may properly be conducted at the same time where there is a connecting factor. (*Barclays Bank plc v Homan and others* [1993] BCLC 680)

8. Complaint about the lack of a scheme of arrangement is premature. The winding-up process has not yet reached that stage. What is being attempted at this point is to arrange re-financing. If the re-financing is successful, there should be no need for a scheme of arrangement. However, the Order complained of makes provision for same should it become necessary. At a hearing in Delaware, USA, on the 9th day of November 1999, at which Satfonico and HRH Prince Moulay were represented, the US Court approved a proposal for re-financing of the Company. It was envisaged that an application would likewise be made to this Court for its approval which I now give. Support has come from the majority of the creditors. If they had thought that their rights as creditors were being trampled upon or otherwise abrogated by use of Chapter 11 bankruptcy proceedings, it is unlikely that they, through counsel, would have given support to the Delaware Court Order of 9th November 1999.

9. As to the complaint concerning the validity of the Board Meeting on 30th October, 1999, I accept the argument that this Court has no jurisdiction to entertain this application in the winding-up proceedings and no leave has been granted to commence substantive proceedings for that purpose as is required pursuant to section 167(4) of the Companies Act 1981 following the appointment of joint provisional liquidators.

10. Finally, I would add that, after having heard the applications over two days, it seemed to me that the reason behind the objections which were raised by Mr Attride-Stirling in some considerable detail was to slow down the process and delay the attempts by the company to arrange re-financing. It is not without interest that offers of re-financing came from two sources:

    No. 1. McCaw/Teledesic and

    No. 2 Afro-Asian Satellite

11. The majority of the directors supported the offer from Source No. 1. His Royal Highness Prince Moulay Omar Cherkaoui supported the offer from Source No. 2.

12. The Summons of 5th November 1999 is dismissed with costs. An Order in terms is made on the Summons of the 29th October 1999.

HE EASTERN CARIBBEAN SUPREME COURT

THE TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2018/0206, 0207,0208,0210,0212

IN THE MATTERS OF CONSTELLATION OVERSEAS LTD.; LONE STAR OFFSHORE LTD.; GOLD STAR EQUITIES LTD.; OLINDA STAR LTD.; SNOVER INTERNATIONAL INC.; AND ALPHA STAR EQUITIES LTD.

AND IN THE MATTER OF THE INSOLVENCY ACT, 2003

[1] CONSTELLATION OVERSEAS LTD.

[2] LONE STAR OFFSHORE LTD.

[3] GOLD STAR EQUITIES LTD.

[4] OLINDA STAR LTD.

[5] SNOVER INTERNATIONAL INC.

[6] ALPHA STAR EQUITIES LTD.

Applicants

Appearances:

Mr David Chivers QC, with him Mr Grant Carrol of Ogier for the applicants
Mr Alex Hall Taylor for the Consenting A/L/B Lenders of Maples and Calder
Ms Rosalind Nicolson for Banco Bradesco S.A of Walkers

2018: December 13, 19
2019: February 4

The Insolvency Act 2003- appointment of provisional liquidators-whether court has jurisdiction to appoint "soft touch" provisional liquidators to support a company's restructuring and reorganization

JUDGMENT

[1] **Adderley, J:** This was an application for the appointment of "soft touch" provisional liquidators over six British Virgin Islands ("**BVI**") registered companies which form a part of a Group of companies. It is believed to be the first application of its kind in the BVI.

[2] On 19 December, 2018, I acceded to the application to appoint "soft touch" joint provisional liquidators ("**JPLs**") over the companies and to grant a stay of proceedings in respect thereof. I promised to give my reasons later and now do so.

[3] The essence of a "soft touch" provisional liquidation is that a company remains under the day to day control of the directors, but is protected against actions by individual creditors. The purpose is to give the Group the opportunity to restructure its debts, or otherwise achieve a better outcome for creditors than would be achieved by liquidation. It may be appropriate where there is no alleged wrongdoing of the directors.

[4] This application was made in the context of a major cross-border restructuring involving both a Brazilian Judicial Reorganisation and a US Chapter 15 application.

[5] The Applicants to the present Applications were Constellatons Overseas Ltd ("the Company") (a holding company) and the BVI Subsidiaries (certain Drilling Rig-owning entities within the Group). The applicants were seeking orders from this Court to appoint JPLs over each of the applicants in order to allow them to enter into a "soft touch" provisional liquidation in the BVI and thre stay of proceedings against it. The purpose of the appointment of JPLs is to support and facilitate the restructuring of the Group through the RJ, as supported by the Chapter 15 Proceedings in the US. The Company's largest unsecured creditor, Banco Bradesco S.A. ("**Bradesco**"), supports the Company's application for the appointment of JPLs.

[6] In answer to the court's early enquiry counsel made it clear that this was not an application for recognition of an international insolvency or foreign representative under s.457 of the British Virgin Islands' Insolvency Act 2003 ("**IA**"). Therefore the principles of modified universalism discussed in **Rubin v Eurofinance**[1] and in **Cambridge Gas** [2] did not arise with this application. The issue of legislation impliedly excluding the use of common law powers as arose in **Singularis**[3] did not apply either.

[7] The court had raised the issue to assuage its fears that the application might be an attempt to obtain through the back door 'interim relief' under the provision of s 452 of the IA with the remedies afforded under s. 453. Those provisions fall under Part XVIII (Cross Border Insolvency) of the IA which were passed in 2003 by the legislature but for policy or other reasons deliberately not brought into force. Section 452 is predicated on the court recognizing a foreign judgment; this application was not so based.

[8] It was a wholly domestic remedy under the IA based on the common law jurisdiction in the BVI being applied to companies in the BVI in their place of incorporation. That it may assist the ongoing insolvency proceedings in the companies' COMI is a matter which its promoters would have decided before approaching the BVI courts.

[9] The application is a protective measure; the primary reason for making such an application is to ward of predatory creditors who may wish to take satellite ex parte actions against the companies registered in the BVI in an attempt to steal a march on creditors generally. Such attempts have taken place on at least two prior occasions in similar situations in the BVI.

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[1] [2013] 1 AC 236,

[2] Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigation Holdings PLc [2006] UKPC 26

[3] Singularis Holdings Ltd v Pricewaterhouse Coopers [2014] UKPC 36

BACKGROUND

[10] Constellation Oil Services Holding S.A. (Luxembourg) (**"Constellation Holding"**), together with its direct and indirect majority-owned subsidiaries (collectively, **"the Group"**), form an oil and gas drilling business. The Group is experiencing financial distress attributable to the ongoing recession in the oil and gas sector. The effects of this industry-wide downturn have been exacerbated by the recent financial recession in Brazil.

[11] In view of its financial position, and after taking legal advice in the relevant jurisdictions the Group decided to seek the protection of a court-supervised restructuring under the First Business Court of Rio de Janeiro (**"the Brazilian Court"**), facilitated by supporting ancillary proceedings in other jurisdictions. On 6 December 2018 (**"the RJ Petition Date"**) the applicants, along with a group of their affiliates, (together, **"the RJ Debtors"**), filed a petition for a jointly administered *recuperação judicial* (a **"Judicial Reorganisation"**, or **"RJ"**) in the Brazilian Court. The aim of the RJ is to facilitate the agreement and implementation of a plan for restructuring the Group's debt. On the same day, the Brazilian Court entered an order formally accepting the RJ Debtors into the Brazilian RJ Proceedings. The RJ Debtors are presently operating their businesses under the judicial supervision of the Brazilian Court

[12] As the Group has both a complex, integrated, and multinational corporate structure and debt structure, ancillary support from courts in several other jurisdictions (including the BVI) is needed in order for the restructuring under the RJ to be successful. For this reason, shortly after the RJ proceeding was commenced in Brazil, certain companies within the Group, including the applicants, (together, **"the Chapter 15 Debtors")** commenced ancillary proceedings in the US for protection under Chapter 15 of the US Bankruptcy Code (**"the Chapter 15 Proceedings"**), in order to seek the recognition of the RJ as the "*foreign main proceeding*" of each of the Chapter 15 Debtors.

[13] Counsel for the applicants represented that the reorganization is supported by creditors holding over US$ 1 billion of the companies' debt of US$ 1.5 billion. The court acceded to the request of

the applicants to have Mr Alex Hall Taylor and David Welford of Maples and Calder appear at the hearing in support representing a group referred to as the Consenting A/L/B Lenders , a consortium of lenders led by HSBC(USA) NA and Citibank NA who have acted as lenders of the order of US$600 million to various entities within the Group. While reserving all their rights they expressed the view that the Consenting A/L/B Lenders have a significant interest in the solvency, financial position, and restructuring plans of the Group and its underlying entities to which they have lent very substantial funds and to which they intend to lend further funds. Therefore they are very interested in the determination of the applications.

[14] Similarly, Ms Rosalind Nicholson representing Banco Bradesco the single largest creditor of the Group in the sum of about US$152.6 million was in attendance to support the application.

[15] A look at the consolidated balance sheet to September 2018 shows that the company is balance sheet solvent but with approximately only US$100 million cash on hand the Group is not likely to be able to pay its upcoming debts absent a restructuring and so is cash flow insolvent. This is exacerbated by the insolvency event in the loan documents automatically triggered by the commencement of the RJ Proceedings and the Chapter 15 Proceedings.

BACKGROUND

[16] The applicants made a declaration that to the best of the applicants' knowledge, there was no existing arrangement nor proposal for a creditors' arrangement under Part II of the Act, nor any administrator or administrative receiver acting, in relation to any of the applicants in any jurisdiction. They were also not aware of any pending foreign insolvency proceedings against them, other than the Brazilian and US proceedings which they themselves have just initiated along with other entities in the Group, as described below.[4]

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[4] As confirmed in relation to: (i) the Company (ii) Snover International Inc. (iii) Lone Star Offshore Ltd. and (iv) the remaining Applicants

Brazilian RJ Proceedings

[17] On 6 December 2018 the RJ Debtors [5] filed the RJ Petition in the Brazilian Court commencing their procedurally joint Judicial Reorganisation. The Brazilian Court's acceptance of the RJ Petition is currently pending.

[18] An RJ is a collective mechanism under Brazilian bankruptcy and restructuring law for adjusting debts under the control and supervision of a competent Brazilian court, and is commenced by debtors filing a petition in the court in the jurisdiction in which the debtors maintain their "*principal estabelecimento*"[6] according to Brazilian law.

[19] The Brazilian Court has jurisdiction to process an RJ of foreign entities, such as the applicants, if Brazil is the "*principal estabelecimento*" of the debtors for the purposes of Brazilian restructuring law. The RJ Debtors have been accepted to undergo a jointly administered RJ

[20] Proceedings and collections of claims against the RJ Debtors are stayed for 180 days from the date of the Brazilian Court formally accepting the debtors into an RJ.

[21] The officers of debtor companies subject to an RJ continue to administer the companies' affairs, acting under the supervision of the court.

[22] Creditors are given additional protection throughout the process by provisions in the law which allow for the formation of creditors' committees and the appointment of a Judicial Administrator to oversee the process. The procedure requires equal treatment of creditor claims of the same class, absent an economic justification for treating a certain subgroup differently (e.g. payments to critical suppliers, payments to creditors providing additional financing during the RJ).

[23] Debtors have a set time period in which to present a plan to their creditors. Following plan submission, a general meeting is held for a creditor vote. The plan is then either approved,

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[5] A full list of the RJ Debtors was provided to the court. All of the Applicants are RJ Debtors.

[6] As noted in the Galdino Affidavits, Brazilian bankruptcy laws employs the concept of "*principal estabelecimento*" (typically translated as "principal place of business", in order to explain this Brazilian concept to a non-Brazilian audience) for the purpose of venue and jurisdiction in an RJ proceeding.

"crammed-down" on dissenting classes, or rejected. Approval of a plan requires significant consensus among creditors of each secured and unsecured class.

[24] The Group elected to commence its centralised restructuring in Brazil because Brazil has to date been the operational centre of the Group's business. Brazil is the "*principal estabelecimento*" of the Group for the purposes of Brazilian restructuring law. It is also the "centre of main interests" or "COMI" of each Chapter 15 Debtor for the purposes of US restructuring law (which is relevant because of the Group's New York law-governed debt, and the commencement of the Chapter 15 Proceedings seeking recognition of the RJ for each of the Chapter 15 Debtors, including the applicants). Approximately R$ 5,753,783,237.77 (US$ 1,482,934,061.44) in third-party debt owed by the RJ Debtors collectively will be subject to restructuring in the course of the RJ.

[25] The Group hopes that as a result of the RJ and ancillary proceedings in other jurisdictions (including provisional liquidations in the BVI), it will be able to maintain its operations during the course of its restructuring negotiations, and thereby preserve its value as a going concern for the benefit of creditors and employees as a whole.

[26] In order to ensure that the Group can undergo a globally co-ordinated and centralised restructuring, certain of the RJ Debtors have initiated complementary restructuring proceedings in other relevant jurisdictions: specifically the US and this jurisdiction. These proceedings are necessary because the Group is presently vulnerable to adverse creditor actions. Such adverse creditor action would be to the detriment of the Group's creditors as a whole, and would jeopardise the prospects of success in the RJ.

US Chapter 15 Proceedings

[27] **The Chapter 15 Debtors**[7] have commenced ancillary proceedings in the US to seek recognition of the RJ as the "foreign main proceeding", in order to obtain certain protections from the US Bankruptcy Court, Southern District of New York (**"the US Court"**) in support of the RJ. On 6

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[7] A full list of the Chapter 15 Debtors is provided in the table at Appendix 1 to the appellants' skeleton argument. All of the Applicants are Chapter 15 Debtors.

December 2018 the Chapter 15 Debtors filed a Chapter 15 petition (**"the Chapter 15 Petition"**) under the US Bankruptcy Code in order to commence their Chapter 15 Proceedings

[28] The Chapter 15 Debtors initiated these proceedings in order to seek the protection of the US Court over their assets, property and interests within the US (and also because the vast majority of the Group's debt is governed by New York law). The US Court's determination of the Chapter 15 Petition is currently pending. Temporary injunctive relief (namely, a stay barring the commencement or continuation of actions against the Chapter 15 Debtors or their US property) has been sought pending a hearing of the Chapter 15 Petition.

THE BVI INSOLVENCY LAW ("IA")

[29] A brief summary of the relevant provisions under the IA will place the application in context, and will allow the provisions to be readily compared with the legislation of other jurisdictions to which I shall refer.

[30] By s 159 of the IA the court has the power to appoint a liquidator of a company under s 162. The grounds set forth in s.162 include s 162(1) (a) the company is insolvent, s.162(1)(b) that it is just and equitable that a liquidator should be appointed , and s 162(1)(c) it is in the public interest to do so.

[31] Insolvency is defined in s 8 of the Act. Under s 8(c)(ii) a company is defined as being insolvent if it is unable to pay its debts when they fall due. It is also deemed to be insolvent if it fails to comply with a statutory demand and does not pay or apply under s156 to set it aside within 14 days.

[32] Under s. 162(2) amoung the persons who have standing to apply to appoint a liquidator are the company itself, a creditor or a member, the supervisor of a creditors arrangement, the Financial Services Commission and the Attorney General. There are special provisions governing an application by the latter two and or by a member.

[33] Rule 157 mandates that a sealed copy of the application and supporting affidavit for the appointment of a liquidator "shall" be served on the company 14 days or less after filing, and an affidavit verifying such service be filed.

[34] Under s.165 (1)(b) of the IA the application must be advertised between 7 days or more after service and 7 days or more before the date on which the petition is to be heard. Under Rule 31 advertisement must be in the BVI Gazette (r.31(1) (a)), and in such newspaper or newspapers that the applicant considers most appropriate for ensuring that the application comes to the attention of the creditors or individuals subject to the insolvency proceeding (R 31(1)(b)).

[35] Under s 162(2) if not duly advertised, the court may dismiss the application.

[36] Under Rule 15 the proposed liquidator must give his/her written consent to act, and as the consent is only valid for 6 weeks the written consent cannot be more than six weeks old at the time the court grants the Order. Under section 483 non-resident insolvency practitioners must provide prior written notice the Financial Services Commission.

[37] Under s 168 an application for the appointment of a liquidator must be determined within 6 months from filing failing which it is deemed to be dismissed. The court has a discretion to extend the period for up to three months provided that the application is made before the period expires and the Court is satisfied that special circumstances justify the extension. There is no limitation on the number of times that such an extension can be granted if at the time of the application the court is satisfied that special circumstances exist to grant an extension.

[38] After hearing the application the court has power to "make any interim order or other order that it deems fit". Section 167 lists the orders that can be made:

> "On the hearing of an application for the appointment of a liquidator, the Court may-
>
> (a) appoint a liquidator under section 159(1);
>
> (b) dismiss the application, even if a ground on which the Court could appoint a liquidator has been proved;
>
> (c) adjourn the hearing conditionally or unconditionally; or

(d) make any interim or other order that it considers fit"

Appointment Provisional liquidators

[39] Section 170 under which a provisional liquidator is appointed and s174 under which certain consequential remedies may be applied for by the applicant are not freestanding. In each case application for the appointment of a liquidator must first have been made and not yet determined or withdrawn.

[40] Section 170 of the IA provides for the appointment of provisional liquidators as follows:

> "(1) Where an application for the appointment of a liquidator of a company has been filed but not yet determined or withdrawn, the court may, on application of a person specified in subsection (2) appoint ...and eligible insolvency practitioner as provisional liquidator of the company on the grounds specified in subsection (4)."(underline added)

[41] Subsection (2) lists, the company among those having standing to apply. Two of the grounds specified in subsection (4) of section 170 on which the court would appoint a provisional liquidator include: if the company consents, and the Court is satisfied that the appointment is necessary for the purpose of maintaining the value of the assets owned or managed by the company. There is also a public interest ground on which a provisional liquidator may be appointed that is not germane to this case.

[42] Under s170(2) a creditor can apply to terminate the appointment of the provisional liquidation.

[43] Pursuant to section 170(4) of the Act, the Court has the power to appoint JPLs on "*such terms as it considers fit*". Section 171(1) further provides that JPLs have *"the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out the functions for which [they were] appointed*". The Court has the power under section

170(2) of the Act to further limit the powers of JPLs in such manner and at such times as it considers fit.

[44] The jurisdiction of the court exercised under statutory provisions has been considered in a number of jurisdictions and certain principles have emerged.

ENGLAND

[45] The legislative provisions setting out the ability of the English courts to appoint JPLs are contained in section 135 of the Insolvency Act 1986. This section provides that:

> (1) Subject to the provisions of this section, the court may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally.
>
> (2) In England and Wales, the appointment of a provisional liquidator may be made at any time before the making of a winding-up order, and either the official receiver or any other fit person may be appointed.
>
> (3) The provisional liquidator shall carry out such functions as the court may confer on him.
>
> (4) When a liquidator is provisionally appointed by the court, his powers may be limited by the order appointing him."

[46] **Palmer's Company Law**[8] describes section 135 of the Insolvency Act 1986 as conferring "*a general power which the court will exercise on the basis of the view it takes of the requirements in the case before it*".

[47] Further, section 130(2) of the Insolvency Act 1986 provides that: "*When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose*"

[8] Morse, Geoffrey snf Worthington, Sarah, eds. (2018) Palmer's Company Law. Sweet & Maxwell, London, UK, Sections 15.290 and 15.295

[48] There are a number of English authorities which lend support to a court order appointing JPLs over the Applicants in order to enable a court-supervised restructuring process to take place. The development of this practice is described in **Palmer's Company Law** in the following manner:

> "*The latent potential of provisional liquidation to serve as a vehicle for resolving the financial affairs of insolvent companies has been increasingly explored in recent years. The relative speed with which the procedure can be initiated, combined with the benefits of an automatic moratorium in relation to the company's affairs and property, can in certain cases be utilised to facilitate the rescue of a financially troubled company where such alternatives as administration or administrative receivership may not be available. Provisional liquidators can be appointed with wide powers and duties which transcend the function of merely maintaining the assets for the benefit of creditors pending a winding up. If they are successful in restoring the company to viability, the order of appointment can be discharged and no winding up need take place. The courts have been supportive of such creative use of the procedure, and have been prepared to adapt other principles of insolvency law to meet the needs of emerging practice.*"

[49] The flexibility of the ability of the English courts to appoint JPLs is consistently emphasised in the English authorities.

[50] In **MHMH Ltd and others v Carwood Barker Holdings Ltd** [2004] EWHC 3174 (Ch), Evans-Lombe J observed that "*one thing*" that emerges from the English and Commonwealth authorities "*is the flexibility of the remedy for the appointment of provisional liquidators of companies*".

[51] Sir Robert Megarry V-C in **Re Highfield Commodities Ltd (1984)** 1 B.C.C. 99277; [1985] 1 W.L.R. 149 said that:

> "... *section 238* [the predecessor to section 135 of the Insolvency Act 1986] *is in quite general terms. I can see no hint in it that it is to be restricted to certain categories of cases. The section confers on the court a discretionary power, and that power must obviously be exercised in a proper judicial manner. The exercise of that power may have serious consequences for the company, and so a need for the exercise of the power must overtop those consequences.*"

[52] The practice seems to have had particular attraction for insurance companies to whom administration under Part II of the Insolvency Act 1986 did not apply (see **Re English and American Insurance Co Ltd** [1994] 1 BCLC 649 and **Re Hawk Insurance** [2001] 2 BCLC 480. In **Smith & Ors v UIC Insurance Co Ltd** [2001] B.C.C. 11; [2000] All ER (D) 33. His Honour Judge Dean QC acknowledged the wide range of purposes for which JPLs can be appointed:

> "i. *Historically, the appointment of a provisional liquidator was by way of a temporary and very often urgent appointment for the purpose of preserving the assets, for the purposes of preserving priorities of creditors pending the completion of the winding-up proceedings. The effect of the appointment is immediately to prevent parties commencing or continuing proceedings against the company or its property with the leave of the court ...*
>
> *ii. It appears, however ... that the appointment of a provisional liquidator can be used for far wider purposes ... in the case particularly of insurance companies the procedure of appointing a provisional liquidator is frequently, if not inevitably, made not for the purpose of safeguarding rival priorities or protecting assets in a pending full blown liquidation, but in order to enable a form of administration of the company with a view to resolving the financial difficulties, not necessarily by a winding up but by a scheme of arrangement under s. 425 of the Companies Act 1985.*"

[53] However, the practice was not confined to insurance companies, and extended to others that were not eligible for administration.

[54] Harman J discussed and acknowledged the "*developing practice of the court of using a petition by the company for its own winding up as a basis for the appointment of provisional liquidators*", and said that this was "*a practice which several Chancery judges have dealt with and approved of*" (**Re English & American Insurance Co Ltd** [1994] 1 BCLC 649. He summarised the breadth of the grounds on which the English Court is able to appoint JPLs. In **Re Andrew Weir Insurance Company Limited** (1992, High Court, unreported judgment**).** He said this:

"[p.2] Traditionally, provisional liquidators have usually been appointed in cases where it was thought by the petitioning creditor, frequently the Crown, that there was a real risk of the assets of the company being dissipated or for there to be some form of jeopardy to assets or risk of improper dealing with assets. Nothing of that sort whatever arises in this case. However, the power in the Court to appoint liquidators provisionally, as the Act puts it under Section 135, is in entirely general terms: "The court may" (plainly creating a judicial discretion) "at any time after the presentation of a winding up petition appoint a liquidator provisionally."

There is no sort of suggestion in the Statute that it is only in cases where there is jeopardy to assets or impropriety of some sort that the court should make such an appointment (p. 2)...

[p.3] I believe that there is a tendency to appoint provisional liquidators nowadays in cases where there are no suggestions of misfeasance or wrong-doing by the directors. I have myself made such appointments in other cases."

[55] Although analogies are sometimes inappropriate in law, the learned Judge's comments can be applied by analogy to the legislative provisions which govern the appointment of JPLs in the BVI, as they are phrased in similarly broad terms:

Burden of Proof

[56] The Court does not have to be satisfied that a restructuring will occur. That could only be known after the vote. The cases seem to require only that there was at least *"some prospect"* of promoting a restructuring (see **Re Esal (Commodities) Ltd** [1985] BCLC 450 and **Re ARM Asset Backed Securities** [2013] BCC 252 per Richards J.

[57] A company's own application for the appointment of JPLs has always been treated more favourably than that of a creditor (see **Re London, Hamburg and Continental Exchange** [1866] 2 LR Eq 231 and **Re Club Mediterranean Pty Ltd** [1975] 1 ACL 36]). A distinction has always been drawn historically between applications to appoint JPLs which are made by a company itself and those which are made by a company's creditors. If the company itself makes, consents to, or is

shown not to oppose the application, "*the appointment is almost a matter of course ...* " (see **Palmer's Company Law** referred to in **Re Union Accident Insurance Co Ltd** [1972] All ER 1105).

Foreign Restructuring

[58] Further, **Palmer's Company Law** contains an express discussion of "*the potential for deployment of* [the provisional liquidation procedure] *in support of foreign proceedings directed at procuring the rescue of a company*" The commentary refers to the case of **Re Daewoo Motor Co Ltd** (2001, High Court, unreported judgment, Lightman J) which is summarised as follows:

> "*In that case, a Korean company had been placed under the control of a court-appointed receiver in its country of incorporation. The receiver anticipated that there was a risk creditors might seek to seize the company's English assets* [...] *By presenting a winding up petition in the name of the company, coupled with an application for appointment of provisional liquidators, the receiver was able to establish the necessary conditions for concluding an orderly disposal of the assets under the protective mantle of the automatic stay. Subsequently, the provisional liquidators obtained an order from the English court authorizing them to remit the proceedings of realization to the receiver in Korea, to be administered for the benefit of all creditors including those from England itself.*"[9]

[59] **Lightman & Moss, *The Law of Administrators and Receivers of Companies (6th ed.)*[10]** summarises the position under English law as follows:

> "*The traditional aim and purpose of the appointment [of JPLs] was usually to secure the assets of the company so that they may be available for equal distribution to creditors. Accordingly, obvious insolvency and jeopardy to assets are reasons for an appointment, but not the only reasons ... The avoidance of a scramble by*

[9] While this case itself was unreported, in the subsequent related case of ***Daewoo Motor Co. Ltd. v Stormglaze UK Ltd.* [2005] EWHC 2799 (Ch)** Lewison J confirmed that "*The provisional liquidators were appointed by an order of Mr. Justice Lightman essentially to assist the Korean receiver*".

[10] Fletcher, I. F., Lightman, G., & Moss, G.S. (2012). London:Sweet & Maxwell. Sections 2-053

creditors for assets and the protection of the assets pending the putting forward of a Companies Act scheme of arrangement have also been accepted as good reasons for the appointment of provisional liquidators."

[60] Accordingly, there is persuasive authority in England for using the Court's statutory powers flexibly in support of restructuring in general, including a foreign restructuring process. The practice in the English courts of using provisional liquidations in aid of corporate rescues has also been used, adapted and built upon by the courts of the Cayman Islands and Bermuda, who each now have a well-established practice of appointing JPLs in aid of cross-border corporate rescues.

[61] A few examples will suffice.

THE CAYMAN ISLANDS

[62] At all material times until 1 March 2009, when the Companies (Amendment) Law, 2007 (Commencement Order , 2009) was brought into force section 99 of The Companies Law in Cayman did not contain an express provision that JPLs could be appointed for the purposes of aiding a restructuring. It simply provided that:

> "*the Court may, at any time after the presentation of a petition for winding up a Company under this law, and before making an order for winding up the Company, upon the application of the Company, or of any creditor or contributor of the Company, restrain further proceedings in any action, suit or proceeding against the Company upon such terms as the Court thinks fit; and the court may also, at any time after the presentation of such petition and before the first appointment of liquidators appoint provisionally an official liquidator of the estate and effects of the company*".

[63] While this provision was phrased in general terms, and did not expressly state that JPLs could be appointed for the purposes of aiding a restructuring, the provision was used to appoint JPLs for these purposes in **Re Fruit of the Loom Ltd.** ([2000] CILR, Note 7b; unreported)

[64] The practice of appointing JPLs upon the application of a company in aid of a company presenting a compromise or arrangement to its creditors was then codified in 2007.[11] Section 104 of the Companies Law (as amended) which provides...

> "i. *the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally".*

Section 104(3) provides:

> a. "An application for the appointment of a provisional liquidator may be made under subsection (1) by the company ex-parte on the grounds that- (a) the company is likely to become unable to pay its debts within the meaning of section 93; and (b) the company intends to present a compromise or arrangement to its creditors".

[65] Further, section 96 of the Companies Law (as amended) provides that:

> *"At any time after the presentation of a winding up petition and before a winding up order has been made, the company and any creditor or contributory may –*
>
> *where any action or proceeding against the company ... is pending in a summary court, the Court, the Court of Appeal or the Privy Council, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and*
>
> 1. *where an action or proceeding is pending against the company in a foreign court, apply to the Court for an injunction to restrain further proceedings therein,*
>
> ii. *and the court to which the application is made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit".*

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[11] Pursuant to The Companies (Amendment) Law 2007 (Law 15 of 2007). This Act repealed, *inter alia*, section 99 of the previous Companies Law, and replaced it with *inter alia* section 104 of the current Act.

[66] This provision to stay proceedings is in similar terms to s 170(4) of the IA.

[67] The decision to appoint JPLs in aid of a refinancing in **Re Fruit of the Loom Ltd** was made before the provision to appoint JPLs for such purposes had been codified, and is therefore analogous to the current legal position in the BVI. In that case the holding company for an international group sought the appointment of JPLs in order to assist a refinancing of its assets. The court approved the refinancing package, appointed JPLs to oversee the company's business and the refinancing procedure under the control of the board and supervision of the Court; and granted an injunction restraining proceedings against the company.[12] In considering whether the appointment of the JPLs should continue, Smellie CJ held applying the dicta of Harman J in **Re English & American Insurance Co Ltd** that since there were no specific statutory powers enabling the Cayman courts to make administration orders over companies, the court could use its wide discretion under section 99 of the Companies Law to allow a company to restructure and refinance itself for the benefit of creditors and shareholders.

[68] He also opined on the principles that should govern whether the appointment of the JPLs should be continued as follows:

> 1. The JPLs should be satisfied that the refinancing and/or sale of the business as a going concern was likely to be more beneficial to creditors than a liquidation of the company's assets and a rateable distribution to creditors;
>
> 2. there must be a real prospect of a refinancing and/or sale as a going concern being effected for the benefit of the general body of creditors;
>
> 3. Achieving such a refinancing and/or sale as a going concern should be in the best interests of creditors and shareholders in the circumstances; and
>
> 4. The Court will be astute to ensure that its orders are not abused by a company which is hopelessly insolvent being allowed to continue to trade.

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[12] The decision to appoint JPLs was made during a previous unreported hearing, but the nature of the application and the decision were discussed in Smellie CJ's later judgment concerning whether or not the appointment of JPLs should continue.

[69] There have been other appointments of "soft touch" provisional liquidators since then in the Cayman Islands including, amoung others, **Re Trident Microsystems (Far East) Limited** [2012] (1) CLR 424, **Re Mongolian Mining Corporation** (2016, Grand Court of the Cayman Islands, court order, McMillan J)[13], and **Re China Agrotech Holdings Limited (2017, Grand Court of the Cayman Islands,** unreported , per Segal J).

BERMUDA

[70] There are several judgments from the Bermudan courts considering and endorsing the use of "soft touch" provisional liquidations in order to assist with global restructurings.

[71] The statutory powers of the Bermudan courts to appoint JPLs are contained in section 170 of the Companies Act 1981 as follows:

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

[72] Further, section 167(4) of the Companies Act 1981 provides:

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

[13] There was no reported judgment of the decision to appoint the JPLs, but the Applicants had obtained a copy of the court's order appointing the JPLs.

[73] The case law foundation for the Bermudan courts' provisional liquidation restructuring jurisdiction was laid in the case of **Re ICO Global Communications (Holdings) Limited** 1999] Bda L.R. 69.[14] A Bermudan company applied for JPLs to be appointed over itself on the same day as it filed for Chapter 11 protection in the US in order to allow it to consider a refinancing or reorganisation. The court granted the company's application. Ward CJ (as he then was) was required to consider whether the initial appointment of JPLs should be continued. In his judgment the Judge considered the initial appointment, and endorsed the practice of appointing JPLs in aid of restructurings and stated (p.2, ¶6):

> "An Order was made that Messrs. Wallace and Butterfield be appointed joint provisional liquidators. I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court..."

[74] **Discover Reinsurance Company v PEG Reinsurance Company Limited [2006]** Bda L.R. 88 concerned an initial appointment of JPLs by the court upon the application of a creditor of a Bermudan company,[15] which the company subsequently sought to have discharged. In the judgment Kawaley J considered in detail the principles governing the appointment of JPLs in Bermuda. In my judgment the following passages (at p.5, ¶19) are of particular germane:

> "i. The use of provisional liquidation to facilitate a restructuring has not always occurred in clear cases of insolvency. It has often been utilized when companies are in what has been referred to as the "zone of insolvency". Be that as it may, the Bermuda model of restructuring provisional liquidation has often kept the pre-existing management in place, and merely given the provisional liquidators "soft" monitoring powers. In theory, these

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[14] The original judgment in which JPLs were appointed over the company was not reported, but one of the issues before Ward CJ in **Re ICO Global Communications (Holdings) Limited [1999] Bda L.R. 69** was whether the appointment of the JPLs that had already been appointed should be continued. It was in this context that the Judge discussed the original appointment of the JPLs, and endorsed the practice of appointing JPLs in aid of restructurings.

[15] The initial application for the appointment of JPLs was not reported.

monitoring powers are designed to reassure both creditors and the Court that assets are not dissipated, on the implicit assumption that the management that has run the company into difficulties can hardly be trusted to have the creditors' best interests at heart...."

[75] In **Up Energy Development Group Limited** [2016] SC (Bda) 83 (2016, Supreme Court of Bermuda, unreported) a creditor of a Bermudan company that held underlying assets in China and Canada sought the appointment of "soft touch" JPLs over a Bermudan debtor company in order to oversee a debt restructuring that was being negotiated by the company. The application was opposed by the Bermudan debtor company. Kawaley J expressed the view:

> "*The established practice of this Court in appointing JPLs to supervise a de facto debtor-in-possession restructuring has typically arisen in the context of winding-up petitions presented by the company*" (at ¶11). This supports the ability of the Applicants to seek the appointment of JPLs over themselves.
>
> "*Further, given the evidence concerning the likely favourable return to creditors if a restructuring can be achieved, and the role the JPLs would play in protecting creditor interests during negotiations, it is also difficult to see how the Applications could reasonably be opposed by creditor interests.*"
>
> "*In summary, the Court has a broad discretionary jurisdiction to appoint JPLs before a winding-up order is made.*" (at ¶14).

[76] The powers of this Court are similarly broad.

[77] In **Re Seadrill Limited & others [2018] SC (Bda) 30 Com (5 April 2018)** three Bermudan companies within an offshore drilling group commenced Chapter 11 proceedings in the US in order to facilitate a group restructuring. The restructuring was required in order to address liquidity challenges resulting from the downturn in the oil and gas industry. The original decision to appoint JPLs over the companies was not reported, but in a later decision granting recognition of the Chapter 11 plan and permanently staying all claims against the companies Kawaley CJ Commented that:

"When a Bermudian company is placed into provisional liquidation for the purposes of pursuing an insolvent restructuring, this Court makes three central interlocutory findings:

1. *a prima facie case for winding-up has been made out on the grounds of insolvency;*
2. *the creditors have displaced the shareholders as the key stakeholders in the company; and*
3. *an arguable case that a restructuring is where the best interests of the creditors lie have been made out*" (¶19).

[78] He also confirmed that these findings had underpinned the original order appointing the JPLs (¶20).

HONG KONG

[79] The powers and jurisdiction of the courts of Hong Kong to appoint JPLs are contained in section 192 and following sections of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32). Section 192 provides that: "*For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators, provisionally or otherwise, in accordance with sections 193 and 194*". Section 193 prescribes the jurisdictional conditions for the exercise of this power.

[80] The decision of the Hong Kong Court of Appeal in **Re Legend International Resorts Limited** [2006] 2 HKLRD 192 cast doubt upon the Hong Kong courts' ability to appoint JPLs in aid of a restructuring. In his judgment, Rogers VP speaking for the panel (Rogers, LePichon JJA) said that based upon the wording of section 192 and the following sections, the appointment of JPLs must be for the primary purpose of a winding up "*not for the purposes of avoiding the winding-up*" (¶35 – 36).

[80] The extent of the principle established by the decision has been ameliorated to some extent by the recent decision of **Re China Solar Energy Holdings Limited [2018]** HKCFI 555. The court held

that JPLs may pursue a corporate restructuring, provided they have originally been appointed on conventional grounds such as a need to preserve company assets against creditor actions.

THE BAHAMAS

[81] In The Bahamas, the common law position has been codified into statute. Under **The companies (Winding Up Amendment) Act, 2011** section 199(3) a company may, as in the Cayman Islands under their 2009 Act, seek the appointment of JPLs on the grounds that the company is, or is likely to become, unable to pay its debts, and intends to present a compromise or arrangement to its creditors. It reads as follows:

> "(3) an application for the appointment of a provisional liquidator may be made under subsection(1) at any time after the presentation of a winding up petition but before the making of a winding up order by the company ex parte on the grounds that-
>
> the company is or is likely to become unable to pay its debts within the meaning of section 188; and
>
> (b) the company intends to present a compromise or arrangement to its creditors"

THE CURRENT APPLICATION

[82] The applications to appoint liquidators were filed after the boards of directors of each of the applicants resolved to appoint Mr Paul Pretlove and Ms Eleanor Fisher as JPLs and/or liquidators. A separate Fixed Form R14 was filed electronically on 7 December 2017 by each company stating its intention to apply for an order under s 162(1)(a) of the IA for Joint Liquidators to be appointed over each of the applicants, and of their intention to appoint Eleanor Fisher of Kalo (Cayman Limited) and Paul Pretlove of Kalo (BVI) Limited as such liquidators. As explained earlier the ground relied on under Section 162(1)(a) was that the company is insolvent. The meaning of 'insolvent' is set out in s 8. For present purposes section 8(1)(c) applies, namely, either the value of the company's liabilities exceeds it assets, or the company is unable to pay its debts as they fall due. Ms Eleanor Fischer is a non-resident insolvency practitioner and so prior written notification was given to the FSC as required by section 483 of the IA. Each of the proposed JPLs has given consent to act.

[83] As mentioned in paragraph 15 above, the Report of Alvarez and Marshall which was in evidence shows that as of 30 September 2018 the companies were balance sheet solvent but that absent a restructuring, they are prima facie cash flow insolvent and would not have sufficient cash to meet upcoming financial debt obligations. If the companies were to default on certain debt obligations this would trigger additional defaults due to the default provisions in certain finance documents. Therefore there is a prima facie case for appointing a liquidator.

[84] Self-evidently because the companies themselves are the applicants they have consented as required by s 170(4)(a), and likewise there is no requirement to serve notice on the companies pursuant to Rule 157. After consideration of extensive business and financial evidence the court was satisfied that the appointments were necessary for the purpose of maintaining the value of the assets owned or managed by the companies, and aiding their possible reorganization.

[85] Since the hearing date has not yet been set prima facie there is no requirement to advertise pursuant to s165(1)(b) either. However, in the interest of all the creditors as well as to put potential investors on notice I order that notice of the appointments be provided by placing an advertisement in the BVI Gazette as soon as reasonably practicable.

[86] There is evidence of a real prospect of restructuring. The restructuring involves releases of some security to facilitate cash flow and injection of further cash by bondholders. With the requirement for a 50% majority of creditors' approval, the **RJ** has a realistic chance of success. The US court on 10 December granted a moratorium and the effective hearing will be on 15 February 2019.

[87] The Houlihan Report in evidence before the court showed that realization of assets for the company as a going concern is significantly better than a company in liquidation. There is a US$700 million difference between the breakup value and the company as a going concern, and therefore the appointment of a provisional liquidator is very germane to allowing the going concern value to be maintained for the benefit of the creditors as a whole.

[88] The court noted that both Mr Pretlove and Ms Fisher are a highly experienced restructuring experts. This is a relevant consideration to the appointment of "soft touch" provisional liquidators, and the court took it into account consideration.

[89] I adopt the opinions of general principle relating to the flexibility of the court and the principles to be applied in appointing provisional liquidators expressed by Smellie, CJ in **Re Fruit of the Loom**, Kawaley, J in **Discovery Reinsurance** and **Re Seadrill** and Ward CJ in **ICO Global** all of which themselves were anchored in the persuasive English authorities cited. In summary, on principle the court has a very wide common law jurisdiction to appoint provisional liquidators to preserve and protect the assets owned or managed by the Company, and that the jurisdiction includes making such appointments to aid the company's reorganization including cooperating with cross border reorganizational efforts aimed at achieving that overriding objective. While it is not always good to rely on analogies, having regard to the authorities mentioned the court was of the view that jurisdiction with a similar wide discretion exists under s 170 of the IA. It would allow this Court to co-operate with the Brazilian and US Courts; would not destroy the rights of the applicants' creditors; and would have the benefit of allowing the Court oversight of the Group's restructuring process for the benefit of the creditors as a whole. Schemes of Arrangement are not alien to the laws of the BVI being allowed under s178 of the Business Companies Act 2005 albeit in the context of voluntary liquidations.

[90] The Hong Kong Case of **Re Legend International Resorts Limited** [2006] 2 HKLRD 192 where in his judgment, Rogers VP opined that the appointment of JPLs must be for the purposes of a winding up "*not for the purposes of avoiding the winding-up*" can be distinguished. Under s 167(1)(b) of the IA on hearing a liquidation application the court can dismiss the application even if a ground on which the Court could appoint a liquidator has been proved. From this it appears that the legislature did not intend that the application for the appointment of a liquidatior was necessarily for the purpose of winding up the company.

[91] For all the above reasons I was satisfied that the court had jurisdiction to appoint the JLPs for the intended purpose and that this was a proper case in which to do so. I therefore acceded to the application and approved the appointment of Paul Pretlove and Eleanor Fisher as joint Provisional Liquidators of the applicants with the powers set out in the draft order. The JLPs shall deliver regularly but at least every 60 days to the court a confidential Report on the progress of the RJ Brazilian proceedings and the Chapter 15 Proceedings with the purpose of informing the court of the prospects and likely timing of successfully concluding the pending reorganization and restructuring. The court will be alive to the need that as officers of the court the JLPs will preserve

and not facilitate any dissipation or misuse of the assets of the companies to the detriment of creditors or facilitate mismanagement on the part of directors.

[92] In order to promote the orderly administration of the estate the JLPs may enter into protocols with the directors. In addition as there are parallel cross-border insolvency proceedings taking place, the JLPs should consider whether it is in the interest of the estate to enter into protocols for cross boarder cooperation within the framework of the Judicial Insolvency Network's (JIN) Guidelines for Communication and Cooperation between Courts in Cross Border Insolvency Matters which is a template to help parties customize communication and cooperation agreement for individual cross-border restructuring and insolvency cases. These Guidelines were adopted by the BVI under the Insolvency Rules on 15 May, 2017 by the Chief Justice's Practice Direction 8, No 2 of 2017 under the Insolvency Rules.

[93] Under the IA there is no automatic moratorium upon filing of an application for the appointment of a liquidator; an application must be made. Section 174(1) of the Act, which governs the Court's power to stay or restrain proceedings when an application for the appointment of a liquidator has been made, provides that:

> "Where an application for the appointment of a liquidator of a company has been filed but not yet determined or withdrawn, a person specified in section 170(2) [the applicant for the appointment of a liquidator, the company, a creditor, a member, the commission or any person entitled to apply for the appointment of a liquidator] may,
>
> iii. where any action or proceeding is pending against the company in the Court, the Court of Appeal or the Privy Council, apply to the Court, the Court of Appeal or the Privy Council, as the case may be, for a stay of the action or proceeding; and
>
> iv. where any action or proceeding is pending against the company in any other Virgin Islands court or tribunal in the Virgin Islands, apply to the Court for a stay of the action or proceeding".

[95] As part of this application the applicants sought a stay under s.174(1). I granted that stay in the form of the draft Order.

[96] I wish to thank counsel who acted for the applicants for the industry and research in preparing their skeleton arguments from which I lifted certain pertinent parts verbatim. The fact that I did not refer to all of authorities mentioned does not mean that I did not review them.

The Hon K. Neville Adderley
Commercial Court Judge (Ag)

By The Court

Registrar

Re Legend International Resorts Ltd

A

(Court of Appeal)
(Civil Appeal Nos 207 and 210 of 2005)

B

Rogers V-P and Le Pichon JA
7–9 February and 1 March 2006

Company law — compulsory winding-up — unable to pay debts — creditor's petition — petitioner bought distressed debt — whether petition should be struck out on ground petitioner not creditor as not "eligible transferee" under facility agreement

C

Company law — provisional liquidators — appointment — power of court to appoint under s.193 — whether to be extended to enable appointment of liquidator for purpose of exploring corporate rescue even though assets of company not in jeopardy — Companies Ordinance (Cap.32) s.193

D

公司法—強制清盤—無力償債—債權人的呈請—呈請人的業務包括購買不良債權—應否以債權人並非融資協議所指的"合資格承讓人"為理由而將其呈請剔除

E

*公司法—強制清盤—臨時清盤人—委任—法庭根據第**193**條委任臨時清盤人的權力—權力應否伸展，以至即使不存在着公司資產流失的危險，法庭仍可委任臨時清盤人以協助探討挽救公司的可能性—《公司條例》(第**32**章)第**193**條*

F

P, which primarily bought distressed debt in the secondary debt market, was the assignee of a loan participation from one of the lenders under a loan facility agreement (the Agreement) entered into by C, a company, as borrower. P served a written notice of demand on C demanding repayment. C ignored this, following which P presented a winding-up petition (the Petition) under s.177(1)(d) of the Companies Ordinance (Cap.32) and under s.193 applied for provisional liquidators to be appointed (the Application). After P served the Petition on C, C appointed a rehabilitation receiver in the Philippines who, every three months, was required to report to the court there on the general condition of C. It appeared that the rehabilitation proceedings were not merely ongoing but were potentially viable. Additionally, none of the other creditors of C had supported the Application. C sought to strike out the Petition (the Striking-out Application) on the ground, *inter alia*, that P was not a creditor as it could not bring itself within the definition of "eligible transferee" as defined in the Agreement, and so there could be no valid assignment of the loan. Both applications were dismissed (see [2005] 3 HKLRD 16) and this was an appeal against that decision.

G

H

I

J

Held, dismissing the appeal, that:

(1) The traditional basis in Hong Kong for the appointment of provisional liquidators under s.193, namely that there had to be a showing of assets in jeopardy, still had direct application. Further, the wording of s.193 was very clear; the appointment of a provisional liquidator had to be for the purposes of the winding-up. Provided that those purposes existed there would be no objection to extra powers being given to the provisional liquidator *(Re Keview Technology (BVI) Ltd* [2002] 2 HKLRD 290, *Re Luen Cheong Tai International Holdings Ltd* [2003] 2 HKLRD 719 considered). (See pp.201D–203I.)

(2) There was still a significant difference between: (a) the appointment of provisional liquidators on the basis that C was insolvent and that its assets were in jeopardy, which was permissible; and (b) the appointment of the provisional liquidator solely for the purpose of enabling a corporate rescue to take place, which was not. (See p.203G–I.)

(3) Here, the appeal against the decision on the Application would be dismissed. There was no basis for disturbing the decision of the Court below as the protection of assets basis for the appointment of provisional liquidators had not been made out; the assets of C were not shown to be in jeopardy (*Securities & Futures Commission v Mandarin Resources Corp Ltd & Another* [1997] HKLRD 405, *Re Luen Cheong Tai International Holdings Ltd* [2003] 2 HKLRD 719, considered). (See pp.197B–E, 201G–H.)

(4) In addition, the appeal against the decision on the Striking-out Application would be dismissed. First, the Agreement defined "eligible transferee" as "any bank, deposit taking company or other financial institution". The terms of the Agreement and the significance of its provisions read in context necessitated the words "financial institution" being given their ordinary meaning. There was no reason why the financial institution involved had to be restricted to a bank or deposit taking company. All that was required was that it had to be an entity capable of lending money of the appropriate amount; there was no requirement that the principal activity of the "transferee" had to be the provision of finance in the primary lending market (*Argo Fund Ltd v Essar Steel Ltd* [2004] EWHC 128 applied). (See p.198E–J.)

(5) It was clear that P was capable of lending money in the ordinary course of its business, albeit primarily involved with buying distressed debt in the secondary debt market. The fact that it was not entitled under the laws of the state of its incorporation, namely Delaware, to conduct banking business, did not hinder its money-lending ability. (See p.196D–F.)

(6) Second, as to whether or not P's petition was an abuse of process, the true question was "whether the petitioner indeed seeks a winding-up order". The fact that P might have been content

with a reconstruction of C, or some other arrangement, did not mean that if all else failed it would not ultimately seek a winding-up order. It was only if it were the intention of P never to seek a winding-up order that the matter of abuse would assume importance. In any event, if P chose not to pursue a winding-up order when the time came, the ultimate outcome would be that the petition would be dismissed with costs against P. (See pp.199J–200C.)

Appeal

This was an appeal against two applications rejected by S Kwan J on 5 June 2005 (see [2005] 3 HKLRD 16). The first application was a summons issued by the petitioner for the appointment of provisional liquidators to C, pursuant to s.193 of the Companies Ordinance (Cap.32). The second application was a summons issued by the respondent-company C to strike out a winding-up petition. The facts are set out in the judgment.

Mr Michael Crystal QC and Mr Charles Manzoni, instructed by White & Case, for the petitioner.
Mr Barrie Barlow and Mr William Wong, instructed by Richards Butler, for the respondent.

Legislation mentioned in the judgment

Companies Ordinance (Cap.32) ss.58, 59, 166, 166A, 192, 193, 193(1), 193(2), 193(3), 194(1), 199, 199(1)(b), 199(1)(e)
General Corporations Law [USA (De)] s.126

Cases cited in the judgment

Argo Fund Ltd v Essar Steel Ltd [2005] EWHC 600, [2006] 1 All ER (Comm) 56, [2005] 2 Lloyd's Rep 203
Argo Fund Ltd v Essar Steel Ltd [2004] EWHC 128
Keview Technology (BVI) Ltd, Re [2002] 2 HKLRD 290
Luen Cheong Tai International Holdings Ltd, Re [2003] 2 HKLRD 719
Securities & Futures Commission v Mandarin Resources Corp Ltd & Another [1997] HKLRD 405, [1997] 2 HKC 166

Rogers V-P

1. This is an appeal from a judgment of S Kwan J given on 6 June 2005. The Judge had before her two applications. The first was an application on the part of the petitioning creditor, Morgan Stanley Emerging Markets Inc (the petitioner) for the appointment of the provisional liquidators of Legend International Resorts Ltd (the Company). The second application was a summons issued by the Company to strike out the winding-up petition on the grounds that

A it disclosed no reasonable cause of action, it was scandalous, frivolous or vexatious or an abuse of the process of the court.

2. The Judge dismissed the application to strike out the petition but refused the appointment of provisional liquidators. At the conclusion of the hearing of this appeal, judgment was reserved which we now B give.

Background

3. The Company is a Hong Kong company with nominal capital of C $120 million and a paid-up capital of $115,954,000. Almost 60% of the shares of the Company are held by Metroplex Berhad (Metroplex), a Malaysian company which is listed on the Kuala Lumpur stock exchange. 40% of the Company's shares are held by Sinophil Corp, which is incorporated in the Philippines and listed on the Philippine D Stock Exchange. Metroplex holds 22% of Sinophil. As recorded in the judgment, steps are being put in train for Metroplex to take over the shareholding held by Sinophil.

4. The Company's business consists of the operation of a casino in Subic Bay in the Philippines. The premises are leased from the Subic E Bay Municipal Authority (SBMA). According to the audited accounts of the Company, the Company has made losses in each of the last six years commencing with the year ended 31 January 2000. Those losses have been in excess, and in some years greatly in excess, of $100 million per year.

F 5. The operation of the casino in Subic Bay is under a licence from the Philippine Amusement and Gaming Corp (Pagcor). It is the Company's position that it holds an exclusive licence to operate such a casino.

6. In July 1997 the Company entered into a facility agreement. G The Société Générale Asia (Singapore) Ltd was the coordinating arranger and agent of what was in effect a syndicated loan. There were a number of financial institutions that were the lenders. The facility agreement provided for a revolving credit facility of up to an aggregated principal amount of US$33 million. A year later, in July 1998, the H Company defaulted on the repayment of advances under the facility agreement and in respect of the interest which had accrued and other outstanding amounts. Naturally, this constituted an event of default under the terms of the facility agreement. In December 1999 Société Générale Asia served a written demand for payment within ten days I of the total amount then owing, which was US$26,375,450.93. This was, but one symptom of the financial difficulties into which the Company and Metroplex had fallen.

7. In December 2000 Metroplex had sought assistance from the Corporate Debt Restructuring Committee in Malaysia but, eventually, J that route had proved to be unfruitful. As set out in the judgment below Metroplex endeavoured to solve its financial difficulties by

seeking an order for a scheme of arrangement. In the course of the applications in Malaysia to restructure Metroplex, draft scheme documents in respect of the Company were exhibited as part of that endeavour. That endeavour also seems to have proved unfruitful and the majority of the creditors did not support the proposed scheme. One matter which emerged from the scheme documents was that Metroplex owed the Company some US$151,708,107.

8. The petitioning creditor is a Delaware company incorporated under the provisions of the General Corporations Law of Delaware. It would seem that its business comprises of, or includes in a major respect, the acquisition of distressed debt in the secondary debt market. Although the law of Delaware does not prevent it from lending money for its corporate purposes, s.126 of the General Corporations Law of Delaware provides that:

> Banking power denied.
>
> (a) No corporation organized under this chapter shall possess the power of issuing bills, notes, or other evidences of debt for circulation as money, or the power of carrying on the business of receiving deposits of money.
>
> (b) Corporations organized under this chapter to buy, sell and otherwise deal in notes, open accounts and other similar evidences of debt, or to loan money and take notes, open accounts and other similar evidences of debt as collateral security therefore, shall not be deemed to be engaging in the business of banking.

9. The petitioner has filed specific evidence that it does make loans and buy and sell loans and, as such, contends that it is indeed a financial institution conducting what is commonly referred to as investment banking.

10. As part of its ordinary business the petitioner had, prior to the presentation of the petition, acquired the debt previously owed to Keppel Bank of Singapore Ltd which was part of the syndicated loan referred to above.

11. This petition was presented on 3 November 2004. Two days later the Company filed a petition in the local court in the Philippines for corporate rehabilitation, that has been referred to as the Rehab Petition. The Rehab Plan annexed to the Rehab Petition closely followed the draft scheme document which had been exhibited to affidavits in Malaysia. As part of the proposal for reconstruction, it dealt with the debt owed by the Company to Metroplex and the debt owed as part of the syndicated loan. It did not deal with either of the debts which were owed to SBMA or Pagcor. The allegation is that the Company owes SBMA an amount which is equivalent to more than the US$13 million and Pagcor an amount which is equivalent to more than US$4 million.

A 12. When the petition was presented, the petitioner sought the appointment of provisional liquidators. The application for the appointment of provisional liquidators was expressed to be in conjunction with an application in Malaysia for appointment of provisional liquidators in respect of Metroplex. In relation to those B proceedings it need only be said that the petitioner had presented a petition to wind up Metroplex but that petition has not been pursued.

13. The basis upon which the application for the appointment of provisional liquidators was made was that they should be empowered to explore a restructuring scheme for the Company. It was said that C although the business of the Company was such that there was scope for producing value to the creditors it was not in the best interests of the creditors that the restructuring process should remain in the hands of the then current management. Although it was suggested that the amount which the Company's casino derived as revenue based on the D number of seats at the gaming tables and slot machines was considerably less than might be expected and also that there had been dealings with other companies all of which could be the subject of investigations by the provisional liquidators, it was not overtly suggested or said that the assets of the Company were in jeopardy. Certainly that was not E the basis on which the application for appointment was made.

The hearing of the applications in the court below

14. On the hearing of the applications in the court below the F Company sought to strike out the petition on the basis that the petitioner was not a creditor of the Company since it was not entitled to take an assignment of the loans under the syndicated loan. The point which was raised was that the petitioner did not come within the meaning of an "Eligible Transferee" as used in the facility G agreement and defined in cl.1.01 thereof. The Judge dismissed that contention and held that the petitioner did have *locus* to present a winding-up petition.

15. The second basis for seeking to strike out the petition was that it was said that the presentation of the winding-up petition was H an abuse of the process because the petitioner's predominant purpose was to be able to obtain control of the Company's administration. It was also said that the petition had been presented not to achieve a winding-up but in order to have provisional liquidators appointed with a view to proferring a scheme of arrangement. The Judge was not I satisfied that there had been any abuse of the winding-up procedure, remarking that the petition should only be struck out in plain and obvious cases.

16. With regard to the appointment of provisional liquidators the Judge observed that she did not consider that the protection of assets J basis for the appointment of provisional liquidators had been made out. Indeed, it would appear that the application for the appointment

of provisional liquidators had initially been put, not upon the basis that there was a requirement for the protection of the assets which might be in jeopardy but that the provisional liquidators should be appointed for the purpose of exploring, formulating and pursuing a corporate rescue. In this respect, although the Judge said at para.92 that the Court had jurisdiction to appoint provisional liquidators to explore, formulate and pursue a corporate rescue, she went on to hold that the circumstances did not warrant such an application at that time, although the Judge clearly left open the possibility of a further application being made at a later time.

This appeal

17. On this appeal Mr Barlow, who appeared on behalf of the Company, argued that the petition should be struck out for the same reasons as he had argued in the court below. At the hearing, this Court indicated that it did not consider that the petition should be struck out albeit no order was made immediately.

18. The argument that the petitioner was incompetent to present a creditor's winding-up petition was on the basis that it could not take a valid assignment of the rights of a lender under the facility agreement. The point at issue was whether the petitioner could bring itself within the definition of "Eligible Transferee". In the facility agreement that was defined as meaning "any bank, deposit taking company or other financial institution, wherever incorporated, duly authorised to carry on its business and to participate in the facility".

19. The substance of the point was that the facility agreement was a "revolving credit" facility. The Company was entitled to request the making of an advance during the period of the agreement and even if money were repaid the Company was entitled to request further advances. It was thus said that the identity of any lender was of significance because the lender had to be in a position whereby it could provide the various loan amounts as and when required. The argument thus ran that the definition of Eligible Transferee had to be read in the context of the Transferee being in the nature of a bank.

20. In this regard reliance was placed by Mr Barlow on the decision of Steel J in *Argo Fund Ltd v Essar Steel Ltd* [2004] EWHC 128. However that was a decision on a summary judgment application where, of course, the court had to be satisfied that there was no viable argument. That case had been tried later by Aikens J. His decision is reported in *Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600. In my view, considerable care has to be taken in considering the judgment in relation to the present case. Whereas "Transferee" was defined in the relevant agreement as meaning a bank or other financial institution and Aikens J held after a trial that the plaintiff in that case did constitute a financial institution, it must still be borne in mind that he did so in the context of the particular contract which he was considering. His

A reasoning turned upon the fact that financial institution in the terms of that contract meant an entity which was capable of lending money. In doing so he rejected the argument that in that case the requirement was that the principle activity of the transferee had to be the provision of finance in the primary lending market.

B 21. In my view, the assistance to be derived from the reasoning in that case as regards this case is the importance of considering the terms of the particular contract and the significance of the provision. It was emphasised that the definition in the present contract was that the Transferee should be a bank, deposit taking company or other C financial institution and it was said that the words financial institution should be restricted to an entity which was similar to a bank or deposit taking company. In my view, the words financial institution still should be given their ordinary meaning. There is no apparent reason emerging from a consideration of the facility agreement why the financial D institution involved should be restricted to a bank or deposit taking company. It would have to be an entity which was capable of lending money of the appropriate amount. Over and above that I see no warrant for restricting the term Eligible Transferee any further.

22. On the evidence filed in this case, it is clear that the petitioner E does lend money in the ordinary course of its business and although it is primarily involved with buying distressed debt in the secondary debt market, it is capable of and does lend money. The fact that it is not entitled under the laws of the state of its incorporation, namely Delaware, to conduct banking business, does not prevent it from F lending money and on the basis of the evidence and arguments that have been presented to-date, I have no doubt that the petitioner does come within the definition of Eligible Transferee.

23. This Court was made fully aware that some two months, or slightly more, after the presentation of the petition the Company issued G proceedings in the Commercial Court in London seeking a declaration that there had been no effective transfer by way of novation of the debt to the petitioner. In doing so, the Company relied upon the fact that the facility agreement was to be governed by and construed in accordance with the laws of England although under cl.23.02 of H the facility agreement the parties irrevocably submitted to the non-exclusive jurisdiction of the courts of Hong Kong and England. The commencement of those proceedings could hardly be suggested to lead to an acceleration of the resolution of the challenge to the ability of the petitioner to present the petition. Rather, the commencement I of those proceedings and the refusal of the petitioner to accept service of those proceedings without formal orders, has, if anything, led to yet further prolongation of the litigation of the disputes between the parties.

24. With regard to the case presented on the basis that the petition J was an abuse of process, it would seem that there are arguments which could be made. The ultimate question must nevertheless be as to

whether the petitioner indeed seeks a winding-up order. The fact that a petitioner might be content with a reconstruction of the Company or some other arrangement does not mean that, if all else fails, the petitioner will not seek a winding-up order. If it were the intention of the petitioner never to seek a winding-up order then the matter of abuse would be of significance. It would seem, however, that if a petitioner chooses not to pursue to seek a winding-up order when the time comes, the ultimate outcome would be that the petition would be dismissed with costs against the petitioner. The net effect is similar, therefore, to that if the petition is struck out at an early stage. The major difference is one of timing.

The appointment of provisional liquidators

25. The power to appoint liquidators is contained in s.192 of the Companies Ordinance (Cap.32). That provides:

> For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators, provisionally or otherwise, in accordance with ss.193 and 194.

26. Section 193 relates to the appointment and powers of provisional liquidators and s.194(1) relates to the appointment of liquidators but where a winding-up order is made. Section 193(1) provides that the court can appoint a liquidator provisionally at any time after the presentation of a petition and sub-s.(2) provides that the appointment may be made at any time before the making of a winding-up order. Subsection (3) gives the court power to limit or restrict the powers of the provisional liquidator in the order appointing him. That, no doubt, is a reference to the powers of the liquidator which are dealt with generally in s.199. Those powers are specifically made subject to s.193(3). Generally speaking the powers under s.199 are directed to an orderly winding-up of the Company and the eventual dissolution of the business. There is a power given under s.199(1)(b) for the liquidator to carry on the business of the Company, but even then there is a specific limitation that that may only be done in so far as it may be necessary for the beneficial winding-up of the Company. Section 199(1)(e) provides that the liquidator may compromise or make an arrangement with creditors or persons claiming to be paid as creditors and taken together with the provisions of s.166 it is clear that the liquidator is given power to apply to the court for a scheme of arrangement.

27. Traditionally the primary object of appointing a provisional liquidator has been regarded as the need to maintain the status quo and to prevent anybody from obtaining priority over other creditors. The appointment was not only provisional but contingent. The

appointment was made where it was clearly shown that the Company was insolvent, either by admission by the Company itself or upon other evidence. The purpose of the appointment was to protect the assets of the Company and hence some danger to the assets, not limited to malfeasance, had to be shown.

28. Recently there has developed a practice in England that provisional liquidators could be appointed in respect of insurance companies even if it could not be shown that there was jeopardy to the assets. The reason for the development of that practice lay in the fact that the insurance policies themselves might have otherwise lapsed. Whilst holders of insurance policies might not be creditors, they were in a position when they might become creditors.

29. In Hong Kong Madam Justice Yuen in the case of *Re Keview Technology (BVI) Ltd* [2002] 2 HKLRD 290 extended the powers of the provisional liquidators in order to enable a corporate rescue to be explored. It is important to note, however, that the provisional liquidators had been appointed, in the first place, because there was a threat of disruption of the factory and seizure of stock by unpaid employees and other creditors. There is thus no doubt that the traditional basis for the appointment of provisional liquidators had been made out. The Judge said in para.19:

> It might be thought paradoxical to extend powers to provisional liquidators to attempt to save the company, when they were appointed upon the presentation of a petition to wind it up. However, the Court retains a discretion whether to order a company to be wound-up, and so long as the petitioner did have *locus* to present the petition and intends to seek a winding-up order if the rescue attempt should fail, I do not see any jurisprudential objection to empowering provisional liquidators to proceed along rescue lines at least in a case such as the present.

30. In doing so the Judge observed that it was not the role of the court to legislate and the court could only operate within the existing framework of the law. That approach was adopted by this Court in the case of *Re Luen Cheong Tai International Holdings Ltd* [2003] 2 HKLRD 719. In that case at first instance the Judge had observed at para.29:

> In *Keview*, it was held by Yuen J (as she then was) that there is no jurisprudential objection in extending the powers of provisional liquidators appointed under s.193 of the Companies Ordinance to carry out a corporate rescue role. It seems to me a logical extension of *Keview* that if provisional liquidators may be empowered by the court to facilitate a restructuring proposal, this recognised function of the provisional liquidators could provide the rationale for appointing them in the first place.

31. It was in that context that this Court whilst dismissing the appeal felt it necessary to say in para.12: A

> The Judge below referred to decisions in which similar orders had been made in circumstances where administration orders were not available. In particular, the Judge referred to the decision in *Re Keview Technology (BVI) Ltd* [2002] 2 HKLRD 290 where the application had the support of 100% of the company's outside creditors. In that case Yuen J (as she then was) held (at para.19) that there was no jurisprudential objection to extending the powers of provisional liquidators in order to enable a corporate rescue to take place provided that a winding up order would be sought should the rescue attempt fail. Once it has *been established* that the grounds for the appointment of provisional liquidators exist on the basis that it is likely that a winding up order would be made *and that circumstances exist which justify the making of the appointment on the basis of the protection of assets*, the fact that the applicant for the appointment wishes that the provisional liquidators be granted powers to facilitate a restructuring of the company can be no bar to the appointment and is not intrinsically objectionable. Whether such powers should be granted and the scope of those powers including any restrictions would depend on the particular circumstances such as the support of the creditors. (Emphasis added.)

B C D E

32. In the meantime, it appears that before the appeal in *Re Luen Cheong Tai International Holdings Ltd* [2003] 2 HKLRD 719 had been heard, other courts at first instance had, at least indicated, that appointment of provisional liquidators could be made on the basis that a corporate rescue should be explored without reference to the question as to whether the assets were in jeopardy. This ultimately led to the bald statement in para.92 of the judgment below which was as follows: F G

> I hold that it is within the jurisdiction of the court to appoint provisional liquidators to explore, formulate and pursue a corporate rescue.

H

33. In my view, the court should not attempt to extend the statutory law albeit for expediency. The appointment of provisional liquidators is a statutory power given to the court. It is not a common law power which can be extended, as in the case of the development of the law in relation to *Mareva* injunctions and *Anton Piller* orders. As Madam Justice Yuen observed in the *Re Keview Technology (BVI) Ltd* [2002] 2 HKLRD 290 case it is not the function of the court to legislate. In the Report on Corporate Rescue and Insolvent Trading by the Law Reform Commission of Hong Kong published in October 1996, recommendation was made for the introduction of a law which would I J

A enable corporate rescues to take place far more conveniently than at present. Even now, nearly 10 years later, no such law has been enacted. It is not appropriate for this Court to examine the reasons why no such law has been introduced. The fact of the non-introduction is, nevertheless, indicative that it is not a straight forward matter in respect B of which there are no differences of views as to its desirability or what the provisions of any such law should be.

34. The rationale of corporate rescues is that, if successful, there is almost certainly likely to be a better return to creditors and also shareholders than if the particular company went into liquidation. C Overseas, there have been a number of successful corporate rescues but there have been an equal or perhaps greater number when rescue has failed. In Hong Kong, there have also been some very high profile successful corporate rescues. Nevertheless, whether a law should be introduced remains a matter of policy for the administration and the D legislature. Amongst other things, any such law has to cater for the rights of secured creditors, in respect of both fixed and floating charges; it normally has to cater for the need for there to be further borrowing, in practice thus necessitating giving the lenders in respect of any new loans what has been called super priority. The position of directors E also needs to be catered for. Major difficulties can arise in respect of insolvent trading and the liability of the relevant person(s), namely, for example the provisional supervisor has to be limited. Some of the relevant matters dealt with in the Report and in overseas corporate rescue legislation are matters of policy. Not least amongst these are F the rights of the employees and the effect introduction of a corporate rescue regime would have on their rights both under contract and under other legislation.

35. The law on the appointment of provisional liquidators at present is contained in s.192 and the following sections and it is clear G on the wording of those sections that the appointment of a provisional liquidator must be for the purposes of the winding-up. Provided that those purposes exist there is no objection to extra powers being given to the provisional liquidator(s), for example those that would enable the presentation of an application under s.166. There is, H nevertheless, a significant difference between the appointment of provisional liquidators on the basis that the Company is insolvent and that the assets are in jeopardy and the appointment of the provisional liquidators solely for the purpose of enabling a corporate rescue to take place. The difference, may, in most cases, be merely a matter of I emphasis, but in the final analysis the difference exists.

36. Another way of putting the same point is that a scheme of arrangement may well be a viable alternative to winding-up. If it proves to be so, the winding-up will cease and the scheme will take effect. The power of the court under s.192 is to appoint a liquidator J or liquidators for the purposes of the winding-up not for the purposes of avoiding the winding-up. Whatever benefits may be said to arise

and however convenient it may be said to be for the court to be able to appoint provisional liquidators for other purposes it seems to me that the primary purpose of appointing provisional liquidators must always be the purposes of the winding-up. Restructuring a company is an alternative to a winding-up.

37. I would only make one further observation in this respect that is in relation to the case of *Securities & Futures Commissioner v Mandarin Resources Corp Ltd & Another* [1997] HKLRD 405. It is suggested in the written submissions of the petitioner that that case is authority for the proposition that provisional liquidators may be appointed to investigate the affairs of a company. Having re-read my own decision at first instance and that of the Court of Appeal I find it difficult to understand how it can be suggested that the appointment of provisional liquidators in that case was other than to protect the assets which were shown to be likely to be in real jeopardy.

38. In the judgment below in this case, the Judge came to the conclusion, as already observed, that the protection of assets basis for the appointment of provisional liquidators had not been made out. She did so on the basis that there had been appointed a rehabilitation receiver in the Philippines who, every three months, was required to report to the court there on the general condition of the Company. In the context of the situation which existed at the date of the hearing of the application before the Judge below, it appeared that the Rehab proceedings were not merely on going but were potentially viable. Furthermore the Court was presented with a situation where none of the other creditors had supported the application for the appointment of provisional liquidators. On this appeal evidence was admitted as to what had taken place since the hearing in the Court below. Amongst other matters it now appears that all the debts comprised under the loans of the facility agreement are now either owed to the petitioner or Avenue Asia Special Situations Fund III, LP (Avenue Asia). The fact that Avenue Asia might be taking over some of those loans apparently became known to the Judge after the hearing in the Court below and before the written decision was handed down. Nevertheless, at that stage there had been no confirmation that the transfer had taken place.

39. The appeal was presented primarily on the ground that it was necessary to appoint provisional liquidators for the purpose of entering into discussions with relevant parties, particularly the petitioner and Avenue Asia and the other remaining creditor under the Facility Agreement, Ta Chong Bank Ltd, Taiwan, to explore the feasibility of restructuring The Company pursuant to a scheme of arrangement under s.166. It may be noted that it was only after counsel had been questioned by the court as to whether the petitioner's case was that provisional liquidators were necessary for the purpose of preservation of assets that Mr Crystal QC, who appeared on behalf of the petitioner, began to argue a case on that point in his reply speech.

A 40. When asked as to the exact terms of the order which was sought, Mr Crystal later produced a proposed draft order. The first order was limited to the provisional liquidators taking possession of the assets and property of the Company in Hong Kong. It may be noted that it has not been shown that there are any other assets in B Hong Kong other than the statutory books and records, assuming those are here.

41. In addition to calling an informal meeting of creditors and formulating a scheme, the draft order also included giving power to the provisional liquidators to take such steps as they may be advised C in the Philippines whether in the court or with the Rehab Receiver but only after further leave from the court had been obtained.

42. On the basis of the matter as it was before the Judge I do not consider that there are grounds for disturbing her decision. The Judge came to the conclusion that the assets of the Company were not in D jeopardy and although it was considered that there was power in the court to appoint provisional liquidators simply for the purpose of pursuing a corporate rescue, the Judge considered it was not then appropriate particularly in the light of the proceedings than being undertaken in the Philippines.

E 43. On the basis of the evidence before the Judge and the circumstances that existed at the time, I do not consider that it can be said that the Judge fell into error. In those circumstances this Court must be extremely wary of interfering. The Judge was exercising her discretion. Unless there are grounds for holding that the discretion was F exercised wrongly, this Court cannot interfere simply because it might have exercised the discretion another way. Moreover, if circumstances have changed since the hearing below, that may be grounds for the making of a new application to the Judge but not for allowing an appeal. As already noted, however, the Judge specifically had in mind G that the circumstances might change and that then there might be grounds for appointing provisional liquidators.

44. This Court was informed that the matter would be referred back to the Judge within two weeks of the judgment of this court. It appears to me that it is far more suitable for the Judge to be able to H reconsider the matter than for this Court to do so, even if it were open to this Court to interfere with the exercise of the Judge's discretion whether to appoint provisional liquidators.

45. In the first place it seems to me that this Court would be asked to act on a different factual basis to that which the Judge addressed. I To that extent Mr Barlow's point that this Court was being asked to exercise first instance jurisdiction has validity. It is particularly undesirable for this Court to be asked to appoint provisional liquidators in a situation where it is clearly envisaged that there will have to be substantial monitoring of the role of the liquidators. This is all the J more so where the appointment of the provisional liquidators is very much a matter of discretion based upon the Court's assessment of

what is achievable and what is not. Part of the reason for seeking the appointment of provisional liquidators is that it will give the provisional liquidators status to apply to the courts in the Philippines and to deal with the Rehab Receiver. No evidence has yet been given that those ends would be accomplished even if provisional liquidators were appointed.

46. If a new application were to be made to the Judge, there would appear to be grounds for suggesting that there have been material changes in the circumstances. In particular, it would appear that the proposed rehabilitation plan presented on 4 November 2004 was now no longer viable. The proposed plan appears to have envisaged two schemes of arrangement. They are expressed to have been under s.166A of the Ordinance but that was probably a mistake for s.166. Nevertheless, Mr Barlow argued that the reduction of capital could be effected under s.58 of the Ordinance and that approval of creditors was not required and creditors could not have opposed under the terms of s.59. That may be correct but the proposed reduction in what was termed the Sch.B whereby the creditors under the facility agreement would have their loans restructured in a major way would no longer appear to be viable.

47. On the assumption of the applicability of the rules relating to the proposed Rehab Plan, which both parties appeared on this appeal to accept as being the relevant rules, any modification of the proposed Rehab Plan had to be submitted to the court not later than one year after the date of the initial hearing. That date has passed and, indeed, the 18-month period, which appears to be non-extendable, for approving of disapproving the rehabilitation plan is fast approaching in May.

48. The Company appears still to be running at a loss, despite the optimistic view of the Rehab Receiver that, if the bulk of the expenses of the Company are ignored, there may have been a surplus over the last six months. What is perhaps particularly relevant is that the audited accounts which have been obtained in respect of the last two years have been so heavily qualified by the accountants that they could scarcely be said to be worth the paper they are written on. That is so even taking into account that they show that the Company was running at a loss. Once it is appreciated that the Company is running the casino on a day-to-day basis there are, probably, grounds for suggesting that some creditors may be being preferred to others. There, thus, may well be legitimate grounds for arguing that the assets of the Company are in jeopardy.

49. Even if it were established that the assets of the Company were in jeopardy it would be necessary for the court to consider whether the appointment of provisional liquidators would serve any useful purpose. From the point of view of the protection of assets the difficulty arises that there is a Rehab Receiver in place still in the Philippines and it is no by no means clear as to what effective steps can be taken

A by provisional liquidators in respect of those assets. To-date neither the Rehab Receiver nor the court in the Philippines has acknowledged the rights of the petitioner. It may well be that even after this judgment, they may not be prepared to deal with the petitioner, or anybody appointed on the petitioner's application, unless and until the matter B has been resolved in the Commercial Court. In this context, it is also relevant that the order sought in this court did not encompass giving the provisional liquidators any power or authority over the assets of the Company, other than the normal assets, namely, the books and records of the Company.

C 50. If the appointment of provisional liquidators cannot be shown to be likely to achieve any beneficial effect as regards the preservation of the assets of the Company the purpose of appointing provisional liquidators becomes problematic.

51. I would also add that it is by no means clear as to what scheme D could be proposed by provisional liquidators. Without the cooperation of Metroplex, the financial creditors, namely, primarily the petitioner and Avenue Asia, would appear unlikely to be able to propose any plan which could save the Company. In those circumstances it may well be that the only viable course is for the petitioner to press for a E winding up. Indeed, it would appear to be rather surprising that the petition has been allowed to linger for so long. There is no doubt as to the insolvency. On the face of the evidence which is now before the court, the petitioner's *locus* appears clear. It is by no means apparent as to what evidence in that respect the Company F can now adduce. In my view, as in all other cases of winding up petitions, the court should take control of the proceedings and not permit adjournments and delays unless strictly necessary.

Le Pichon JA

G 52. I agree.

Rogers V-P

53. The appeals are therefore dismissed with an order *nisi* of costs in favour of the respondents to the respective appeals.

Re FDG Electric Vehicles Ltd

[2020] HKCFI 2931

(Court of First Instance)

(Miscellaneous Proceedings No 1308 of 2020)

Harris J in Chambers

3, 19 November 2020

Company law — winding-up — foreign company — application by provisional liquidators for order of recognition and assistance — order limited to assets in Hong Kong so powers under order to control company's subsidiaries limited to those incorporated in Hong Kong — stay of proceedings in Hong Kong should not be imposed in terms of order but required separate application

Conflict of laws — corporations and corporate insolvency — order for recognition and assistance — application by provisional liquidators of foreign company — scope of order

公司法 — 清盤 — 外地公司 — 臨時清盤人申請認可和協助令 — 命令限制於香港的資產，因而命令下控制公司的子公司的權力則限制在香港註冊的公司 — 不應於命令的內容施加擱置在香港的法律程序而是需要有分開的申請

法律衝突 — 法團及法團破產 — 認可和協助令 — 外地公司臨時清盤人提出的申請 — 命令的範圍

C had been put into provisional liquidation in Bermuda where it was incorporated. The joint and several provisional liquidators (PLs) applied for an order of recognition and assistance in Hong Kong. A Bermuda-incorporated subsidiary of C (S) owned through the British Virgin Islands (BVI) subsidiaries opposed the scope of assistance sought. The Court considered: (i) whether the order should contain a paragraph giving the PLs the power to take control of all directly and indirectly owned subsidiaries of C; and (ii) whether a stay should be ordered regarding existing or prospective proceedings against C in Hong Kong.

Held, granting an order of recognition of the PLs' appointment and assistance to the extent as set out below, that:

(1) The PLs' power under the order to take control of subsidiaries should be limited to those which were incorporated in Hong

Kong and held either directly or, if indirectly, through Hong Kong incorporated intermediate subsidiaries. Allowing the foreign liquidator to take control of C's assets in jurisdictions other than Hong Kong would amount to impermissible judicial overreach. The application overlooked that the scope of the PLs' powers were governed by the law of Bermuda, and whether the PLs were able to obtain control of the BVI subsidiaries which owned S was a matter of BVI law, not Hong Kong law (*Chen Lingxia v 中國金谷國際信託有限責任公司* [2019] HKCFI 379, [2019] HKEC 416, *Re Shenzhen Everich Supply Chain Co Ltd* [2020] HKCFI 965, [2020] HKEC 1188, *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187 considered). (See paras.2–3, 6.)

(2) The recognition order to be granted in the present case and which this Court would be amenable to granting in the future should be drafted in terms which required appropriate applications in High Court proceedings to be issued and returnable before the Judge granting the recognition order. (See para.7.)

(3) (*Obiter*) The common law power of assistance in the form of a stay existed to assist collective insolvency processes. Whilst the courts had found that the common law principles supported assisting a soft-touch provisional liquidation, this did not mean the courts had accepted that a foreign soft-touch provisional liquidation was for all purposes to be treated as a collective insolvency process. It was not clear whether a stay could be justified if the foreign proceedings had a different character. Further consideration would be required if a stay was sought (*Rubin v Eurofinance SA* [2013] 1 AC 236, *Joint Official Liquidators of A Co v B* [2014] 4 HKLRD 374, *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd* [2019] HKCFI 805, [2019] HKEC 945, *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187 considered). (See paras.11–12, 14.)

(4) (*Obiter*) Given that the discharge or compromise of liabilities under a contract was governed by the law of the contract as established by the English Court of Appeal (the Rule in *Gibbs*), the fact that a foreign incorporated company was subject to a foreign collective insolvency process would not prevent a Hong Kong creditor from attempting to establish a right to payment in Hong Kong, and a stay should not be granted in such circumstances. The circumstances in which the Rule in *Gibbs* might be qualified to a limited extent by permitting assets within the jurisdiction to be remitted to a foreign liquidator would require careful consideration if the issue

arose. This was a further reason why it would be wrong for the court to make orders staying proceedings other than as a result of an application to the court for an order at which the party affected would have the opportunity to argue the alternative (*Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, *Re OJSC International Bank of Azerbaijan* [2019] BCC 452 considered). (See paras.14–15.)

Application

This was the application by the joint and several provisional liquidators of the subject company in provisional liquidation in Bermuda for an order of recognition and assistance.

Mr Tom Ng, instructed by Wilkinson & Grist, for the applicants.
Mr Look Chan Ho, instructed by Michael Li & Co, for FDG Kinetic Ltd (in HCCW 106/2020) and the 12th defendant (in HCA 562/2020).
Attendance of CY Lam & Co, for the 1st defendant (in HCA 276/2020), was excused.
Attendance of Johnnie Yam, Jacky Lee & Co, for the 2nd defendant (in HCA 276/2020) and the plaintiff (in HCA 562/2020), were excused.

Legislation mentioned in the judgment

Bankruptcy Code [United States] Chapter 15
Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) s.193

Cases cited in the judgment

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Winsway Enterprises Holdings Ltd, Re [2017] 1 HKLRD 1
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Other material mentioned in the judgment
UNCITRAL Model Law, art.20

REASONS FOR DECISION

Harris J

The application

1. FDG Electric Vehicles Ltd (**Company**) has been put into provisional liquidation in Bermuda where it is incorporated. The Joint and Several Provisional Liquidators (**PLs**) applied in writing for an order of recognition and assistance. As there were a number of matters arising from the form of the order that was sought about which I had questions I directed that a hearing take place. At the hearing an opposing subsidiary (FDG Kinetic Ltd) appeared through Mr Look Chan Ho to address some of the matters about which I had questions. There is no suggestion that the PLs should not be recognised and some assistance granted. The two issues, which require consideration are as follows:

(a) Should the order contain a paragraph, which on its face gives the PLs the power to take control of all directly and indirectly owned subsidiaries of the Company?
(b) What, if any, stay should be ordered in respect of existing or prospective proceedings against the Company in Hong Kong?

2. As it transpired there was no issue in respect of the first matter as Mr Tom Ng, who appeared for the PLs, accepted Mr Ho's submissions that the power to take control of subsidiaries should be limited to those which are incorporated in Hong Kong and held

either directly or, if indirectly, through Hong Kong incorporated intermediate subsidiaries. The reason for this is as follows.

What assets can a foreign liquidator be empowered to take control of?

3. When the court recognises foreign corporate insolvency proceedings, the court may permit the foreign liquidator to take control of the Company's assets in Hong Kong. This will extend, if relevant, to shareholdings in Hong Kong incorporated companies. It appeared initially that the PLs were seeking the power to take control of subsidiaries incorporated in other jurisdictions such as Bermuda. Mr Ho characterised this as being akin to asking the court to empower a foreign liquidator take control of the Company's bank account in another jurisdiction, which would be impermissible judicial overreach. I agree.

4. The assumption that an order could be obtained giving a power to take control of subsidiaries without a jurisdictional qualification came, so it would appear, from my decision in *Re Shenzhen Everich Supply Chain Co Ltd.*[1] It is correct as can be seen from [2(vi)] that the express power did not contain any jurisdictional qualification. However, the power, which was sought was directed to Hong Kong subsidiaries (see [7] of the decision) and [2] of the order commences with "The Liquidator do have and may exercise in the Hong Kong Special Administrative Region the following powers".

5. This application as originally formulated seemed to envisage a power to take control of foreign incorporated subsidiaries and in so doing overlooked the significance of two conflict of laws rules. **First**, property and contractual claims to shares in a company should be determined by the *lex situs*, and shares have their situs in the place of incorporation of the company: *Chen Lingxia v 中國金谷國際信託有限責任公司.*[2] **Secondly**, the question of whether foreign liquidators are agents of the debtor company is governed by the law of a company's incorporation (*lex incorporationis*): *Re Moody Technology Holdings Ltd.*[3]

6. As originally formulated the application overlooked both that the scope of the PLs powers as representatives of the Company are governed by the law of Bermuda not Hong Kong law, and that the relevant Bermuda subsidiary is owned through the British Virgin Islands (**BVI**) subsidiaries. To take control of the Bermuda subsidiary thus involves taking control of the BVI subsidiaries. Assuming that the powers granted to the PLs extends to obtaining control of the BVI subsidiaries, whether the PLs are able to obtain control of the

1 [2020] HKCFI 965, [2020] HKEC 1188.
2 [2019] HKCLC 89, [2019] HKCFI 379, [17].
3 [2020] 2 HKLRD 187, [46].

BVI subsidiaries is a matter of BVI law not Hong Kong law. One can test this by considering what the BVI registrar of companies is likely to want to see if the PLs attempt to change ownership of shares in the BVI companies and register the changes.[4] It seems to me obvious that the BVI registrar of companies would be interested in the powers conferred by the order appointing the PLs in Bermuda. He would have no interest in the powers purportedly conferred on the PLs in Hong Kong.

Staying proceedings in Hong Kong

7. The recognition orders that have until recently been granted have contained a paragraph in the following terms: "*For so long as the Company remains in liquidation in [relevant jurisdiction], no action or proceedings shall be proceeded with or commenced against the Company or its assets or affairs, or their property within the jurisdiction of this Honourable Court, except with the leave of this Honourable Court and subject to such terms as this Honourable Court may impose*". This was intended to be in the nature of a case management provision, which would ensure that action would not take place in Hong Kong without the relevant parties being aware of the impact of the foreign insolvency proceedings and, if appropriate, a stay granted. However, I recognise that there are a number of questions that the order so worded gives rise to. **First**, that if (which was not the case with the initial orders that were granted) there are already proceedings on foot in Hong Kong, one would expect an application for a stay to be made in those proceedings. **Secondly**, whether or not it is appropriate to grant a stay in respect of unidentified prospective proceedings about which, necessarily, nothing is known. Both Mr Ng and Mr Ho agreed that the paragraph was more appropriately drafted in terms, which did not purport to impose a stay, but required appropriate applications in High Court proceedings to be issued and returnable before the Judge granting the recognition order. The order that I will grant in the present case, and be amenable to granting in the future, is as follows:

> If the Provisional Liquidators wish to apply for a stay or other directions in respect of proceedings in the High Court of any sort as a consequence of the recognition of their appointment by this order such application shall be listed before the Honourable Mr Justice Harris or such other judge as he shall direct. The Provisional Liquidators shall write to the clerk to the Honourable Mr Justice Harris seeking case management directions for the determination of any application that they wish to make pursuant to this order.

[4] This is explained in [39] of the decision of the Court of Final Appeal in *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501.

I note in passing that in a recent recognition and assistance decision in the Cayman Islands, Mr Justice Segal granted a similar order.[5]

8. This order does not assist if the proceedings are in the District Court. It may also commonly be the case that other parties and their legal advisers are not familiar with the law in this area. It will, therefore, be useful if I say something about the court's power to stay proceedings in Hong Kong in aid of foreign liquidations.

9. It is well established that the court has a power at common law to assist a foreign liquidation by ordering a stay of proceedings within its jurisdiction. This is explained by Lord Collins in [54] of his judgment in *Singularis Holdings Ltd v PricewaterhouseCoopers*:[6]

> Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33. They include (subject to what is said below) in *Re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction again a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corp* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency).

10. The underlying rationale for the common law power of assistance is modified universalism. I explain this in [10] of my judgment in *Joint Official Liquidators of A Co v B*,[7] **quoting from Lord Collins's judgment in *Rubin v Eurofinance SA*:**[8]

5 *Re China Agrotech Holdings Ltd* (FSD 157/2017, 19 September 2017), [41]. The critique in [40] does not apply to the present case in my view for the reasons explained later in this decision. *Agrotech* is unusual and reflects the common structure of Chinese business groups listed in Hong Kong. It involved provisional liquidators appointed in Hong Kong over a Cayman Islands company applying for recognition and assistance in the Cayman Islands.

6 [2015] AC 1675.

7 [2014] 4 HKLRD 374.

8 [2013] 1 AC 236.

[19] In *HIH* [2008] 1 WLR 852, para 30, Lord Hoffmann said:

> "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

And in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc (Cambridge Gas)* [2007] 1 AC 508, para 16 he said, speaking for the Privy Council:

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

[20] The US Bankruptcy Court accepted in *In re Maxwell Communication Corpn* (1994) 170 BR 800 (Bankr SDNY) that the United States courts have adopted modified universalism as the approach to international insolvency:

> "the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors."

11. It follows from this that the common law power exists to assist collective insolvency processes. If an application for recognition is made by liquidators, or their equivalent, appointed over a company that has been wound up for the purpose of collecting a company's assets and distributing them amongst its creditors, it is likely that the court will accept that it is being asked to use its common law powers for the purpose that it is intended, namely, to ensure that all a company's assets are distributed to its creditors under a single system of distribution. However, it is important to understand that many of the applications that have been made to the court since *Joint Official Liquidators of A Co v B* was decided in 2014 have not been made by liquidators for this purpose. Many have been made by provisional liquidators appointed in the place of incorporation on a soft-touch basis with a view to facilitating a restructuring of a company's debt using a scheme of arrangement introduced in both the jurisdiction of incorporation and Hong Kong. This technique is often referred to by the name of the case in which it first emerged: *Z-Obee Holdings Ltd*.[9] It was developed to overcome difficulties created by the Court of Appeal's decision in *Re Legend International Resorts Ltd*,[10] which rejected the appointment of provisional liquidators as a means to restructure debt. The recognition of the foreign appointments is justified by reference to the principles of private international law discussed in *Joint Official Liquidators of A Co v B*.[11] Assistance in the form of powers to facilitate a restructuring in Hong Kong is justified by the application of the common law principles most recently discussed in *Re Moody Technology Holdings Ltd*[12] in which DHCJ William Wong SC considers in detail recognition of soft-touch provisional liquidators appointed for the purposes of restructuring. The Deputy Judge agreed with my conclusion in *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd*,[13] namely, that [9]:

> … It is not in my opinion inconsistent with Hong Kong law for restructuring powers to be granted by way of assistance to a provisional liquidator appointed over a foreign company by the court of its place of incorporation, in which a soft-touch provisional liquidation is permissible, as such powers can be granted, albeit in the more limited circumstances discussed in *China Solar*, to a Hong Kong provisional liquidator.

12. However, the fact that the courts have found that the common law principles support assisting a soft-touch provisional

[9] [2018] 1 HKLRD 165.
[10] [2006] 2 HKLRD 192; see also the detailed decision of the limits of *Legend* in *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338.
[11] [2014] 4 HKLRD 374.
[12] [2020] 2 HKLRD 187.
[13] [2019] HKCFI 805, [2019] HKEC 945.

liquidation does not mean that the courts have accepted that a foreign soft-touch provisional liquidation is for all purposes to be treated as a collective insolvency process.

13. If soft-touch provisional liquidation is properly characterised (viewed from the perspective of the Hong Kong statutory insolvency regime), as a collective insolvency process, it would suggest that there is nothing objectionable in appointing provisional liquidators in Hong Kong with a view to them restructuring the debt of a company including restructuring through introduction of a scheme of arrangement. I note in passing that Glenn J in the Southern District of New York accepted in *Re Winsway Enterprises Holdings Ltd*,[14] that for the purposes of an application for a stay under *Chapter 15* of the *US Bankruptcy Code* a scheme is a collective insolvency process. However, if this is the case it would suggest that *Legend* was wrongly decided. This way of viewing the character of the jurisdiction is not considered in the judgment in which the Court of Appeal proceeds on the basis that provisional liquidation is to be used only for the purpose of protecting assets prior to a winding-up order being made. It is, however, difficult to see why, if a soft-touch provisional liquidation is a collective insolvency process, appointment of a provisional liquidator for such a purpose pursuant to *s.193* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap.32) is impermissible.

14. The relevance of this issue in the present context is as follows. The passages that I have quoted in [9] from *Singularis*[15] envisage a stay being granted in aid of a collective insolvency process. It is not clear that if the foreign proceedings have a different character a stay can be justified. This is not an issue that I have to decide in this case, because the PLs are content with a case management direction, but it would require further consideration if an application for a stay of particularly proceedings, including a Hong Kong winding up petition, were to be sought in these or other proceedings.

15. Another consideration is the impact of the English Court of Appeal's decision in *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux*.[16] In short, this decision, which is followed in Hong Kong, establishes that the discharge or compromise of liabilities under a contract is governed by the law of the contract. It follows that the fact that a foreign incorporated company is subject to a foreign collective insolvency process does not prevent a Hong Kong creditor from attempting to establish a

[14] [2017] 1 HKLRD 1, [37]; and also in the case of a number of subsequent similar debt restructurings involving schemes of arrangements.
[15] [2015] AC 1675.
[16] (1890) 25 QBD 399.

right to payment in Hong Kong.[17] Consequently, it would seem that a stay should not be granted in respect of, for example, an action to establish a right to payment under a contract governed by Hong Kong law in aid of a foreign insolvency process. Whether or not once a judgment has been obtained the creditor should be able to take enforcement action is a different question. In the absence of full argument, it is not a question at this stage I will comment on other than to draw attention to the decision of the English Court of Appeal in *Re OJSC International Bank of Azerbaijan*.[18] The Court of Appeal confirmed that it is the practice of the court when exercising its insolvency jurisdiction not to grant a stay (going beyond the automatic stay under *art.20* of the Model Law) where to do so would in substance prevent English creditors from enforcing their English law rights in accordance with the *Rule in Gibbs*. However, in [95] Henderson LJ envisaged circumstances in which to a limited extent the *Rule in Gibbs* might be qualified by permitting assets within the jurisdiction of the English court to be remitted to a foreign liquidator. Henderson LJ may have seen this as a qualification (although it is not clear from the decision) because it would be likely that the creditor would receive less as a result of having to prove in the foreign liquidation in which the *Rule in Gibbs* would not apply than the creditor would if he was able to enforce against the asset all the time it remained located in England. This would seem to involve a recognition of the creditor's right to enforce directly against the asset, which could only be interfered with to a limited extent by the court making orders facilitating steps in the foreign liquidation intended to result in a *pari passu* distribution of assets. This is an issue, which if it arises will require careful consideration. It is a further reason why it would be wrong for the court in my view to make orders staying proceedings other than as a result of an application to the court for an order at which the party affected will have the opportunity to argue the alternative.

Reported by Yuki Kong

[17] See the discussion in *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038, [16]–[27].

[18] [2019] BCC 452.

Re Global Brands Group Holding Ltd (In Liq)

[2022] HKCFI 1789

(Court of First Instance)

(Miscellaneous Proceedings No 644 of 2022)

Harris J in Chambers

1, 23 June 2022

Company law — insolvency — foreign insolvency proceedings — recognition and assistance — provisional liquidator appointed in place of company's incorporation — approach where liquidation not taking place in jurisdiction of company's centre of main interest — in circumstances, order made limited to confirming provisional liquidator's power to receive and transfer out company's assets in Hong Kong

Conflict of laws — corporations and corporate insolvency — cross-border insolvency — recognition and assistance — future approach — criteria primarily to be determined by location of company's centre of main interest — limited exceptions

公司法 — 清盤 — 外地清盤法律程序 — 認可和協助 — 任命臨時清盤人代替公司法團 — 當清盤不在公司主要利益中心的司法管轄權範圍內進行時的做法 — 在某些情況下，命令僅限於確認臨時清盤人收取及轉移公司在香港的資產的權力

法律衝突 — 法團和法團清盤 — 跨國界清盤 — 認可和協助 — 未來的做法 — 準則主要由公司主要利益中心的地點來確定 — 有限制的例外情況

C was an investment holding company incorporated in Bermuda and listed on the Main Board of the Stock Exchange of Hong Kong. Upon C's application to the Bermuda Court in September 2021, a provisional liquidator (PL) was appointed over C for restructuring purposes who continued in office on the making of the winding-up order by the Bermuda Court in November 2021. PL tried to take possession of C's assets in Hong Kong, specifically certain cash balances held by Rs, and applied for an order for recognition and assistance.

Held, allowing PL's application to make the order as set out below, that:

(1) Hong Kong did not have any legislation dealing with cross-border insolvency and restructuring, it had largely been

left to the Judiciary to use common law tools to address challenges that arose in this area. To date, the criteria for granting recognition and assistance were: (i) that the foreign insolvency proceedings were collective insolvency proceedings; and (ii) that the foreign insolvency proceedings were opened in the company's country of incorporation. It was open to the court to develop the common law principles in a manner better suited to the circumstances in which transnational insolvencies currently arose in Hong Kong and the development of the principles in comparable jurisdictions, provided that such development was consistent with modified universalism (*Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, *Rubin v Eurofinance SA* [2013] 1 AC 236, *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 considered). (See paras.10, 16–21, 26.)

(2) In future, the criteria for recognition should primarily be determined by the location of a company's centre of main interests (COMI). The use of companies incorporated in offshore jurisdictions as holding companies and intermediate subsidiaries for business groups conducting their activities in Hong Kong and the Mainland was widespread. It was rare for such companies to conduct any business in their place of incorporation. When such companies were put into provisional or final liquidation at least one of the liquidators appointed by the offshore court would be based in Hong Kong from where they conducted the liquidation. Treating the place of incorporation as the natural home or commercially most relevant jurisdiction for the purpose of determining which jurisdiction was the appropriate place for the seat of a principal liquidation was highly artificial. Adopting the COMI criteria would also bring Hong Kong in line with the approach in the Mainland. Accordingly, the criteria to be adopted were that: (i) the foreign proceedings constituted a collective insolvency process; and (ii) those proceedings (subject to limited exceptions) were conducted in the jurisdiction in which the company's COMI was located (*Re Lamtex Holdings Ltd* [2021] 2 HKLRD 177 considered). (See paras.17, 32.)

(3) In determining a company's COMI, the court would consider factors including the location of directors, principal officers and board meetings, notices of relocation, location of operations, assets, bank accounts, books and records and where the restructuring activities took place (*Re Ocean Rig UDW Inc* 570 BR 687 (Bank SDNY Aug 24, 2017) applied; *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, *Re Opti-Medix Ltd* [2016] 4 SLR 312, *Re Zetta Jet Pte Ltd*

[2019] 4 SLR 1343, *Re Investin Quay House Ltd* [2021] EWHC 2371 (Ch) considered). (See paras.34–38.)

(4) The recognition regime was distinct from the winding-up jurisdiction. The fact that the debtor could be, or had been, wound up in Hong Kong was not of itself a bar to the court granting assistance (*Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 considered). (See para.39.)

(5) In the absence of a winding-up order in Hong Kong, it was not possible for a foreign liquidator to conduct a winding-up in Hong Kong which required the liquidator to exercise the powers available to a Hong Kong liquidator under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32). Nor did the common law power of assistance permit the court in such circumstances to grant powers analogous to those available to a liquidator under that Ordinance. However, the court could grant powers intended to assist a foreign liquidator whose appointment had been recognised on orthodox principles of private international law (*Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 considered; *Re Up Energy Development Group Ltd* [2022] 2 HKLRD 993 explained). (See paras.46–47.)

(6) The correct approach to assessing whether a foreign liquidation should be recognised was first to determine if at the time the application for recognition was made the liquidation was taking place in the jurisdiction of the company's COMI. If it was not, recognition and assistance should be declined, unless:
   (i) it was limited to recognition of a liquidator's authority, if appointed in the place of incorporation, to represent a company and orders that were an incident of that authority; which might be described as managerial assistance; or
   (ii) recognition and limited and carefully prescribed assistance were required as a matter of practicality (*Re Opti-Medix Ltd* [2016] 4 SLR 312 referred to). (See para.50.)

(7) In the present case, the Court would grant an order for recognition of PL with assistance limited to the power to receive and transfer out of Hong Kong the account balances in question. PL was C's lawful agent as a matter of the law of its place of incorporation and entitled to direct that its assets be transferred from accounts in Hong Kong to accounts in Bermuda. The order simply confirmed the position under orthodox principles of private international law and gave PL assistance which was more managerial in nature than a type associated specifically with insolvency. (See paras.14, 48, 50.)

(8) (*Obiter*) The Court's preliminary view is that in future the Hong Kong court should generally decline to recognise soft-touch provisional liquidators appointed by offshore jurisdictions adopting a debtor in possession model. Hong Kong has consciously decided not to enact legislation providing for this kind of debt moratorium. (See para.12.)

Application

This was an application by the provisional liquidator of the subject company appointed in Bermuda for an order seeking recognition and assistance from the Hong Kong court.

Mr Look Chan Ho, instructed by Stephenson Harwood, for the applicant (provisional liquidator of Global Brands Group Holding Ltd).
The 1st respondent (Computershare Hong Kong Trustees Ltd) was not represented and did not appear.
The 2nd respondent (Hongkong and Shanghai Banking Corp Ltd) was not represented and did not appear.

Legislation mentioned in the judgment

Bankruptcy Code [United States] Chs.11, 15
Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) ss.193, 327
Companies Ordinance (Cap.32) (predecessor) s.327

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DECISION

Harris J in Chambers

The Application

1. On 25 May 2022 the Provisional Liquidator of Global Brands Group Holdings Ltd (**Provisional Liquidator** and the **Company** respectively) issued an originating summons to which Computershare Hong Kong Trustee Ltd (**Computershare**) and The Hong Kong and Shanghai Banking Corporation Ltd (**HSBC**) are Respondents seeking an order for recognition and assistance. The Company is incorporated in Bermuda and was wound up in Bermuda on 5 November 2021. The circumstances of the application provide an opportunity to consider in more detail an issue I discuss in *Re Li Yiqing v Lamtex Holdings Ltd*,[1] namely, whether in future the Hong Kong court will recognise and assist a foreign insolvency process conducted in the place of company's centre of main interests (**COMI**) and it is not sufficient, nor necessary, that the foreign insolvency process is conducted in a company's place of incorporation.

Background

2. The Provisional Liquidator, John McKenna, had been appointed on 16 September 2021 and continued in office on the making of the winding-up order. The principle reason for seeking recognition and assistance from the Hong Kong court is to obtain the proceeds of the sale of shares held by Computershare in Hong Kong on behalf of the Company, totalling approximately HK$9

1 [2021] HKCFI 622; [2021] HKCLC 329.

million, and the rather more modest balance held by HSBC in the Company's bank account in Hong Kong, which totals approximately US$5,000. The originating summons also seeks certain other general powers. I will explain them later in this judgment.

3. In his affidavit in support of the application the Provisional Liquidator explains the background to the Company and the circumstances leading up to its liquidation in Bermuda. The Company is an investment holding company. The Company, along with its subsidiaries (**Group**), were engaged in the business design, development, marketing and sale of branded children's, men's and women's apparel, footwear, fashion accessories and related lifestyle products in North America and Europe. The Company and its subsidiaries were also engaged in brand management and offered expertise in expanding its clients' branded assets new product categories, new regions and retail collaborations, as well as assisting in distribution of licensed products on a global basis.

4. The Company was listed on the Main Board of The Stock Exchange of Hong Kong (**HKEX**) Ltd in 2014 as a result of a spin-off from Li & Fung of which it had formed part. Due to the ongoing COVID-19 pandemic and geopolitical uncertainties, as well as structural shifts in the retail industry, the business of the Company and its subsidiaries was seriously challenged. As a result, the Company had been facing immense financial difficulties since 2020. For the year ended 31 March 2020, the Group reported: **(a)** a net loss after tax of US$586,590,000; **(b)** current liabilities exceeding current assets by US$772,125,000; and **(c)** cash and cash equivalents amounting to US$83,880,000. For the six months ended 30 September 2020, the Group reported: **(a)** a net loss after tax of US$119,838,000; **(b)** that current liabilities exceed current assets by US$899,391,000; and **(c)** that the Group's cash and cash equivalents were US$55,805,000.

5. From around January 2021, the Company actively engaged in discussions with the lenders of a syndicated loan to the Group (**Lenders**) of which the Company was a guarantor, other creditors, and potential investors in relation to revising repayment obligations of loans and injecting new equity from prospective investors. The Company also explored different debt restructuring options including potential transactions or corporate actions involving the sale, disposal and/or restructuring of various assets or businesses of the Group (collectively, "**Restructuring**").

6. While the Company explored various restructuring options to improve its financial position, the board of the Company resolved that it was in the interests of the Company and its creditors to commence its own winding-up proceedings and apply to the Bermuda Court to appoint a provisional liquidator with limited powers, which could maximise the chance of success of the

restructuring and provide a moratorium on claims against the Company to avoid a potential disorderly liquidation by the Company's creditors. The appointment was apparently intended to create an environment for a successful restructuring. The board could continue to manage the Group's business operations, a provisional liquidator would monitor and consult with the board on implementing a group-wide and coordinated debt restructuring plan, and the business of the Group could continue to operate to generate revenue as a whole instead of assets being subject to fire sale at a significant discount.

7. On 10 September 2021, the Company presented a petition to the Bermuda Court for the winding-up of the Company **(Petition)** and made an application for appointment of Mr McKenna as provisional liquidator of the Company on a "limited powers" basis for restructuring purposes only. Suffice to say the attempts to restructure proved unsuccessful, the board recognised that a winding-up would be in creditors' best interests and the Company applied successfully for a winding-up order on 5 November 2021.

8. Since his appointment, the Provisional Liquidator has been trying to take possession of the Company's assets in Hong Kong. The Company's assets in Hong Kong are:

(1) cash balances in the sum of about HK$8 million held by Computershare, which represents a surplus arising from the Group's employee share schemes; and
(2) cash balances in the sum of about US$4,800 held in the Company's bank accounts with HSBC.

Both Computershare and HSBC require the Provisional Liquidator to obtain a recognition order before they will release the cash balances. Nearly all the Company's creditors are in Hong Kong. As is to be expected as it is a holding company, the creditors are largely financial or professional companies and are all unsecured. The remainder of the liquidation will be straightforward. The Provisional Liquidator will adjudicate proofs, which seems likely to be uncontroversial, and declare a dividend to be paid out of the assets, which he will receive if a recognition and assistance is granted, which consists of the monies I have referred to in the previous paragraph.

9. The Provisional Liquidator accepts that before the Bermuda liquidation the Company's COMI was probably in Hong Kong. In the light of the Provisional Liquidator's activities after the Bermuda liquidation commenced the COMI may have become either Hong Kong or Bermuda. For the purposes of this decision the Provisional Liquidator accepts that the core requirements that need to be satisfied

before the Hong Kong court will exercise its winding-up jurisdiction over a foreign company are satisfied.[2]

Recognition and Assistance in Hong Kong — Background

10. Commencing in 2014 recognition and assistance has increasingly been used to address issues arising in transnational restructuring and insolvency in Hong Kong that largely arise as a consequence of the extensive use of holding companies incorporated in offshore jurisdictions rather than Hong Kong or the Mainland, although the business groups affected commonly consist of operating and asset owning companies in Hong Kong and the Mainland. This practice has become the norm in the case of companies listed on the HKEX. The operating and asset owning subsidiaries are commonly separated from the holding company by a layer of intermediate subsidiaries incorporated in an offshore jurisdiction different from the holding company. The most common structure recently adopted would appear to involve a Cayman holding company and intermediate subsidiaries incorporated in the British Virgin Islands. The business groups have no assets, creditors or debtors in the offshore jurisdictions. When such business groups encounter financial difficulties and creditors and the companies themselves are considering what steps to take to protect their interests they encounter problems arising from the artificial structure of the group, which it is difficult to address because unlike comparable jurisdictions Hong Kong has neither legislation dealing with rehabilitation of distressed businesses nor legislation dealing with transnational insolvency other than the discretionary power given to the court by *s.327* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap.32) (**Ordinance**), to wind up a foreign company. The absence of the tools available in other jurisdictions, including the Mainland, to address these issues has been a well-publicised source of concern to those involved in restructuring and insolvency for over two decades. In the absence of any legislation to address these issues the Court has worked with practitioners to use common law techniques to address them so far as the common law permits. There have been two major problem areas.

11. The first concerns the restrictions that exist on winding up a foreign incorporated company. It is not necessary to explore this issue in depth as it is comprehensively dealt with in a number of authorities well known to practitioners. In summary the court has adopted what Ma CJ and Lord Millett NPJ refer to in the Court of Final Appeal's judgment in *Kam Leung Sui Kwan v Kam Kwan*

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2 *Silver Starlight Ltd v China CITIC Bank Corporation Ltd, Tianjin Branch* [2021] HKCA 1248; [2021] HKCLC 1347 at [15] (G Lam JA).

Lai.[3] as "*necessary self-imposed constraints on the making of a winding-up order against a foreign company*" . In some cases, these are easy to satisfy. Others less so resulting in delay in creditors or shareholders being able to take action in Hong Kong to protect their economic interests while complicated questions concerning jurisdiction are resolved. It was this problem that led to the application and decision in *Joint Official Liquidators of A Co v B*.[4] The liquidators appointed in the Cayman Islands, where the Company was incorporated, initially sought (ultimately successfully) to wind up the Company in Hong Kong, but pending the determination of the petition wished to be able to obtain documents from the Company's bankers in Hong Kong concerning a substantial fraud. The bankers refused to provide them without an order of the Hong Kong court confirming the liquidators' authority to represent the company in Hong Kong.

12. The second issue concerns the problems caused by Hong Kong's lack of any legislation facilitating debt restructuring and rehabilitation of financially distressed companies. In the period following the Asian Financial Crisis of 1997 and 1998 the practice was developed of companies, mainly listed companies, being put into a form of soft-touch provisional liquidation in Hong Kong to facilitate a debt restructuring. This practice was brought to a halt by the Court of Appeal's decision in *Re Legend International Resorts Ltd*,[5] which determined that the power to appoint provisional liquidators conferred by *s.193* of the *Ordinance* could not be used to appoint provisional liquidators for the principle purpose of restructuring a company. Many of these companies were incorporated in offshore jurisdictions. To circumvent the practical problem to which the Court of Appeal's decision gave rise a technique was developed,[6] which involved a company incorporated in an offshore jurisdiction being put into soft-touch provisional liquidation in its domestic jurisdiction, the courts of those jurisdictions treating this as a proper use of the power to appoint provisional liquidators, and the provisional liquidators being recognised in Hong Kong and assistance being provided in the form of the limited powers necessary for provisional liquidators to participate in the restructuring process in Hong Kong. Unfortunately, it has become increasingly apparent that what is commonly referred to as the *Z-Obee* technique has been abused by certain insolvency

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3 (2015) 18 HKCFAR 501. See [18]–[24] in which Ma CJ and Lord Millett NPJ explain the constraints, commonly referred to as "the 3 core requirements" and their application.

4 [2014] 4 HKLRD 374.

5 [2006] 2 HKLRD 192; [2006] 3 HKC 565.

6 *Z-Obee Holdings Ltd* [2018] 1 HKLRD 165; *Re Joint and Provisional Liquidators of Hsin Chong Group Holdings* [2019] HKCFI 805; *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187.

practitioners and offshore law firms.[7] It seems to me tolerably clear that many of the offshore soft-touch provisional liquidations adopt a debtor in possession model, which has been rejected in Hong Kong, the principal purpose of which, viewed from the Company's point of view, is to obtain so far as possible a moratorium on action being taken to recover unpaid debts. The application to appoint provision liquidators in the present case would appear to be an example. Hong Kong has consciously decided not to enact legislation that provides for this kind of debt moratorium. Although it is not an issue that I need to decide in the present case and is one which requires detailed consideration, my preliminary view is that in future the Hong Kong court should generally decline to recognise soft-touch provisional liquidators appointed by offshore jurisdictions on the kind of terms I have summarised.

13. There is another consideration. As I have already explained the businesses of companies of the sort with which I am concerned are carried on in China; primarily the Mainland. The Mainland has a different economic system to Hong Kong. Reconciling the differences between the Hong Kong and the Mainland systems can be challenging. It requires an understanding of the different insolvency systems and the different social and economic considerations, which are reflected in the differing statute law and the decisions that judges and others involved in the insolvency and restructuring process are required to make. To take one example, the ***Enterprise Bankruptcy Law*** gives primacy to rehabilitation of businesses reflecting the importance placed in the Mainland on maintaining economic and social stability. Consistent with this the Mainland favours debtor in possession solutions. As I have explained Hong Kong does not. Hong Kong and Mainland judges are familiar with these issues and are well placed to deal with them; courts outside China considerably less so. Relevant to this are the concerns that have recently been expressed by two leading academics in the field of international insolvency, Professor Jay Westbrook of the University of Texas at Austin and Professor Christoph Paulus of Humboldt-Universität zu Berlin,[8] about judicial decision making and bankruptcy law becoming increasingly remote from territorial or political control. The suggestion that a Chinese business can avoid the supervision of its affairs by Chinese courts[9] when bankrupt by using a company incorporated in, what has been called by the European Court of Justice, amongst others, a "***letter box***

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7 See for example *Re China Bozza Development Holdings Ltd* [2021] 2 HKLRD 977; [2021] HKCFI 1235.

8 International Insolvency Institute's podcast 23 April 2022.

9 Whether the courts of the Hong Kong SAR or the Mainland.

jurisdiction"[10] invites the question that Professor Westbrook and Professor Paulus pose as to the extent to which it is congruent with the purpose of insolvency law and the expectations of creditors to allow a commercial enterprise to use a bankruptcy process in a jurisdiction with which it or its debt[11] has no economic or social connection rather than one in which it carries on business. The question is relevant to the issue, which I am considering, which in practice amounts to this: should a jurisdiction in which a company's business is conducted recognise an insolvency process conducted in a place with which the company has no material economic connection.

The Order

14. I will grant an order for recognition of the Provisional Liquidator with assistance limited to the power to receive and transfer out of Hong Kong the balances in the account to which I have referred in [8]. My reasons for so ordering are explained in [48]–[50]. The majority of the remainder of this decision concerns the basis on which in future Hong Kong should grant recognition and assistance to foreign insolvency practitioners. The decision is divided into sections addressing the following:

(1) The established principles for common law recognition and assistance relevant to this application.
(2) COMI as the criteria for recognition and assistance.
(3) Principles of recognition — modified universalism.
(4) Modified universalism — criteria for determining home or principal jurisdiction in comparative authorities.
(5) Adopting the COMI criteria in Hong Kong.
(6) Authorities in Hong Kong.
(7) The recent case of Up-Energy.
(8) Conclusion.

Principles of common law recognition and assistance

15. There is a distinction between recognition and assistance. Recognition concerns acknowledging and confirming the status of a foreign insolvency process and officer. Assistance involves granting

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10 *Re Eurofood IFSC Ltd* [2006] Ch 508; *Creative Finance Ltd* Case No. 14-10358 (REG) 13 January 2016; *Re Bear Stearns High-Grade Strategies Master Fund, Ltd* 381 BR 37 (Bankr. S.D.N.Y. 2007), aff'd 389 BR 325 (S.D.N.Y.) (Sweet J).

11 As opposed, for example, to US$ debt governed by United States Law, which would have an economic connection with the United States and might be compromised under *Chapter 11* of the *United States Bankruptcy Code* and normally recognised in Hong Kong in accordance with the *Rule in Gibbs, Antony Gibbs & Sons v La Société Industrielle Et Commerciale Des Métaux* (1890) 25 QBD 399.

expressly to the foreign insolvency officer powers to act in the local jurisdiction. The distinction is well understood. In *Kireeva v Bedzhamov*,[12] Snowden J held:

> [T]here is a conceptual distinction between the principles that apply to the decision whether to recognise a foreign bankruptcy, and the principles that apply to the question of what, if any, further assistance ought to be given by the English court to a foreign trustee in bankruptcy following recognition.

In *Net International Property Ltd v ADV Eitan Erez*,[13] Webster JA explains the distinction in more detail:

> The starting point on the issues of recognition and assistance is to determine what, if any, is the difference between recognition and assistance. There is, at least in theory, a difference between the two principles. Recognition is the formal act of the local court recognising or treating the foreign office holder as having status in the BVI in accordance with his or her appointment by the foreign court. In this case, this means recognising the Trustee's position granted by the courts of Israel as being the trustee in bankruptcy of the assets of Mrs. Sofer and treating him as the trustee of those assets in the BVI.
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> Assistance goes further. If granted by the BVI court, it allows the Trustee to deal with the BVI assets of Mrs. Sofer, namely, her legal and beneficial interest in the shares of Net International. Put another way, recognition gives the foreign office holder status in the BVI and assistance gives him or her power to deal with the BVI assets. However, the dividing line between the two principles is blurred in practice because recognition by itself is generally of little assistance to the foreign office holder unless it is accompanied by the grant of assistance to deal with the local assets. Viewed in this way, recognition is generally treated as recognition and assistance. The blurring of the lines between the two concepts is illustrated by the judgment of the Supreme Court of Transvaal, South Africa, in *Re African Farms Ltd* …
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> Notwithstanding the blurring of the lines between recognition and assistance, it is important to bear in mind that recognition does not necessarily include assistance. In this case, the trial judge's order recognising the Trustee included assistance.

A simple practical example of the distinction is to be found in my decision in *Re China Bozza Development Holdings Ltd*.[14] I held:

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12 [2021] EWHC 2281 (Ch); [2021] BPIR 1465 at [107].
13 (Eastern Caribbean Court of Appeal, 22 February 2021) at [19]–[21].
14 [2021] HKCFI 1235; [2021] HKCLC 831 at [23].

> [N]otwithstanding my misgivings about how this matter has developed the JPLs should be recognised and I will so order. However, granting an order providing active assistance is a different matter. I am not currently satisfied that I should make an order granting the type of general assistance which I have on previous occasions …

16. The authorities establish that the orthodox common law position is that the court may recognise foreign insolvency proceedings that comply with two criteria.[15] First, that the foreign insolvency proceedings are collective insolvency proceedings; and secondly, that the foreign insolvency proceedings are opened in the company's country of incorporation. Part of the rationale for recognising and assisting foreign officeholders appointed in the country of incorporation is to be found in ordinary conflict of laws principles for corporations as opposed to pure insolvency law. As Lord Sumption explains in *Singularis Holdings Ltd v PricewaterhouseCoopers*:[16]

> 12. [E]ven without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation. For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English moveable assets of a foreign bankrupt which had been transferred to an office-holder in an insolvency proceeding under the law of his domicile.

COMI as the criteria for recognition and assistance

17. To date the court in Hong Kong has not used COMI as the yardstick for granting common law recognition or assistance. The criteria applied are those explained in the previous paragraph. It is, however, open to the court as a matter of principle and authority to develop these common law principles. As the then Chief Justice Li observed in *Solicitor (24/07) v Law Society of Hong Kong*:[17] "*[t]he great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions*". For the reasons discussed in the

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15 See *Re CEFC Shanghai International Group Ltd* [2020] HKCFI 167; [2020] HKCLC 1 at [8].

16 [2014] UKPC 36; [2015] AC 1675.

17 (2008) 11 HKCFAR 117 at [19].

remainder of this judgment in my view the criteria to be adopted in future in determining whether or not foreign insolvency proceedings should be recognised and assisted are, in short, that the foreign proceedings constitute a collective insolvency process and that the proceedings (subject to limited exceptions) are conducted in the jurisdiction in which the Company's COMI is located.

18. As I have already explained Hong Kong is unusual in not having any legislation dealing with cross-border insolvency and restructuring. The Government has largely left it to the Judiciary to use common law tools to address the challenges that have arisen in this area as Hong Kong's economy has developed in line with the Mainland's rapid economic expansion. This is not an oversight. On 14 May 2021 the Secretary for Justice and the Supreme Court signed a "*Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region*". This Cooperation Mechanism consists of two parts. The first is the Record of meeting. The second is "*The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region.*"[18] As is explained in both documents the purpose of the Mechanism is to facilitate economic integration and development in Hong Kong and the Mainland. Paragraphs 3 and 5 of the Record of Meeting make it clear that the parties expect the High Court to grant assistance to Mainland Administrators and cooperate on the implementation and improvement of the Mechanism. The absence of relevant legislation and the purpose of the Cooperation Mechanism are relevant to a consideration of the development of common law assistance in Hong Kong, its necessity and what form it might take. Hong Kong is not in the same position as jurisdictions, which have enacted comprehensive statutory codes to regulate recognition and assistance of foreign insolvencies. As the Cooperation Mechanism to which I have referred demonstrates, the absence of a statutory code to regulate recognition and assistance does not imply that the court is to take a restrictive view of its ability to develop the common law principles to address the issues that come before it. It is clear that the opposite is the case.

19. In *Rubin v Eurofinance SA*[19] Lord Collins at [129] describes the limits of a court's ability to develop the law in this field. Lord Collins says this:

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18 最高人民法院關於開展認可和協助香港特別行政區破產程序試點工作的意見

19 [2012] UKSC 46; [2013] 1 AC 236.

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

20. It can readily be understood why the courts in England would approach the development of the common law relating to international insolvency as Lord Collins describes. Judge initiated developments in the law, which in the context of a system, which has introduced deliberate and comprehensive legislation to regulate cross-border insolvency, may be viewed as judicial overreach, are not necessarily to be viewed similarly in a jurisdiction, which lacks comparable legislation and whose current circumstances justify modifying the common law to implement more effectively an established legal principle. The development of the basis upon which foreign liquidations are recognised which I am considering does not involve the creation of a new legal principle. It involves a modification of an existing one, namely, recognition and assistance of a foreign insolvency process. The purpose of the modification is to implement the principle in a manner better suited to the circumstances in which transnational insolvencies currently arise in Hong Kong and the development of the principle in comparable jurisdictions.

21. It is apparent from its terms that the Cooperation Mechanism is premised on the assumption that the common law as practiced in Hong Kong has developed to provide for judicial assistance to insolvencies conducted in different jurisdictions; albeit in the China context different legal jurisdictions within one unitary State. There are many examples of common law assistance being granted by the Hong Kong court to foreign insolvency office holders. In [43]–[44] I give a number of examples of the Court of Final Appeal and the Court of Appeal recognising the court's power to do so. In the case of administrators from the Mainland the Court of First Instance has made a number of orders for recognition and assistance in recent years: *Re Liquidator of CEFC Shanghai*

***International Group Ltd;*[20] *Re Shenzhen Everich Supply Chain Co, Ltd;*[21] *Re HNA Group Co Ltd;*[22] *Nuoxi Capital Ltd v Peking University Founder Group Company Ltd.*[23]**

Principles of recognition — modified universalism

22. Underpinning the principle of recognition is the principle that the insolvency law of a company's home insolvency jurisdiction is applicable across the world. This is illustrated by the English Court of Appeal's decision in *Tchenguiz v Grant Thornton UK LLP*,[24] which concerned whether Icelandic Insolvency Law applied throughout the European Economic Area, including England, by virtue of *Article 10* of the *Parliament and Council Directive 2001/24/EC*, given effect in *England by the Credit Institutions (Reorganisation and Winding Up) Regulations 2004*. Briggs LJ explains the character of the extraterritorial effect of Icelandic bankruptcy law in the following paragraphs:[25]

> 66. This much more confined part of the appeal also breaks down into two sections. The first raises the question whether Icelandic insolvency law (and its equivalents in all other home member states) is 'internationalised' by virtue of the Winding up Directive (and the Insolvency Regulation) regardless whether, viewed separately, it has purely domestic or both domestic and extraterritorial effect. The judge concluded that it was internationalised in that sense, and the claimants' third ground of appeal challenges that conclusion.
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> …
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> 68. The answer to the first of those questions flows in my view inexorably from the analysis of the purposes and terms of the Insolvency Instruments, as described above. The very essence of the universalism sought to be achieved by making the insolvency law of the home member state applicable across the territory of all member states depends upon that being achieved in relation to every potential home member state in which a credit institution is regulated and has its head office regardless whether, apart from those instruments, that state's insolvency law would be anything more than domestic in its application. If that were not so, then the creation of a universally applicable law (subject to strict exceptions) for

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20 *Supra* footnote 14.
21 [2020] HKCFI 965, [2020] HKEC 1188.
22 [2021] HKCFI 2897.
23 [2022] 2 HKC 1; [2021] HKCFI 3817.
24 [2017] EWCA Civ 83; [2018] QB 695.
25 *Ibid* [68].

> the insolvency of credit institutions, and other entities, would fall at the first hurdle, in relation to any home member state the insolvency law of which did not already have cross-border effect.

23. Consistent with this principle the aim of modified universalism is that there should be a unitary bankruptcy proceeding in the court of the home insolvency jurisdiction which receives world-wide recognition and it should apply universally to all the bankrupt's assets. This is explained by Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd*:[26]

> 6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.

24. Universalism is to be contrasted with territorialism where each country is regarded as determining according to its own law the distribution of the assets of an insolvent company located within its territorial jurisdiction.[27] **Modified universalism is a compromise between these two opposites, recognising that the theoretical ideal of universality must in some circumstances give way to the practical reality of territorial or local interests. Lord Hoffmann describes the principle in *HIH* in the paragraph immediately following the one I have just quoted:**[28]

> 7. This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas Transportation Corp u Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of 'modified universalism': see also *Fletcher, Insolvency in Private*

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26 [2008] UKHL 21; [2008] 1 WLR 852 at [6].

27 *Stichting Shell Pensioenfonds v Krys* [2014] UKPC 41; [2015] AC 616 at [15] (Lord Sumption and Lord Toulson).

28 *Supra* at [7].

> *International Law*, 2nd ed (2005), pp 15-17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.

This principle has been part of the English common law since the 18th century.[29]

25. In *Singularis* the Privy Council considered three propositions derived from the decision of the Privy Council in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc*.[30] "*First the principle of modified universalism, namely, that the court has a common law power to assist foreign winding up proceedings so far as it properly can. The second is that this includes doing whatever it [the court] could properly have done in a domestic insolvency, subject to its own law and public policy. The third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction in rem or in personam according to ordinary common law principles is irrelevant.*"[31] The Privy Council concluded that the 2nd and 3rd principles had been wrongly decided, but not the first, which Lord Sumption explains in [19]:

> 19. However, the first proposition, the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by Lord Phillips, Lord Hoffman and Lord Walker in *HIH* [2008] 1 WLR 852, and by Lord Collins of Mapesbury (with whom Lord Walker and Lord Sumption JJSC agreed) in *Rubin v Eurofinance SA* [2013] 1 AC 236. Nothing in the concurring judgment of Lord Mance JSC in that case casts doubt on it. At paras 29–33, Lord Collins summarised the position in this way:
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> > 29. 'Fourth, 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 office-holders 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;

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29 *Re HIH Casualty and General Insurance Ltd supra* at [30]; *Singularis Holdings Ltd v PricewaterhouseCoopers supra* at [19] and [23]; *Riverrock Securities Ltd v International Bank of St Petersburg (Joint Stock Co)* at [80] (Foxton J); *Kireeva v Bedzhamov* [2022] EWCA Civ 35 at [81]–[88] (Newey LJ).

30 [2006] UKPC 26; [2007] 1 AC 508; [2006] 3 WLR 689; [2006] 3 All ER 829.

31 *Supra* Lord Sumption [15].

"This court … will do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under Chapter 11": *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.

30. In *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said: "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention … It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, 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 ….

33. One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf *In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in

> California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). 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.

In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so.

26. It is clear from this passage that modified universalism is the foundation of the common law power to recognise and assist a foreign insolvency process and that the power may be developed if the development is consistent with modified universalism and is consistent with the applicable domestic legal framework. Although the formulation of the principle in *Singularis* is considerably more restrictive than that to be found in *Cambridge Gas*, as is apparent from the final paragraph of the extract of Lord Collin's judgment that I have quoted, it envisages further development of the common law power of assistance.

Modified universalism — criteria for determining home or principle jurisdiction in comparative authorities

27. Universalism and modified universalism are premised on there being a home or principal insolvency jurisdiction. The criteria

for determining the home or principal insolvency jurisdiction have evolved over time. First, there is the concept of the debtor's domicile.[32] Secondly, there is the concept of the debtor's country of incorporation: In *Singularis*, Lord Sumption talks of the common law principle of modified universalism treating the place of incorporation as being the principal insolvency jurisdiction:

> The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction."[33]

Thirdly, there is the concept of COMI. Lord Hoffmann explains in *HIH*.[34] The emergence of the criteria for assessing the most appropriate country to be treated as the principal jurisdiction in which a transnational insolvency is to be conducted:

> In some cases there may be some doubt about how to determine the appropriate jurisdiction which should be regarded as the seat of the principal liquidation. I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings ((EC) No 1346/2000 of 29 May 2000) uses the concept of the '*centre of a debtor's main interests*' as a test, with a presumption that it is the place where the registered office is situated: see article 3.1. That may be more appropriate.

28. Assuming one uses the old concept of domicile, there appear to be two schools of thought on the meaning of "domicile" of a company. One view is that the domicile of a company is in its place of incorporation. Lord Collins explains this in *Rubin v Eurofinance SA*:[35]

> 31. 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

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32 *Re HIH Casualty and General Insurance Ltd supra* at [6] and [8]; see also *Stichting Shell Pensioenfonds v Krys supra* at [14].

33 *Singularis Holdings Ltd v PricewaterhouseCoopers supra* at [23].

34 *Supra* at [31].

35 *Supra* at [31].

> 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.

The alternative view is that the domicile of a company is in its principal place of business, which may or may not be the country of incorporation. This is explained by Murison CJ in *Re Lee Wah Bank*:[36]

> The general principle in cases of this kind is clear enough. It is laid down by Vaugham Williams J in *In re English Scottish and Australian Chartered Bank* [[1893] 3 Ch 385] thus: — 'Where there is a liquidation of the concern the general principle is — ascertain what is the domicile of the company in liquidation; let the Court of the country of domicile act as the principal Court to govern the liquidation; and let the other Courts act as ancillary, as far as they can, to the principal liquidation.' The domicile of a trading company is fixed by the situation of its principal place of business (*Jones v Scottish Accident Insurance Company Ltd* [(1886) 17 QBD 421]) and there is no doubt at all that in this case the domicile of the liquidating Company is Hong Kong.

29. In Singapore, the common law recognition regime has developed to embrace the COMI concept for reasons explained by Abdullah JC in *Re Opti-Medix Ltd*:[37]

> Under a universalist approach, one court takes the lead while other courts assist in administering the liquidation …
>
> A consequence of a greater sensitivity to universalist notions in insolvency is a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings. As the winding up of a company by the court of the place of incorporation accords with legal logic, there may be a natural tendency to regard a liquidator appointed by that court as having primacy or legitimacy. However, the place of incorporation may be an accident of many factors, and may be far removed from the actual place of business. The approach of identifying the COMI has much to commend it as a matter of practicality

30. The position adopted in Hong Kong has historically been that a liquidator appointed in the place of incorporation is

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36 (1926) 2 Malayan Cases 81, 84.

37 *Re Opti-Medix Ltd* [2016] SGHC 108; [2016] 4 SLR 312 at [17]–[18] (Aedit Abdullah JC).

recognised.[38] However, it would be incorrect to say that the Hong Kong recognition criteria has exclusively been tied to the debtor's country of incorporation. There are instances of the Hong Kong court granting, or being willing to grant, recognition to insolvency office-holders appointed in a foreign jurisdiction which was not the jurisdiction of incorporation. In *Re The Russo-Asiatic Bank*,[39] the Court recognised liquidators appointed by the English court over a Russian bank. In *Bank of Credit and Commerce International (Overseas) Ltd v Bank of Credit & Commerce International (Overseas) Ltd, Macau Branch*,[40] the Court of Appeal recognised liquidators appointed in Macau over a Cayman-incorporated bank. In *Joint Administrators of African Minerals Ltd v Madison Pacific Trust Ltd*,[41] I took the view that there was no objection in principle to granting recognition to an English administrator over a Bermuda-incorporated company with its COMI in England.

Adopting the COMI criteria in Hong Kong

31. In *Re Li Yiqing v Lamtex Holdings Ltd*[42] at [22] and [26] I suggested that the Hong Kong court should, as Singapore has done, consider whether common law recognition based on place of incorporation is consistent with contemporary commercial practice in the SAR and the Mainland:

> 22. It is becoming increasingly apparent that it is desirable, and it might reasonably be suggested essential, that the Hong Kong courts are able to deal with recognition and assistance using methods that are consistent with commercial practice in the SAR and the Mainland. In response to suggestions for legislation to address this subject, it has been the Government's position that for the time being it is a matter for the courts of Hong Kong to address using the techniques available at common law. The current position in Hong Kong is that the court recognises only insolvency practitioners appointed in the place of incorporation. In my view we have reached the stage at which this question needs to be reconsidered at there is much in my view to be said in support of Abdullah J's conclusion that the common law in this area contains sufficient flexibility to develop so as to be consistent with commercial practice and there is nothing in principle preventing recognition of liquidators appointed

38 *Re China Fishery Group Ltd* [2019] HKCFI 174; [2019] HKCLC 45 at [24]–[25].
39 (1929-30) 24 HKLR 16.
40 [1997] HKLRD 304.
41 [2015] 4 HKC 215; [2015] HKCLC 323.
42 *Supra* footnote 1.

in a company's COMI or a jurisdiction with which it has a sufficiently strong connection to justify recognition, just as the Hong Kong court will exercise its discretion to wind up a foreign incorporated company if the connection between it and Hong Kong is substantial and the other core requirements are satisfied.[43] It might, I appreciate, be objected that there is a material difference in the case of the jurisdiction to wind up a foreign incorporated company, namely, the power is expressly conferred by statute. This takes me back to *Singularis*.[44]

...

26. As I have already observed Hong Kong has no legislation dealing with recognition of foreign insolvencies. Issues such as recognition of foreign soft-touch provisional liquidation do not involve using the common law to extend legislation. In Hong Kong it is purely a matter of common law. *Singularis* is authority that the common law generally permits recognition and assistance of foreign liquidations. The issue I am currently considering is whether the common law of Hong Kong should be extended to permit recognition of insolvencies in places other than a company's place of incorporation and in particular in which its COMI or something similar is to be found. I can see no doctrinal reason why it should not be.

32. In my view the criteria for recognition should in future primarily be determined by the location of a company's COMI. As I suggest in *Lamtex*,[45] this better reflects the current commercial practice in Hong Kong. The use of companies incorporated in offshore jurisdictions as holding companies and intermediate subsidiaries for business groups conducting their activities in Hong Kong and the Mainland is widespread. The connection between such companies and the place of their incorporation is entirely formal. It is rare for such companies to conduct any business in the jurisdiction and I imagine commonly no director or employee ever visits them. Normally in my experience when such companies are put into provisional or final liquidation two or three liquidators are appointed by the offshore court at least one of whom, commonly two, are based in Hong Kong from where they conduct the liquidation. Treating the place of incorporation in such circumstances as being the natural home or commercially most relevant jurisdiction of the company for the purpose of determining, which jurisdiction

43 See the authorities discussed in *Re China Huiyuan Juice Group Ltd* [2021] 1 HKLRD 255, [18]–[29].
44 *Supra* at [11].
45 *Supra*.

is the appropriate place for the seat of a principal liquidation is highly artificial. It also encounters problems of the type discussed recently by Linda Chan J in *Re Up Energy Development Group Ltd*,[46] namely, the need in the case of a genuine liquidation (as opposed to the type of soft-touch provisional liquidation that I have referred to in [12]) for the liquidator to be able to access the wide, express powers provided for in the *Ordinance*, which cannot be granted by way of recognition at common law. I discuss *Up Energy* in more detail later in [46]. If a company's COMI is in Hong Kong I would not normally expect there to be any difficulty in a petitioner demonstrating that the court can properly exercise its discretion to wind up a foreign incorporated company.[47] A winding up order made in Hong Kong will allow the liquidator to use the powers available under the *Ordinance* and, importantly, seek recognition and assistance in the Mainland, which is normally where a company's business is primarily conducted and its assets located. The Cooperation Mechanism I have referred to in [18] permits the relevant Mainland courts to recognise liquidators appointed in Hong Kong over companies whose COMI is located in Hong Kong at the time the application for recognition and assistance is commenced. Adopting the COMI criteria would bring Hong Kong in line with the approach in the Mainland, which is of itself desirable.

33. Adopting and framing the COMI criteria requires consideration of five subsidiary questions. **First**, it is necessary to decide the relevant date for determining COMI. There are three alternatives:

(1) the COMI location as at the date of commencement of the foreign insolvency proceedings;
(2) the COMI location as at the date of the hearing of the foreign officeholder's recognition application in Hong Kong; and
(3) the COMI location as at the date the foreign office-holder's Hong Kong recognition application is made. This approach would be consistent with the position under *Article 6* of *The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region*, which forms part of the Cooperation Mechanism. See also *Re Zetta Jet*.[48]

34. **Secondly**, it is necessary to decide the elements of COMI. There are four established approaches. All are similar. Under the

46 [2022] 2 HKLRD 993.
47 See [11].
48 [2019] SGHC 53; [2019] 4 SLR 1343 at [52]–[61] (Aedit Abdullah J).

Cooperation Mechanism, COMI generally means the place of incorporation, although other factors are also relevant, including the place of the debtor's principal office, the debtor's principal place of business, and the place of the debtor's principal assets (*Article 4* of the Cooperation Mechanism). In the context of the common law Lord Hoffmann in *HIH*[49] regarded the following as the key COMI elements — the place of incorporation, the place of central management, and the location of assets and liabilities. In *Re Opti-Medix Ltd*,[50] the Singapore court suggested the following common law COMI test:

> The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there …
>
> I would note that on a common law adoption of the COMI test, there need not necessarily be a presumption in favour of the registered office, as there is under the Model Law or the EU Insolvency Regulation. However, such a presumption provides a sound default rule in the absence of evidence to the contrary, and provides certainty and regularity. The adoption of such a presumption would also harmonise the results on common law and statutory applications of the COMI test.

35. ICC Judge Mullen explains the key COMI considerations under the EU Insolvency Regulation, in *Re Investin Quay House Ltd*:[51]

> [T]here is a presumption that the COMI of a company corresponds to the place in which it is registered. Ms Staynings took me to factors that have been held to be relevant in rebutting the presumption, which include —
>
> i) Where the majority of the company's administration is undertaken in the UK, particularly if the company's creditors would consider the UK to be the place where the important functions are carried out …;
>
> ii) Where day to day conduct of the business and activities of the company was handled by an agent appointed in England and dealings with third parties were arranged from offices in London, particularly since a third party

49 *Supra* at [31].
50 *Supra* at [18] and [25].
51 *Re Investin Quay House Ltd* [2021] EWHC 2371 (Ch) at [35].

would not have known that board meetings took place in Jersey …;

iii) Where a company is a 'letterbox' company that does not carry out any business in the country where its office is situated …; and

iv) Generally, factors going to the 'head office functions test', including the law governing the main contracts, the location of business relations with clients, the location of creditors, and the management of the company …

I bear in mind of course that the question is fact specific and the cases cited are simply examples of factors that the court has considered relevant in the particular circumstances of those cases.

36. The term COMI is not defined in the UNCITRAL Model Law on Cross-Border Insolvency. The key COMI considerations are summarised by Abdullah JC in *Re Zetta Jet*[52] at [29] and [85]:

The term 'COMI' is not … defined in the Model Law or the Singapore Model Law. There is only a presumption under Art 16(3) of the Singapore Model Law that the place of the debtor's registered office is its COMI …

I will assess the various factors raised by the parties in the following categories:

(a) the location from which control and direction was administered;
(b) the location of clients;
(c) the location of creditors;
(d) the location of employees;
(e) the location of operations;
(f) dealings with third parties; and
(g) the governing law.

37. A more comprehensive discussion of the criteria for determining COMI under the Model Law is to be found in the judgment of Glenn J in *Re Ocean Rig UDW Inc*,[53] which concerned an application for recognition under *Chapter 15* of the *United States Bankruptcy Code*. The case concerns the restructuring of the debt of four companies through a scheme of arrangement sanctioned in the Cayman Islands. One which was incorporated in the Cayman Islands was the holding company of the other three, which were incorporated in the Republic of the Marshall Islands. Until sometime

52 *Supra*.
53 570 BR 687 (Bank. S.D.N.Y. Aug. 24, 2017); the decision was upheld on appeal 585 BR 31 (S.D.N.Y. April 5, 2018).

in 2016 each of the companies had its COMI in the Marshall Islands. It was the companies' case that subsequently the COMI was moved to the Cayman Islands. Whether or not this was correct was relevant because recognition under *Chapter 15* requires that a company is in an insolvency process in the location of its "centre of main interests", in which case it is a "foreign main proceeding", or in a place in which it has an "establishment", in which case it is a "foreign non-main proceeding": the terms in quotes being defined in *Chapter 15*, which adopts the *UNCITRAL Model Code* on cross-border insolvency. The legal framework and the issue is summarised by Glenn J at p.695:

> [O]f course, more than good intentions are required before a U.S. bankruptcy court can recognize a foreign proceeding as either a foreign main or foreign non-main proceeding. For example, a so-called 'letter box company,' with no real establishment or other required indicia for its proposed COMI, cannot support recognition. See *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 BR 122, 129-31 & n.8 (Bankr. S.D.N.Y.), *aff'd*, 389 BR 325 (S.D.N.Y. 2007) (stating that 'the COMI presumption may be overcome particularly in the case of a "letterbox" company not carrying out any business' in the country where its registered office is located) (citation omitted). The question that must be addressed here is whether the Foreign Debtors' change of COMI from the RMI to the Cayman Islands satisfies the requirements of the Bankruptcy Code, permitting this Court to recognize the Cayman Proceedings as a foreign main proceeding. A U.S, bankruptcy court that is asked to recognize a foreign proceeding as a foreign main proceeding must decide where a foreign debtor has its center of main interest.

38. It is not necessary for me to consider the detailed analysis by Glenn J of the evidence relied on as demonstrating that the COMI for each company had moved from the Marshall Islands to the Cayman Islands. It is sufficient to note that Glenn J considered evidence of the following matters as being relevant: the location of directors and board meetings, the location of the companies' principal officers, notices of relocation to the Cayman Islands, location of operations, location of assets, location of bank accounts, location of books and records and the location in which the restructuring activities took place. Glenn J concluded that the COMI of each of the companies was in the Cayman Islands and the proceedings in the Cayman Islands to restructure the debt were "foreign main proceedings". His conclusion is contained in the following passages on p.704.

[I]n assessing these factors, a chapter 15 debtor's COMI is determined as of the filing date of the chapter 15 petition, without regard to the debtor's historic operational activity. See *In re Fairfield Sentry*, 714 F.3d at 137 ('[A] debtor's COMI should be determined based on its activities at or around the time the chapter 15 petition is filed, as the statutory text suggests.'). However, as discussed in greater detail below, to the extent that a debtor's COMI has shifted prior to filing its chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith.

The JPLs submit that, as of the Petition Date, each Debtor's 'center of main interests' within the meaning of chapter 15 of the Bankruptcy Code was in the Cayman Islands and that COMI was not manipulated prior to the filing in bad faith. As explained more fully below, the Court agrees. The Court concludes that the Cayman Proceedings are foreign main proceedings based on the facts discussed at considerable length in Section F. of the Background section (I.) above. Those facts establish that, among other things, the Foreign Debtors (i) conduct their management and operations in the Cayman Islands; (ii) have offices in the Cayman Islands; (iii) hold their board meetings in the Cayman Islands; (iv) have officers with residences in the Cayman Islands; (v) have bank accounts in the Cayman Islands; (vi) maintain their books and records in the Cayman Islands; (vii) conducted restructuring activities from the Cayman Islands; (viii) provided notices of relocation to the Cayman Islands to paying agents, indenture trustees, administrative and collateral agents, and investment service providers; and (ix) filed a Form 6-K with the SEC showing that their office was in the Cayman Islands.

In my view similar matters are relevant to the Hong Kong court's determination of whether or not the COMI of a company is in the jurisdiction of the foreign insolvency proceedings.

39. Thirdly, how the relationship between the COMI criteria and the Hong Kong court's winding-up jurisdiction may be relevant; a subject I touched on in [32]. The position in my view is as follows. The recognition regime is distinct from the winding-up jurisdiction. The Court may recognise foreign insolvency proceedings whether or not the debtor may be wound up in Hong Kong: *Singularis Holdings Ltd.*[54] The fact that the debtor could be, or has been, wound up in Hong Kong is not of itself a bar to the Court granting assistance to the foreign insolvency office-holders. Recognition as an ancillary liquidation is one form of assistance that may be granted to foreign insolvency office-holders.

54 *Supra* at [5] and [13].

40. **Fourthly,** whether an inconsistency between the principles of private international law and the principles of recognition and assistance, the former supporting recognition of foreign office-holders appointed in the country of incorporation as the company's lawful agents in accordance with agency theory and ordinary conflict of laws principles for corporations and the latter supporting recognition largely determined by COMI, will cause practical problems. In my view not. The COMI test is relevant in cases in which a foreign liquidator requires more than an order that confirms the liquidator's status and rights arising from his appointment in the place of incorporation (which is justified by orthodox principles of private international law) and seeks a power necessary to exercise a right in furtherance of a liquidation (which engages the principle of modified universalism); the sort of order referred to by Lord Sumption in [23] of *Singularis*,[55] albeit on the assumption that the Liquidator had been appointed in the place of incorporation and this justifies recognition:

> [T]he right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the companies title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holders right to act on the company's behalf in the same way as any other agent or company appointed in accordance with the law of its incorporation. The recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

41. **Fifthly,** cases where the location of the COMI is unclear. In my view where the location of COMI is unclear, the Court may nevertheless grant recognition and assistance if for practical reasons it is necessary and the foreign insolvency process is in the place of incorporation. This type of pragmatic approach was supported by Abdullah JC in *Re Opti-Medix Ltd*:[56]

> Aside from a common law COMI test, the recognition of the Tokyo order could also be justified on practical grounds. Where the interests of the forum are not adversely affected by a foreign order, the courts should lean towards recognition. This approach could be justified on the bases of not only comity but also of business practicality. In the present case, the interests of Singapore creditors were protected by the undertaking …, and there was no

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55 *Supra*.
56 *Supra* at [26].

competing jurisdiction interested in the winding up of the Companies. On the other hand, the jurisdiction which had the greatest interest, Japan, had moved in favour of liquidation. To hinder the orderly dissolution of the Companies in this situation would serve no purpose. The decisions in both *Re Lee Wah Bank* … and *Re RussoAsiatic Bank* … could perhaps be explained on this practical basis.

42. In my view none of the subsidiary matters I have considered suggest that adopting the COMI criteria conflicts in a material and problematic way with other principles and practical considerations, which are potentially engaged.

Authorities in Hong Kong

43. The authorities show the following types of specific assistance having been granted. In *Re Irish Shipping Ltd*[57] concerned a petition to winding up an unregistered company pursuant to *s.327* of the *Companies Ordinance* (Cap.32). The company was incorporated and in liquidation in Ireland. The petition was presented by the company's liquidator. Jones J in accepting that assistance in the form of an ancillary liquidation should be granted says this:

Another factor that I have taken into account in exercising my discretion is the comity of nations whereby it is desirable that the court should assist the liquidator in another jurisdiction to carry out his duties unless good reasons to the contrary have been put forward and I find none in this case. The jurisdiction of this court in the liquidation would be ancillary as far as possible to the winding up in Ireland and would provide assistance to the official liquidator in the collection and preservation of the assets within Hong Kong.

In *Re Information Security One Ltd*[58] the winding-up petition was brought by the company in compulsory liquidation in the Cayman Islands in which it was incorporated acting by its joint and several liquidators. Kwan J as she then was held that:

8. Authorities for the proposition that an ancillary liquidation may be brought in Hong Kong in respect of a foreign company where there is principal liquidation in its place of incorporation are found in *Re Irish Shipping Ltd* [1985] HKLR 437 and *Re Zhu Kuan Group Co Ltd* (unrep., HCCW No 874 of 2003) …

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57 [1985] HKLR 437, 439, 445 (Jones J).

58 [2007] 3 HKLRD 780 at [1]–[2] and [8] (Kwan J).

Similarly, in *Re China Medical Technologies Inc (No 1)*[59] where the Court of Appeal permitted Cayman Liquidators to act on behalf of the debtor in Hong Kong. Barma JA explains the situation in [5]–[6] and [24]:

> The Company, incorporated in the Cayman Islands, was not registered in Hong Kong. It was the holding company of a group of companies which developed, manufactured and marketed surgical and medical equipment in China. It was wound up in the Cayman Islands in July 2012 and placed into bankruptcy in New York in August 2012…
>
> The petition to wind up the Company in Hong Kong was, as noted above, brought by the Company itself, acting through its Cayman Islands Joint Official Liquidators …
>
> In the present case, it is pertinent to note that while the winding up order sought is in respect of an insolvent company, the petition is not in fact brought by a creditor, but by the Company itself, acting through its liquidators appointed in its home jurisdiction, by the courts of its place of incorporation.

44. The following cases demonstrate that it is permissible for foreign insolvency office-holders to take possession of the debtor's assets: In *Singularis Holdings Ltd*[60] Lord Sumption explains that:

> The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent company.

The Court of Final Appeal in *Chen Li Hung v Ting Lei Miao*[61] recognised and assisted Taiwanese bankruptcy trustees. Bokhary PJ held:

> By suing to establish that shares registered in other persons' names are beneficially owned by a bankrupt, his trustees in bankruptcy would be doing nothing materially different from suing to recover debts due to him. And I am satisfied that we should proceed on the footing that under the law in operation where they were appointed, the Trustees have the right to sue in their own names here with a view to getting the disputed 1.25 million Nikko shares into Mr Ting's estate. This is because it is not in dispute that every step taken by the Trustees, including every step which they have taken in Hong Kong, is in conformity with directions obtained by them from the bankruptcy court in Taiwan …

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59 [2018] HKCA 111; [2018] HKCLC 65.
60 *Supra* at [10].
61 (2000) 3 HKCFAR 9 at 16–17, 21.

> I hold that the Taiwanese bankruptcy order extends to Mr Ting's assets situated in Hong Kong…
>
> In my judgment, the Taiwanese bankruptcy order is to be given effect by the Hong Kong courts…
>
> That the Trustees act in accordance with the directions of the Taiwanese bankruptcy court is an unremarkable matter consistent with routine insolvency practice the world over.

45. It is permissible to grant foreign insolvency office-holders the power to gather information from third parties. Continuing from his explanation quoted in [25] above Lord Sumption explains in *Singularis*:[62]

> [T]here is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation in *In re African Farms Ltd* and in *HIH* and *Rubin*, that such an order must be consistent with the substantive law and public policy of the assisting court … It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information.

Also in *Singularis* a stay was imposed on creditors trying to levy execution against local assets.[63]

62 *Supra*.
63 *Supra* at [12]–[14] and [19] (Lord Sumption), and [54] (Lord Collins).

Re Up Energy Development Group Ltd

46. Mr Ho drew my attention to a very recent decision of Linda Chan J in *Re Up Energy Development Group Ltd.*[64] As Chan J notes in the first paragraph of her judgment *Up Energy* is an unusual case. *Up Energy* is incorporated in Bermuda, listed in Hong Kong and its business was conducted in the Mainland. The winding-up petition in Hong Kong came on for substantive hearing before Chan J on 10 January 2022. As I understand the position the company sought initially to have the petition adjourned until after a hearing to convene a meeting of creditors, which it intended would be made before me a few months later. Chan J was not satisfied that all the relevant issues had been properly addressed before her and adjourned the petition for further argument on 14 February 2022. Chan J ordered further submissions to be made. The company was wound up in Bermuda on 11 March 2022. The company had been put into soft-touch provisional liquidation in 2017, which was recognised by an order made by me in August 2017. Obviously this proved unsuccessful. The Company argued that it should not be wound up in Hong Kong and instead the liquidation in Bermuda should be recognised and the powers necessary to conduct the liquidation in Hong Kong extended to the liquidators by way of common law recognition. Chan J rejected this argument. Chan J held, and I simplify, that it was not possible for a foreign liquidator to conduct a winding up in Hong Kong, which required the liquidators to exercise the powers available to a Hong Kong liquidator under the *Ordinance*. The common law power of assistance did not permit the court "*to make the provisions under the CWUO available to the Bermuda liquidators or the Company in the absence of a winding up order made by the Hong Kong court.*"[65] Mr Ho in the present case agreed that Chan J's conclusion represented the current orthodox view for the reasons explained in *Rubin v Eurofinance*[66] and *Singularis.*[67] I agree. So far as the present case is concerned what requires consideration is sub-paragraph (3) of [81], which contains Chan J's determinations. Chan J says this: "*In the absence of a winding up order [in Hong Kong] made against the [c]ompany, the court does not have power under the common law to confer any powers on the Bermuda Liquidators or make any provisions under the [Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32)] available to the [c]ompany.*" Mr Ho quite properly brought it to my attention, because although the second part of the sentence, which concerns the issue that I understand was

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64 *Supra.*
65 [59].
66 *Supra.*
67 *Supra.*

central in the case is not relevant to the present matter as the order sought does not require a power under the *Ordinance* to be extended to the Liquidator, the first part of the sentence suggests that no powers at all can be conferred at common law.

47. As I have explained, in the present case the order that I have made is justified by established principles of private international law. As Lord Sumption demonstrates in the parts of *Singularis* referred to in [16] above the court is not constrained from granting any assistance at all to a foreign liquidator. The court can grant assistance to facilitate a foreign liquidator whose appointment has been recognised on orthodox principles of private international and which engages the principles of modified universalism. As Chan J refers at length to *Singularis* in her judgment I think a fair reading of [81(3)] is that her Ladyship had in mind (A) an argument that the common law allowed powers analogous to those provided in the Ordinance to be granted to foreign liquidators rather than (B) powers intended to assist a foreign liquidator effectively to exercise rights that a domestic court recognises because the liquidator had been appointed in the place of incorporation; in other words the situation discussed by Lord Sumption in [23] of *Singularis*. I am concerned with the latter type of case. For the reasons I have explained in earlier paragraphs, in my view it is entirely consistent with modified universalism and the established common law principles of recognition and assistance for the Hong Kong court to grant powers intended to assist a foreign liquidator appointed in the jurisdiction of a company's COMI effectively to exercise rights, which arise from the liquidator's status in the COMI jurisdiction.

Form of Order

48. I will grant an order in the form annexed to this judgment. In [1] I will order that the liquidation is recognised. This I do on the basis discussed in [39]–[40] alternatively on practical grounds. The Liquidator is the lawful agent of the Company as a matter of the law of its place of incorporation and entitled to direct that its assets are transferred from accounts in Hong Kong to accounts in Bermuda. Paragraph 2 confirms that the Provisional Liquidator has the power to secure and obtain the Company's assets and documents in Hong Kong. This is simply confirming the position under orthodox principles of private international law and gives the Provisional Liquidator assistance, which might fairly be described as more managerial in nature than of a type associated specifically with insolvency.

49. Paragraph 3 permits the transfers of the relevant sums of money as directed by the Provisional Liquidator. Paragraphs 4 and 5 are self-explanatory.

Conclusion

50. In my view the correct approach to assessing whether or not a foreign liquidation should be recognised is first to determine if at the time the application for recognition is made the foreign liquidation is taking place in the jurisdiction of the Company's COMI. If it is not recognition and assistance should be declined unless the application falls within one of the following two categories. **First**, it is limited to recognition of a liquidator's authority, if appointed in the place of incorporation, to represent a company and orders that are an incident of that authority; which might be described as managerial assistance. As the Provisional Liquidator in the present case only requires an order that demonstrates to Computershare and HSBC that as the lawful agent of the Company he is entitled to direct the monies to be transferred to another bank account in my view the application, when the superfluous paragraphs dealing with more general assistance in the originating summons are deleted, is justified by established principles of private international law. **Secondly**, recognition and limited and carefully prescribed assistance which does not fall within the first category required by a liquidator appointed in the place of incorporation as a matter of practicality; the type of situation in other words, which Abdullah JC describes as justifying assistance on practical grounds in *Opti-Medix*.

Reported by Ken TC Lee

Appendix

Order

UPON the application of Mr. John Christopher McKenna of Finance & Risk Services Ltd in his capacity as the sole provisional liquidator of Global Brands Group Holding Ltd (In Liquidation in Bermuda) (**Company**) by way of *ex parte* originating summons filed on 25 May 2022

AND UPON reading the Letter of Request issued by the Supreme Court of Bermuda dated 28 March 2022, the Affidavit of John Christopher McKenna filed on 26 May 2022 and the exhibit referred to therein, and the 2nd Affidavit of Lau Po Wa Vivian filed on 27 May 2022 and the exhibit referred to therein

AND UPON hearing counsel for the Applicant, the 1st and 2nd Respondents being absent

<u>**IT IS ORDERED THAT:**</u>

(1) The liquidation of the Company pursuant to the order of the Supreme Court of Bermuda (**Bermuda Court**) dated 5 November 2021 and the appointment of John Christopher McKenna of Finance & Risk Services Ltd, Suite 502, 26 Bermudiana Road, Hamilton, Bermuda, as provisional liquidator (**Provisional Liquidator**) pursuant to the order of the Bermuda Court dated 16 September 2021, and his continuation in office pursuant to the order of the Bermuda Court dated 5 November 2021, be recognised by this Court.

(2) The Provisional Liquidator has and may exercise in the Hong Kong Special Administrative Region the following powers:

a) to locate, protect, secure and take into their possession and control the books, papers, and records of the Company including the accountancy and statutory records within the jurisdiction of this Court. The books, records and documents of the Company include:

i. Emails exchanged and other correspondences between the Company and its auditors, and the Company and other third parties; and

ii. Documents and information provided by the Company to its auditors and provided by the

auditors to the Company in relation to the audit work;

b) to take all necessary steps to prevent any disposal of the Company's assets and, in particular, to secure any credit balances in any bank accounts in the name or under the control of the Company within this jurisdiction;
c) to operate and open or close any bank accounts in the name and on behalf of the Company for the purpose of collecting the assets and paying the costs and expenses of the Provisional Liquidator;
d) to retain and employ barristers, solicitors or attorneys, accountants and/or such other agents or professional persons as the Provisional Liquidator considers appropriate for the purpose of advising or assisting in the execution of their powers and duties under this Order; and
e) to bring legal proceedings and make applications to this Court, whether in his own name or in the name of the Company.

(3) Subject to any adjustments for additional interest accrued and for bank charges or fees incurred, the following balances comprising receivables due in respect of dividends and interest income derived from shares that are not vested under the Company's 2014 and 2016 share award schemes (**GBG Share Award Schemes**) because of staff termination standing to the credit of the 1st Respondent, the trustee for the GBG Share Award Schemes, and maintained with the 2nd Respondent, be delivered up to the Company in accordance with the instructions issued by the Provisional Liquidator:

Type of account	**Name of Account**	**Account number**	**Balances (HKD)**
Cash Custodian Account	Computershare Hong Kong Trustees Ltd Account No. 0018	848-XXXXXX-001	64,860.54 or any balances remaining therein
Cash Custodian Account	Computershare Hong Kong Trustees Ltd Account No. 0047	741-XXXXXX-001	8,399,057.66 or any balances remaining therein

Type of account	Name of Account	Account number	Balances (HKD)
	Computershare Hong Kong Trustees Ltd Account No. 0047 - No.2 Account		

(4) The sum of HK$135,250 be returned by the 1st Respondent to the Company in accordance with the instructions issued by the Provisional Liquidator. Such sum is the total amount deducted by the 1st Respondent from the cash balance held by them as trustee under the GBG Share Award Schemes to set off their outstanding fees for the months of April to August 2021.

(5) The following balances standing to the credit of the Company maintained with the 2nd Respondent, subject to any adjustments for additional interest accrued and for bank charges or fees incurred be delivered up to the Company in accordance with the instructions issued by the Provisional Liquidator:

Type of account	Account number	Balances
EUR Current Account	848-XXXXXX-220	EUR 9.85
HKD Current Account	848-XXXXXX-001	HKD 730.01
USD Current Account	848-XXXXXX-201	USD 4,748.79

(6) The Provisional Liquidator does have liberty to apply; and

(7) The costs of this application be paid out of the assets of the Company as an expense of the liquidation.

A B C D E F G H I J K L M N O P Q R S T U V

HCMP 172/2021
[2021] HKCFI 1235

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 172 OF 2021

IN THE MATTER OF China Bozza Development Holdings Limited（中國寶沙發展控股有限公司）(formerly known as China Agroforestry Low-Carbon Holdings Limited（中國農林低碳控股有限公司）(in Provisional Liquidation in the Cayman Islands)

and

IN THE MATTER OF the inherent jurisdiction of the Court

BY

THE JOINT PROVISIONAL LIQUIDATORS OF CHINA BOZZA DEVELOPMENT HOLDINGS LIMITED (IN PROVISIONAL LIQUIDATION IN THE CAYMAN ISLANDS) — Applicants

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Before: Hon Harris J in Chambers

Date of Hearing: 15 April 2021

Date of Decision: 11 May 2021

D E C I S I O N

A B C D E F G H I J K L M N O P Q R S T U V

Introduction

1. China Bozza Development Holdings Limited ("**Company**") is incorporated in the Cayman Islands and listed on the GEM Board of the Stock Exchange of Hong Kong Limited ("**SEHK**"). According to the affirmation evidence that has been filed in support of this application the Company is an investment holding company and its business operations are mainly conducted in the Mainland through companies incorporated in the Mainland and held indirectly by the Company through intermediate holding companies incorporated in the British Virgin Islands ("**BVI**"). The Company and its subsidiaries, are principally engaged in forestry management, provision of services in relation to container houses and moneylending. The group's major assets are the rights of use in respect of forests in the Mainland which are held by a number of mainland companies held by the BVI intermediate subsidiaries.

2. On 15 May 2020 a petition was presented in Hong Kong for the Company to be wound up on the grounds of insolvency.

3. On 30 November 2020 a director of the Company presented a petition in the Cayman Islands for the winding up of the Company. On 1 December 2020 the Company applied for the appointment of soft-touch provisional liquidators to facilitate a restructuring of the debt of the Company. On 3 December 2020 the Cayman Court appointed Lai Wing Lun and Osman Mohammed Arab of RSM Corporate Advisory (Hong Kong) Limited as soft-touch provisional liquidators along with Martin Nicholas John Trott, who is based in the Cayman Islands ("**JPLs**"). On 5 February 2021 an application was made supported by a letter of request from the Cayman Court for recognition and assistance of the JPLs in Hong Kong.

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4. These kind of applications have become increasingly frequent and commonly they have been dealt with on the papers. I declined to do so in the present case and directed that there be a hearing, which took place on 1 March 2021. I did so for a number of reasons. Until recently applications for recognition of soft-touch provisional liquidators appointed in a company's place of incorporation took place in respect of listed companies, which were not subject to winding up petitions in Hong Kong. The applications occurred in cases in which a company was using a technique commonly called the *Z-Obee* [1] technique to restructure debt. I had become aware that with increasing frequency such applications are being made after a petition had been presented in Hong Kong. At the time this application first came on before me I heard during the same week two winding up petitions involving companies, which had recently been placed in soft-touch provisional liquidation in the jurisdiction of incorporation: *Lamtex Holdings Limited* [2] and *Ping An Securities Group (Holdings) Limited* [3]. *Lamtex*, *Ping An* and the present case all involved the same firm of insolvency practitioners: RSM. In short I was concerned that the *Z-Obee* technique, (which had been developed in order to address the problems faced by a company attempting to restructure its debt caused by the absence in Hong Kong of any statutory mechanism, which provides for restructuring under the supervision of independent professionals and also the court and the impact of the Court of Appeal's decision in *Legend International Resorts Ltd* [4]) is being abused to obtain a *de facto* moratorium of enforcement action by creditors in Hong Kong.

1 [2018] 1 HKLRD 165 and see the discussion in [31]–[33] of *Re China Huiyuan Juice Group Ltd* [2021] 1 HKLRD 255.
2 [2021] HKCFI 622.
3 [2021] HKCFI 651.
4 [2006] 2 HKLRD 192.

5. At the hearing on 1 March 2021 I informed the JPLs that the papers told me little about the circumstances in which the application in the Cayman Islands came to be made. Although I had some of the papers put before the Cayman court they suggested that at the time the application had been made the Company did not have any restructuring plan, which it wished to implement out of provisional liquidation, rather it was seeking to appoint soft-touch provisional liquidators, who would then make efforts to formulate such a plan. This was done without any creditor input or regard to the proceedings in the Hong Kong SAR, the jurisdiction in which the Company is listed and in which, along with the Mainland, most of its creditors appear to be based. I adjourned the application in order that I could be provided with comprehensive evidence as to the circumstances in which the Company came to make the application in the Cayman Islands and RSM nominated. The JPLs asked for a month to prepare the necessary evidence and I fixed the next hearing for 15 April 2021. I, therefore, proceed on the basis that the Company and JPLs put before me all the advice sought and obtained by the Board of the Company concerning the Company's obligations to creditors (the Company clearly being cash flow insolvent) and options open to the Board if they thought there was any justification for trying to prevent liquidation.

The Company and JPLs' evidence

6. The evidence that was adduced demonstrated that the Board did not seek legal or other professional advice on the consequences and implications of the Company's dire financial position or the statutory demand after it received the statutory demand or the Petition issued against it. What appears to have happened can be explained briefly. Professor Phillip Fei, who became Chairman of the Board in July 2019, explains in his affirmation that from 12 February 2020 the Company began to issue

occasional circulars to creditors informing them of its financial position and giving the impression that it had commenced some form of debt restructuring. Details of the restructuring were not provided. There is no evidence that the Board had anything one could sensibly describe as a plan to restructure the Company's debt or business. I am told nothing about the Company's business, how it came to be unprofitable, why any investor might be interested in injecting funds into the Company or how the Board thought that the Company's business might be rehabilitated.

7. Apparently in June 2020 discussions with an investor, Chen Jianwei, resulted in an agreement being signed pursuant to which the Company could borrow up to HK$83,500,000 to be used to refinance the Company's debt. However, it would appear that Mr Chen only provided HK$3,300,000 and the hope that his loan would facilitate repayment of the creditors, nearly all of whom appear to be individual lenders to the Company resident in the Mainland, proved in vain.

8. In 2020 the Company began with no success to look for investors to improve its financial position. In November 2020 Professor Fei became acquainted with Perry Ng. Apparently Mr Ng shared with Professor Fei his experience in another listed company in Hong Kong, which was also facing financial difficulties at the time and was attempting to restructure its debts through a scheme of arrangement with the help of soft-touch provisional liquidator, who happened to be RSM, who were assisted by Michael Li & Co and Conyers, Dill and Pearman, who the Company subsequently instructed in the present matter.

9. Professor Fei subsequently met with RSM, who explained to him soft-touch provisional liquidation. This left Professor Fei believing, and I quote from [16] of his affirmation, "…. *that the Company will be*

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better placed to negotiate with its creditors and may have a higher chance of restructuring its debt with the help of soft-touch Joint provisional liquidators. More particularly, the majority of the creditors of the company are retail bond creditors who have lost confidence in the management after the Company failed to honour the previous settlement proposal." At the meeting with RSM, RSM produced a presentation explaining something about the firm and the services that it could provide. I will quote what the presentation says about the Company's current position as RSM understood it and how the Company might proceed:

> "We understand that you intends to carry out debt restructuring and formulate, promote and implement a restructuring plan. However, as the Petitioner has filed a winding-up petition in the High Court of Hong Kong, the board of directors of your company needs to consider the potential outcome which the company appears before the winding-up hearing on 2 December 2020 and provisional liquidator be appointed by the High Court of Hong Kong.
>
> According to the public information, the Petitioner has not yet applied for the appointment of a provisional liquidator. At the same time, as mentioned earlier, under the existing judicial system of Hong Kong, even if the appointment power lies with the Hong Kong court, it is still difficult for the company to request the Hong Kong court to appoint a provisional liquidator for restructuring purposes. In Hong Kong, the appointment of a provisional liquidator means that the powers of the company's existing board of directors and management will immediately cease, and its role will become to cooperate with the provisional liquidator in taking over, investigating and reorganising the company according to the power granted by the court when the provisional liquidator considers appropriate. Then, the provisional liquidator needs time to understand the company the management's restructuring plan. Therefore, the debt restructuring plan that your company originally intended to promote will therefore face great delay and uncertainty.
>
> However, there is an alternative plan for China Bozza. Since China Bozza is a company incorporated in the Cayman Islands, you can seek to appoint an independent professional institution jointly accepted by the company, investors and creditors as a restructuring consultant or the aforementioned provisional liquidator (with power for restructuring purposes only) in the Cayman Islands courts. On the basis of low intervention (Soft-touch Basis), the provisional liquidators could work with the

> company's board of directors and management to design and promote a debt restructuring plan that balances the best interests of all stakeholders.
>
> In order to achieve the above objectives and gradually realise your company's debt restructuring in a planned way, we recommend that your company implement a restructuring plan in stages. The main task of the first stage is to apply to the Cayman Islands for the appointment of provisional liquidators limited to the purpose of restructuring. The following is the preliminary idea and timetable of our proposed debt restructuring plan."

10. This description of the options open to the Company was incorrect. It was not necessary to appoint soft-touch provisional liquidators in the Cayman Island in order to restructure the Company's debt. The Board could have appointed RSM to advise it on restructuring in Hong Kong and attempted to persuade creditors and the Court in Hong Kong to adjourn the Petition in order to allow the Company the opportunity to progress a restructuring.

Directors' Duties to Creditors

11. It is unclear what in practice either the Company or RSM had in mind. Restructuring is a term used to describe the process of altering existing debt obligations and business activities of a company with a view to improving its medium to long term financial and business viability. It is not a thing in itself; a kind of medication for the ills of a distressed company.

12. If one views restructuring of an insolvent listed company simply as a commercial transaction consisting of selling the Company at a price attractive to investors interested in acquiring a listed vehicle for their own business, it is likely influence to whose interests one gives weight and the different parties will all have different interests. An investor's imperative is to buy at the lowest price, which necessarily means paying

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creditors as little as possible. The owners of the Company, and I think it might reasonably be assumed the Board they have appointed and in cases such as the present who choose the provisional liquidators, are interested in avoiding liquidation as it would result in them loosing their entire investment. For the owners anything is better than liquidation, which literally. For the professionals involved it is an opportunity to earn fees underwritten by an investor. If these considerations are what motivates the decisions of the parties to which I have referred and creditors are not involved in the restructuring process that creditors' interests are largely unheard, and not as they should be driving the process.

13. What a company should be advised once it appears likely that it is insolvent is that the interests of the creditors become paramount. In *West Mercia Safetywear v Dodd* [5] Dillon LJ approves the statement of Street CJ in *Kinsela v Russell Kinsela Pty Ltd*:

> "In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration."

14. Various other authorities include dictum to the effect that once a company becomes insolvent the directors' fiduciary duties are owed to the general body of creditors not to the shareholders. A recent example is

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[5] [1988] BCLC 250, 252.

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the decision of Coleman J in *Cyberworks Audio Video Technology Limited v Remedy Asia Ltd and others* [6]. In [66]–[68] Coleman J explains:

> "66. At the point in time when a company is insolvent or nears insolvency or is in doubtful solvency, or if a contemplated payment or course of action would jeopardise its solvency, the interests of the creditors 'intrude' on the directors' duties, and will require the directors to take into account those interests. This may be termed the 'creditors' interests duty'. This arises because creditors become prospectively entitled through a liquidation to displace the power of the shareholders and the directors so as to deal with the company's assets. The underlying principle is that directors are not free to take action which create a real, as opposed to remote, risk to the creditors' prospects of being paid, without first having considered their interests rather than just those of the company and its shareholders. However, that does not give rise to any duty on the part of the directors owed directly to the creditors. Rather, the directors will owe a duty to the company to take care to protect the interests of creditors: see Geraghty, Sinclair & Snowden 'Company Directors: Law and Liability' at §6.122.
>
> 67. Exactly when the risk to creditors' interests becomes real for these purposes will ultimately have to be judged on a case-by-case basis. There have been different verbal formulations ('verge of insolvency', 'dubious solvency', 'parlous financial state of affairs', etc), but they generally fit the different factual circumstances in which they were expressed: see, for example, *Re HLC Environmental Projects Ltd (in liq)* [2014] BCC 337 at §§88-89.
>
> 68. In the case of *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112, at §§213-220, the English Court of Appeal considered possible answers to the question of when the creditors' interests duty is triggered. First, it was recognised that the duty is engaged at least at the point when the company is actually insolvent, either on a cash-flow or balance sheet basis (and in most of the cases the focus is on balance sheet solvency or insolvency). But the court found more difficult the question as to where the trigger might lie, short of actual insolvency. It noted that the qualified way in which judges have expressed the trigger reflects that the directors of a company may often not know, nor be expected to know, that the company is actually insolvent until sometime after it has occurred. But it is for that reason, among others, that a test falling short of established insolvency is justified. In its conclusion, the court considered that the relevant formulation which accurately encapsulates the trigger is that the duty arises when the directors know or should

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[6] [2020] HKCFI 398; see also *Re Pantone 485 Ltd* [2002] BCLC 266.

> know that the company is or is likely to become insolvent. In that context, 'likely' means probable, not some lower test."

15. In the context of a group of companies it will also be relevant for directors to understand that the duty to consider the interests of creditors, requires the directors to consider the interests of the creditors of each company in a group separately. As Godfrey Lam J explains in [235] in *Re Wing Fai Construction Co Ltd* [7]:

> "As a matter of principle, it is not a sufficient justification for the directors involved in such payments to say that they looked to the benefit of the group as a whole. Each company, albeit within a group, is a separate legal person with separate interests and separate and probably different creditors. It is the duty of the directors of a company "to consult its interests and its interests alone" in deciding how to exercise their powers as directors of that company; they are not entitled to sacrifice the interests of that company in order to promote the interests of other group companies, even if they are also directors of them: *Walker v Wimborne* (1976) 137 CLR 1 at 6–7; *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] 1 Ch 62, 74D–E; *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580, 620."

16. These principles and how they apply is something of which directors should be informed by lawyers and informed insolvency practitioners when they are asked to advise a board of a company, which it seems likely is insolvent. Consistent with this one would expect creditors to have a central role in the development of any plan to restructure a company's debt. Historically this has been the case in Hong Kong when dealing with listed companies. I touch briefly on the history of the use of provisional liquidation as a vehicle to facilitate restructuring in [31] of my decision in *China Huiyuan* [8]. I think it will be useful if I say more about this in this decision in order to give greater context to the present issues and my reasoning.

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7 (Unreported HCCW 735/2002, 24 November 2017).
8 *Supra*.

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Soft-touch provisional liquidation in Hong Kong

17. As a consequence of the Asian Financial Crisis, which began to effect Hong Kong from about the second half of 1997 a number of listed companies began to experience financial difficulties. Commonly local banks such as HSBC and Standard Chartered were their major creditors. The banks required a number of these companies to appoint independent financial advisers ("**IFA**"), which the banks approved, to assist them address their financial difficulties. The advisers were specialist insolvency practitioners. In a number of cases a stage was reached at which the IFAs and the banks took the view that control of the companies needed to be taken out of the hands of management, who they had concluded were not capable of finding means to maximise value for the benefit of creditors. At the time it was easier than is currently the case to sell a listed company to a purchaser primarily interested in acquiring a listed vehicle. If this was thought to be the best method of maximising value it required the involvement of personnel capable of managing the process. This was achieved by a creditor issuing a petition and applying for appointment of provisional liquidators, normally the IFAs, with the agreement of other actively involved creditors, who, particularly in the case of banking creditors, were informed and involved in the formulation of the terms of the restructuring. As far as I am aware the first case in which this happened was *Seapower Resources International Limited* [9], which followed from a series of cases concerning members of the *HIH* [10] insurance group, in which Hartmann J had accepted in the face of opposition from the Official Receiver, that the companies could be restructured out of provisional liquidation. In the case of *Seapower* the provisional liquidators' powers

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[9] HCCW 1325/2001, 31 December 2001 and 22 April 2002. No reasons were given for the decision to appoint provisional liquidators. However, the decision on the resulting petition to approve a scheme was reduced to writing: [2003] HKEC 1372.

[10] (Unreported, HCCW 337, 339 & 340/2001, 21 December 2001).

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were extended to allow them to introduce a scheme of arrangement 4 months after their appointment. This technique continued to be used [11] until the decision of the Court of Appeal in *Re Legend International Resorts Limited* [12] brought it to halt. The Court of Appeal took a differing view to Hartmann J and the judges who had heard the reported cases referred to in footnote 11, and held that *section 193* of what is now the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32, did not allow provisional liquidators to be appointed, and I simplify, principally for the purpose of restructuring.

18. It will be appreciated that in the circumstances I have described there was little risk of proper regard not being given to the interests of the general body of unsecured creditors. The cases that have currently been coming before this court are increasingly very different. The present case illustrates one reason why this is so. The Company does not appear to have any banking debt in Hong Kong. The creditors are nearly all what are described as purchasers of "bonds". This suggests, particularly in the context of a listed company, that the creditors are holders of a series of publicly tradeable bonds. They are not. Their debts arise from individual loans at remarkably low interest rates made by members of the public. Commonly the loans are made because the "bond" (whose holder will normally be from the Mainland) give the purchaser residency rights in Hong Kong, or for reasons touched on in my recent decision in *China Greenfresh Group Co Ltd* [13], provide a mechanism to evade

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[11] See by way of example: *Re Yaohan Hong Kong Corp Ltd* [2001] 1 HKLRD 363; *Re Rhine Holdings Ltd* [2000] 3 HKC 543; *Re Albatronics (Far East) Ltd* [2002] 4 HKC 99; *Re Luen Cheong Tai International Holdings Ltd* [2002] 3 HKLRD 610 (CFI), [2003] 2 HKLRD 719 (CA).

[12] *Supra*; see also my discussion of the case and the extension of a provisional liquidators powers to permit them to develop and implement a restructuring in *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338.

[13] [2021] HKCFI 1182.

Mainland exchange controls. *Lamtex* [14] and *Ping An* [15] are recent examples. In many cases the procuring of such loans seems to be little more than a scam as the companies are already distressed and the risk of default is significant. Unsurprisingly the creditors have little understanding of their rights or the methods available for securing the maximum return on the loans that they have made.

The Present Case

19. As I have already explained, in the present case the Board neither sought nor were offered proper legal advice. It is suggested in the evidence filed for this application that the reason soft-touch provisional liquidation was sought was because the Board believed that creditors might be more trusting of attempts to restructure debt if independent professionals were appointed. This is not, however, mentioned in the minute of the Board meeting at which the Board resolved that the Company commence proceedings in the Cayman Islands with a view to appointing soft-touch provisional liquidators. I note in passing the first of the resolutions passed by the Board is in the following terms:

> "It is in the interest and commercial benefit of the company and its shareholders as a whole to implement a debt restructuring and to present the petition and make the application to the Grand Court to facilitate such debt restructuring."

This was drafted by this Company's Hong Kong solicitors Michael Li & Co. As I have demonstrated in [12]–[14] this evidences a failure to understand to whose interests, namely the creditors, the Board need to have regard.

[14] *Supra*.
[15] *Supra*.

20. Creating confidence amongst creditors also does not feature as a consideration in any of the documents RSM have produced contemporary to the application or in the evidence submitted to the Cayman Court. We probably find the primary driver behind appointing RSM and applying for soft-touch provisional liquidation explained in [30] of Professor Fei's 2nd affirmation filed in the proceedings in the Cayman Islands:

> "In addition, I understand they have an established network of investors who might be interested in becoming 'White Knights' of the Company after carrying out a suitable due diligence process. In the event that it is not feasible to rescue the Company, appointing Provisional Liquidators at this juncture would ensure that the assets of the Company will be properly preserved, which is in the interests of the creditors, public shareholders and all other stakeholders of the Company."

It is also apparent that no consideration appears to have been given by the Company or its advisers to whether or not it might be in the interests of its creditors for the Company to be wound up.

21. I think it a fairly compelling inference that RSM were selling their ability to find an investor and work with it to avoid a liquidation and retain some shareholder value. The creditors were a group to be bought off; not the group whose financial interests took priority to other considerations. I note that the wording used by the drafter from Conyers Dill & Pearman also suggests a lack of familiarity with the principles I have explained in [12]–[14].

Conclusion

22. This case illustrates that the way soft-touch provisional liquidation commenced in the place of incorporation of listed companies has been used recently has strayed materially from the way it was originally

used in Hong Kong. The indifference shown in the present case by both the insolvency practitioners and legal advisers to the relevant guiding principles is troubling particularly as *Lamtex* and *Ping An* involve the same professionals and a body of creditors who are ripe for exploitation and whose rights need protection. That does not mean that a restructuring involving a sale of the Company to an investor is not in the best interests of creditors, but it does mean that the court needs to supervise closely the use of the *Z-Obee* technique to avoid it being misused by professionals more concerned with generating fees than the interests of creditors.

23. As I explain in [7] of *China Huiyuan* [16] as a matter of private international law, a liquidator, including a provisional liquidator, should be recognised as having the powers to act on behalf of the company over whom they are appointed that have been bestowed on them by the courts of the place of incorporation. It follows that notwithstanding my misgivings about how this matter has developed the JPLs should be recognised and I will so order. However, granting an order providing active assistance is a different matter. I am not currently satisfied that I should make an order granting the type of general assistance which I have on previous occasions, because of concerns that I have about the way in which the JPLs are approaching this and other cases. I will grant general liberty to apply thus giving the JPLs the option to seek a further order if it is required and they can justify it.

24. I would also add the following observations. As I explain in *Lamtex* [17] the fact that provisional liquidators have been appointed in the place of incorporation does not mean that the Hong Kong Court will automatically adjourn a petition issued in Hong Kong. I will not repeat the

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[16] *Supra*.
[17] *Supra*.

reasoning to be found in *Lamtex*. I note, however, that there does appear to be a material difference in the approach of the Cayman Court and Hong Kong Court to granting adjournments at the request of a company seeking time to restructure its debt. As I explain in [38] of *Lamtex* the Hong Kong Court will grant an adjournment if it is demonstrated by a company that it has a proposal to address its financial difficulties that is in the best interests of the general body of unsecured creditors, particularly if there is in principle support from sufficient of the creditors in terms of value of the unsecured debt to suggest that if a scheme of arrangement is introduced it is likely to achieve the necessary statutory majority in value (75%) to engage the court's discretionary power to sanction the scheme. If the skeleton argument submitted to the Cayman Court is accurate it would appear that the Cayman Court's criteria are less onerous and that a proposal does not have to be demonstrated in order to obtain an adjournment of a petition and the giving of time for a company to attempt to restructure its debt through soft-touch provisional liquidation. If this is correct, practitioners need to be mindful of the differences in the approach of the Cayman and Hong Kong Courts and their consequences.

25. Practitioners should be alive to the need for evidence to be filed that provides an informed and candid description of a company's financial position and what is envisaged to be the most likely solution to its problems. This should not need stating, but the evidence filed in a large number of cases involving Mainland listed businesses suggests that it requires emphasising. If the reality is, for example, that a company is (a) hopelessly insolvent, (b) there is no prospect of realising value from sale of its indirectly owned assets in the Mainland as they will be seized by Mainland creditors and (c) the only hope of achieving other than a *de minimis* return to off-shore creditors is the sale of the company to an

investor, who may wish to acquire it to use as a listed vehicle for a different type of business; this should be explained and justified. Simply referring to a possible "debt restructuring" and treating the expression as a kind of magical incantation, the recitation of which will conjure up an adjournment of the petition is as inadequate as it is facile.

26. I will grant an order for recognition in the terms appended in this decision.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Terrence Tai, instructed by Michael Li & Co, for the applicants

Appendix

Order

IT IS ORDERED THAT:-

1. The provisional liquidation of China Bozza Development Holdings Limited (in Provisional Liquidation in the Cayman Islands) ("**Company**") and the appointment of Mr. Martin Nicholas John Trott of R&H Restructuring (Cayman) Limited, Windward 1, Regatta Office Park, PO Box 897, Grand Cayman, KY1-1103, Cayman Islands; and Mr. Osman Mohammed Arab and Mr. Lai Wing Lun, both of RSM Corporate Advisory (Hong Kong) Limited, 29/F., Lee Garden Two, 28 Yun Ping Road, Causeway Bay, Hong Kong, as the Joint Provisional Liquidators for the Company for restructuring purposes ("**JPLs**"), pursuant to the Order of the Grand Court of the Cayman Islands dated 3 December 2020, be recognised by this Court.

2. The JPLs do have liberty to apply.

3. The costs of this application be paid out of the assets of the Company as an expense of the provisional liquidation.

SUPREME COURT BERMUDA 2022 FEB 21 AM 9:56

Dicey, Morris & Collins on the Conflict of Laws 16th Ed.

Mainwork

Volume 2

Part 6 - Corporations and Insolvency

Chapter 30 - Corporations and Corporate Insolvency [1]

Section 4. - Winding up, Administration, Company Voluntary Arrangements and Receivership

C. - Effect of foreign winding-up order or other order in foreign insolvency proceedings [461]

Rule 193

(1)

30R-142

The authority of a liquidator appointed under the law of the place of incorporation is recognised in England.

(2) English courts will enforce an order made by a court in any other part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law as if it were made by an English court exercising the corresponding jurisdiction, but the English courts are not required to enforce such an order in relation to property situate in England.

(3) Where an English court has jurisdiction in relation to insolvency law, it will assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

(4) English courts have a common law power to provide assistance to foreign insolvency proceedings where such assistance can be provided in a manner consistent with English law and public policy.

Comment

Introduction

30-143

This Rule addresses a number of issues relating to the effect of a foreign winding-up order or other order of a foreign court in insolvency proceedings. Clause (1) deals with the traditional position at common law that the English court will recognise the authority of a liquidator appointed under the law of the place of incorporation. Clause (2) concerns the intra-UK effect of an order made by a UK court exercising jurisdiction in relation to insolvency law—that is, for the purposes of this Rule, the effect in England of such an order made by the Scottish or Northern Irish Court.

30-144

Clauses (3) and (4) concern judicial assistance in support of foreign insolvency proceedings. There are three regimes [462] which govern the assistance the English court may give to a foreign court exercising jurisdiction in relation to insolvency: (i) s.426 of the Insolvency Act 1986, which is addressed at clause (3) of the Rule; (ii) the Cross-Border Insolvency Regulations 2006 implementing in Great Britain the UNCITRAL Model Law on Cross-Border Insolvency, which are addressed at Rules 195 to 200; and (iii) the court's common law powers, which are addressed at clause (4) of this Rule.

Clause (1) of the Rule

30-145

This clause is justified because the law of the place of incorporation determines who is entitled to act on behalf of a corporation. [463] If under that law a liquidator is appointed to act then their authority should be recognised here. [464] The court may also recognise the authority of a foreign liquidator pursuant to the Cross-Border Insolvency Regulations 2006 implementing the UNCITRAL Model Law, [465] or a request from a foreign court under s.426 of the Insolvency Act 1986. [466] This clause deals with the position at common law.

30-146

While at common law only a liquidator appointed under the law of the place of incorporation has been recognised, some have suggested that a broader approach might be appropriate, [467] and indeed some jurisdictions recognise a wider principle. [468] More particularly, it has been suggested that an 1dbappointment made in a country other than the place of incorporation may be recognised in England if it is recognised under the law of the place of incorporation of the company. [469] More speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised. [470]

30-147

Recognition of a liquidator's authority may be sought by reference to an appointment made in the exercise of a foreign jurisdiction similar to that conferred on the English courts in regard to companies incorporated outside the United Kingdom. [471] The protagonist of recognition in such a case could urge that "it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves." [472] However, even if an appeal to comity has any force in this context (which is doubtful), [473] it has been rejected in the context of company insolvency, [474] though it is possible that the liquidator's authority would be recognised as extending to those affairs of the company which are local to the country where the appointment was made. [475] Where there is no likelihood of a liquidation in the country of incorporation it may be possible that the liquidator's authority may be held to extend beyond those affairs. This treatment of the argument based on comity is defensible because where there is a liquidation in the country of incorporation and the English courts exercise their own jurisdiction to make an order, they seem concerned to ensure that the liquidator should not go beyond dealing with the company's English affairs without special direction. [476] Such concern is not shown where there is no likelihood of a liquidation in the country of incorporation. [477]

Recognition of foreign corporate rescue procedures at common law

30-148

A feature of modern insolvency and restructuring law and practice is an arrangement (which may take various forms) in which a company which is, or is close to becoming, insolvent, is re-organised in such a way as to restore the company or particular aspects of its business to a financially sound and viable state. [478] The question may arise, in an international context, as to the effect to be given in England at common law to such an arrangement which is established under a foreign law. [479]

30-149

In Felixstowe Dock and Railway Co v US Lines Inc, [480] a United States corporation, which carried on business all over the world, and which was registered in England under the Companies Act 1985, was under re-organisation in the United States pursuant to Chapter 11 of the United States Bankruptcy Code. Application of Chapter 11 in the United States had led to the issue of an order restraining all persons including those located outside the United States from commencing or continuing proceedings anywhere against the United States corporation. In response, two English companies and a Dutch company sought and obtained *Mareva* injunctions [481] against that company so as to prevent it from removing assets from the jurisdiction. The company applied to have these injunctions set aside so as to permit the assets in England to be transferred to the United States to be administered in accordance with the Chapter 11 scheme. Hirst J. refused to set aside the injunctions. He stressed "that the court would in principle always wish to cooperate in every proper way with an order like the present one made by a court in a friendly jurisdiction" [482] but was not prepared, by reference to the principle of comity, to discharge the injunctions and thus repatriate the assets to the United States. In particular, this would have caused substantial prejudice to the claimants since the

English assets would have been used to keep the United States' corporation alive as a going concern in a manner from which the claimants could obtain no benefit since the plan for re-organisation of the company envisaged its withdrawal from the European market. Nor was Hirst J. convinced "that if the boot were on the other leg, the United States court would inevitably release the assets to allow repatriation here." [483]

30-150

Although it may be deduced that the principle of comity or reciprocity does not provide a basis for recognising the full effect of a foreign corporate rescue scheme at common law, Felixstowe Dock and Railway Co v US Lines Inc [484] does not provide much assistance in identifying the circumstances, if any, in which such schemes will be regarded as effective. The question is, however, of much less practical importance since the introduction of the Cross-Border Insolvency Regulations implementing the UNCITRAL Model Law. That regime permits a foreign representative to apply to the English court for the recognition of a foreign insolvency proceeding, which includes proceedings for the purpose of reorganisation as well as liquidation. [485]

The rule in Antony Gibbs [486]

30-151

Whether a foreign insolvency proceeding is recognised at common law or under the Model Law, it is clear that if the foreign process purports to modify the rights and obligations of creditors under contracts governed by English law, without their consent or participation in the proceedings, such modifications will not be given effect by the English court. This is the so-called "rule in Antony Gibbs", that a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding, unless the creditor has submitted to the foreign process. The essence of the rule is that the modification of a contractual obligation is governed by the proper law of the contract.

30-152

In OJSC International Bank of Azerbaijan [487] the Court of Appeal outlined the rule and referred to the criticism of it by academics and commentators "on the basis that it is an outdated relic from an era when international cooperation in insolvency matters was in its infancy, and a parochial outlook tended to prevail". Henderson L.J. observed that the charge of parochialism seemed "rather unfair", since it applies to prevent the discharge of a debt other than by its proper law, whether or not that is English law. The real criticisms that may be made of the rule, he suggested, are twofold:

(i) that it may be seen as increasingly anachronistic given the increasing acceptance of the principle of modified universalism in cross-border insolvency, which means that there "may now be a strong case for saying that, in the absence of a stipulation to the contrary, contracting parties should generally be taken to envisage that, upon the supervening insolvency of one party, a single law closely associated with that party should govern the rights of its creditors, wherever in the world its assets happen to be situated, and regardless of the proper law of the contract"; and

(ii) that the rule may be thought to sit uneasily with established principles of English law which expect foreign courts to recognise English insolvency judgments or orders. [488]

Clause (2) of the Rule

30-153

This reflects s.426(1) and (2) of the Insolvency Act 1986. Section 426(1) provides that an order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part. Section 426(2) adds the proviso that s.426(1) does not require a court in any part of the United Kingdom to enforce, in relation to property situated in that part, any order made by a court in any other part of the United Kingdom.

30-154

The effect is that the English court may be obliged to enforce a Scottish or Northern Irish order for (for example) winding up. It is not required to enforce such orders in relation to property situated in

England, but it clearly has a discretion to do so. More generally, it has a duty to assist such courts where they have jurisdiction in relation to insolvency law (as addressed at clause (3) of the Rule), which could extend to securing effective title to property which is alleged to be comprised in the Scottish or Northern Irish order.

Clause (3) of the Rule

30-155

Clause (3) of the Rule reflects ss.426(4) and (5) of the Insolvency Act 1986, which provide as follows:

> "(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist [489] the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> (5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."

Relevant country or territory

30-156

The obligation to provide assistance under s.426 extends only to a "relevant country or territory". That expression means any of the Channel Islands or the Isle of Man, and any country or territory designated for the purposes of the subsection by the Secretary of State by order made by statutory instrument. [490] Orders have been made designating various countries. [491]

Jurisdiction in relation to insolvency law in any part of the United Kingdom

30-157

For these purposes, *"insolvency law"* means, in relation to England and Wales, provision made by or under the Insolvency Act 1986 as well as certain provisions of the Company Directors' Disqualification Act 1986. [492] The provisions of Pt VII of the Companies Act 1989 (concerned with Financial Markets and Insolvency) also fall within the definition of "insolvency law" for these purposes, [493] subject to the limitation that a court in the United Kingdom shall not, pursuant to s.426 or any other enactment or rule of law, give effect to "(a) any order of a court exercising jurisdiction in relation to insolvency law in a country of territory outside the United Kingdom, or (b) any act of a person appointed in such a country or territory to discharge any functions under insolvency law, in so far as the making of the order or the doing of the act would be prohibited in the case of a court in the United Kingdom or a relevant office-holder by provisions made by or under" Pt VII of the 1989 Act. [494] Provisions about bank insolvency and bank administration under the Banking Act 2009 are also "insolvency law" for the purposes of s.426. [495]

30-158

In Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [496] the Court of Appeal held that for the purposes of s.426(5) the definition of insolvency law at s.426(10) was a complete definition of that expression. [497] However, the court went on to point out that the reference to insolvency law at s.426(4), i.e. "courts having jurisdiction in relation to insolvency law in any part of the United Kingdom," merely served to identify the court on which the obligation to provide assistance was placed. [498] It did not indicate that the English court could *only apply* insolvency law as defined for the purposes of s.426(5). [499]

Request from foreign court having corresponding jurisdiction

30-159

The duty of assistance under s.426 applies only as between courts and, before the English court can act, it must have received a request, which must be sufficiently specific, [500] from a foreign court so to act. Thus a foreign liquidator cannot invoke the assistance of the English court directly: it will be necessary to approach a relevant foreign court which must issue the request. [501]

30-160

Under s.426(4) the duty is to assist the courts having "the corresponding jurisdiction", which in the context means jurisdiction in relation to insolvency law, in any other part of the United Kingdom or any relevant country or territory. In relation to any relevant country or territory, the expression "insolvency law" means so much of the law of that country or territory as corresponds to provisions falling within the definition of "insolvency law" in relation to the various parts of the United Kingdom. [502]

30-161

The requirement is that the requesting court is a court *having* the corresponding jurisdiction. There is no requirement that court is *exercising* such jurisdiction, in the sense of connoting a requirement for the existence of formal insolvency proceedings in the requesting state. In HSBC Bank Plc v Tambrook Jersey Ltd [503] the Royal Court of Jersey issued a letter of request to the English court asking it to make an administration order against the debtor company, incorporated in Jersey. No insolvency proceedings had been commenced or were contemplated in Jersey, because it was thought that an English administration would be more advantageous to the creditors than a winding-up, or the Jersey equivalent. Nonetheless, it was held that the Royal Court was a court having jurisdiction in insolvency law, within the meaning of Insolvency Act 1986, s.426(4) and, therefore, the English court could make such an order. [504]

30-162

The requirement that the requesting court is a court having the corresponding jurisdiction means that it is the court with jurisdiction in insolvency matters, and not that it has jurisdiction to do in the foreign country what the English court is requested to do. Otherwise, the English court would not be able to make an order under s.426 unless the foreign court were able to do so in comparable circumstances. [505]

Meaning of "shall assist"

30-163

Section 426(4) provides that the English court "shall assist" the foreign court which issues the request. Despite the mandatory nature of this language, the court is not bound to accede to the assistance requested. [506] Rather, the court must consider whether the requested assistance or comparable assistance can properly be granted, so that assistance is ultimately a matter for the discretion of the court. In exercising this discretion, the court will naturally lean in favour of granting the request. [507] The philosophy of the section is clearly to favour cooperation with the foreign court: the English court "should exercise its discretion in favour of giving the particular assistance requested … unless there is some good reason for not doing so." [508]

The insolvency law which is applicable by either court

30-164

Generally, s.426(5) provides that a request from a foreign court is authority for the English court to apply, in relation to the matters specified in the request, either English insolvency law or the insolvency law of the requesting court in relation to comparable matters falling within its jurisdiction. [509] Since s.426(5) adds to, rather than restricts, the court's powers to assist under s.426(4), s.426(4) enables the English court, when asked for assistance, to exercise its own general jurisdiction and powers, [510] while s.426(5) enables the court to apply the insolvency law of England and Wales as defined in the 1986 Act [511] or so much of the law of a relevant country as corresponds to it. [512]

30-165

When applying the insolvency law of a relevant country or territory which corresponds to the insolvency law of England, the court should apply any principles, practices or discretions which the court requesting the assistance would apply in exercising its powers under the foreign law. [513] In England v Smith [514] it was held that application of the law of the requesting court should not be

circumscribed by limitations to be found in the corresponding provisions of the insolvency law of England, unless some principle of English public policy would be infringed were the foreign law to be applied according to its terms. Accordingly, the English court was prepared to accede to a request from the Supreme Court of South Australia seeking examination of a person allegedly concerned with the affairs of a company under s.596B of the Australian Corporations Law, even though such an order would not have been made under the corresponding (but different) provisions of s.236 of the Insolvency Act 1986 because the order would be regarded as oppressive.[515]

30-166

The English court has jurisdiction to apply a provision of foreign law, as requested by the foreign court, even though the foreign court might be unable to apply that law because it lacked jurisdiction over the company in respect of which the request is made, although the fact that the foreign court lacked jurisdiction may be taken into account in determining whether the court should exercise its discretion to accede to the request.[516] Conversely, where the English court is applying English law, in response to a letter of request under s.426, the mere fact that the court (apart from that section) would lack jurisdiction to make the relevant order in respect of an overseas company will not necessarily preclude it making such an order in relation to such a company pursuant to the request.[517]

30-167

Issues may arise as to when a rule of foreign insolvency law “corresponds” to a relevant provision of English insolvency law, so that the English court is able to apply it under s.426(5).[518] In Re Business City Express Ltd,[519] a request for assistance was received from an Irish court in which the English court was asked to make a scheme of arrangement, entered into in Ireland after a company had gone into examinership there, binding upon English creditors. There was no provision of English law by which this could be done.[520] The court applied Irish law to the English creditors without discussing the question of whether the Irish law corresponded to any provision made by or under the Insolvency Act 1986.[521]

30-168

It is not necessary that the foreign insolvency law be the same as English insolvency law, for if this were the case (and it is in any event contradicted by the decision in Re Business City Express Ltd[522]) the notion of applying foreign insolvency law would be redundant.[523] Accordingly, the most appropriate solution is to interpret “corresponds” in a broad fashion and to determine in the particular case whether it is appropriate in the light of the matters specified in the request, for the court to exercise its discretion to provide assistance as specified under the relevant foreign law.[524]

30-169

Where the English court has to decide whether to apply the insolvency law of England or the insolvency law of the requesting court, pursuant to s.426(5), the subsection stipulates that in exercising its discretion “the court shall have regard in particular to the rules of private international law.” It is not clear what the precise scope of this requirement is intended to be.[525] Use of “shall” suggests that the provision is mandatory. But the subsection does not say that the court must *apply* English rules of private international law with the consequence that it can only provide assistance if its private international law rules (e.g. of jurisdiction) would otherwise empower it to do so.[526] Rather, it is suggested, the use of the phrase “have regard” indicates that the English court must, in deciding what assistance to offer, consider its rules of private international law to see what effect these would have in the circumstances of the case.[527] But it should not necessarily be constrained by those rules if, in the circumstances, they would prevent the court from acting directly (because, say, those rules would not confer original jurisdiction on the court[528]) if the court took the view that it should nevertheless provide the assistance requested.

30-170

Put more broadly, the court should take into account the foreign elements in the situation, such as the connections of the parties with England and with the relevant foreign country, in deciding what law to apply[529] in the light of the particular assistance which is sought. To interpret s.426 in a more limited way would seem to be inconsistent with its purpose.[530] Thus, for example, if a request for assistance were received from a court administering an insolvency and the effect of acceding to the request would be to enforce that country’s revenue law in England, the English court might refuse to

accede to the request having regard to the rule of private international law that an English court will not enforce a foreign revenue law. [531] A similar view might be taken if acting pursuant to the request would infringe English public policy. [532]

30-171

The court's power to assist a foreign court under s.426(4), (5) does not extend to enforcing a judgment or order of the foreign court. [533] This is in contrast to the intra-UK position under s.426(1). [534]

Particular applications

30-172

In applying s.426 it has been held that an administration order could be made over a foreign company pursuant to a request by a court in a designated country. [535] It has also been held that, pursuant to a request from the court in the Isle of Man, the provisions of the Insolvency Act 1986 dealing with company voluntary arrangements [536] could be applied to companies incorporated in the Isle of Man even though company voluntary arrangements did not exist under the law of the Isle of Man. [537] Additionally, orders have been made, upon request, recognising liquidators, appointed in a designated country, as having that status in England. [538] Further, the English court has been prepared to apply the provisions of the Insolvency Act 1986 concerning transactions at an undervalue [539] at the request of a foreign court [540] and it also seems likely that the other provisions of the 1986 Act concerned with the adjustment of prior transactions will be applied in appropriate cases. [541] Similarly, the provisions of the 1986 Act relating to fraudulent and wrongful trading have been held to be capable of application under s.426 of the Act. [542] A request pursuant to s.426 of the Act may also induce the court to order an examination of the officer of a company according to the provisions of s.236 of the 1986 Act [543] and, equally, to order the production of relevant documents. [544] And where the English court exercises its general powers in providing assistance under s.426(4) of the 1986 Act it may grant, for example, injunctive relief. [545]

30-173

As regards comparable provisions of foreign insolvency law, s.426 has been applied to render a foreign scheme of arrangement binding on English creditors by invoking foreign law, even though the scheme could not have been rendered binding according to English law. [546] The court has also acceded to a request to apply foreign provisions of insolvency law concerned with procuring the examination of witnesses [547] and to a request to apply foreign provisions concerned with fraudulent trading and the giving of a preference. [548] It has also been held that s.426 enables the court to order remission of assets to a liquidator in a country whose insolvency scheme is not in accordance with English law. [549]

Clause (4) of the Rule

30-174

Clause (4) addresses the court's discretion at common law to provide assistance in aid of foreign insolvency proceedings, which has been a prominent and distinct feature of the private international law of insolvency. [550] Although there were no statutory procedures in the context of corporate insolvencies until the Insolvency Act 1986, [551] it was clear that the principle of cooperation was recognised at common law. [552] The original statutory regime is to be found in the Insolvency Act 1986, s.426. [553] There is a broader regime for providing judicial assistance under the Cross-Border Insolvency Regulations 2006 implementing the UNCITRAL Model Law on Cross-Border Insolvency [554] (which, in contrast to s.426, is not limited to requests from the courts of countries designated for that purpose), but there is no doubt that the existence of these regimes does not prejudice the continued operation of the common law. [555] The circumstances in which the English court is called on to exercise its common law powers of assistance may, however, be limited in future, given the breadth of the statutory regimes, and in particular that which applies under the 2006 Regulations. [556]

30-175

The court's common law power to provide assistance is subject to a number of important limitations. In particular, it does not in itself enable an English court to: extend the scope of domestic insolvency legislation by analogy to cases where it does not apply on its terms; [557] make any order which the

relevant foreign court could not make in a domestic insolvency; [558] or enforce a judgment of a foreign court relating to insolvency proceedings in circumstances where it could not otherwise do so. [559] These limitations are discussed in the paragraphs below.

Modified universalism

30-176

The court's power to provide assistance at common law has long been recognised, [560] but the parameters of the assistance that may be provided have undergone a process of judicial development in recent years. [561] It now appears to be accepted [562] that the underlying principle is one of "modified universalism", which (as the term suggests) is a moderate or pragmatic version of the more extreme view that there should be a unitary winding up proceeding in a debtor's "home" jurisdiction, and that these proceedings should apply universally to all the debtor's assets and receive worldwide recognition. [563] Modified universalism, in contrast, provides that the English courts should assist foreign winding up proceedings so far as they properly can so as to achieve that aim. [564] The obvious question is to identify the limits of what the English court can properly do in this regard.

Limits of common law power to assist

30-177

The leading decision on the limits of common law judicial assistance is that of the Privy Council in Singularis Holdings v PricewaterhouseCoopers [565] where it was held that under the principle of "modified universalism" the court had a common law power to assist foreign winding-up proceedings, but this power was subject to local law and local public policy and the court could only act within the limits of its own statutory and common law powers. The fact that local law might permit the court to make a particular order in the case of a domestic insolvency did not necessarily mean that, in the absence of statutory authorisation, it could do the same in support of a foreign insolvency. In particular, there was no power to provide assistance in insolvency matters by applying local legislation by analogy, or "as if" it applied, if as a matter of its legislative scope it did not apply to the case in hand. Application of legislation in this way was profoundly contrary to the established relationship between the judiciary and the legislature. [566]

30-178

Lord Sumption, speaking for a majority of the Privy Council, held that there was no simple universal answer to the question of how far it was appropriate to develop the common law so as to recognise something equivalent to a statutory power. This depended on the precise nature of the particular power that the court was being asked to exercise to assist the foreign court—in that case, an order for the production of information by an entity within the personal jurisdiction of the Bermuda court, where the court's statutory power to order production applied only to a company wound up in Bermuda. The majority held that, in principle, there was a common law power to assist a foreign court by ordering the production of information, whether in oral or documentary form, that was necessary for the administration of a foreign winding up. [567] Lord Sumption spelled out the limits of this power: [568]

> "In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers …. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. [569] Fourth … such an order must be consistent with the substantive law and public policy of the assisting court … common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations … Finally, … its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance."

30-179

In Singularis, while the majority considered that there was a power to require the production of information, it held that the power could not be exercised in that case (applying the second principle in the passage quoted in the previous paragraph) because the liquidators had no such power under the law of the jurisdiction that appointed them. Therefore the court would not be "assisting" the liquidators in carrying out their tasks under the relevant foreign law. [570] The minority, Lords Mance and Neuberger, would have held (if it were necessary to decide the issue) that no power existed at common law to assist a foreign liquidation by ordering the production of information.

30-180

In providing assistance at common law, the English court applies its own law and not the law of the foreign jurisdiction. [571] This contrasts with the position under s.426 of the Insolvency Act 1986, where the court has a choice as to whether to apply English insolvency law or the insolvency law of the relevant foreign country, [572] but is in line with the position under the Cross-Border Insolvency Regulations 2006 implementing the UNCITRAL Model Law. [573]

30-181

In Rubin v Eurofinance SA [574] it was pointed out that the common law assistance cases have been concerned with such matters as: the vesting of English assets in a foreign officeholder; the staying of local proceedings; orders for examination in support of the foreign proceedings; or orders for the remittal of assets to a foreign liquidation. Illustrative cases include Banque Indosuez SA v Ferromet Resources Inc [575] where an English injunction against a Texas corporation in US Chapter 11 proceedings was discharged on the basis that the English court would do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration in Texas; and Re Impex Services Worldwide Ltd [576] where a Manx order for the examination and production of documents was made in aid of the provisional liquidation in England of an English company.

30-182

There remains, however, some uncertainty as to whether the court's powers to grant assistance at common law extend to remitting assets to a foreign liquidator in a country whose insolvency scheme is not in accordance with English law, and therefore may not result in a pari passu distribution. [577] In Re HIH Casualty and General Insurance Ltd [578] the House of Lords held, unanimously, that the English court should exercise its discretion to remit assets to Australia, despite differences in the operation of the Australian insolvency scheme. Lord Scott, however, expressed the view that the discretion arose only under s.426 of the 1986 Act and not at common law, and thus could operate only in relation to countries to which s.426 had been applied. [579] Lords Hoffmann and Walker took the view that discretion could also be exercised under the inherent common law power of the court. [580] Lord Phillips did not stray into this "controversial area". [581]

Enforcement of foreign judgments relating to insolvency proceedings

30-183

In Rubin v Eurofinance SA, a majority of the Supreme Court [582] held that a money judgment issued by a foreign court in insolvency proceedings, as a judgment in personam, was enforceable in England (if at all) only under the common law rules relating to the enforcement of foreign judgments in England. [583] There was no special rule relating to the enforcement of judgments in insolvency proceedings and any change from so well-established a rule in English law was a matter for the legislature and not judicial innovation. It followed that a US judgment in adversary proceedings (being the equivalent of undervalue transaction and preference claims under English law) could not be enforced in England since the defendant had not appeared in the US proceedings or otherwise submitted to the US court. An Australian judgment for the recovery of preferential payments (which was the subject of a joined appeal) could be enforced, but only because the defendant had submitted to the jurisdiction of the New South Wales court. [584]

30-184

The Supreme Court in Rubin also confirmed that neither s.426 of the Insolvency Act 1986, nor the Cross-Border Insolvency Regulations 2006 implementing the UNCITRAL Model Law on Cross-Border Insolvency, [585] enabled the English court to enforce a foreign judgment in insolvency proceedings, since such assistance was not contemplated in the relevant legislation. It should be noted, however,

that a separate Model Law, the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), would (if adopted and implemented in the UK) lead to the recognition and enforcement of insolvency-related judgments. 586

Illustrations

1.

30-185

X is a company incorporated in Ethiopia. An order is made for the winding up of the company in Ethiopia and a liquidator is appointed. By Ethiopian law, the effect of the appointment is that no one other than the liquidator is empowered to act on behalf of the company. A and B, who are directors of the company, authorise the commencement of proceedings in England in the name of the company without the sanction of the liquidator. The action must be stayed. 587

2. X, a company incorporated in Delaware, USA, with its headquarters in New Jersey, USA, has assets situated in England. X has incurred large debts in England to A and B, both English companies, and C, a Dutch company. Having encountered severe financial difficulties X petitions the United States bankruptcy court under Chapter 11 of the United States Bankruptcy Code, the United States court making, in respect of X, a restraining order staying all legal proceedings against X. A, B and C obtain *Mareva* injunctions restraining X from removing its assets in England from the jurisdiction. X seeks to have the *Mareva* injunctions set aside on the ground that the restraining order issued by the United States courts should be recognised and that its English assets should be repatriated to the United States to be administered in the re-organisation of X under the Chapter 11 scheme. The court dismisses X's application. 588

3. X, a company incorporated in Western Australia, is a wholly owned subsidiary of Y, an Australian company which is in liquidation in Australia by order of the Federal Court of Australia. X is indebted to Y in the sum of A$2,331,790. X has a leasehold interest in a substantial agricultural and sporting estate in England. If a winding-up order in relation to X is made in England or Australia, the landlord of the estate will be able to determine X's interest by re-entry, there will be no power to relieve from forfeiture and the value of the leasehold interest will be lost. Y asks the Federal Court of Australia to issue a letter of request to the English court seeking, in respect of X, an administration order under the Insolvency Act 1986. Pursuant to s.426 of the 1986 Act the English court has jurisdiction to make the administration order. 589

4. X is a company incorporated in Jersey. No insolvency proceedings have been commenced or are contemplated in Jersey, as it is thought that an English administration would be more advantageous to X's creditors. The Royal Court of Jersey issues a letter of request to the English court pursuant to s.426 of the Insolvency Act 1986 asking it to make an administration order in respect of X. The court has jurisdiction to make the order. 590

5. X is an insurance company, originally incorporated in Massachusetts, USA, but re-incorporated in Bermuda where it is placed in insolvent liquidation. Y is a German reinsurance company which has reinsured the liabilities of X. The reinsurance treaty between Y and X provides for arbitration in Massachusetts. Y invokes the arbitration clause. X's liquidators seek an order from the English court restraining Y from pursuing any actions or proceedings against X in any jurisdiction that might be available, pursuant to a letter of request issued by the Bermudan court under the Insolvency Act 1986, s.426. The English court has no power to issue such an order under either English or Bermudan insolvency law. 591 But it has jurisdiction under its general powers to issue such an injunction, which general powers may be exercised under s.426(4) of the 1986 Act. In the circumstances of the case the court declines to grant the injunction. 592

6.

30-186

X is a company, incorporated in the Cayman Islands, where it is in insolvent liquidation. The Grand Court of the Cayman Islands issues a letter of request to the English court under the Insolvency Act 1986, s.426, in which relief is sought under the Insolvency Act 1986, ss.212–214 and s.238 against A and B who are directors of a group of companies to which X belongs. The court accedes to the request. 593

7. X is a company incorporated in Western Australia, which is in insolvent liquidation in South Australia. The Supreme Court of South Australia issues a letter of request to the English court under the Insolvency Act 1986, s.426, seeking assistance under the Australian Corporations Law, s.596B, which empowers the Australian court to order the examination of a person

concerning a company's affairs. The court accedes to the request even though it would not, in the circumstances of the case, be possible to obtain such an order under Insolvency Act 1986, s.236.[594]

8. X is an insurance company incorporated in Australia where it is in liquidation. Winding-up petitions have been presented to the English court and provisional liquidators appointed. The Australian and English liquidators seek directions as to whether the English assets of X should be remitted to the Australian liquidators for distribution in accordance with Australian law. Under Australian law, but not under English law, reinsurance recoveries of an insurance company must be distributed to those creditors who have insurance claims against the company, in priority to other claims. The court orders the remission even though Australian law is not in accordance with English law.[595]

9. X is a company incorporated in the Cayman Islands which is being wound up there. X's liquidators obtain from the Cayman Islands court an order requiring Y (a company registered in Bermuda and X's auditor) to disclose any property or documents belonging to X (the relevant Cayman statutory provision does not extend beyond documents belonging to X). The liquidators also apply to the Bermudan court for an order requiring Y to disclose Y's own documents relating to X. The relevant Bermudan statutory provision applies only to companies ordered to be wound up in Bermuda. The court holds that there is a common law power to assist foreign insolvency proceedings by ordering the production of information, but that power does not extend to enabling the foreign office-holder to do something which they could not do under the law by which they were appointed. The court therefore cannot order disclosure of Y's own documents relating to X.[596]

10. X is a British Virgin Islands company. A United States court is conducting bankruptcy proceedings against X under Chapter 11 of the United States Bankruptcy Code. In the course of these proceedings, the United States court makes orders against X and appoints a receiver. X takes no part in these proceedings. The receiver seeks to enforce the orders in England as foreign judgments even though the orders would not be recognised and enforced under the common law rules relating to the recognition and enforcement of foreign judgments.[597] The court holds that the orders cannot be recognised and enforced in England irrespective of any common law power to assist a foreign court in insolvency proceedings.[598]

1. Farnsworth, *The Residence and Domicile of Corporations* (1939); Baxter (1962) 40 Can. Bar Rev. 165; Drucker (1968) 17 I.C.L.Q. 28; Fletcher, *Cross-Border Insolvency: Comparative Dimensions* (1990); Drury [1998] C.L.J. 165; Rammeloo, *Corporations in Private International Law* (2001); Paschalidis, *Freedom of Establishment and Private International Law for Companies* (2012); American Law Institute, Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases (2012); Sheldon, *Cross-Border Insolvency* (4th ed. 2015); Fletcher, *Law of Insolvency* (7th ed. 2017), Chs 30, 31; Mevorach, *The Future of Cross-Border Insolvency* (2018); See also Briggs, *Private International Law in English Courts* (2014), Chs 10 and 11; Franken (2014) 34 O.J.L.S. 97; Fletcher [2014] J.B.L. 523.

461. Fletcher, *Insolvency in Private International Law* (2nd ed. 2005), pp.200–223 and Ch.4; Smart, *Cross-Border Insolvency* (2nd ed. 1998), Chs 6, 7, 8, 12, 14.

462. A fourth regime, under the recast Insolvency Regulation, ceased to apply from the end of the EU withdrawal transition period, as explained above (see para.30-043).

463. Banco de Bilbao v Sancha and Rey [1938] 2 K.B. 176 (CA). This passage was cited with approval in Re Macks, Ex p. Saint (2000) 204 C.L.R. 158, 227–228. See also Re Trading Partners Ltd [2002] 1 B.C.L.C. 655.

464. Bank of Ethiopia v National Bank of Egypt and Liguori [1937] Ch. 513, 524; Baden, Delvaux and Lecuit v Société Généralé pour Favoriser le Développement du Commerce et de l'Industrie en France SA [1983] B.C.L.C. 325; Felixstowe Dock and Railway Co v US Lines Inc [1989] Q.B. 360, 374–375; Re ITT (1975) 58 D.L.R. (3d) 55 (Ont.) (a legal entity of a type unknown in England). See also Macaulay v Guaranty Trust Co of New York (1927) 44 T.L.R. 99 (which seems to have been treated as a case of bankruptcy); Sea Insurance Co v Rossia Insurance Co (1924) 20 Ll.L.R. 308 (CA); Burr v Anglo-French Banking Corp (1933) 49 T.L.R. 405; Onassis v Drewry (HP) SARL (1949) 83 Ll.L.R. 249 (CA); Re OJSC ANK Yugraneft [2008] EWHC 2614 (Ch.), [2009] 1 B.C.L.C. 298; Jefferies International Ltd v Landsbanski Islands HF [2009] EWHC 894 (Comm.); Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd

[2009] EWHC 1912 (Ch.), [2009] 2 B.C.L.C. 400, at [48], [62]–[63]; and see Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd [2009] EWHC 2593 (Ch.), [2010] 2 B.C.L.C. 237. See also AssetInsure Pty Ltd v New Cap Reinsurance Corp Ltd [2006] HCA 13, (2006) 225 C.L.R. 131; Re Chow Cho Poon (Private) Ltd [2011] NSWSC 300.

465. See below, Rules 195–197.

466. See paras 30-155 et seq., below.

467. In Re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 W.L.R. 852, at [31], Lord Hoffmann suggested that it might in some circumstances be appropriate to regard some jurisdiction other than that of the company's place of incorporation as the appropriate seat of the principal liquidation, but the issue did not arise in that case. In Hooley Ltd v Ganges Jute Private Ltd [2016] CSOH 141, 2017 S.L.T. 58 (revd. by [2019] CSIH 40, 2019 S.C. 632 but not on this point), the Scottish court referred to this comment but said it found no support for the proposition that the common law power to recognise and grant assistance to foreign insolvency proceedings applied or ought to be applied to a court in the country of incorporation (Scotland) with regard to insolvency proceedings in another jurisdiction (in that case India). The court referred to the view of Lord Collins in Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236, at [129], that the formulation of a new rule for the identification of courts of competent jurisdiction in respect of insolvency proceedings was a matter for the legislature and not for judicial innovation. Sed quaere: the decision in Rubin concerned the recognition of in personam judgments in insolvency proceedings and not foreign insolvencies more generally.

468. A different view was taken in Singapore in Re Opti-Medix Ltd [2016] SGHC 108, in which the court recognised Japanese insolvency proceedings in respect of two BVI-incorporated companies. The court said that in cross-border insolvency there had been a general movement away from the traditional, territorial focus on the interests of the local creditors, towards recognition that universal co-operation between jurisdictions was a necessary part of the contemporary world. The court accepted that identifying the centre of main interests (COMI) as the place to conduct principal insolvency proceedings had much to recommend it as a matter of practicality. The COMI was the place where the bulk of the business was carried out and consequently provided a strong connecting factor. The Grand Court of the Cayman Islands in Re China Agrotech Holdings Ltd, FSD 157 of 2017 (NSJ), also granted recognition and assistance, at common law, to liquidators appointed in Hong Kong of a Cayman incorporated company.

469. Sheldon, *Cross-Border Insolvency* (4th ed. 2015), p.275. cf. Macaulay v Guaranty Trust Company of New York (1927) 44 T.L.R. 99; Re Chow Cho Poon (Private) Ltd [2011] NSWSC 300, at [69]–[70].

470. Smart, pp.275–290; see Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd (1888) 15 R. 935. See also North Australian Territory Co Ltd v Goldsbrough Mort and Co Ltd (1889) 61 L.T. 716; Barclays Bank Plc v Homan [1993] B.C.L.C. 680 (Hoffmann J. and CA).

471. See above, Rule 188.

472. Travers v Holley [1953] P. 246, 257, per Hodson L.J. But see Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236, at [125]–[126].

473. Re Trepca Mines Ltd [1960] 1 W.L.R. 1273 (CA); Felixstowe Dock and Railway Co v US Lines Inc [1989] Q.B. 360. And see Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236, at [125]–[126].

474. Re Trepca Mines Ltd, above; Société Co-opérative Sidmetal v Titan International Ltd [1966] 1 Q.B. 828; Schemmer v Property Resources Ltd [1975] Ch. 273, 287.

475. North Australian Territory Co Ltd v Goldsbrough Mort & Co Ltd (1889) 61 L.T. 716, 717.

476. Re Commercial Bank of South Australia (1886) 33 Ch.D. 174, 178; Re Vocalion (Foreign) Ltd [1932] 2 Ch. 196, 207; Re Hibernian Merchants Ltd [1958] Ch. 76.

477. For example, Re Azoff-Don Commercial Bank [1954] Ch. 315. Admittedly the point is not explicitly made.

478. In England apart from the scheme of arrangement and the restructuring plan procedure, under (respectively) Pts 26 and 26A of the Companies Act 2006 (as amended), a procedure also

exists for the making of an administration order: see Insolvency Act 1986, s.8 and Sch.B1, inserted by Enterprise Act 2002, s.248 and Sch.161. In the United States there is the well-known procedure under Ch.11 of the United States Bankruptcy Code. For a description see Felixstowe Dock and Railway Co v US Lines Inc [1989] Q.B. 360, 366–370.

479. See also Re Joint Provisional Liquidators of Moody Technology Holdings Ltd [2020] HKCFI 416 where the Hong Kong High Court held that, in principle, foreign insolvency practitioners could be recognised even though their powers differed from those available in Hong Kong. The fact the Hong Kong courts could not appoint such a provisional liquidator did not constitute a bar to recognising and assisting foreign practitioners with those powers and functions. It was held that in recognising foreign provisional liquidators and granting them restructuring powers, the court was merely recognising the liquidators' status as agents of the company, and giving effect to their management and governance powers under the law of the company's incorporation.

480. [1989] Q.B. 360. See Ziegel in Lian et al. (eds.), Current Developments in International Banking and Corporate Financial Operations (1989), p.313; Westbrook, *Current Issues in Insolvency Law* (1991), p.27; Morse in Rajak (ed.) Insolvency Law: Theory and Practice (1993), p.201; Lightman and Moss. The Law of Administrators and Receivers of Companies (5th ed. 2011), Ch.30; Sheldon, *Cross-Border Insolvency* (4th ed. 2015), pp.290–292; Fletcher, *Insolvency in Private International Law* (2nd ed. 2005), pp.219–223.

481. Now freezing injunctions: CPR, r.25(1)(f). See above, Rule 27.

482. [1989] Q.B. 360, 376.

483. ibid., at 389. cf. Banque Indosuez SA v Ferromet Resources Inc [1993] B.C.L.C. 112 (claims of bank could be adequately protected in Chapter 11 proceedings in Texas, thereby justifying discharge of injunctions obtained in England). See also Barclays Bank Plc v Homan [1993] B.C.L.C. 680 (CA); Grupo Torras SA v Sheikh Fahad Mohammed Al Sabah [1996] 1 Lloyd's Rep. 7, 11 (CA); Mithras Management Ltd v New Visions Entertainment Corp (1992) 90 D.L.R. (4th) 726 (Ont.); Fournier v The Ship "Margaret Z" [1997] 1 N.Z.L.R. 629. In Re Singer Sewing Machine Co of Canada Ltd [2000] 5 W.W.R. 598 (Alta) an American Ch. 11 order in respect of a Canadian company which carried on business only in Canada and whose assets were all in Canada was refused recognition in Alberta.

484. [1989] Q.B. 360. cf. ML Ubase Holdings Ltd v Trigem Computer Inc [2007] NSWSC 859 at [65]; Re Chow Cho Poon (Private) Ltd [2011] NSWSC 300, at [69]–[70].

485. See Rules 195–200 and in particular para.30-228 for a definition of a "foreign proceeding" to which the Model Law applies. See also clauses (3) and (4) of the current Rule relating to the court's powers to provide assistance in support of a foreign insolvency proceeding under, respectively, s.426 and the common law. In Re Phoenix Kapitaldienst GmbH [2012] EWHC 62 (Ch.), [2013] Ch. 61, a case to which neither the Model Law nor s.426 applied, the court held that it had power at common law to recognise a foreign administrator (and to provide the same assistance as it could in a domestic insolvency, though this latter aspect was disapproved in Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675).

486. Gibbs v La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399.

487. [2018] EWCA Civ 2802, [2019] Bus. L.R. 1130: see the discussion at para.30-276, below. See also Wight v Eckhardt Marine GmbH [2003] UKPC 37, [2004] 1 A.C. 147, at [11]; Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo [2011] EWHC 256 (Comm.), [2011] 1 W.L.R. 2038; Joint Administrators of Heritable Bank Plc v Winding up Board of Landsbanki Islands HF [2013] UKSC 13, [2013] 1 W.L.R. 725, at [44]; Goldman Sachs International v Novo Banco SA [2018] UKSC 34, [2018] 1 W.L.R. 3683, at [12]; Re Agrokor DD [2017] EWHC 2791 (Ch.); KfW v Singal [2020] EWHC 2214 (Comm.); Re West African Gas Pipeline Co Ltd [2021] EWHC 3360 (Ch.); Chang v Cosco Shipping (Qidong) Offshore Ltd [2021] CSOH 94.

488. He noted, however, that this second objection was decisively rejected in Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236, at [126].

489. s.426 only extends to "incoming" requests for assistance. It does not apply to permit the English court to *request* assistance from a court in a relevant country or territory: cf. McIsaac and Wilson Petrs., 1995 S.L.T. 498.

490. Insolvency Act 1986, s.426(11).

491. There have been three such orders, in 1986, 1996 and 1998 respectively, each referred to as the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order. SI 1986/2123 designated Anguilla, Australia, The Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Montserrat, New Zealand, St. Helena, Turks and Caicos Islands, Tuvalu and the Virgin Islands (i.e. the British Virgin Islands); SI 1996/253 designated Malaysia and South Africa; and SI 1998/2766 designated Brunei Darussalam. It should be noted that the Insolvency Regulation, and its successor the recast Insolvency Regulation, did not apply in the United Kingdom to the extent that they were irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time the (original) Insolvency Regulation entered into force (May 31, 2002): see Insolvency Regulation Arts 44(3)(b), 47 and recast Insolvency Regulation Art.85(3)(b). The relevant Commonwealth countries were Australia, Bahamas, Botswana, Brunei Darussalam, Canada, Malaysia, New Zealand, South Africa and Tuvalu.

492. Insolvency Act 1986, s.426(10)(a), as amended by Insolvency Act 2000, Sch.4, Pt II. The relevant provisions of the Company Directors' Disqualification Act 1986, as amended by Insolvency Act 2000, ss.5, 8 and Sch.4, Pt I, are ss.1A, 6–10, 10–15, 19(c) and 20 (with Sch.1).

493. Companies Act 1989, s.183(1).

494. Companies Act 1989, s.183(2).

495. Insolvency Act 1986, s.426(13) and (14), added by Banking Act 2009, ss.129 and 165.

496. [1997] 1 B.C.L.C. 497 (CA).

497. ibid., at 516. The court did not mention the further provisions falling within the definition of insolvency law by virtue of Companies Act 1989, s.183(1) and the decision predated the additions to that definition by virtue of the Banking Act 2009 (see para.30-157, above).

498. [1997] 1 B.C.L.C. 497 (CA), 516.

499. ibid., at 516–517. See paras 30-164 et seq. See also Re Dallhold Estates (UK) Pty Ltd [1992] B.C.L.C. 621, 626. The expression includes both substantive and procedural insolvency law: see Re Bank of Credit and Commerce International SA (No.9), The Times, August 11, 1993 (Rattee J), revd. in part but not on this point, [1994] 1 W.L.R. 708 (CA). See also Re HIH Casualty and General Insurance Ltd [2008] UKHL, [2008] 1 W.L.R. 852.

500. Fourie v Le Roux [2004] EWHC 2557 (Ch.), [2005] B.P.I.R. 723, referred to without comment in [2005] EWCA Civ 204, [2006] 2 B.C.L.C. 531. See also Chen Yung Ngai Kenneth v Li Shu Chung [2021] 7 WLUK 158 (for further proceedings see [2021] EWHC 3346 (Ch.)).

501. It is not clear whether the relevant foreign court must, in addition to being a court in a relevant country or territory, also be a court which is recognised on English principles as having authority to appoint a liquidator, or whether it is also possible for assistance to be given in relation to a request from the courts of a country other than that which appointed the liquidator but in which insolvency proceedings have nonetheless been commenced. On one view, resolution of this issue could be seen as going to the applicability of s.426, but the better view, it is suggested, is that the jurisdictional competence of the foreign court is a matter to be taken into account in deciding what, if any, assistance to offer in the exercise of the court's discretion.

502. Insolvency Act 1986, s.426(10)(d). This section refers expressly only to the provisions set out in s.426(10) but, it is suggested, would also encompass the provisions added to the definition of "insolveny law" by virtue of the Companies Act 1989 and the Insolvency Act 2000: see para. 30-157, above.

503. [2013] EWCA Civ 576, [2014] Ch. 252.

504. cf. Re Phoenix Kapitaldienst GmbH [2012] EWHC 62 (Ch.), [2013] Ch. 61 (court has power at common law to recognise a foreign administrator and to provide same assistance as in a domestic insolvency), disapproved in Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675. See also Fletcher (2014) 27 Insolv. Int. 43.

505. Re Television Trade Rentals Ltd [2002] EWHC 211 (Ch.), [2002] B.C.C. 807, at [12]. Accordingly, in that case, which concerned a letter of request from the Isle of Man court, it did not matter that there was no equivalent under Isle of Man law to the company voluntary arrangement provisions under Pt 1 of the Insolvency Act 1986 under which the English Court

was being asked to make an order.

506. Re Dallhold Estates (UK) Pty Ltd [1992] B.C.L.C. 621; Re Bank of Credit and Commerce International SA (No.9), The Times, August 11, 1993 (Rattee J.), revd. in part but not on this point, [1994] 1 W.L.R. 708 (CA); Re Focus Insurance Co Ltd [1997] 1 B.C.L.C. 219; Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 B.C.L.C. 497 (CA); England v Smith [2001] Ch. 419 (CA); Duke Group v Carver [2001] B.P.I.R. 459; Re Trading Partners Ltd [2002] 1 B.C.L.C. 655; Re Television Trade Rentals Ltd [2002] EWHC 211 (Ch.), [2002] B.C.C. 807; Fourie v Le Roux (No.2) [2005] EWHC 922 (Ch.), 2005 B.P.I.R. 779; Re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 W.L.R. 852.

507. Re Dallhold Estates (UK) Pty Ltd, above; Re Bank of Credit and Commerce International SA (No.9), above; Hughes v Hannover Ruckversicherungs-Aktiengesellschaft, above; England v Smith, above; Duke Group Ltd v Carver, above; Re Trading Partners Ltd, above; Re Television Trade Rentals Ltd, above.

508. Re Bank of Credit and Commerce International SA (No.9), at 785, per Rattee J. See also Re Dallhold Estates (UK) Pty Ltd, above, at 627. A request was refused in Re Focus Insurance Co Ltd, above, and in Hughes v Hannover Ruckversicherungs-Aktiengesellschaft, above. Requests were acceded to in England v Smith, above; Duke Group Ltd v Carver, above; Re Trading Partners Ltd, above (in part); Re Television Trade Rentals Ltd, above; Fourie v Le Roux (No.2), above; Re HIH Casualty and General Insurance Ltd, above.

509. See Re Dallhold Estates (UK) Pty Ltd [1992] B.C.L.C. 621; Re Bank of Credit and Commerce International S.A. (No.9), The Times, August 11, 1993 (Rattee J.), revd. in part but not on this point, [1994] 1 W.L.R. 708 (CA); Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 B.C.L.C. 497 (CA); England v Smith [2001] Ch. 419 (CA); Re Trading Partners Ltd [2002] 1 B.C.L.C. 655; Re Television Trade Rentals Ltd [2002] EWHC 211 (Ch.), [2002] B.C.C. 807; Fourie v Le Roux (No.2) [2005] EWHC 922 (Ch.), [2005] B.P.I.R. 779; Re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 W.L.R. 852; Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236.

510. Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 B.C.L.C. 497 (CA), 517. Thus the court could (but did not) restrain proceedings abroad by reference to its general powers to issue an anti-suit injunction.

511. s.426(10)(a).

512. s.426(10)(d).

513. England v Smith [2001] 1 Ch. 419 (CA), disapproving Re JN Taylor Finance Pty Ltd [1999] B.C.L.C. 256.

514. [2001] 1 Ch. 419 (CA).

515. ibid. To the same effect is Duke Group Ltd v Carver [2001] B.P.I.R. 459. Contrast Re JN Taylor Finance Pty Ltd, above, disapproved in England v Smith, above. For orders under s.236, see below, para.30-131.

516. Fourie v Le Roux (No.2) [2005] EWHC 922 (Ch.), [2005] B.P.I.R. 779.

517. Re Dallhold Estates (UK) Pty Ltd [1992] B.C.L.C. 621. See also Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 B.C.L.C. 497, 511 (CA); Re Television Trade Rentals Ltd [2002] EWHC 211 (Ch.), [2002] B.C.C. 807; Fourie v Le Roux (No.2) [2005] EWHC 922 (Ch.), [2005] B.P.I.R. 779; HSBC Bank Plc v Tambrook Jersey Ltd, above.

518. Insolvency Act 1986, s.426(10)(d): see para.30-161, above.

519. [1997] 2 B.C.L.C. 510.

520. ibid., at 513.

521. There is no discussion of this issue in Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 B.C.L.C. 497 (CA).

522. See above. The matter was addressed by Quinn J. in Ireland in Re Arctic Aviation Assets [2021] IEHC 268, at [277], who accepted expert evidence on the UK practice to the effect that the "authorities suggest that a broad approach should be taken to the meaning of 'corresponds' and that it is not necessary that the foreign law be the same as the 1986 Act provisions, or, at

least, to involve the same approach or procedure. I say 'suggest' because little judicial consideration appears to have been given to the meaning of 'corresponds to' within the meaning of s.426(10)(d)."

523. Re Business City Express Ltd, above. See England v Smith [2001] Ch. 419 (CA); Duke Group Ltd v Carver [2001] B.P.I.R. 459; Fourie v Le Roux (No.2) [2005] EWHC 922 (Ch.), [2005] B.P.I.R. 779.

524. e.g. examinership in Irish law broadly corresponds to administration under Insolvency Act 1986, Pt II, in England. The appointment of an administrator may, but will not necessarily, lead to the approval of a creditor's voluntary arrangement under Insolvency Act 1986, Pt I, or the sanctioning of a scheme of arrangement under Companies Act 2006. This may be sufficient to enable it to be said that Irish law "corresponds" to English law on the matter. See further Re HIH Casualty and General Insurance Ltd, above.

525. The requirement has been described as an "obscure and ill-thought out provision": Re Television Trade Rentals Ltd, above, at [17]. See also Re HIH Casualty and General Insurance Ltd, above, at [81]; Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236, at [147].

526. Re Dallhold Estates (UK) Pty Ltd, above.

527. ibid.

528. ibid. But the court may not give extraterritorial effect to a provision of English insolvency law which is territorially limited to events occurring in England: see Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] B.C.L.C. 497 (CA).

529. Re Television Trade Rentals Ltd, above, at [17].

530. Hughes v Hannover Ruckversicherungs-Aktiengesellschaft, above, cf. Re Business City Express Ltd [1997] 2 B.C.L.C. 510.

531. Re Bank of Credit and Commerce International SA (No.9), The Times, August 11, 1993 (Rattee J.), revd. in part but not on this point, [1994] 1 W.L.R. 708 (CA). cf. Peter Buchanan Ltd v McVey [1954] I.R. 89, [1955] A.C. 516n. See above, Rule 20. See Sheldon, *Cross-Border Insolvency* (4th ed. 2015), pp.456–465.

532. Hughes v Hannover Ruckversicherungs-Aktiengesellschaft, above, at 518; see also England v Smith, above; Re HIH Casualty and General Insurance Ltd, above. cf. Re A Debtor, Ex p. Viscount of the Royal Court of Jersey [1981] Ch. 384, 402; Sheldon, ibid.

533. Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236 at [152].

534. See clause (2) of this Rule.

535. HSBC Bank Plc v Tambrook Jersey Ltd, above.

536. Insolvency Act 1986, Pt I, amended by Insolvency Act 2000, ss.1–4 and SI 2005/879.

537. Re Television Trade Rentals Ltd [2002] EWHC 211 (Ch.), [2002] B.C.C. 807.

538. Re Trading Partners Ltd [2002] B.C.L.C. 655; New Cap Reinsurance Corp Ltd v HIH Casualty and General Insurance Ltd [2002] EWCA Civ 300, [2002] B.C.L.C. 228; Re HIH Casualty and General Insurance Ltd, above; see also Daewoo Motor Co Ltd v Stormglaze Ltd [2005] EWHC 2799 (Ch.), [2006] B.P.I.R. 415.

539. Insolvency Act 1986, s.238.

540. Re Bank of Credit and Commerce International SA (No.9), The Times, August 11, 1993 (Rattee J.), revd. in part but not on this point, [1994] 1 W.L.R. 708 (CA).

541. ss.239–246, 423–424; Fletcher, *Cross-Border Insolvency: Comparative Dimensions* (1990), pp.22–23.

542. ss.212–214; Re Bank of Credit and Commerce International SA (No.9), above. The assistance requested may be granted even if it would expose directors of foreign companies to liabilities under English law for activities which are lawful under the law of the jurisdiction in which the company is incorporated: ibid.

543. England v Smith [2001] Ch. 419 (CA); Duke Group Ltd v Carver [2001] B.P.I.R. 459; Re Trading Partners Ltd [2002] 1 B.C.L.C. 655. cf. Re Focus Insurance Co Ltd [1997] 1 B.C.L.C. 219.

544. cf. Bell Group Finance Pty Ltd v Bell Group (UK) Holdings Ltd [1996] 1 B.C.L.C. 304.

545. Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 B.C.L.C. 497 (CA). cf. Fourie v Le Roux [2005] EWCA Civ 204, [2006] 2 B.C.L.C. 531, affd. in part [2007] UKHL 1, [2007] 1 W.L.R. 320.

546. Re Business City Express Ltd [1997] 2 B.C.L.C. 510.

547. England v Smith [2001] Ch. 419; Duke Group Ltd v Carver [2001] B.P.I.R. 459.

548. Fourie v Le Roux (No.2) [2005] EWHC 922 (Ch.), [2005] B.P.I.R. 779.

549. Re HIH Casualty and General Insurance Ltd, above.

550. See Fletcher, *Insolvency in Private International Law* (2nd ed. 2005), Ch.4; Sheldon, *Cross-Border Insolvency* (4th ed. 2015), Ch.6; Woloniecki (1986) 35 I.C.L.Q. 644; Polonsky (1996) 113 S.A.L.J. 109. Other co-operative procedures of general application may become relevant in insolvency cases: see, e.g. Evidence (Proceedings in Other Jurisdictions) Act 1975; Re International Power Industries NV [1985] B.C.L.C. 128. See above, Rule 29 et seq. As to the position under the UNCITRAL Model Law on Cross-Border Insolvency, implemented in Great Britain in the Cross-Border Insolvency Regulations 2006, see below, Rules 195 et seq.

551. Provision for co-operation in the field of individual insolvency was to be found in s.122 of the now repealed Bankruptcy Act 1914, the predecessors of which were Bankruptcy Act 1869, s.74 and Bankruptcy Act 1883, s.118.

552. Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26, [2007] 1 A.C. 508; Re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 W.L.R. 852; Re OJSC ANK Yugraneft [2008] EWHC 2614 (Ch.), [2009] 1 B.C.L.C. 298; Jefferies International Ltd v Landsbanki Islands HF [2009] EWHC 894 (Comm.); Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd [2009] EWHC 1912 (Ch.), [2009] 2 B.C.L.C. 400, at [48], [62]–[63]; Re Swissair Schweizerische Luftverkehr-Aktiengeselschaft [2009] EWHC 2099 (Ch.), [2009] B.P.I.R. 1505, at [4]–[12]; Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236. See Moss (2006) 19 Insolvency Intelligence 123; Tham [2007] L.M.C.L.Q. 129; Fletcher, *Cross-Border Insolvency: Comparative Dimensions* (1990), pp.17–18, 20–22; Smart, pp.392–396.

553. See clause (3) of this Rule: paras 30-155 et seq., above.

554. See Rules 195–200.

555. See authorities cited at n.552.

556. See Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675, at [50].

557. Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675: see in particular Lord Collins at [83] and [108], and see paras 30-177 et seq., below.

558. Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675: see in particular Lord Sumption at [25] and [29], and see paras 30-177 et seq., below.

559. Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236, and see para.30-183, below.

560. For an early example see Re African Farms Ltd [1906] T.S. 373, a case from South Africa where it was stated (at 377) that "recognition … carries with it the active assistance of the court" (cited for instance in Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26, [2007] 1 A.C. 508, at [20]; Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236, at [14]; In re Phoenix Kapitaldienst GmbH [2012] EWHC 62 (Ch.), [2013] Ch. 61, at [15]).

561. See generally Mevorach, *The Future of Cross-Border Insolvency* (2018); McCormack, (2012) 32 O.J.L.S. 325, (2012) 128 L.Q.R. 140. See also Re Bedzhamov [2021] EWHC 2281 (Ch.), at [220]–[240].

562. See Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675, at [19] (Lord Sumption).

563. See Lord Hoffmann's description of the principle, or "aspiration", in In re HIH Casualty and General Insurance Ltd [2008] 1 W.L.R. 852, [7]. And see Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675 where Lord Neuberger referred at

[157] to the extreme version of the "principle of universality" propounded by Lord Hoffmann in Cambridge Gas.

564. See Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675, at [15] (Lord Sumption). The principle of modified universalism has also been expressly recognised by the Scottish courts (Hooley Ltd v Ganges Jute Private Ltd [2016] CSOH 141, 2017 S.L.T. 58 —although subject to limits: see n.467 above) and by the courts in Hong Kong, which have confirmed that no reciprocity is required for an order for assistance to be made, and that oral examinations can be ordered to assist a foreign liquidator (Joint Provisional Liquidators of BJB Career Education Co Ltd (In Provisional Liquidation) v Xu Zhendong [2016] HKCFI 1930). For acceptance of the principle in Ireland see the Irish Supreme Court in Re Dunne (a bankrupt) [2015] IESC 42, [2015] 2 I.L.R.M. 103, at [63].

565. [2014] UKPC 36, [2015] A.C. 1675. See also Re Dunne (a bankrupt), above, [58].

566. Singularis Holdings v PricewaterhouseCoopers, above, at [83] and [108] (Lord Collins). It was held that the Privy Council's decision in Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26, [2007] 1 A.C. 508 was wrong in applying Manx statutory provisions for approval of schemes of arrangement by analogy, or "as if" they applied, when they did not apply under their terms.

567. Lord Clarke, at [112], said that the right and duty to assist foreign office-holders would be an empty formula if it were confined to recognising the company's title to its assets, or to recognising the office-holder's right to act on behalf of the company's behalf in the same way as that of any other duly-appointed corporate agent. See also Lord Sumption's comment at [23] that the "recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them".

568. [2014] UKPC 36, [2015] A.C. 1675, at [25]. Some of the limitations on the common law power to provide assistance in relation to foreign insolvency proceedings set out by Lord Sumption have been questioned subsequently overseas. Lord Sumption, for example, said that the power to assist was "available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up … " (at [25]). See, however, the remarks of Lord Neuberger (at [158]). In Re Gulf Pacific Shipping [2016] SGHC 287, the Singapore High Court departed from the views of Lord Sumption and held that it could grant assistance at common law to the liquidators of a Hong Kong company that was in creditors' voluntary liquidation in Hong Kong.

569. This principle was applied in Re Bedzhamov [2021] EWHC 2281 (Ch.), at [272]–[275].

570. [2014] UKPC 36, [2015] A.C. 1675, at [29].

571. Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26, [2007] 1 A.C. 508, at [22]; Re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 W.L.R. 852, at [14]; Pan Ocean Co Ltd v Fibria Celulose S/A [2014] EWHC 2124, [2014] Bus. L.R. 1041, at [89].

572. Insolvency Act 1986, s.426(5): see para.30-164, above.

573. See discussion at para.30-275, below.

574. [2012] UKSC 46, [2013] 1 A.C. 236, at [31].

575. [1993] B.C.L.C. 112.

576. [2004] B.P.I.R. 564.

577. In Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft [2009] EWHC 2099 (Ch.), [2009] B.P.I.R. 1505, at [4]–[12] it was held that the court has a general power to order remittal of assets where there would be a pari passu distribution in the foreign liquidation without necessitating resort to s.426 of the Insolvency Act 1986.

578. [2008] UKHL 21, [2008] 1 W.L.R. 852.

579. ibid., at [59]–[62], [66], [69], [74].

580. ibid., at [10], [11], [18]—[21], [24], [26], [27], [30], [63].

581. ibid., at [44].

582. [2012] UKSC 46, [2013] 1 A.C. 236, Lord Clarke dissenting.

583. See Rules 46 et seq.

584. The joined appeal was in New Cap Reinsurance Corp Ltd v Grant. The defendants' participation in the Australian insolvency proceeding, albeit not the actual recovery proceedings, was sufficient for them to be taken to have submitted to the court's jurisdiction. Enforcement in that case was under the Foreign Judgments (Reciprocal Enforcement) Act 1933, which applies to Australia, but if the 1993 Act had not applied the judgment would have been enforceable at common law: see [2012] UKSC 46, [2013] 1 A.C. 236, at [167], [170] and [176].

585. See para.30-288, below.

586. See para.30-289, below.

587. Based on Bank of Ethiopia v National Bank of Egypt and Liguori [1937] Ch. 513.

588. cf. Felixstowe Dock and Railway Co v US Lines Inc [1989] Q.B. 360.

589. Re Dallhold Estates (UK) Pty Ltd [1992] B.C.L.C. 621.

590. HSBC Bank Plc v Tambrook Jersey Ltd [2013] EWCA Civ 576, [2014] Ch. 252.

591. Insolvency Act 1986, ss.130(2), 426(5), (10)(a) and (b).

592. Hughes v Hannover Ruckversicherungs-Aktiengesellschaft [1997] 1 B.C.L.C. 497 (CA).

593. Re Bank of Credit and Commerce International SA (No.9), The Times, August 11, 1993 (Rattee J.), revd. in part, but not on this point, [1994] 1 W.L.R. 708 (CA).

594. England v Smith [2001] Ch. 419 (CA).

595. Re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [2008] 1 W.L.R. 852. The decision left open whether the discretion arose at common law or only under s.426 (with two members of the court taking the view that it was only under s.426, two taking the opposite view, and one declining to express a view on the point).

596. Singularis Holdings v PricewaterhouseCoopers [2014] UKPC 36, [2015] A.C. 1675

597. Rule 46.

598. Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 A.C. 236.

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 329 of 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF SILVER BASE GROUP HOLDINGS LIMITED

Appearances: Mr Jonathon Milne and Ms Róisín Liddy-Murphy of Conyers Dill & Pearman LLP for the Company

Before: The Hon. Justice David Doyle

Heard: 8 December 2021

Judgment Delivered: 8 December 2021

HEADNOTE

Appointment of light-touch provisional liquidators for restructuring purposes – importance of the laws of the place of incorporation of a company – the need to take into account the position of creditors – sections 95(1)(b) and 104 of the Companies Act (2021 Revision) – adjournment of winding up petition – winding up proceedings also filed in Hong Kong – comity concerns dealt with

JUDGMENT

Introduction

1. This judgment should be read in the light of the judgment I delivered on 22 November 2021.

2. I have considered the pleadings, the evidence, the skeleton arguments and the oral submissions of Mr Jonathon Milne who with Ms Róisín Liddy-Murphy appears today on behalf of Silver Base Group Holdings Limited (the "Company"). I am grateful to them for their helpful assistance to the Court. In allaying the concerns of the creditors and the Court they have displayed first class written and oral advocacy skills. No one has appeared today to oppose the relief requested by the Company.

3. I have however considered the views of the creditors which have been put before the court including the letters dated 29 November 2021 and 6 December 2021 from Katherine Chan Law Office for Mr WANG Jianfei a dissatisfied significant creditor of the Company, communications from Shao Bin, Mayfair & Ayers Financial Group Limited, Patrick Chu, Conti Wang Lawyers LLP, Fan Wu on behalf of his father, and numerous others.

The Law

4. I have considered the relevant statutory provisions including sections 95(1)(b) and 104 of the Companies Act (2021 Revision) (the "Companies Act").

5. I have considered the relevant local case law, emanating from the formidable judicial quartet of Justices Smellie, Kawaley, Segal and Parker including the following judgments:

   (1) Parker J in *CW Group Holdings Limited* (FSD; unreported judgment 3 August 2018);
   (2) Kawaley J in *ACL Asean Towers Holdco Limited* (FSD; unreported judgment 8 March 2019);

(3) Smellie CJ in *Sun Cheong Creative Development Holdings Limited* (FSD; unreported judgment 20 October 2020); and

(4) Segal J in *Midway Resources International* (FSD; unreported 30 March 2021).

The importance of the laws of the place of the Company's incorporation

6. The Company is incorporated under the laws of the Cayman Islands. I have full regard to the importance of the laws of the place of a company's incorporation and the international recognition of light-touch provisional liquidators appointed for restructuring purposes. See *The Law of Insolvency* 5th Edition (2020) Ian Fletcher at paragraph 30-054; *Dicey, Morris & Collins* on *The Conflict of Laws* (Fifteenth Edition) rules 175 and 179; Chief Justice Smellie in *Sun Cheong*; Harris J in *Re China Huiyan Juice Group Limited* [2020] HKCFI 2940 (19 November 2020) and Harris J in *Li Yiging v Lamtex Holdings Ltd* [2021] HKCFI 622.

7. Ian Fletcher puts it well at paragraph 30-054 when he refers to the long accepted fundamental principle that the law of the place of a company's incorporation is primarily, "possibly immutably", competent to control all questions concerning a company's initial formation and subsequent existence. Dicey Rule 179 sets out the common law and private international law position that the authority of a liquidator (and I would add a provisional liquidator) appointed under the law of the place of incorporation should be recognised in other jurisdictions.

8. Dicey Rule 175(2) under the heading "Corporations and Insolvency" citing at footnote 78 caselaw from as long ago as 1843 states:

> "All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

This fundamental principle has been etched on my mind ever since *Buckmaster and Moore*

v Fado Investments 1984 – 86 MLR 252 (in respect of foreign partnerships) – challenging experiences in court are always memorable.

9. Lord Sumption (who also sits in the Hong Kong Court of Final Appeal) at paragraph 23 of his much read judgment in *Singularis Holdings Limited v PriceWaterhouseCoopers* [2014] UKPC 36 also emphasised the importance, in international insolvency cases, of respecting and having full regard to the laws of the relevant company's place of incorporation.

10. I note Mr Milne's observation that the Cayman Islands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency and that this court should place emphasis on the laws of the place of the Company's incorporation and in effect not be too influenced by the observations of Harris J in Hong Kong in respect of the laws of a company's centre of main interests.

11. Mr Milne is right to stress that the Cayman Islands is a jurisdiction of substance:

> "…the Cayman Islands is a highly sophisticated jurisdiction with a predictable and highly-regarded legal system. There are many reasons that Hong Kong-listed companies, in particular, choose to be incorporated in the Cayman Islands, such as:
>
> a. the essential basic company law framework is based on English law concepts covering the whole life cycle of the company from incorporation to dissolution. The statutory regime and corporate governance framework is modern and flexible, which enables companies to meet and adapt to the listing rule requirements of a major stock exchange;
>
> b. there is an appropriate balance under the Companies Act in relation to restructuring and insolvency issues, with officeholders and the Court ensuring careful regard to the interests of management and all stakeholders; and

c. incorporation and maintenance costs of a Cayman Islands company are relatively low. There are experienced practitioners in the areas of legal, corporate and accounting services for Cayman Islands companies located in Hong Kong."

12. The Cayman Islands is plainly a jurisdiction of substance which legitimately facilitates world trade and develops the common law to the great economic benefit of many jurisdictions worldwide. If higher authority is required to support that proposition one need only turn to Lady Arden's important lecture at The Peace Palace in The Hague (3 February 2020) on *The Judicial Committee of the Privy Council as an important source of financial services jurisprudence* which generously acknowledged the significant contribution of the Cayman Islands to such jurisprudence and its "importance in today's world in commercial terms", emphasising how the jurisdiction legitimately attracts "massive funds for investment" and how the determination of those weighty financial cases "inspires respect for the rule of law."

Hong Kong case law

13. In view of the Company's substantial connections with Hong Kong and other areas of the People's Republic of China I have considered some of the Hong Kong case law including:

(1) Deputy High Court Judge William Wong SC in *Moody Technology Holdings Limited (in provisional liquidation for restructuring purposes)* (12 March 2020);
(2) Harris J in *Re China Huiyan Juice Group Ltd* [2020] HKCF 1 2940;
(3) Harris J in *Li Yiqing v Lamtex Holdings Ltd* [2021] HKCFI 622 ;
(4) Harris J in *Re China Bozza Development Holdings Ltd* [2021] HKCFI 1235;
(5) Harris J in *Ping An Securities (Holdings) Ltd* [2021] HKCFI 651;
(6) Harris J in *Victory City International Holdings Ltd* [2021] HKCFI 1370; and
(7) Harris J in *China Oil Gangran Energy Group Holdings Limited* [2021] HKCFI 1592.

The initial lack of notice to creditors and comity concerns

14. I was initially concerned over lack of notice to the creditors and comity in respect of the Hong Kong proceedings. These two concerns have now been dealt with.

15. Firstly, I adjourned on 22 November 2021 to enable creditors to be given further notice. The initial adjournment was to 1 December 2021 and then a further adjournment to today 8 December 2021 to give the creditors more time to express their views.

16. Secondly, in relation to the comity concern Mr Milne has skillfully and pragmatically dealt with that concern in amended paragraph 4 of the latest draft Order. In effect the Hong Kong proceedings are carved out of the statutory moratorium if the Hong Kong Court sees fit to do so. Moreover it is open to any creditor to apply to this court seeking leave to proceed against the Company notwithstanding the appointment of the joint provisional liquidators ("JPLs").

Various other concerns and issues

17. In light of the opposition of numerous creditors I had concerns as to the viability of any restructuring proposals but again Mr Milne has skillfully and pragmatically allayed those concerns by including an amended paragraph 3(v) of the latest draft Order in effect requiring the JPLs to report to the court on the feasibility of a restructuring for the benefit of the Company's creditors.

18. I was also concerned that the original draft Order did not require the JPLs to consult with the Company's creditors. I see from paragraph 3(i) of the amended draft that there is now a provision giving the JPLs power to consult with the Company's creditors. I would expect the JPLs to exercise that power. Moreover paragraph 3(ii) now expressly includes a power for the JPLs to do all things necessary to implement the Restructuring Proposal not only in consultation with the board of directors of the Company but also "the Company's creditors".

19. A significant creditor has expressed concerns in respect of the Chairman of the Company. The JPLs under paragraph 3(ii) of the Order are given express power to monitor, oversee and supervise the board of directors of the Company (the "Board") and the continuation of the business of the Company under the control of the Board pending the implementation of the restructuring proposals. Again I would expect the JPLs to exercise that power and keep a close eye on the Chairman in light of the concerns expressed by the creditor. The JPLs have power under paragraph 3(v) to conduct investigations into the affairs of the Company and in particular in respect of three areas of specific concern. Moreover under paragraph 6 of the proposed Order there can be no payment or disposition of the Company's assets (including real and personal property) without the express written approval of the JPLs.

20. I should record that I am satisfied as to the identity of the proposed JPLs. Another creditor preferred others within Ernst & Young and R&H Restructuring (Cayman) Ltd who were stated to have more experience and resources but their consents to act were not filed and there was no good reason not to appoint the individuals proposed by the Company. I have no doubt as to their significant experience and resources. I considered the case law in this area including my judgment in *Global Fidelity Bank, Ltd (in voluntary liquidation)* (FSD; unreported judgment 20 August 2021) and was satisfied that there were no issues of lack of independence in respect of the JPLs.

21. I cannot see any prejudice to the creditors in appointing JPLs at this stage to monitor the Board, conduct investigations and to consult with creditors in respect of the feasibility of a debt restructuring plan and then to report to the court in that respect. The appointment will not stop the winding up proceedings in Hong Kong if the Hong Kong Court decides not to recognise the statutory moratorium in respect of any proceedings in Hong Kong. It will, of course, be entirely a matter for the Hong Kong Court as to what orders it makes in respect of any active proceedings before it involving the Company. Looking at the matter through Cayman Islands' eyes, in the judgment of this court, it would be sensible and appropriate for the Hong Kong Court to recognise and give assistance to the JPLs which

this court has appointed over a company incorporated under the laws of the Cayman Islands. I leave these matters however to the Hong Kong Courts having endeavoured to deal with the concerns previously expressed by Harris J.

22. It may be that in the future a detailed protocol can be arrived at for appropriate communications between this court and the Hong Kong Court when dealing with similar cases involving companies with connections to both jurisdictions but for the moment I endeavour to communicate my messages to the Hong Kong Court through this judgment.

23. I think it also sensible to adjourn the winding up petition in this jurisdiction to 10am on Friday 11 February 2022 with the JPLs to report, after consultation with the creditors, on the feasibility of a debt restructuring before 2pm on 27 January 2022. If such is not feasible then the court can make a winding up Order on the 11 February 2022.

Summary

24. In summary:

(1) I am satisfied that the Company has been duly authorised to present the winding up petition and the application to appoint JPLs. I considered Article 162(1) of the Company's Articles of Association and the resolutions passed by the Board. The Company was incorporated on 12 September 2007 prior to the 1 March 2009 date referred to in section 94(2) of the Companies Act so I also considered the rule in *Emmadart* [1979] 1 Ch 540 and the judgment of Smellie J (as he then was) in *Banco Economico S.A. v Allied Leasing and Finance Corporation* 1998 CILR 102.

(2) I have concluded that the Company is or is likely to become unable to pay its debts and that it intends to present a compromise or arrangement to its creditors. The section 104(3) conditions are met. My initial reservations have been dealt with by Mr Milne and I am now content to appoint JPLs for restructuring purposes. Moreover there is good reason to adjourn the winding up petition to give some breathing space in the best

interests of the creditors and to enable the JPLs to report back as to whether a restructuring is feasible;

(3) I have noted the concerns of Harris J expressed in the judgments I have referred to above. I have considered those concerns prior to deciding to appoint JPLs in this case. I have given the creditors an opportunity to be heard. I have ordered that the documents filed in these proceedings should be filed with the Hong Kong Court. In this case the Board has taken professional advice and sought the assistance of experts. There is a plan and information has been provided about the past and potential future of the Company. The Board are well aware that as the Company has entered the zone of insolvency focus moves to the best interests of the creditors. The JPLs will be able to consult with the creditors and endeavour to take matters forward in their best interests.

<u>The Order</u>

25. I make an Order substantially in terms of the amended draft filed yesterday such draft to include the further amendments I specified during my exchanges with counsel.

26. The following Order was made:

(1) Ms. CHAN Pui Sze and Ms. MAK Hau Yin, both of Briscoe Wong Advisory Limited and Mr. Martin Nicholas John Trott of R&H Restructuring (Cayman) Ltd, are hereby appointed joint provisional liquidators ("JPLs") of the Company.

(2) The JPLs shall not be required to give security for their appointment.

(3) The powers of the JPLs appointed pursuant to paragraph 1 above shall be limited to the following:

(i) to consult with the Company and the Company's creditors in respect of, and review, on an ongoing basis, all issues relating to the feasibility of a debt restructuring plan (the "Restructuring Proposal") as to be recommended by

the directors of the Company and the JPLs, including with respect to the necessary steps which need to be taken in order for the Restructuring Proposal to be successfully implemented to allow the Company to continue as a going concern;

(ii) to do all things necessary to implement the Restructuring Proposal in consultation with the board of directors of the Company (the "Board") and the Company's creditors;

(iii) to monitor, oversee and supervise the Board and the continuation of the business of the Company under the control of the Board pending the implementation of the Restructuring Proposal;

(iv) with the consent of the Board to do all acts and to execute in the name of and on behalf of the Company, all deeds, receipts and other documents and for that purpose to use, when necessary, the seal (if any) of the Company;

(v) for the purpose of reporting to the Court on the feasibility of a restructuring and for the benefit of the Company's creditors, to ascertain and conduct investigations into the affairs of the Company and its subsidiaries. Such investigations shall include, *inter alia*, an investigation into: (i) prepayments of approximately RMB534,191,000 (equivalent to approximately HK$652,034,000) to three purchase agents for the purchase of liquor products, of which approximately RMB164,691,000 (equivalent to approximately HK$201,022,000) was paid to a company controlled by the Chairman's brother; (ii) restrictions (if any) placed on the use of the Company's RMB cash reserves in the context of paying current debts owed to the Company's creditors located in Hong Kong, and the People's Republic of China and elsewhere; and (iii) the status of the Company's redemption of its investment in the collective investment scheme managed by Guotai Junan.

(vi) to request and receive from third parties documents and information concerning the Company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency.

(vii) to locate, protect, secure and take into their possession and control all assets and property within the jurisdiction of the courts of the Cayman Islands to which the Company is or appears to be entitled.

(viii) to locate, protect, secure and take into their possession and control the books, papers, and records of the Company including the accountancy and statutory records within the jurisdiction of the courts of the Cayman Islands and to investigate the assets and affairs of the Company and the circumstances which gave rise to its insolvency.

(ix) to retain and employ barristers, solicitors or attorneys and/or such other agents or professional persons as the JPLs consider appropriate for the purpose of advising or assisting in the execution of their powers and duties.

(x) seek recognition of the provisional liquidation and/or the appointment of the JPLs in any jurisdiction the JPLs consider necessary together with such other relief as they may consider necessary for the proper exercise of their functions within that jurisdiction, including but not limited to potential applications for recognition in Hong Kong and the People's Republic of China; and

(xi) to bring or defend legal proceedings and make all such applications to this Court whether in their own names or in the name of the Company on behalf of and for the benefit of the Company including any applications for:

(a) orders for disclosure, the production of documents and/or examination of third parties which it is anticipated may be made by the JPLs to facilitate their investigations into the assets and affairs

of the Company and the circumstances which gave rise to its insolvency; and/or

(b) ancillary relief such as freezing orders, search and seizure orders in any legal proceedings commenced.

(4) For the avoidance of doubt, for so long as provisional liquidators are appointed to the Company, pursuant to section 97(1) of the Companies Act and subject to the proviso below, no suit, action or other proceeding, including criminal proceedings, shall be proceeded with or commenced against the Company except with the leave of the Court and subject to such terms as the Court may impose. Provided however, this Order is made without prejudice to the jurisdiction of The High Court of the Hong Kong Special Administrative Region (the "Hong Kong Court") to determine whether to recognise the statutory moratorium under section 97(1) of the Companies Act, including in relation to extant winding-up proceedings presented in action HCCW 385 of 2021 which are pending before the Hong Kong Court.

(5) This Order, along with all other Orders, judgments and court filings in the Cayman Islands in this matter, shall be filed forthwith in electronic and hard copy form with the Hong Kong Court under cover of a letter which makes reference to all extant proceedings concerning the Company and/or subsidiaries of the Company currently before the Hong Kong Court.

(6) For the avoidance of any doubt, no payment or disposition of the Company's assets (including real and personal property) or any transfer of shares or any alteration in the status of the Company's members shall be made or effected without the express written approval of the JPLs but no such payment or other disposition or transfer of shares or alteration in the status of the Company's members made or effected by or with the authority or approval of the JPLs in carrying out their duties and functions and in the exercise of their powers under this Order shall be avoided by virtue of the provisions of section 99 of the Companies Act.

(7) In the event that a winding-up order is made against the Company by this Court, any fees and expenses of the JPLs, including all costs, charges and expenses of any attorneys and all other agents, managers, accountants and other persons that they may employ, which are payable in accordance with the terms of the orders which may be made by this Court, and which are outstanding at the date of the winding-up order, shall be treated as fees and expenses properly incurred in preserving, realising or getting in the assets of the Company for the purposes of Order 20 of the Companies Winding Up Rules, 2018.

(8) Save as are specifically set out herein:

(a) the JPLs will have no general or additional powers or duties with respect to the property or records of the Company; and

(b) the Board shall continue to manage the Company's affairs in all respects and exercise the powers conferred upon it by the Company's Memorandum and Articles of Association, provided always that, should the JPLs consider at any time that the Board is not acting in the best interests of the creditors of the Company, the JPLs shall have the power to report same to this Court and seek such directions from this Court as the JPLs consider are appropriate.

(9) The Company shall provide the JPLs with such information as the JPLs may reasonably require in order that the JPLs should be able properly to discharge their functions under this Order and as officers of this Court.

(10) The powers exercisable by the JPLs pursuant to this order may be exercised jointly and severally.

(11) The remuneration and expenses of the JPLs, including the expenses associated with the exercise of their powers, shall be paid out of the assets of the Company subject to approval of the Court.

(12) The JPLs, the Company and any creditors of the Company do have liberty to apply.

(13) The winding up petition presented by the Company on 11 November 2021 be adjourned until 10 am on Friday 11 February 2022.

(14) The JPLs provide their report on the status of their investigations and the feasibility of a debt restructuring process to this Honourable Court, with a copy served upon the Company's creditors and filed with the Hong Kong Court before 2 pm on 27 January 2022.

(15) No order as to costs.

David Doyle

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THE HON. JUSTICE DOYLE
JUDGE OF THE GRAND COURT

HCCW 385/2021 & HCMP 859/2022
(HEARD TOGETHER)
[2022] HKCFI 2386

HCCW 385/2021

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 385 OF 2021

IN THE MATTER of section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

and

IN THE MATTER of Silver Base Group Holdings Limited （銀基集團控股有限公司）

AND HCMP 859/2022

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 859 OF 2022

IN THE MATTER of Silver Base Group Holdings Limited (In Official Liquidation in the Cayman Islands)

CHAN PUI SZE, MAK HAU YIN, MARTIN NICHOLAS JOHN TROTT AS THE JOINT OFFICIAL LIQUIDATORS OF SILVER BASE GROUP HOLDINGS LIMITED (IN OFFICIAL LIQUIDATION IN THE CAYMAN ISLANDS)	Applicants

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(HEARD TOGETHER)

Before: Hon Harris J in Court

Date of Hearing: 27 July 2022

Date of Decision: 27 July 2022

Reasons for Decision: 5 August 2022

R E A S O N S F O R D E C I S I O N

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1. On 21 October 2021 Wang Jianfei issued a petition to wind up the Company on the grounds of insolvency. His Petition was amended on 16 December 2021. The Company is incorporated in the Cayman Islands and its shares were listed on the Main Board of the Stock Exchange of Hong Kong ("**HKSE**"). The Company applied successfully to be put into soft-touch provisional liquidation in the Cayman Islands on 11 November 2021. This was intended to facilitate a restructuring of its debt. The restructuring was unsuccessful. On 5 May 2022 the Company was put into liquidation in the Cayman Islands and liquidators appointed ("**Cayman Liquidators**"). The Hong Kong Petition is now unopposed. Initially the Cayman Liquidators applied for recognition in Hong Kong ("**Recognition Application**"). They no longer do so and take the view that the Company should be wound up here; although ideally the Hong Kong liquidators will be the same individuals as the Cayman Liquidators for reasons of economy and efficiency. I will make no order in respect of the Recognition Application with no order as to costs.

A B C D E F G H I J K L M N O P Q R S T U V

2. As the matter has developed there are very limited issues for the Court to consider. As I have already explained, the Petition is no longer contested. As the Company is incorporated in the Cayman Islands it is necessary for it to satisfy the three core requirements[1] which guide the Court in determining whether or not it should exercise its statutory discretion pursuant to *section 327* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32, which permits the court to order the winding up in Hong Kong of a foreign incorporated company. The three criteria in my view are clearly satisfied in the present case. **First**, the Company was listed in Hong Kong and this is enough to constitute sufficient connection. **Secondly**, there is a reasonable prospect of a winding up in order in Hong Kong benefiting the Petitioner. There are clearly assets here including cash in bank. The fact that the Cayman Liquidators consider it necessary that there is a liquidation in Hong Kong supports this conclusion. **Thirdly**, there are creditors in Hong Kong other than the Petitioner over whom the Court can exercise jurisdiction. I will, therefore, make the normal winding up, order one set of costs for the supporting creditors and also order that the Cayman Liquidators' costs be paid out of the assets of the Company.

3. There is one other matter that I will comment on, although it is not necessary for me to decide it. The Cayman Liquidators' decision not to pursue their Recognition Application is partly a consequence of my recent decision in *Re Global Brands Holding Ltd*[2]. I held that in future foreign liquidators should be recognised and assisted if they were appointed in a company's centre of main interests ("**COMI**") rather than the place of incorporation, unless they happened to be the same. The

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[1] *Shandong Chenming Paper Holdings Ltd. v Arjowiggins HKK 2 Limited* [2022] HKCFA 11, [3].
[2] [2022] HKCFI 1789.

A B C D E F G H I J K L M N O P Q R S T U V

Cayman Liquidators recognise that the Company's COMI is not in the Cayman Islands. Initially they took the view that they could, however, properly seek limited recognition, what I call in *Global Brands* managerial recognition, of their authority as the duly appointed agents of the Company appointed in accordance with the law of its place of incorporation, which established principles of private international law recognise determines matters of internal management and authority to represent a foreign company. In *Global Brands* the company was not in liquidation in Hong Kong. It seems to me that if a foreign company is in liquidation in Hong Kong then the principle I have just explained may be qualified. A number of matters will need further consideration in the future:

(1) What, if any, recognition should be granted to a foreign liquidator appointed in the place of incorporation (if it is not the COMI) if the company is wound up in Hong Kong? In such circumstances should the Hong Kong court proceed on the basis that within its jurisdiction only the Hong Kong appointed liquidator is the duly authorised agent of the company?

(2) It is commonly assumed that if a company is in liquidation in its place of incorporation and wound up in another jurisdiction, the latter is to be treated as an ancillary liquidation[3]. Should this be the case if the place of incorporation is not the COMI and the reality is, as is commonly the case with letter box jurisdictions, that a company's connection with it is formal and it has no assets, creditors or debtors located there? There is no practical reason for requiring realisations to be transferred to the liquidators appointed in the place of incorporation if all the creditors, or the large majority, are

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[3] *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, Sir Richard Scott VC, 246C-F; *Re Up Energy Development Group Limited* [2022] HKCFI 1329, [33]–[34].

located in Hong Kong and the Mainland. On the contrary it just increases costs and delay. It also needs to be borne in mind that proceeding on the basis that the liquidation in the place of incorporation (which is not COMI) is the main liquidation involves recognising it; which is inconsistent with (1).

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Edward K H Ng, instructed by Katherine Chan Law Office, for the Petitioner

Mr Jason Yu, instructed by Karas LLP, for the joint official liquidators

Mr Look Chan Ho, instructed by Patrick Chu, Conti Wong Lawyers LLP, for the Supporting Creditor (Brender Services Limited)

H Y Leung & Co LLP, for the supporting creditors (Wang Qi & 王建東), did not appear

Attendance of D S Cheung & Co, for the company, was excused

Attendance of Gall, for the supporting creditor (Zhao Hong Li), was excused

Attendance of Li, Kwok & Law, for the supporting creditor (Huang Zeming), was excused

Attendance of Patrick Chu, Conti Wong Lawyers LLP, for the supporting creditor (Crosby Securities Limited), was excused

Attendance of the Official Receiver was excused

Re Lamtex Holdings Ltd
(林達控股有限公司)

[2021] HKCFI 622

(Court of First Instance)

(Companies (Winding-up) Proceedings No 263 of 2020)

Harris J

28 January, 11 March 2021

Company law — winding-up — foreign company — application by foreign "soft-touch" provisional liquidators for recognition and assistance after petition presented in Hong Kong — different place of company's incorporation and centre of main interest — approach to primacy of jurisdiction — no credible plan for restructuring debt — adjournment of petition declined

Conflict of laws — corporations and corporate insolvency — cross-border insolvency — order for recognition and assistance — application by foreign "soft-touch" provisional liquidators — different place of company's incorporation and centre of main interest — approach to primacy of jurisdiction — development of principles

公司法 — 清盤 — 外地公司 — 外地「便利做事」的臨時清盤人在香港提出呈請後申請認可及協助 — 公司成立的不同地點及主要利益的中心 — 就司法管轄權的首要性的做法 — 沒有重組債務的可靠方案 — 押後呈請被拒絕

法律衝突 — 法團及法團清盤 — 跨國界清盤 — 認可及協助令 — 外地「便利做事」的臨時清盤人的申請 — 公司成立的不同地點及主要利益中心 — 就司法管轄權的首要性的做法 — 法律原則的發展

C was incorporated in Bermuda and listed on the Main Board of the Stock Exchange of Hong Kong Ltd. Prior to C becoming insolvent, it carried on businesses in the Mainland and Hong Kong. In August 2020, L issued the present winding-up petition in Hong Kong against C on an undisputed debt owed by C under a series of bonds governed by Hong Kong law issued mainly to individuals resident in the Mainland. Most of C's debt was held by the other bond holders who supported L's petition for an immediate winding up order and no creditors opposed L's application. In October 2020, C presented a winding-up petition in Bermuda. Upon C's application, "soft-touch" provisional liquidators (JPLs) were appointed in Bermuda for restructuring purposes. An application by

the JPLs for their recognition and assistance in progressing a restructuring of C's debt in Hong Kong was granted in November 2020. At issue was whether the Court should make an immediate winding-up order or adjourn the Hong Kong petition, as sought by the JPLs, for the purpose of restructuring C's debt.

Held, declining to grant the adjournment sought by the JPLs and making a winding-up order, that:

(1) A winding up in a company's country of incorporation would as a matter of Hong Kong rules of private international law be given extra-territorial effect in Hong Kong. The effect extended to the distribution of a company's assets to its creditors. The place of incorporation should generally be the system of distribution and a winding up of a company's assets in Hong Kong was ancillary to it (*Re International Tin Council* [1987] Ch 419, *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 applied). (See paras.7, 9, 13.)

(2) It was desirable that the Hong Kong courts were able to deal with recognition and assistance using methods that were consistent with commercial practice in the HKSAR and the Mainland. It was a common feature of the corporate structure of Hong Kong and Mainland business groups that their holding companies were incorporated in an offshore jurisdiction with whom they had no connection other than registration. Accordingly, there was a need to reconsider the current position in Hong Kong where the court recognised only insolvency practitioners appointed in the place of incorporation. The common law in this area was sufficiently flexible to develop so as to be consistent with commercial practice and there was nothing in principle preventing recognition of liquidators appointed in a company's centre of main interest (COMI) or a jurisdiction with which it had a sufficiently strong connection to justify recognition (*Re Opti-Medix Ltd* [2016] SGHC 108 applied; *Re Eurofood IFSC Ltd* [2006] Ch 508, *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd* 374 BR 122 (Bankr SDNY 2007), *Re Basis Yield Alpha Fund (Master)* 381 BR 37 (Bankr SDNY 2008), *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, *Re Creative Finance Ltd* 543 BR 498 (Bankr SDNY 2016) considered). (See paras.19, 22.)

(3) While the principles of modified universalism generally militated in favour of staying local (Hong Kong) proceedings in favour of foreign proceedings opened in the place of incorporation in order to preserve unitary global proceedings, this may not be so where the foreign proceedings were

"soft-touch" provisional liquidation (*Re Sun Cheong Creative Development Holdings Ltd* (FSD 169/2020, Cayman Islands Grand Court, 20 October 2020) considered). (See para.28.)

(4) The following approach should be adopted in Hong Kong to determine disputes over which jurisdiction should be the primary one to conduct an insolvency process. Generally, the place of incorporation should be the jurisdiction in which a company should be liquidated. In practice, this meant it would be the system for distribution to creditors. However, if the COMI was elsewhere, regard was to be had to other factors: (i) was the company a holding company and, if so, did the group structure require the place of incorporation to be the primary jurisdiction in order effectively to liquidate or restructure the group; (ii) the extent to which giving primacy to the place of incorporation was artificial having regard to the strength of the COMI's connection with its location; and (iii) the views of creditors. Ultimately, this meant that which insolvency process should be given primacy would depend on the circumstances of the case and involve giving appropriate weight to the location of a company's COMI. (See paras.35–36.)

(5) C's COMI was located in Hong Kong. L and nearly all other creditors of C were Chinese nationals resident in the Mainland. No creditor had appeared to oppose the petition. C had not demonstrated a good reason to adjourn the petition. The information about the restructuring was scanty in the extreme. C did not have a credible plan to restructure its debt. It was considerably more likely that the application in Bermuda was an attempt to engineer a *de facto* moratorium, which could not be obtained under Hong Kong law, with a view to then searching for a solution to C's financial problems. Viewed from a Hong Kong perspective, this was a questionable use of "soft-touch" provisional liquidation and one which would encourage the court to view with care similar applications for recognition in the future. Going forward, unless the agreement of a petitioner and supporting creditors had been obtained in advance the court would not deal in writing with recognition and assistance applications made by "soft-touch" provisional liquidators after a winding up petition had been presented in Hong Kong (*Re China Huiyuan Juice Group Ltd* [2021] 1 HKLRD 255 applied). (See paras.39, 42.)

Applications

This was the petitioner's application (Li Yiqing (李益清)) to wind up the subject company and the foreign joint provisional liquidators'

application for an adjournment of the petition for the purpose of restructuring the company's debt.

[*Editor's note*: See *Re Ping An Securities Group (Holdings) Ltd* [2021] 2 HKLRD 204] for another case on the court's approach to orders for recognition and assistance sought by foreign "soft-touch" provisional liquidators.]

Mr Leung Sze Lum, instructed by Au Yeung, Cheng, Ho & Tin, for the petitioner.
Ms Elizabeth Cheung, instructed by Wilkinson & Grist, for the respondent.
Mr Michael Lok and Ms Sharon Yuen, instructed by Chungs Lawyers, for the joint provisional liquidators.
The attendance of the Official Received was excused.

Legislation mentioned in the judgment
Bankruptcy Code [United States] Chapter 15
Companies (Winding Up and Miscellaneous Proceedings) Ordinance (Cap.32) ss.197, 327

Cases cited in the judgment
Basis Yield Alpha Fund (Master), Re 381 BR 37 (Bankr SDNY 2008)
Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd, Re 374 BR 122 (Bankr SDNY 2007)
China Huiyuan Juice Group Ltd, Re [2021] 1 HKLRD 255, [2021] 2 HKC 387, [2020] HKCFI 2940
China Solar Energy Holdings Ltd (No 2), Re [2018] 2 HKLRD 338, [2018] HKCFI 555
Creative Finance Ltd, Re Case No 14-10358 (REG), 543 BR 498 (Bankr SDNY 2016)
Eurofood IFSC Ltd (C-341/04), Re EU:C:2006:281, [2006] Ch 508, [2006] 3 WLR 309, [2006] BCC 397
HIH Casualty and General Insurance Ltd, Re [2008] UKHL 21, [2008] 1 WLR 852, [2008] 3 All ER 869, [2008] Bus LR 905
International Tin Council, Re [1987] Ch 419, [1987] 2 WLR 1229, [1987] 1 All ER 890, (1987) 3 BCC 103
Joint Official Liquidators of A Co v B [2014] 4 HKLRD 374, [2014] 5 HKC 152
Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd, Re [2019] HKCFI 805, [2019] HKEC 945
Legend International Resorts Ltd, Re [2006] 2 HKLRD 192, [2006] 3 HKC 565
Moody Technology Holdings Ltd, Re [2020] 2 HKLRD 187, [2020] 4 HKC 78, [2020] HKCFI 416
Opti-Medix Ltd, Re [2016] SGHC 108

Rubin v Eurofinance SA [2012] UKSC 46, [2013] 1 AC 236, [2012] 3 WLR 1019, [2013] 1 All ER 521, [2013] Bus LR 1
Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36, [2015] AC 1675, [2015] 2 WLR 971, [2015] BCC 66
Solomon v Ross (1764) 1 H BI 131N
Stichting Shell Pensioenfonds v Krys [2014] UKPC 41, [2015] AC 616, [2015] 2 WLR 289, [2015] 2 All ER (Comm) 97, [2015] BCC 205
Sun Cheong Creative Development Holdings Ltd, Re (FSD 169/2020, Cayman Islands Grand Court, 20 October 2020)
Z-Obee Holdings Ltd, Re [2018] 1 HKLRD 165

Other materials mentioned in the judgment
Dicey, Morris and Collins, *The Conflict of Laws* (15th ed.) rr.175–179, Vol.2, para.3-102, footnote 430
Fletcher, *The Law of Insolvency* (4th ed), para.30-007

DECISION

Harris J

Introduction

1. The Petition before me, which was issued on 20 August 2020, gives rise to an issue of some importance in the development of the principles, which guide the Hong Kong court in dealing with cross-border insolvency and, in particular, cross-border debt restructuring. The company which is the subject of the Petition, Lamtex Holdings Ltd, (**Company**) is incorporated in Bermuda and listed on the Main Board of The Stock Exchange of Hong Kong Ltd (**SEHK**). Until it encountered the problems that have caused its current financial difficulties, which it is not in dispute have rendered it insolvent, it carried on a series of unrelated businesses in the Mainland and Hong Kong: loan financing, securities brokerage, trading and manufacturing electronic businesses in the Mainland and Hotel operations also in the Mainland.

2. It is subject to two winding-up petitions. The present Petition has been issued by Li Yiqing, whose undisputed debt of HK$10,200,000 as at 2 July 2020 arises under a series of bonds governed by Hong Kong law issued very largely to individuals resident in the Mainland. The attraction of the bonds is that they satisfy Hong Kong Immigration's investment requirements and are capable of supporting an application for the right to reside in the SAR. Six other bond holders support Ms Li's Petition for an immediate winding up order. No creditors of the Company oppose Ms Li's application.

3. On 30 October 2020, the Company presented a petition in Bermuda seeking a winding up order and also an order appointing Osman Mohammed Arab and Wong Kwok Keung of RSM as provisional liquidators for restructuring purposes. On the same day the Company issued an application for Messrs Arab and Wong's appointment as soft-touch provisional liquidators (**JPLs**). On 10 November 2020 the Chief Justice granted that application. The application was unopposed, although given the short notice of the application given to the bondholders, who I am told by the JPLs constitute nearly the Company's entire debt, and the fact that they are individuals resident in the Mainland, this is unsurprising particularly given the complications created by Covid-19.

4. A letter of request seeking the recognition and assistance of the JPLs by the High Court of Hong Kong was issued by the Chief Justice. On 23 November 2020, I granted the application made by the JPLs for their recognition and assistance in progressing a restructuring of the Company's debt.

5. What I am required to do is to determine whether to put the Company into immediate liquidation in Hong Kong or to adjourn the Petition in order to allow the Company and the JPLs the opportunity to restructure the debt. In practice I understand that this is likely to involve the Company's principal shareholder finding another investor who with him will subscribe for new shares in sufficient value to repay the bondholders. I will explain how the attempts to achieve this have developed later in this Decision.

6. It is not in dispute that Ms Li and the supporting creditors are owed the sums they claim. Neither is it in dispute that the Petition satisfies the three core requirements that guide the court in determining whether to exercise its discretionary jurisdiction to wind up a company incorporated in a foreign jurisdiction. Ms Li is on the face of the matter entitled to a winding up order *ex debito justitae* unless the Company can demonstrate some relevant and persuasive reason to adjourn the Petition. Various issues require consideration in order to determine the Petition:

(1) The private international law principles governing recognition of a foreign winding up order.
(2) The impact of a winding up order on a company's assets and their distribution during a liquidation.
(3) Recognition and assistance of a foreign insolvency process generally at common law.
(4) How a dispute over which jurisdiction is to be the primary one to conduct an insolvency process is to be resolved.
(5) The application of the principles applied to the facts of this case.

Recognition of a foreign winding up order

7. A winding up in a company's country of incorporation will as a matter of Hong Kong rules of private international law be given extra-territorial effect in Hong Kong.[1] This is a consequence of the more general established principles of private international law that apply to foreign companies. This is demonstrated by rr.175–179 in *The Conflict of Laws*, Dicey, Morris and Collins (15th ed.). These rules recognise that, as one would expect, generally matters concerning the constitution and management of the affairs of a foreign company are determined by the laws of the place of its incorporation. The authors of *Conflict of Laws* explain in para.3-102 of the 2nd volume that r.179 is justified because the law of the place of incorporation determines who is entitled to act on behalf of a corporation and in footnote 430 various authorities are cited as establishing this principle. Consistent with this, as a general principle the domiciliary law of a company is the appropriate law and system under which to liquidate a company.[2] *Section 327* of the *Companies (Winding Up and Miscellaneous Proceedings) Ordinance* (Cap.32) (**Ordinance**), which gives the Court of First Instance the jurisdiction to wind up a company incorporated in a foreign jurisdiction, is a statutory exception to this principle. The authors of the *Conflicts of Laws* in para.3-102 go on to explain in the same paragraph that "*If under that law [the law of the place of incorporation] a liquidator is appointed to act then his authority should be recognised here*".

8. From this foundation the common law has developed a doctrine commonly referred to as "modified universalism", which guides courts determining cross-border issues arising in transnational insolvencies. Its principal feature is the requirement that so far as consistent with justice and public policy the courts in the local jurisdiction (in this case Hong Kong) cooperate with the courts in the country of the principal liquidation to ensure that all of a company's assets are distributed to its creditors under a single system of distribution.[3]. The present case requires consideration of the extent to which the principles of private international law and modified universalism require primacy to be given to a company's place of incorporation in the process of determining which single system is to be recognised by courts in different jurisdictions dealing with transnational insolvencies. The facts of this case require consideration of a refinement of that issue, namely, whether primacy is to be accorded to the proceedings in the place of incorporation if it is not a winding up, but a soft-touch provisional liquidation. That issue itself requires further refinement as the local jurisdiction

1 *Re International Tin Council* [1987] Ch 419, 446, Millet J.
2 Fletcher, *The Law of Insolvency* (4th ed), para.30-007 and the authorities referred to in the relevant footnotes.
3 See the discussion in [9]–[10] of *Joint Official Liquidators of A Co v B* [2014] 4 HKLRD 374 and the authorities referred to in those paragraphs.

(Hong Kong) is the one which for the purposes of liquidation of the Company's assets and distributions to creditors the Company has the closest connection.

Effect of a winding up order on a company's assets

9. I have already explained that under Hong Kong rules of private international law a winding up in a company's place of incorporation will be given extra-territorial effect in Hong Kong. The effect extends to the distribution of a company's assets to its creditors.

10. The making of a winding up order divests a company of its beneficial ownership of its assets and subjects to them to a statutory trust for their distribution in accordance with the rules of distribution in the *Ordinance*. This applies to assets wherever they are located. This follows from the language of *s.197* of the *Ordinance*.[4] As Lords Sumption and Toulson explain in *Stichting Shell*[5] this "*... reflects the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets. They will fall to be distributed in the BVI liquidation pari passu among unsecured creditors and, to the extent of any surplus, among its members.*"[6]

11. Their Lordships continue:

> [15] This necessarily excludes a purely territorial approach in which each country is regarded as determining according to its own law the distribution of the assets of an insolvent company located within its territorial jurisdiction. The lex situs is of course relevant to the question what assets are truly part of the insolvent estate. It will generally determine whether the company had at the relevant time a proprietary interest in an asset, and if so what kind of interest. Thus, if execution is levied on an asset of the company within the territorial jurisdiction of a foreign court before the company is wound up, it will no longer be regarded by the winding up court as part of the insolvent estate. But short of a transfer of a proprietary interest in the asset prior to the winding up order, it is generally for the law of that jurisdiction to determine the distribution of the company's assets among its creditors and members, at any rate where the company is being wound up in the jurisdiction of its incorporation. In England and the BVI the court may, and commonly does,

4 See in relation to the equivalent English provision *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 (PC), Lord Sumption and Lord Toulson, [14].

5 *Ibid*.

6 [2015] AC 616.

> assert dominion over the local assets of an insolvent foreign company by conducting an ancillary winding up. But it does so in support of the principal winding up, and so far as it can in such a way as to ensure that creditors and members are treated equally regardless of the location of the assets …

12. As a consequence, the court may intervene to enjoin a creditor who commences proceedings in another jurisdiction from continuing with them if they will achieve a result which will interfere with the statutory scheme for distribution of assets.[7] The court acts in such cases in the interests of the general body of creditors. Their Lordships continue: "*In protecting its insolvency jurisdiction, to adopt Lord Goff's phrase, the court is not standing on its dignity. It intervenes because the proper distribution of the company's assets depends on its ability to get in those assets so that comparable claims to them may be dealt with fairly in accordance with a common set of rules applying equally to all of them. There is no jurisdiction other than that of the insolvent's domicile in which that result can be achieved. The alternative is a free-for-all in which the distribution of assets depends on the adventitious location of assets and the race to grab them is to the swiftest, and the best informed, best resourced or best lawyered*".[8] However in order for the court to be able to intervene, the creditor must be subject to the *in personam* jurisdiction of the court of the place of incorporation and if the creditor is a foreign entity, it will have to have taken some steps to submit to that jurisdiction. In the present case, there is no suggestion that the petitioner has submitted to the jurisdiction of the Bermuda court and could be enjoined in Bermuda from taking action to interfere with the insolvency process in Bermuda.

13. This principle suggests that the place of incorporation should, viewed from the perspective of Hong Kong law, generally be the system of distribution and a winding up of a company's assets in Hong Kong is ancillary to it.

Recognition of foreign insolvencies at common law

14. As Lord Collins explains in [21]–[22] of *Rubin v Eurofinance SA*,[9] jurisdiction in international bankruptcy has been the subject of discussion and debate since the late 19th century. In the case of personal bankruptcy the significance of domicile was considered and determined as early as 1764 in *Solomon v Ross*,[10] in which it was held that there should be one process of distribution

[7] *Ibid*, [18]–[24].
[8] *Ibid*, [24].
[9] [2013] 1 AC 236.
[10] (1764) 1 H BI 131N.

of a bankrupt's property, and that it should be administered by the bankrupt's place of domicile. The Privy Council's decision in *Singularis Holdings Ltd v PricewaterhouseCoopers*[11] explains the significance of the place of incorporation when considering whether a foreign insolvency process should be recognised at common law. In [19], Lord Sumption explains modified universalism by quoting [29]–[33] of Lord Collins' decision in *Rubin v Eurofinance SA*:[12]

> [29] Fourth, 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 office-holders 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 US 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.
>
> [30] In *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said:
>
> > "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention… It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."
>
> [31] The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, 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

11 [2015] AC 1675.
12 [2013] 1 AC 236.

the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there …

…

[33] One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf In *re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). 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.

15. In Lord Collins' own judgment in *Singularis*, his Lordship in explaining how local statutory powers and the common law may be used in aid of foreign insolvencies also says this:

[52] In my judgment in *Rubin v Eurofinance SA*, at para 29, I quoted what Millett LJ had said in *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827:

> "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention …. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever

> assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

…

[54] Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33. They include (subject to what is said below) In *re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency).

…

[58] A second group of cases is where the statutory powers of the court have been used in aid of foreign insolvencies. The best known example is the use of the long-standing power to wind up foreign companies which are being wound up (or even have been dissolved) in the country of incorporation. In *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 Sir Richard Scott V-C conducted an exhaustive analysis of the cases on ancillary liquidations, and concluded (at p 246): (1) Where a foreign company was in liquidation in its country of incorporation, a winding up order made in England would normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England would not be ancillary in the sense that it would within the power of the English liquidators to get in and realise all the assets

> of the company worldwide: they would necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it would be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England would be ancillary in the sense, also, that it would be the liquidators in the principal liquidation who would be best placed to declare the dividend and to distribute the assets in the pool accordingly. (4) None the less, the ancillary character of an English winding up did not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which was brought before the court.

16. These decisions establish that so far as the common law in England is concerned recognition is limited to liquidators appointed in a company's place of incorporation. This is consistent, in my view, with the principles I have described in [7]–[13] and the significance they give to a collective insolvency process commenced in a company's place of incorporation. However, not all jurisdictions adopt the same approach to recognition as the English courts and are willing to countenance recognition of liquidations commenced in jurisdictions other than that of the place of incorporation. This is a consequence of local statutory provisions, in particular the incorporation of the *UNCITRAL Model Law on Cross-Border Insolvency* (Model Law) into the law of the local jurisdiction, and partly the common law developing differently: in particular in Singapore.

17. Prior to Singapore adopting the Model Law, which generally treats a company's centre of main interest (COMI) as the determinant of whether or not a liquidation should be recognised as the relevant foreign main proceedings for the purposes of recognition and enforcement, the courts of Singapore had to rely on the common law in order to grant orders assisting foreign liquidators. In *Re Opti-Medix Ltd*,[13] Abdullah JC considered whether the court's recognition and assistance of foreign liquidators should be limited to office holders appointed in a company's place of incorporation. Abdullah JC acknowledges that the English position limits recognition to liquidators appointed in the place of incorporation.[14] However, the Judge goes on to suggest in the following paragraphs that this approach does not sit well with the

13 [2016] SGHC 108.

14 [20] referring to the passages of Lord Collins in *Rubin v Eurofinance* that I have quoted in [15].

common commercial practice in jurisdictions like Hong Kong and Singapore of using companies incorporated in jurisdictions other than their COMI, citing Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd*,[15] whose views were later rejected in *Rubin v Eurofinance*.

[19] In *HIH* [2008] 1 WLR 852, para 30, Lord Hoffmann said:

> "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so fa[r] as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

And in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc (Cambridge Gas)* [2007] 1 AC 508, para 16 he said, speaking for the Privy Council:

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

[20] The US Bankruptcy Court accepted in In *re Maxwell Communication Corpn* (1994) 170 BR 800 (Bankr SDNY) that the United States courts have adopted modified universalism as the approach to international insolvency:

> "the United States in ancillary bankruptcy cases has embraced an approach to international insolvency which is a modified form of universalism accepting the central premise of universalism, that is, that

15 [2008] 1 WLR 852, [31].

assets should be collected and distributed on a worldwide basis, but reserving to local courts discretion to evaluate the fairness of home country procedures and to protect the interests of local creditors."

18. Abdullah J agreed with passages from *Cross-Border Insolvency* by Tom Smith QC that the authorities do not support the restrictive approach to development of the common law to permit recognition of insolvency proceedings taking place in jurisdictions other than the place of incorporation and concluded that in Singapore the common law did permit recognition of insolvency proceedings in a company's COMI[16] if it is different from the place of its incorporation.

19. As the increasing number of applications in Hong Kong for recognition and assistance illustrate, it is common for business people in Hong Kong to use offshore companies.[17] The owners of such companies and the businesses they operate have no connection with the offshore jurisdiction. Their COMI is likely to be in Hong Kong or in the Mainland. In my view it is becoming increasingly clear that the restricted view of recognition and assistance explained in the judgments of Lord Sumption and Lord Collins does not serve Hong Kong well. It is a common feature of the corporate structure of Hong Kong and Mainland business groups that their holding companies are incorporated in an offshore jurisdiction with whom they have no connection other than registration. These jurisdictions have been described by various courts as "letterbox" jurisdictions reflecting the common absence of any connection other than registration with the offshore jurisdiction. As far as I am aware, the term was first used by the European Court of Justice in *Re Eurofood IFSC Ltd*[18] in the context of an assessment of whether or not the presumption in the Community legislation that COMI is in the location of registration had been rebutted and also the process of determining COMI under the EU Insolvency Regulation. The relevant passages are at p.542, [34]–[35]:

It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective

[16] It is not necessary for the purposes of this decision to delve into what constitutes COMI.

[17] I have dealt with 20 applications for recognition and assistance from companies incorporated in offshore jurisdictions since May 2020 when the High Court reopened after the end of the General Adjournment period necessitated by Covid-19. These have nearly all been Mainland business groups listed on the SEHK.

[18] [2006] Ch 508.

and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the member state in which its registered office is situated.

20. We find a similar characterisation of an offshore company by the US Bankruptcy Court in the context of determining COMI under Chapter 15 of the US Bankruptcy Code. In *Re Creative Finance Ltd*,[19] Judge Gerber of the United States Bankruptcy Court for the Southern District of New York refers to the British Virgin Islands as a "letterbox jurisdiction", and consequently not normally eligible for recognition under Chapter 15. The relevant passages are at p.5:

And while a COMI can (and not infrequently does) change from the jurisdiction in which a foreign debtor actually did business to a 'letterbox' jurisdiction, it can do so only where material activities have been undertaken in the jurisdiction in which the foreign proceeding was filed — thus providing a meaningful basis for the expectations of third parties … Though they did most of their business in the U.K. and suffered entry of a judgment there, and though their operations were directed out of Spain and Dubai, the Debtors were organized under the law of a letterbox jurisdiction — the British Virgin Islands — though they did not do business there …

21. In *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd*,[20] Judge Lifland denied recognition because the insolvency practitioners of the company, which was incorporated in the Cayman Islands by whose court they were appointed, failed to demonstrate that the company's COMI was located there. Subsequent to *Bear Stearns*, in *Re Basis Yield Alpha Fund (Master)*,[21] Gerber J similarly rejected an application for recognition by insolvency practitioners appointed in Cayman where the company was incorporated, finding material issues of fact as to the propriety of foreign "main" recognition (notwithstanding the s.1516 presumption) with respect to Cayman liquidation proceedings where recognition was sought virtually immediately after the filing of the proceedings in the Cayman Islands. In each of these cases, the Cayman Islands is characterised as a letterbox jurisdiction. The evidence showed (or at least strongly suggested) that the foreign debtors had been organised under Cayman law for tax or regulatory reasons, had principal places of business elsewhere in the world

[19] Case No 14-10358 (REG), 13 January 2016.
[20] 374 BR 122 (Bankr SDNY 2007), *aff'd* 389 BR 325 (SDNY 2008) (Sweet J).
[21] 381 BR 37 (Bankr SDNY 2008).

before their Cayman filings and had done little or no business in the Cayman Islands before US recognition was sought, thus impairing the US courts' ability to find that the debtors' COMIs had shifted from the nations where they previously did business to the Cayman Islands. I understand that since *Bear Stearns* and *Basis Yield* were decided, foreign representatives from jurisdictions such as the Cayman Islands and BVI have increasingly frequently filed their US Chapter 15 cases only after they have undertaken substantial work in the offshore jurisdictions in order to address this problem.

22. It is becoming increasingly apparent that it is desirable, and it might reasonably be suggested essential, that the Hong Kong courts are able to deal with recognition and assistance using methods that are consistent with commercial practice in the SAR and the Mainland. In response to suggestions for legislation to address this subject, it has been the Government's position that for the time being it is a matter for the courts of Hong Kong to address using the techniques available at common law. The current position in Hong Kong is that the court recognises only insolvency practitioners appointed in the place of incorporation. In my view, we have reached the stage at which this question needs to be reconsidered as there is much in my view to be said in support of Abdullah J's conclusion that the common law in this area contains sufficient flexibility to develop so as to be consistent with commercial practice, and there is nothing in principle preventing recognition of liquidators appointed in a company's COMI or a jurisdiction with which it has a sufficiently strong connection to justify recognition, just as the Hong Kong court will exercise its discretion to wind up a foreign incorporated company if the connection between it and Hong Kong is substantial and the other core requirements are satisfied.[22] It might, I appreciate, be objected that there is a material difference in the case of the jurisdiction to wind up a foreign incorporated company, namely, the power is expressly conferred by statute. This takes me back to *Singularis*.[23]

23. In *Singularis*,[24] the Privy Council considered the limits on the proper development of the common law to address issues arising in cross-border insolvency. As Lord Sumption states in [19]: "*The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise.*"

24. Lord Collins in the introductory section of his judgment says this in [38]:

[22] See the authorities discussed in *Re China Huiyuan Juice Group Ltd* [2021] 1 HKLRD 255, [18]–[29].
[23] [2015] AC 1675, [11].
[24] [2015] AC 1675, [11].

In my judgment the answer to the present appeal is to be found in the following propositions. First, there is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings. Second, that power is primarily exercised through the existing powers of the court. Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law. Fourth, the very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply. Fifth, in consequence, those powers do not extend to the application, by analogy 'as if' the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case.

25. Lord Collins expands on this summary in [65]–[69]. In [70] Lord Collins notes that how, if at all, the common law as it applies to recognition and assistance of foreign liquidators should be developed was not the issue on the part of the appeal under consideration, which as summarised in the first holding in the headnote was "*... that there was a power at common law to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers by ordering the production of information in oral or documentary form which was necessary for the administration of a foreign winding up, but the power was not available to enable them to do something which they could not do under the law by which they had been appointed; and that, although the fact that express provision was made in Bermuda for the powers exercisable on the winding up of companies to which the Companies Act 1981 applied did not exclude the use of common law powers in relation to other companies which lay outside the scope of the statute altogether it was not a proper exercise of the power of assistance for the Bermudan court to make the order sought by the liquidators since the material which they sought in Bermuda was not obtainable under the domestic law of the court which had appointed them*". As Lord Collins notes in [70], the issue before the court was: "*... whether, as the liquidators argue, legislation may be extended by the judiciary to apply to cases where the legislature has not applied it. It raises a much more radical question than the familiar question whether a common law rule should be extended or developed or whether the extension or development should be left to Parliament.*"

26. As I have already observed, Hong Kong has no legislation dealing with recognition of foreign insolvencies. Issues such as recognition of foreign soft-touch provisional liquidation do not involve using the common law to extend legislation. In Hong Kong it is purely a matter of common law. *Singularis* is authority that the common law generally permits recognition and assistance of foreign liquidations. The issue I am currently considering is whether the

common law of Hong Kong should be extended to permit recognition of insolvencies in places other than a company's place of incorporation and in particular in which its COMI or something similar is to be found. I can see no doctrinal reason why it should not be.

27. This, I recognise, is tangential to the issue I am considering, but if circumstances justify, as in my view they probably do, accepting the location of COMI as a basis for recognition it suggests that where, as in the present case, there is a contest for recognition between insolvency proceedings in the place in which a company's COMI is located and in the company's place of incorporation there is less reason to give primacy to the place of incorporation than the principles of private international law and the effect of a winding up order on the distribution of a company's assets might suggest. I have already illustrated in [20] that in a jurisdiction (New York), which applies the Model Law such a contest is likely to be resolved in favour of the place in which COMI is located. If the place of incorporation is an offshore jurisdiction in most cases this is likely to better reflect the reality, namely, that a company's assets, management and creditors have little connection with the place of incorporation and it is more efficient and effective for an insolvency process to be managed out of the location of COMI.

28. Ms Cheung suggested that the principles of modified universalism militated in favour of staying local (Hong Kong) proceedings in favour of foreign proceedings opened in the place of incorporation in order to preserve unitary global proceedings. This may be so in many cases, but not so where the foreign proceedings are soft-touch provisional liquidation of the type in the present case, which involves a technique developed in Hong Kong to circumvent the problems caused by the Hong Kong Court of Appeal's decision in ***Re Legend International Resorts Ltd***[25] and the soft-touch provisional liquidation is managed out of Hong Kong. In other words, we are not here considering, which of two jurisdictions, in both of which are located a company's creditors and assets, should be the jurisdiction controlling the system for distributions to creditors. There is no dispute that any restructuring will involve a Hong Kong scheme of arrangement to which any scheme in Bermuda will in practice be ancillary. The reality will be that if I adjourn the Petition and grant the JPLs the recognition and assistance they request the work that they undertake will take place

[25] [2006] 2 HKLRD 192. See also the decision in *Re Z-Obee Holdings Ltd* [2018] 1 HKLRD 165, which was the first case in Hong Kong in which a foreign incorporated listed company was put into soft-touch provisional liquidation in its place of incorporation (Bermuda) and the provisional liquidators introduced a scheme of arrangement in Hong Kong. See also *Re Joint and Provisional Liquidators of Hsin Chong Group Holdings Ltd* [2019] HKCFI 805, [2019] HKEC 945 and *Re Joint Provisional Liquidators of Moody Technology Holdings Ltd* [2020] 2 HKLRD 187, which discuss and conclude that the court can recognise and assist soft-touch provisional liquidators appointed to introduce a scheme of arrangement in Hong Kong.

in Hong Kong. This is apparent from the fact that two of the three JPLs are Hong Kong liquidators and it is clear from their evidence that their work is being undertaken here and involves prospective investors from Hong Kong or the Mainland.

29. In a recent judgment in the Financial Services Division of the Grand Court of the Cayman Islands in *Re Sun Cheong Creative Development Holdings Ltd*,[26] Chief Justice Smellie sets out the principle applicable under Cayman Law to recognition and assistance. They can be summarised as follows:

(1) All other things being equal, the jurisdiction to assume the role of primary insolvency proceeding will generally be presumed to be the place of incorporation of the company. As such, the starting point would be for the company to be wound up by, or reorganised under the supervision of the court of the place of incorporation, unless there are compelling reasons justifying the displacement of the court of the place of incorporation as the primary jurisdiction: [6].

(2) The Cayman court had acknowledged foreign courts to have assumed the role of primary insolvency proceedings in respect of the Cayman Islands incorporated companies in the limited situations where (i) there is a "*particularly strong nexus*" between the company and the foreign jurisdiction such that the legitimate expectation of interested parties as to the *locus* of the primary insolvency proceedings has shifted to that foreign jurisdiction; (ii) the foreign court had already appointed officers seeking to effect a restructuring for the benefit of stakeholders; and (iii) there were no competing proceedings in the Cayman Islands: [7].

(3) It is not the practice of the Cayman court to defer automatically to winding up proceedings begun in a foreign jurisdiction simply because a petition was presented there first in time. Instead, the Cayman court will consider on a case by case basis whether it is satisfied that there is a genuine intention on the part of the company to present a plan of reorganisation in the Cayman Islands for the benefit of the company's body of creditors: [8].

(4) The Cayman court will be slow to give primacy to pure foreign winding up proceedings in respect of a Cayman Islands company where it is satisfied that there is an intention on the part of the company to present a plan of reorganisation in the Cayman Islands for the benefit of its creditors. On the other hand, the Cayman court will be more likely to recognise foreign insolvency proceedings over a Cayman Islands

[26] FSD 169/2020, Cayman Islands Grand Court, 20 October 2020.

company where the purpose is to facilitate a restructuring or otherwise avoid the need to wind up the company: [56].

30. The 3rd and 4th principles suggest that the Cayman court's readiness to recognise a foreign insolvency processes may be limited to a foreign restructuring process. With the limited exception discussed in *Re China Solar Energy Holdings Ltd (No 2)*,[27] involving provisional liquidators appointed on conventional asset protection grounds being granted after appointment additional powers to restructure a company's debt normally through a scheme of arrangement, there is no insolvency process in Hong Kong for reorganisation, to use the Chief Justice's term. Occasionally attempts at reorganisation are made after winding up has been ordered using a scheme of arrangement, but currently this is rare. Either debt can be restructured before an order to wind up a company is made or liquidation takes place. This is largely a consequence of nearly all restructuring in Hong Kong, which involves the court involving listed companies. It was the practical imperative of restructuring listed companies out of provisional liquidation that drove the development of what is referred to as the "*Z-Obee*"[28] technique.

31. A reluctance on the part of an offshore jurisdiction to recognise a Hong Kong winding up order if the company is in local soft-touch provisional liquidation might, depending on the circumstances, seriously impede a Hong Kong liquidation of a company, which sits, as is common, at the apex of a group, whose principal assets and operations are in the Mainland and owned by Mainland subsidiaries, which are in turn owned by intermediate subsidiaries incorporated in other offshore jurisdictions. A common structure is a Cayman incorporated holding company, which owns intermediate subsidiaries incorporated in the British Virgin Islands, which own the Mainland subsidiaries. As I discussed in detail in *China Huiyuan*,[29] in cases in which a listed company's business is in the Mainland it may be necessary because of the common structure of such groups for the holding company, if it is incorporated in an offshore jurisdiction, to be wound up in its place of incorporation in order for liquidators to have any prospect of obtaining control of Mainland subsidiaries. If this is a material consideration, it would normally be appropriate for the place of incorporation to be the primary insolvency jurisdiction.

32. Another consideration is the principle of comity. Generally, the courts of Hong Kong are slow to ignore the express requests of other courts, particularly in the present context a request from the court of the jurisdiction of the company's incorporation. It is

[27] [2018] 2 HKLRD 338.
[28] See footnote 25.
[29] [2021] 1 HKLRD 255, [16].

but one factor to which regard is to be had. It is, however, a weighty one, which requires careful scrutiny of the reasons advanced by a party asking the Hong Kong court not to comply with a request.

33. It was also submitted by Ms Cheung that the petitioner cannot sensibly argue that there is something unfair to the petitioner in restricting her right to wind up the Company in Hong Kong, because she must be taken to have understood that she was investing in a foreign company. As the Privy Council pointed out in [43] of *Stichting Shell*,[30] where an anti-suit injunction was granted against a creditor seeking via Dutch proceedings to attach the assets of a company that had gone into liquidation in its place of incorporation (namely the BVI), thereby obtaining prior access to the insolvent estate, there was "***nothing to suggest that allowing Shell an advantage over other comparable claimants would be consistent with the ends of justice. Nor, in the circumstances, should Shell find this surprising. It invested in a company incorporated in the British Virgin Islands and must, as a reasonable investor, have expected that if that company became insolvent it would be wound up under the law of that jurisdiction.***"

34. I accept that it is not sufficient for the petitioner to object that it is unfair for her to have to pursue recovery of the debt through a winding up in the Company's place of incorporation. Conversely, if the three core requirements are satisfied it is not in my view sufficient for the Company simply to point to insolvency proceedings commenced sometime after the Hong Kong Petition was presented in its place of incorporation and request in the face of objection from local creditors this Court simply to defer to that of its place of incorporation. It seems to me unrealistic to expect the court not to have regard to the fact that companies such as the present conduct businesses in the People's Republic of China which commonly is also the location of a high proportion of their shareholders, creditors and assets. What appears to have happened over the course of the last 20 years or so is that many Mainland businesses have been permitted to list in Hong Kong using corporate vehicles incorporated in jurisdictions which have no connection with either Hong Kong or the Mainland. Little regard appears to have been had by the SEHK or the regulators to the jurisdictional problems that this might cause in the event of a company running into financial problems. It might also be thought surprising that the Mainland regulators have been willing to allow Mainland business groups to list using offshore incorporated companies rather than Hong Kong ones thus potentially ceding judicial supervision at the holding company level to a jurisdiction outside Hong Kong. The increasing number of problems with which the court is having to deal arising from what appears to be a poorly considered acceptance

[30] [2015] AC 616.

of the use of holding companies incorporated in offshore jurisdiction justifies consideration being given to whether changes are required.

How a dispute over which jurisdiction is to be the primary one to conduct an insolvency process is to be resolved

35. The principles that emerge from the authorities that I have considered, which explore and identify the common law principles that guide the court in determining how to deal with the types of issues that arise in cross-border insolvency do not point clearly to how the court should resolve the present dispute. However, I would suggest that they do support the following approach to its determination:

(1) Generally, the place of incorporation should be the jurisdiction in which a company should be liquidated; in practice this means it will be the system for distributions to creditors.
(2) However, if the COMI is elsewhere regard is to be had to other factors:

    (a) Is the company a holding company and, if so, does the group structure require the place of incorporation to be the primary jurisdiction in order effectively to liquidate or restructure the group.
    (b) The extent to which giving primacy to the place of incorporation is artificial having regard to the strength of the COMI's connection with its location.
    (c) The views of creditors.

36. Ultimately, this means that which insolvency process should be given primacy will depend on the circumstances of the case and involve giving appropriate weight to the location of a company's COMI. In my view, acknowledging that the place of incorporation is not necessarily determinative is more consistent with both commercial practice and the common factual matrix, which commonly connect a company far more closely with Hong Kong than an offshore jurisdiction.

37. The views of creditors are also a major consideration. In the present case the dispute is about whether or not the Company should be wound up immediately or the Petition adjourned in order to allow the JPLs time to attempt a restructuring of the Company. It has not been argued that if the Company is to be wound up, this should take place in Bermuda and liquidators appointed in Bermuda recognised in Hong Kong in order that they can carry out the liquidation in Hong Kong.

38. The principles that guide the court when determining whether or not to accede to an application for an adjournment to permit a company to progress a restructuring are explained by me in [50]–[51] of *China Huiyuan*.[31]

[50] As the New Zealand Court of Appeal has recently observed '*Insolvency law is a mix of principle and pragmatism. The [insolvency legislation] is to be used in a practical way. It does not require liquidation when that will not serve any useful purpose*'.[32] The way in which the courts assess applications by financially distressed companies that seek adjournments of petitions reflects this.

> "When the court considers the possibility of benefit resulting from an order, the normal starting point is to consider any possible benefit to the petitioner, whether it be a debtor or a creditor. In many cases, showing benefit to the petitioner will be sufficient to persuade the court to make the order … I do not see why a consideration of benefit should be restricted to the possibility of benefit to the petitioner; benefit to others should also be relevant. *Conversely, disadvantages or unfairness to others may also be relevant*. After all, the court is exercising a discretion and is surely required to consider the effect of the proposed order on all relevant persons. In such a case, as is normal, the court will consider the effect of making the order and the effect of not making the order and will then consider what to do, having regard to all relevant considerations, including the legitimate aspirations of all potentially affected persons."[33] (Emphasis added.)
>
> I accept that as a general proposition, in the absence of good discretionary grounds to the contrary, an applicant for winding up who has proved its debt and has proved insolvency ought to achieve a winding up order. However, … *the discretion can be exercised in favour of granting a stay where the refusal of a stay would be likely to work a substantial injustice*."[34] (Emphasis added.)

[31] [2021] 1 HKLRD 255, [17].
[32] *90 Nine Ltd v Luxury Rentals NZ Ltd* [2019] NZCA 424, [12].
[33] *JSC Bank of Moscow v Kekhman* [2015] EWHC 396 (Ch); [2015] 1 WLR 3737 at [63].
[34] *New Acland Coal v Oakey Coal Action Alliance Inc* [2020] QSC 212, [37].

[51] I summarise how this balancing exercise is to be approached when, as in the present case, creditors take differing views about what is in their best interests in *Re Chase On Development Ltd*:[35]

> "In cases in which a company is clearly insolvent and a petitioner's debt is not in dispute an important consideration, when a court it being asked to adjourn a petition by a Company in order to allow it to attempt to restructure its debt, are the views of its unsecured creditors.
> If the creditors are taking different views the Court will normally take into account all the circumstances including the following considerations:
>
> (a) A qualitative assessment of the number of creditors for and against a winding-up order. It is not just a matter of counting the number of creditors in favour and those against or the proportion of the value of the debt they hold.
> (b) The reasons proferred by the supporting and opposing creditors.
> (c) The feasibility of the proposed restructuring."

Application of the principles to the facts of this case

39. It is not disputed by the Company or the JPLs that the Company's COMI has been located at all material times in Hong Kong. Clearly, the Company has a close connection with Hong Kong and the People's Republic of China more generally. As I mention in [2]–[3], the petitioner and nearly all the other creditors of the Company are Chinese nationals, who are resident in the Mainland. The petitioner has obtained affirmations from five creditors resident in the Mainland and one in Malaysia, who support the Petition. No creditor has appeared to oppose the Petition. The petitioner also obtained a report from an experienced insolvency practitioner, Yuen Tsz Chun, pointing out what Mr Yuen says are shortcomings in the current restructuring proposal and the JPLs' evidence.

[35] [2020] HKCFI 629, [4]–[5].

40. The evidence of the JPLs is contained in the affirmations of Wong Kwok Keung of RSM Corporate Advisory in Hong Kong dated 4 and 26 January 2021. The first affirmation describes the financial state of the Company to the extent that the Liquidators can assess it from the limited financial information that they obtained at the time the first affirmation was made, which was limited. It would appear the current management of the Company had not been able to obtain most of the books and records of the Company. Mr Wong says that on the limited information that he has available that the JPLs' estimate the return on a liquidation of 5.9 cents in the dollar. He then goes on to describe two terms sheets (the first dated 20 November 2020 and immediately replaced with a new one dated 27 November 2020, which was terminated on 9 December 2020) and memorandum of understanding dated 12 December 2020 with potential investors. These are short and vague. Mr Wong's 2nd affirmation takes issue with some of Mr Yuen's criticism and adds nothing to the evidence concerning a restructuring.

41. I do not consider it necessary to comment in any greater detail on Mr Wong's evidence. What appears to have happened is that sometime after the Petition was presented in Hong Kong, the Company came into contact with RSM and the possibility of avoiding a winding up in Hong Kong was discussed. This resulted in the presentation of a petition in Bermuda on 30 October 2020 and an application on the same day to appoint soft-touch provisional liquidators, which was granted on 10 November 2020. This resulted in evidence being filed by a director of the Company dated 16 November 2020 seeking an adjournment of the Hong Kong Petition at its first hearing before me on 23 November 2020 on the grounds that the JPLs had been appointed. At that hearing I ordered that both the application for recognition and assistance that I was told would be forthcoming, and the Petition be listed for hearing on 28 January 2021. The more substantial evidence I have described was filed in the intervening period.

42. It does not seem to me that the Company has demonstrated a good reason to adjourn the Petition. The information about the restructuring is scanty in the extreme. The evidence that was filed by a director of the Company for the purposes of the application to appoint soft-touch provisional liquidators in Bermuda refers in [94]–[101] to a restructuring proposal contained in a term sheet dated 10 June 2020. The information about the restructuring was sparse and the term sheet was promptly terminated and replaced with the November terms sheets to which I have referred, which were also promptly terminated. The evidence does not suggest that at the time of the appointment of soft-touch provisional liquidators the Company had, or has now, a credible plan to restructure its debt. It looks considerably more likely that the application in

Bermuda was an attempt to engineer a *de facto* moratorium, which could not be obtained under Hong Kong law, with a view to then searching for a solution to the Company's financial problems. Viewed from a Hong Kong perspective this is a questionable use of soft-touch provisional liquidation and one, which will encourage the court to view with care similar applications for recognition in the future. Going forward I anticipate that unless the agreement of a petitioner and supporting creditors have been obtained in advance, the court will not deal with recognition and assistance applications made by soft-touch provisional liquidators after a winding up petition has been presented in Hong Kong on the papers.

43. The petitioner and the other creditors who support a winding up are quite understandably sceptical of the prospects of the Company's unimpressive attempts at restructuring being successful. The court will normally defer to the creditors on matters of commercial judgment unless there is a difference between them, which requires determination. In the present case I can see no good reason not to defer to their views.

44. In conclusion it seems to me that the facts of this case justify the court making the order sought by the creditors who have come forward to express a view on the present controversy. The COMI of the Company is in Hong Kong and it has not been argued before me that if the Company is to be wound up this should be done in Bermuda or that a winding up order in Hong Kong would be futile because of factors such as those discussed in [31]. Essentially the contest in the present case would appear to be between some of the shareholders and the creditors. I can see nothing in the principles that I have discussed or the facts of the present case, which necessitate or justify refusing to grant the order that the petitioner seeks. I will, therefore, making the normal winding up order. I shall adjourn the application for recognition and assistance in order that the JPLs can consider how it should be dealt with in the light of my decision.

Reported by Ken TC Lee

HCCW 217/2020
[2021] HKCFI 1394

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 217 OF 2020

IN THE MATTER of Ping An Securities Group (Holdings) Limited（平安證券集團（控股）有限公司） ("the Company")

and

IN THE MATTER of section 327(4)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

Before: Hon Harris J in Court

Date of Hearing: 10 May 2021

Date of Decision: 10 May 2021

D E C I S I O N

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1. On 5 March 2021 there was a substantive hearing of Yang Xueli's petition (the "**Petitioner**"). For reasons that can be found in my decision dated 12 March 2021 I granted an adjournment until

10 May 2021. Directly relevant to my reasons for doing so are [21] and [22] of the decision [1]. In [22] I say this:

> "22. The JPLs expect it to be possible to sign the subscription agreement in April. Once this is done they can take steps to introduce a scheme of arrangement at the end of April or beginning of May. This explains why the Company and the JPLs are content with a short adjournment of two months by which time they hope to be able to have commenced the formal restructuring process."

2. A number of matters were clear by the time the hearing had been completed. The relevant ones are that, firstly, Ms Yang was firmly of the view that it was in her best interests that the Company be wound up. Ms Yang was sufficiently strongly of that view that subsequent to my decision, Ms Yang issued a notice of appeal. Secondly, in agreeing to make an order for an adjournment I had relied on what I had been told which is summarised in [22] of the decision.

3. The expectation that is recorded in [22] has not been realised, instead, matters have progressed as follows. The provisional liquidators have made no effort to contact the Petitioner and not provided her with any information at all about the progress of the restructuring until Ms Yang received a copy of the 2nd affirmation of Lai Wing Lun, one of the provisional liquidators, on Friday 7 May 2021, in other words, the working day before the petition came back on for hearing before me. The only other source of information received by Ms Yang would have been Ms Yuen's skeleton argument which was also served sometime on Friday.

4. Mr Lai's 2nd affirmation summarises, it did exhibit any documents, the progress of the restructuring. It would appear that

1 [2021] HKCFI 651.

agreements including a subscription agreement were signed, on Thursday 6 May 2021. It would also appear that on Monday 3 May 2021 a 54-page PowerPoint presentation was provided to the three largest unsecured creditors who the provisional liquidators have decided they would inform of the progress of the restructuring. Those three opposing creditors support a further adjournment. The way in which this matter has progressed, is in my view, entirely unsatisfactory. Clearly the Petitioner had a right to be kept properly informed of the progress of the restructuring.

5. Neither Ms Yang nor the Court, should had been put in the position of being given information which is manifestly incomplete, so close to the hearing that it was difficult to deal with. I have reached the stage at which I am increasingly concerned about the way soft-touch provisional liquidation, and what is generally referred to as the *Z-Obee* [2] technique, is being used. I have explained this in a number of decisions and I have recently completed other decisions which will be handed down very shortly developing those concerns further. Soft-touch provisional liquidation need close monitoring by the Court and I expect soft-touch provisional liquidators and their legal advisers to ensure that this is possible not, as in the present case, make representations to the court on which they know the court has relied and then ignore them.

6. It seems to me to be perfectly reasonable for the Petitioner to seek a winding up today. She has a substantial claim against this Company, the return if the restructuring were to be completed would according to the provisional liquidators only be approximately 2.75%, and proper regard to her interests has manifestly not been given. In these circumstances

[2] [2018] 1 HKLRD 165.

A B C D E F G H I J K L M N O P Q R S T U V

I consider it appropriate to exercise my discretion and make the normal winding up order. I would only add one comment, namely, that the provisional liquidators are not appointed by this court and therefore, the Official Receiver will become the first provisional liquidator in Hong Kong.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Felix Ng, instructed by Edward Lau Phoebe Ng Solicitors LLP, for the petitioner

Ms Sharon Yuen, instructed by DLA Piper Hong Kong, for the respondent

Mr Raymond Kong, instructed by Official Receiver's Office, for the Official Receiver

Re Up Energy Development Group Ltd

[2022] HKCFI 1329

(Court of First Instance)

(Companies (Winding-up) Proceedings No 91 of 2016)

Linda Chan J

1 April (remote hearing), 6 May 2022

Company law — winding-up — foreign company — mere fact company had been wound up by foreign court not ground for Hong Kong court to decline making winding-up order — whether reasonable possibility of benefit to creditors if winding-up order made

Company law — insolvency — foreign insolvency proceedings — recognition and assistance — approach where absence of winding-up order by Hong Kong court

Conflict of laws — cross-border insolvency — mere fact company had been wound up by foreign court not ground for Hong Kong court to decline making winding-up order — recognition and assistance — approach

公司法 — 清盤 — 外地公司 — 僅僅的事實指公司已被外國法院清盤並非香港法院拒絕作出清盤令的理由 — 如果作出清盤令，是否有對債權人有利的合理可能性

公司法 — 無力償債 — 外地清盤法律程序 — 認可和協助 — 沒有香港法院清盤令的情況下的做法

法律衝突 — 跨國界清盤 — 僅僅的事實指公司已被外國法院清盤並非香港法院拒絕作出清盤令的理由 — 認可和協助 — 做法

C was an investment holding company incorporated in Bermuda and listed on the Stock Exchange of Hong Kong Ltd (the HKEx). Although the major assets of C's group of companies were located in the Mainland, C carried on most of its financing activities in Hong Kong. An unpaid creditor (P) sought a winding-up order against C (the Petition). While the proceedings were pending, another creditor presented a winding-up petition against C in Bermuda. Subsequently, trading of C's shares was suspended. The Bermuda Court appointed provisional liquidators (PLs) to supervise the process of restructuring. Upon the PLs' *ex parte* application, Harris J made an order recognising their appointment. Under the PLs' control, C took elaborate steps with a view to resume trading

on the HKEx, but without success. Rescue attempts having failed, the Bermuda Court made a winding-up order against C. There was no dispute that C was insolvent and that the first and the third core requirements for the Court to exercise its discretion to wind up C under s.327(3)(c) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) (the CWUO) were satisfied. The PLs and one of the creditors opposed the Petition on the grounds that: (i) the Hong Kong Court should give "primacy" to the Bermuda Court and decline to make a winding-up order against C (Primacy Ground); (ii) Harris J already made a finding that the second core requirement for winding up a foreign company was not satisfied (Second Core Requirement Ground); (iii) if there were matters which needed to be dealt with in Hong Kong, the liquidators appointed in Bermuda (the Bermuda Liquidators) could seek recognition and assistance from Hong Kong Court under common law or seek a winding-up order in Hong Kong, but there was no present need to seek such assistance (Recognition Ground); and (iv) an ancillary winding-up order would lead to additional time and costs and add to the burden of the estate rather than benefit it (Ancillary Winding-up Ground).

Held, making a winding-up order against C, that:

Primacy Ground

(1) Once the petitioner discharged the burden of showing the foreign company was insolvent and the three core requirements were satisfied, the Court would be prepared to make a winding-up order against the company unless there was evidence to suggest that the debts would be paid from another source or that a viable restructuring proposal had the support of the requisite majority of creditors. The three core requirements recognised that *prima facie* the most appropriate place to wind up a foreign company was the place of its incorporation and the domestic court would give primacy to that court. There was no requirement for the domestic court to decline a winding-up order on the ground that the company had been or would be wound up in the place of incorporation (*Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch 43, *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501 applied; *Re Real Estate Development Co* [1991] BCLC 210, *Re G Ltd* [2016] 1 HKLRD 167, *Re Lamtex Holdings Ltd* [2021] 2 HKLRD 177 considered; *Re International Tin Council* [1987] Ch 419, *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508, *Re Information Security One Ltd* [2007] 3 HKLRD 780, *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852,

Stichting Shell Pensioenfonds v Krys [2015] AC 616, *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] 1 HKLRD 1120, *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187 distinguished). (See paras.37, 40, 44–46, 81.)

(2) It would not be difficult for the petitioner to satisfy the three core requirements in case of a non-Hong Kong company whose primary listing had been on the HKEx. Here, other than maintaining its registers and complying with the statutory requirements of filings, C had not carried on any business or other activity in Bermuda. Nor did C have any assets in Bermuda. It was difficult to see why all the affairs arising in the liquidation of such company in Hong Kong should be left to the liquidators appointed in Bermuda. (See paras.47, 49.)

Second Core Requirement Ground

(3) Harris J had not made a finding to the effect that the second core requirement had not or would not be satisfied. (See para.51.)

(4) C indisputably had assets in Hong Kong which might be recovered by the liquidators appointed under the CWUO for the benefit of the creditors. For this reason alone, there was reasonable prospect that P would derive a sufficient benefit from the making of a winding-up order against C. The second core requirement was hence satisfied (*Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501 applied; *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd* [2020] HKCA 670 considered). (See paras.52, 54–55, 81.)

Recognition Ground

(5) The Court had no power under common law to confer any powers on the Bermuda Liquidators or make the provisions under the CWUO available to C in the absence of a winding-up order made by the Hong Kong Court. Winding-up was the creature of statute. The *only* way to bring into operation the statutory scheme of winding-up was by the Court making a winding-up order against C. Except s.268B, *all* the provisions under the CWUO, as mandated by their wording, *only* applied to a company wound up by the Court and liquidator appointed in Hong Kong. There was no basis for the Court to make them available to foreign liquidators *as if* the company had been wound up when no such order had *in fact* been made by the Court (*Ayerst (Inspector of Taxes) v C&K (Construction) Ltd* [1976] AC 167, *Re International Tin Council* [1987] Ch 419, *Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 applied; *Re CEFC Shanghai International Group Ltd*

(Mainland liquidation) [2020] 1 HKLRD 676, *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187, *Re Lamtex Holdings Ltd* [2021] 2 HKLRD 177 distinguished; *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 not followed). (See paras.59–67, 81.)

Ancillary Winding-up Ground

(6) (*Obiter*) The mere fact that a foreign company is wound up by the court of the place of incorporation does not obviate the need for a winding-up order against the company in other jurisdictions. If there are assets within the domestic jurisdiction, those assets will be taken and dealt with by liquidators appointed in that jurisdiction and the liquidation will be carried on as ancillary liquidation. Where the company concerned has been wound up in its place of incorporation, normally the same individuals would be appointed as liquidators in both jurisdictions. These liquidators would enter into protocols, approved by the Courts of both jurisdictions, to regulate and harmonise the liquidations, so as to reduce the conflicts and complications which may arise in cross-border insolvency matters (*Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, *Re Kong Wah Holdings Ltd (No 2)* [2004] 3 HKC 596 applied). (See paras.74–76.)

(7) (*Obiter*) A winding-up order would be in the interests of the creditors as it would avoid the need for the Bermuda Liquidators to make successive applications to the Court for recognition and powers under the CWUO, even assuming (contrary to this Court's view) the Court has power to do so. (See paras.79–81.)

Application

This was an application by an unpaid creditor for a winding-up order against an insolvent foreign company.

Mr Toby Brown and Ms Jacquelyn Ng, instructed by Lam & Co, for the Petitioner.

Ms Rachel Lam SC leading Ms Tinny Chan, instructed by Chungs Lawyers, for the Joint Provisional Liquidators of the Company.

Ms Audrey Eu SC leading Mr Anson Wong Yu Yat, instructed by Fan Wong & Tso, for the opposing creditor (Integrated Capital (Asia) Ltd).

Ms Maureen Chan, of Official Receiver's Office, for the Official Receiver.

White & Case, for the opposing creditor (China Minsheng Banking Corp Ltd), absent.

Chiu & Partners, for the opposing creditor (Hao Tian Development Group Ltd), absent.

Clifford Chance, for the supporting creditor (Credit Suisse AG, Singapore Branch), absent.

Legislation mentioned in the judgment

Companies (Fees and Percentages) Order (Cap.32C, Sub.Leg.) ss.6–7, 174, 3, Table B, Item 1

Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) ss.178(1)(a)(ii), 182, 183, 199, 200, 203, 204, 211, 224, 264B, 265D, 266, 267, 268, 268A, 268B, 269, 271–276, 275, 276, 296, 327, 327(1), (3), (3)(c)

Companies (Winding-Up) Rules 1982 [Bermuda] r.140

Companies Act 1981 [Bermuda] ss.99, 156, 170(3), 174

Companies Ordinance (Cap.622) Pt.16

Rules of the High Court (Cap.4A, Sub.Leg.) O.62 r.6(2)

Cases cited in the judgment

Ayerst v C&K (Construction) Ltd [1976] AC 167, [1975] 3 WLR 16, [1975] 2 All ER 537

Bank of Credit and Commerce International SA (No 10) [1997] Ch 213, [1997] 2 WLR 172, [1996] 4 All ER 796, [1996] BCC 980

CEFC Shanghai International Group Ltd, Re [2020] 1 HKLRD 676, [2020] 4 HKC 62, [2020] HKCFI 167

Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc, Re [2006] UKPC 26, [2007] 1 AC 508, [2006] 3 WLR 689, [2006] 3 All ER 829

China Huiyuan Juice Group Ltd, Re [2021] 1 HKLRD 255, [2021] 1 HKC 387, [2020] HKCFI 2940

China Medical Technologies Inc, Re (HCCW 435/2012, [2014] HKEC 1438)

Eloc Electro-Optieck and Communicatie BV, Re [1982] Ch 43, [1981] 3 WLR 176, [1981] 2 All ER 1111

G Ltd, Re [2016] 1 HKLRD 167

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JUDGMENT

Linda Chan J

1. This is a somewhat unusual case. An unpaid creditor to which a substantial sum is owed asks the court to make a winding up order against an insolvent listed company, but the provisional liquidators appointed by the court of the place of incorporation oppose the application on the ground that there is no benefit in the court making such an order. The proposition, if accepted, would mean that an unpaid creditor which advanced loan to a foreign company in Hong Kong and is able to satisfy the 3 core requirements cannot seek a winding up order under s.327(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) (**CWUO**) so as to bring into operation the statutory scheme of winding up in Hong Kong. It is unusual because the proposition flies against the

long line of authorities decided in the context of s.327 (and the equivalent provisions in other jurisdictions) and the fact that the court has in the past wound up many foreign listed companies. It is also unusual for office holders to oppose a winding up order in circumstances where they have not carried out any meaningful investigation into the affairs of the company, despite having been appointed to office for over 5 years.

A. Background

2. The company concerned is Up Energy Development Group Ltd (**Company**). It was incorporated in Bermuda on 30 October 1992. Apart from maintaining a registered office where the register of members, register of directors and register of convertible notes have been kept, the Company has not carried on any other activity in Bermuda.

3. The Company is registered under Part 16 of the Companies Ordinance (Cap.622) (**CO**) as a non-Hong Kong company. It has since at least 1992 established a principal place of business in Hong Kong. Since 2 December 1992, the shares of the Company have been listed on The Stock Exchange of Hong Kong Ltd (**HKEx**).

4. As required by the Listing Rules,[1] the Company had sufficient management presence in Hong Kong. The Company and all the directors, irrespective of where they reside, gave an undertaking to HKEx to comply with the Listing Rules.

5. The Company is an investment holding company and its subsidiaries principally engage in development, construction and operation of coal mining and coke processing facilities in the Mainland (together "**Group**"). According to the financial information published by the Company, until December 2015, the major assets of the Group were:

(1) 3 coal mines in Northern Xinjiang in the Mainland namely, Xiaohuangshan Mine, Shizhuanggou Mine and Quanshuigou Mine, all of which had been under construction (collectively "**Three Mines**");
(2) Baicheng Mine in Xinjiang; and
(3) 3 ancillary production facilities for coal coking (**Coking Plant**), coal washing and water recycling.

6. Although the major assets of the Group are located in the Mainland, the Company has carried on most of its financing activities in Hong Kong. These included issuing convertible notes due in 2016 and 2018, borrowing long term facilities and loans from banks and issuing new shares.

1 LR 8.12

7. During 2013 to 2016, the Company suspended construction of the Three Mines, the water recycling plant and the coal washing plant due to financial difficulties. Subsequently, the Company stated that it intended to focus on the development of Xiaohuangshan Mine first and would resume construction of the other 2 mines in the next step.[2] The Company failed to renew the mining licences in relation to these 2 mines, and the licences expired in December 2015.

8. On 19 February 2016, the Company announced that it had not settled the principal amounts payable on the convertible notes due in 2016 or within the remedial period. This led to cross-default on the convertible notes due in 2018 and the amount of HK$3,459 million became payable.

9. On 1 March 2016, HEC Securities Ltd[3] (**Petitioner**) served a statutory demand requiring the Company to pay HK$230 million together with interest at 5% p.a. from 1 January 2016 (**Debt**), being the amount due and payable on the convertible notes issued by the Company. This was followed by the Petitioner presenting the petition on 29 March 2016 (as amended on 31 May 2016 and re-amended on 12 July 2016) (**Petition**). As the Company has failed to satisfy the statutory demand, it is deemed insolvent by virtue of s.178(1)(a)(ii) of the CWUO.

10. In the Petition (para.6), the Petitioner referred to the Group structure chart as of 30 June 2015 which showed that the Company had the following direct and indirect wholly-owned subsidiaries in Hong Kong:

(1) Direct subsidiaries:

- (a) West China Mining Holdings Ltd (**West China**), which owns indirectly 100% of Baicheng Mine;
- (b) Up Energy (Hong Kong) Ltd (**UE HK**), which owns indirectly (i) 79.2% of Xiaohuangshan Mine, (ii) 70% of Water Recycling Plant, (iii) 79% of Coking Plant, and (iv) 70% of Up Energy (Fukang) Trading Ltd (a Mainland company);
- (c) Up Energy Development (HK) Ltd (**UE Development**), which owns 50% of Up Energy Management Ltd (**UE Management**);
- (d) UE Management;
- (e) UP Energy Trading Ltd (**UE Trading**); and
- (f) Up Energy Finance Ltd (**UE Finance**).

(2) Indirect subsidiaries:

2 As stated in the Company's annual report for 2019, p.4
3 Subsequently changed its name to Seekers Markets Ltd

(a) Up Creative Technology (Hong Kong) Ltd (**UC Technology**), held through Up Energy Development Group (BVI) Company Ltd (**UE BVI**); and
(b) Up Energy Resources (Hong Kong) Ltd (**UE Resources**), held through UE BVI. As at 30 September 2015, UE Resources obtained a long term facility of HK$317 million from Minsheng Bank Hong Kong, which was guaranteed by the Company and Qin Jun.

11. On 18 May 2016, Credit Suisse AG, Singapore Branch (**CS**), a creditor to whom HK$154.3 million was owed, presented a winding up petition against the Company in Companies (Winding Up) 2016: No.183 (**Bermuda Proceedings**). Separately, CS filed a notice of intention to appear and supports the Petition.

12. On 30 June 2016, trading of the Company's shares was suspended due to its failure to release annual results for the financial year ended 31 March 2016.

13. On 18 October 2016, HKEx informed the Company that it had been placed into the first stage of delisting, and the Company was required to comply with the following resumption conditions:[4]

(1) demonstrate that it has a sufficient level of operations or assets of sufficient value as required under LR 13.24;
(2) publish all outstanding financial results and address audit qualifications (if any); and
(3) have the winding up petitions against the Company (and its subsidiaries), where applicable, withdrawn or dismissed and the provisional liquidators discharged.

14. In the meantime, CS applied for appointment of provisional liquidators to supervise the process of restructuring. By orders dated 7 and 28 October 2016, the Bermuda court appointed Mr Lai Win Lun and Mr Osman Mohammed Arab, both of RSM Corporate Advisory (Hong Kong) Ltd, and Mr Roy Bailey of EY Bermuda Ltd, as provisional liquidators of the Company (collectively **PLs**).

15. On 19 April 2017, HKEx informed the Company that it had been placed in the second stage of delisting, and the Company must submit a viable resumption proposal at least 10 days before the second stage expired on 29 September 2017.

16. On 28 April 2017, the PLs obtained a further order from Bermuda court (**2017 Order**) under which:

4 The events relevant to suspension of trading and the steps taken by the Company to satisfy the resumption conditions and to challenge the decision of HKEx have been fully set out in the Judgment of Coleman J in *Up Energy Development Group Ltd v Stock Exchange of Hong Kong Ltd* (HCAL 949/2021, [2021] HKCFI 3813), [3]–[27]

(1) they were granted extensive powers, by virtue of s.170(3) of the Companies Act 1981 (**Act**), to the exclusion of the directors of the Company, to, *inter alia*, (a) ascertain and secure the assets of the Group, review the books of accounts of the Company wherever located; (b) conduct investigations and obtain information necessary to locate, secure, take possession of and recover assets of the Company; (c) enter into settlements and compromises with creditors and debtors without further sanction of the Bermuda court; (d) carry on the business of the Company so far as may be necessary for the restructuring of the Company; (e) commence proceedings outside Bermuda for the purpose of seeking recognition of their appointment in Hong Kong and the BVI; and (f) consider and implement a scheme of arrangement with the creditors under s.99 of the Act;

(2) they may bring or defend any proceedings in the name and on behalf of the Company which relate to the property of the Company or which is necessary for the purpose of effectually winding up the Company and recovering its property as provided under s.174 of the Act;

(3) any obligation upon the PLs to consult with the Company in respect of the restructuring proposal, funding of the restructuring and ongoing business operations of the Company is dispensed with;

(4) they may submit bills of costs for taxation in respect of all costs, charges and expenses of those persons employed by them which shall be taxed on an attorney-and-own-client basis;

(5) no payment or disposition made by or with the authority of the PLs in carrying out their duties and in the exercise of their powers under the Order shall be avoided by virtue of s.156 of the Act; and

(6) in the event that a winding up order is made against the Company, any fees and expenses of the PLs including all costs and charges of any persons employed by them in accordance with the terms of the orders made by the Bermuda court shall be treated as fees and expenses properly incurred in preserving, realising or getting in the assets of the Company for the purpose of r.140 of the Companies (Winding-Up) Rules 1982 and paid on a first priority basis.

17. Upon the PLs' application, the Bermuda court issued a letter of request dated 23 June 2017 requesting the Hong Kong court to recognise the appointment of the PLs. On 7 July 2017, the PLs issued an *ex parte* originating summons in HCMP 1570/2017 to seek recognition of their appointment in Hong Kong. The

application was stated to have been made under the CWUO and inherent jurisdiction of the court, although the relevant provision was not identified.

18. By order dated 16 August 2017, Harris J made an order recognising the appointment of the PLs in HCMP 1570/2017 (Recognition Order) in the following terms:

2. The [PLs] have and may exercise such powers as are available to them as a matter of Bermuda law and would be available to them under the laws of Hong Kong as if they had been appointed provisional liquidators of the Company under the laws of Hong Kong and in particular, without prejudice to the generality of the foregoing, for the following purposes:

    (a) to request and receive from third parties documents and information concerning the Company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency;
    (b) to locate, protect, secure and take into possession and control all assets and property within the jurisdiction of this Honourable Court to which the Company is or appears to be entitled;
    (c) to locate, protect, secure and take into their possession and control the books, papers and records of the Company including the accountancy and statutory records within this jurisdiction of this Honourable Court and to investigate the assets and affairs of the Company and the circumstances which gave rise to its insolvency;
    (d) to retain and employ barristers, solicitors or attorneys and/or such other agents or professional persons as the [PLs] consider appropriate for the purpose of advising or assisting in the execution of their powers and duties; and
    (e) so far as may be necessary to supplement and to effect the powers set out at sub-paragraphs (a) to (c) above, to bring legal proceedings and make all such applications to this Honourable Court whether in their own names or in the name of the Company on behalf of and for the benefit of the Company including any applications for:

        (i) orders for disclosure, the production of documents and/or examination of third parties which it is anticipated may be made

by the [PLs] to facilitate their investigations into the assets and affairs of the Company and the circumstances which gave rise to its insolvency; and/or

(ii) ancillary relief such as freezing orders, search and seizure orders in any legal proceedings commenced.

3. Anything that is authorized or required to be done by the [PLs] is to be done by all or anyone or more of the persons appointed.

4. For so long as the Company remains in provisional liquidation in Bermuda, no action or proceeding shall be proceeded with or commenced against the Company or its assets or affairs, or their property within the jurisdiction of this Honourable Court, except with leave of this Honourable Court and subject to such terms as this Honourable Court may impose.

19. The Recognition Order was sought and obtained by the PLs upon their *ex parte* application. It appears that the PLs had *not* drawn to the attention of the court that:

(1) the Recognition Order would not bind the Company or its creditors as they are not parties to the OS;

(2) the powers sought and obtained by the PLs go far beyond the stated purpose of considering and implementing a restructuring proposal in respect of the Company's debts;

(3) almost all the fundraising activities had been carried out by the Company in Hong Kong or were governed by Hong Kong law. As such, any investigation or work required to be carried out by the PLs would have to be carried out in Hong Kong; and

(4) the PLs would not be subject to the supervision of the Official Receiver (OR) or the court they would otherwise have been subject had they been appointed as provisional liquidators by an order made in these proceedings.

20. Since their appointment, the Company under the control of the PLs has taken elaborate steps with a view to resume trading on HKEx. These include:

(1) On 29 September 2017, the Company submitted a draft resumption proposal, which was subsequently modified on 9

November 2017. HKEx did not consider the proposal viable and so informed the Company in its letter dated 17 November 2017.

(2) On 28 November 2017, the Company applied to the Listing Committee (**LC**) and subsequently to the Listing (Review) Committee (**LRC**) for a review of the decision to place the Company in the third stage of delisting. On 31 August 2018, HKEx informed the Company that the decision was upheld, and the Company was required to submit a viable resumption proposal by 25 February 2019.

(3) On 25 February 2019, the Company submitted a fresh resumption proposal. That proposal was subsequently modified and clarified in response to queries made by HKEx.

(4) By letter dated 20 March 2020, the LC informed the Company that it considered the resumption proposal not viable and decided to cancel the listing of the Company's shares (**LC Decision**).

(5) On 30 March 2020, the Company requested for review of the LC Decision. On 30 October 2020, the LRC informed the Company that its resumption proposal was not viable and upheld the LC Decision (**LRC Decision**).

(6) On 6 November 2020, the Company applied to the Listing Appeal Committee (**LAC**) for a review. At the hearing on 21 April 2021, extensive written and oral submissions were made by the Company. In its decision dated 30 April 2021 (**LAC Decision**), the LAC upheld the LRC Decision.

(7) This notwithstanding, HKEx postponed execution of the LAC Decision on the basis that the Company would apply for leave for judicial review in respect of the LAC Decision.

(8) On 6 July 2021, the Company applied for leave to apply for judicial review of the LAC Decision. After a fully contested rolled-up hearing, on 21 December 2021, Coleman J refused the application with costs against the Company.

21. In the meantime, on 30 September 2019, a proposed scheme of arrangement between the Company and all its creditors (**Scheme**) was approved by the requisite majorities of creditors. The Scheme was sanctioned by the Bermuda court on 1 November 2019, but would not become effective until (1) the Hong Kong court sanctions the Scheme; and (2) HKEx approved resumption of trading of the Company's shares. As the Company has not been able to resume trading, the Scheme lapses.

22. Notwithstanding the lack of success in obtaining HKEx's approval on resumption, the Petitioner (and the supporting creditors) did not seek a winding up order against the Company. Instead, the Petitioner and the PLs filed numerous consent summonses, in each

instance, *without* the consent of the creditors who had given notice of intention to appear, asking the Court to adjourn the Petition. This resulted in the Petition having been adjourned many times.

23. Meanwhile, according to the information contained in the Company's public announcements and the annual report for the year ended 31 March 2019, the assets in Hong Kong as identified in the Petition continued to reduce in that:

(1) Baicheng Mine (owned indirectly by West China) was amongst the 109 mines required to be closed down pursuant to the notice dated 16 February 2017 issued by the Xinjiang Government, and the Company's shares in West China had been pledged in favour of China Minsheng Banking Corp., Ltd, Hong Kong Branch;
(2) The Company's shares in UE HK (alongside with the shares in 2 other wholly owned subsidiaries incorporated in Bermuda and the Mainland) were charged as security in connection with the issue of convertible notes;
(3) The Company resolved to put UE Development into creditors' voluntary winding up on 29 March 2019, thereby reducing the Company's indirect shareholding in UE Management from 100% to 50%;
(4) The Company resolved to put UE Trading into creditors' voluntary winding up on 8 June 2018;
(5) The Company allowed UE Resources to be struck off from the Companies Register on 1 April 2021;
(6) UC Technology remains an indirect wholly owned subsidiary; and
(7) UE Finance remains wholly owned by the Company.

24. At the hearing on 31 August 2021, Harris J gave leave to the Petitioner to re-amend the Petition and declined to make an *immediate* winding up order against the Company for the reasons stated in his Decision [2021] HKCFI 2595. His Lordship adjourned the Petition until the 2nd Monday after the handing down of the application for judicial review brought by the Company and made clear (at [8]) that "[i]f the judicial review is unsuccessful presumably the Company will be wound up either in Bermuda or possibly if there is no opposition, I may be prepared to make an order in Hong Kong."

25. The Petition was listed for hearing before this Court on 10 January 2022. Shortly before the hearing, the Petitioner and the PLs filed a consent summons to seek an order that the Petition be dismissed with no order as to costs save that the costs of the OR be deducted from the deposit. However:

(1) No explanation was provided by the Petitioner or the PLs as to why the Petition should be dismissed with no order as to costs and whether the creditors who had filed notices of intention to appear, had agreed to the proposed order.
(2) It appears that the PLs, who were supposedly under a duty to protect the interests of the unsecured creditors, had not considered the fact that after the dismissal of the Petition, the creditors would *not* be able to invoke the statutory scheme for winding up under the CWUO.
(3) Nor had the PLs considered why a winding up order to be made against the Company in Bermuda would be sufficient for the purpose of investigating and liquidating the affairs of the Company which had been carried out in Hong Kong and recovering assets located in Hong Kong or from persons or entities which are amenable to the jurisdiction.

26. The PLs were directed to address the question as to (1) whether a winding up order made against the Company in Bermuda would be sufficient to deal with all affairs of the Company in Hong Kong; (2) whether in the *absence* of a winding up order made in Hong Kong, the provisions under the CWUO would apply to the Company; (3) whether a winding up order would be recognised more easily and efficiently in the Mainland; (4) if liquidators are appointed in Hong Kong, whether they can take control over the BVI subsidiaries by appointing themselves as directors of those subsidiaries and any other means; and (5) any other matters which the PLs consider relevant to the question of whether or not the Company should be wound up in Hong Kong. The Petition was adjourned to 14 February 2022 to give sufficient time for the parties to address the questions.

27. At the hearing on 14 February 2022, Ms Tinny Chan, counsel for the Company, *opposed* the Petition on the following grounds:[5]

(1) The Company is expected to be wound up by the Bermuda court on 11 March 2022, whereupon the liquidation process will be commenced in Bermuda for the creditors' benefit;
(2) The creditors were "relatively apathetic" regarding where the Company is to be wound up in that (a) only CS (representing 2.57% of unsecured debt) appeared as supporting creditor; (b) Capital Sunlight Ltd, Integrated Capital (Asia) Ltd (**ICA**) and Kaisun Holdings (**Kaisun**) (representing 10.98% of unsecured debt) opposed the Petition; (c) China Minsheng Banking Corporation Ltd, Hong Kong branch, Deutsche Bank AG

5 Although Ms Chan stated in her skeleton that the Company/PLs were "neutral" to the petition. At the hearing, Ms Chan confirmed that her instructions were to oppose the Court making a winding up order against the Company.

Singapore branch and Hao Tian Development Group Ltd (representing 20.99% of unsecured debt) were neutral, and 52 creditors (representing 65.46% of unsecured debt) had not indicated their stance;

(3) The second core requirement is indispensable. Harris J in his Decision of 31 August 2021 found that such requirement was not satisfied. In any event, on the basis of the matters pleaded in the Petition, the second core requirement was not satisfied;

(4) The BVI law expert confirmed that the liquidators appointed by the Hong Kong court would not be able to register themselves as members or directors of the Company's subsidiaries incorporated in the BVI;

(5) The Mainland law expert opined that the Mainland court would only grant recognition and assistance if the requirements stipulated in articles 4 to 7 of the SPC Opinion are met, which included the centre of main interest (**COMI**) of the company have been in Hong Kong for at least 6 months. This plainly cannot be met by the Company;

(6) The affairs of the Company in Hong Kong can be sufficiently dealt with by way of recognition and assistance granted by the Hong Kong court, on the premise that the court "may grant orders that give the foreign officeholder substantially the same powers to, for example, investigate the affairs of the company as would be available to a liquidator if the foreign jurisdiction has similar provisions in its insolvency regime", citing *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187, [16]–[25], [41]; *Re Lamtex Holdings Ltd* [2021] 2 HKLRD 177, [7], [9], [13], [19] and [22]; *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676, [8]–[13]; and

(7) Even if the powers of liquidators appointed in Hong Kong court are more extensive, it is not a reason to "bypass the second core requirement". Ms Chan contends that:

> [t]he objective is to allow the company to be wound up in the place to which it is most connected or sufficiently connected, and to give effect to the winding up order pronounced in such jurisdiction; parties should not be encouraged to shop for the most potent and robust insolvency jurisdiction to wind up a company. (**Contention**)

28. As the PLs had not dealt with the question of jurisdiction (as described in [26(2)] above), they were directed to address that question. However, in her supplemental skeleton, Ms Chan repeated her contentions that (1) the 3 core requirements must be satisfied; and (2) a recognition application "obviates rather than supports the

need for another winding up order by the Hong Kong court", relying on *Re Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, [22]. Ms Chan submits that the proper course would be the one suggested by Harris J in *Re G Ltd* [2016] 1 HKLRD 167, [6].

29. In view of the stance taken by the PLs and the lack of assistance on the question of jurisdiction, the Petition was adjourned to allow the parties to address the question which affects not just the Company but the right of the creditors to invoke the statutory regime of winding up in respect of a foreign company.

30. By order dated 11 March 2022, the Bermuda court made a winding up order against the Company. In the meantime, the Petitioner filed expert opinions on Bermuda law, BVI law and Mainland law in response to the opinions filed by the PLs in opposition to the Petition.

B. Issues

31. As can be seen from the above background, there is no dispute that the Company is insolvent and should be wound up. One would have thought that so long as the Petitioner is able to satisfy the 3 core requirements for the court to exercise its discretion to wind up the Company under s.327(3)(c) of the CWUO, the Petitioner is entitled *ex debito justitiae* to a winding up order against the Company. There is no dispute that the first and third core requirements are satisfied.

32. At the hearing, the PLs (represented by Ms Rachel Lam SC leading Ms Tinny Chan) and ICA (represented by Ms Audrey Eu SC leading Mr Anson Wong Yu Yat) continue to oppose the Petition on the following grounds:

(1) Hong Kong court should give "primacy" to the Bermuda court and decline to make a winding up order against the Company (Primacy Ground);
(2) Harris J already made a finding that the second core requirement was not satisfied (Second Core Requirement Ground);
(3) If there are matters which need to be dealt with in Hong Kong, the liquidators appointed in Bermuda *can* seek recognition and assistance from the Hong Kong court under common law or seek a winding up order in Hong Kong. There is no *present* need to seek such assistance (Recognition Ground); and

(4) An ancillary winding up order would lead to additional time and costs, and add to the burden of the estate rather than benefit it (Ancillary winding-up Ground).

33. On the other hand, Mr Toby Brown (appearing with Ms Jacquelyn Ng), counsel for the Petitioner, submits that the real issue is whether an ancillary winding up order should be made by the court. It is difficult to fathom why the PLs would devote time and the Company's funds to oppose a winding up order in circumstances where the Company has assets in Hong Kong and there are clear advantages in the court making a winding up order against the Company.

34. In considering whether a company should be wound up, the court looks at the situation of the company as at the date of the hearing. As the Company has already been wound up in Bermuda, the real issue is whether the Petitioner is able to satisfy the second core requirement so as to bring into operation the statutory scheme of winding up under CWUO with liquidators appointed to carry on an ancillary liquidation in Hong Kong.

35. As will be seen further below, the Recognition Ground is premised on the assumption that in the *absence* of a winding up order, the court has the power under common law to make the provisions under the CWUO applicable to the Company. For the reasons explained in section B3 below, I do not think that the assumption is right.

B1. Primacy Ground

36. Ms Eu contends that the "normal rule" is to wind up a company at the place of incorporation and the other jurisdictions to recognise the foreign liquidators so as to give "primacy to the home jurisdiction". Reliance is placed on the expert evidence (which has not been identified in her written or oral submissions) and "a long line of authorities". When this Court asks Ms Eu which authorities she seeks to rely on, she points to the following authorities:

(1) *Re Joint Liquidators of Supreme Tycoon Ltd* [2018] 1 HKLRD 1120 where Harris J said (at [12]):

> … the rationale underlying the common law power of assistance is modified universalism. In the conventional case, one would expect an insolvent company to be wound up in its place of incorporation and for its liquidators to consider whether or not it is necessary to seek recognition and potentially assistance from the court in Hong Kong. In the

> case of liquidators appointed in jurisdictions with similar insolvency regimes to Hong Kong, the assistance may extend to granting orders that give the foreign liquidators substantially similar powers to, for example, investigate the affairs of a company by examination and orders for the production of documents as a Hong Kong liquidator would have. Indeed, as recognised by the Privy Council, the common law power of assistance exists for the purpose of surmounting the practical problems posed for a worldwide winding-up of the company's affairs by the territorial limits of the powers of each country's court.

(2) In *Re Moody Technology Holdings Ltd* (滿地科技股份有限公司) [2020] 2 HKLRD 187, where DHCJ William Wong SC said (at [16]) that "[a] crucial feature of cross-border insolvency cooperation is the recognition of foreign proceedings" and "[t]he raison d'être for recognising foreign proceedings is the avoidance of parallel proceedings".

37. Neither *Supreme Tycoon* nor *Moody Technology* supports Ms Eu's contention:

(1) *Supreme Tycoon* was concerned with an *ex parte* application made by the foreign liquidators for recognition and assistance for the specific purpose of obtaining information and collecting assets from the persons amenable to the jurisdiction. There was no discussion or holding in support of Ms Eu's contention.

(2) Similarly, in *Moody Technology,* the court dealt with an *ex parte* application[6] made by the foreign liquidators for recognition of their appointment and the powers set out in the letter of request for restructuring purpose. Again, there was no discussion or holding which supports the notion that the local court should decline to make a winding up against the foreign company once winding up proceedings have been commenced at the place of incorporation.

38. It is not surprising that Ms Eu is unable to cite a single authority in support of her contention as it goes against the statutory right given to the creditor (and the company) to present a winding up petition against a foreign company under s.327(3) of the CWUO and the well established principles governing how the court would exercise the discretionary jurisdiction under that section.

39. Ms Lam readily accepts that the Petitioner's right to seek a winding up order from the court is a legitimate one, and there is

6 Notice of application was subsequently given to the parties to the petition presented in the Hong Kong court, as directed by the Court

no authority in support of the proposition that the local court should decline to make a winding up order against the foreign company on the "primary" ground when the 3 core requirements are satisfied.

40. In her written submissions, Ms Lam no longer advances the Contention. Instead, she sets out the "traditional" English and Hong Kong approach to cross-border insolvency where liquidations were commenced and carried on in the place of incorporation (as principal liquidation) and the jurisdictions where there are assets to be collected or affairs to be administered (as ancillary liquidations) so as "to bring about a distribution of the company's worldwide assets on as uniform a basis as was consistent with overriding principles of local insolvency law", citing *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, [10], *per* Lord Sumption; *Re International Tin Council* [1987] Ch 419, 446G–447B, *per* Millett J; *Re Information Security One Ltd* [2007] 3 HKLRD 780, [8], *per* Kwan J (as she then was).

41. Ms Lam also refers to the development of cross-border insolvencies in common law jurisdictions which she describes as "generally favoured an approach/doctrine commonly referred to as 'modified universalism'" in that:

(1) The principal feature of modified universalism is the requirement that so far as consistent with justice and public policy the courts in the local jurisdiction cooperate with the court in the country of the principal liquidation to ensure that all of a company's assets are distributed to its creditors under a single system of distribution (*Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, [30], *per* Lord Hoffmann; *Cambridge Gas Transport Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, [16], *per* Lord Hoffmann).
(2) Thus, the common law regime of recognition and assistance is developed to obviate the need of a parallel winding up order in a foreign jurisdiction. As pointed out in *Cambridge Gas* at [22], cited in *Re Moody Technology Holdings Ltd* [2020] 2 HKLRD 187, [16].
(3) The doctrine of modified universalism was also reaffirmed in *Singularis*, which set down some limits to the common law power of the court to recognise and grant assistance to foreign insolvency proceedings (at [19], [25]).
(4) Since then, common law authorities continue to embrace modified universalism (*Stichting Shell Pensioenfonds v Krys* [2015] AC 616[7]).

7 In that case, the Privy Council affirmed the power of the BVI courts to issue an anti-suit injunction at the request of the liquidators in order to restrain a creditor, a Dutch pension fund, from continuing proceedings that it had instituted in the Netherlands. In particular, the Board endorsed a uniform distribution scheme that was established by the jurisdiction

42. Ms Lam acknowledges that the above authorities do *not* say that domestic court cannot wind up a foreign company. The real question is whether it is appropriate to do so on the facts of each case:

(1) An ancillary winding up order can still be made in Hong Kong if the 3 core requirements are satisfied.
(2) By way of example, in *Re Lamtex Holdings Ltd* [2021] 2 HKLRD 177 the court decided not to give primacy to winding up proceedings in the place of incorporation where the COMI of the company was located in Hong Kong and a "soft-touch" restructuring had been abused to engineer a *de facto* moratorium when there was no credible plan for restructuring ([28], [35]–[36], [39] and [42]).

43. Lastly, Ms Lam contends that the current practice under Hong Kong law is that set out in *Re G Ltd* [2016] 1 HKLRD 167, [6]:

> [O]ne would expect an insolvent company to be wound up in its place of incorporation and for its liquidators to consider whether or not it is necessary to seek recognition and potentially assistance from the court in Hong Kong. If they do the most straightforward way for them to proceed is to obtain a letter of request from the local court and then apply ex parte on paper for a recognition order … If the liquidators think that it is desirable that the foreign company is put into liquidation in Hong Kong and they are satisfied that they will be able to demonstrate to this Court that the criteria by which such petitions are assessed are satisfied, they can apply for a winding-up order and if the circumstances require it apply for themselves to be appointed provisional liquidators in Hong Kong pending the determination of the petition.

44. Except *Re Lamtex and Re G Ltd*, in all the authorities cited by Ms Lam, the courts were *not* concerned with the question whether the discretionary jurisdiction to wind up foreign companies should be exercised in favour of the petitioner. Instead, the courts were dealing with *specific* issues arising in the liquidation carried out in the place of incorporation of the company (*Stichting Shell, Re Moody*) or the liquidations carried out in different jurisdictions and the principles governing the approach of the courts in dealing with such issues (*Cambridge Gas*, *Singularis*, *HIH Casualty*). Indeed, the very fact that the courts had to deal with such cross-border

of the insolvent's home jurisdiction and rejected a "race to the court" approach to find and release assets outside of the statutory scheme ([24])

insolvency issues was precisely because it was permissible and unobjectionable for liquidations to have been commenced in the jurisdictions where the assets were located or where the company's affairs had been carried out and required investigation. They are *not* authorities to suggest that once the winding up process has been commenced in the place of incorporation, the court should decline to make a winding up order against that foreign company when the 3 core requirements are satisfied. The suggestion that it has been the *practice* of the court to exercise the discretion in this way does *not* accord with the fact that the court has made many winding up orders against foreign companies, in particular those companies whose shares had been listed on HKEx.

45. In my judgment, it is important to understand the genesis of the courts imposing the 3 core requirements in considering whether to exercise its discretionary jurisdiction to wind up a foreign company. This was sufficiently explained by Ma CJ and Lord Millett NPJ in *Kam Leung Sui Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501, [18]–[24], and may be summarised as follows:

(1) Section 327(1) and (3) of the CWUO confers a discretionary jurisdiction on the court to wind up a foreign company ([18], [21]).
(2) The most appropriate jurisdiction in which to wind up a company is the jurisdiction where it is incorporated. There must be "some connection between the foreign company and the jurisdiction" other than the petitioner's decision to present a winding up petition in the jurisdiction. It is unhelpful and potentially misleading to describe the jurisdiction under s.327 as "exorbitant" or as "usurping" the functions of the courts of the country of incorporation ([19]).
(3) The courts have adopted self-imposed constraints on the making of a winding up order against a foreign company by requiring the petitioner to satisfy the 3 core requirements before it would exercise its statutory jurisdiction to wind up a foreign company.
(4) The origin of imposing the 3 core requirements is to be found in *Re Real Estate Development Co* [1991] BCLC 210, at 217, where Knox J said ([21]):

> the proposition that there must be a sufficient connection between the company and the jurisdiction in which it is sought to wind it up prompted the question: sufficient for what? He answered the question by saying that the connection must be:

> sufficient to justify the court setting in motion its winding up procedures over a body which *prima facie* is beyond the limits of territoriality.

(5) As regards the second core requirement, the presence of significant assets normally means that a winding up order is likely to benefit the creditors but is *not* essential. It is sufficient that there is a reasonable possibility that the petitioner will derive a benefit from the making of a winding up order in the local jurisdiction. For this purpose, ownership of the assets by the company is not a matter of crucial importance: *Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch 43 ([22]–[23]).

(6) Ultimately, the question to be considered by the court in the case of a creditor's petition is ([24]):

> whether there is a sufficient connection between the company and this jurisdiction to justify the court in ordering a company to be wound up despite the fact that it is incorporated elsewhere; and that in deciding that question the fact that there is <u>a reasonable prospect that the petitioner will derive a sufficient benefit from the making of a winding up order, whether by the distribution of its assets or otherwise, will always be necessary and will often be sufficient</u>. (underlined added)

(7) A creditor's purpose in presenting a winding-up petition is to obtain payment of his debt, so that the existence of significant assets within the jurisdiction will usually suffice; and if the creditor thinks it worthwhile, he may seek winding-up orders in different jurisdictions until his debt is satisfied ([26]).

46. As is clear from *Kam v Kam* and the authorities discussed therein, the imposition of the 3 core requirements was in recognition of the fact that *prima facie* the most appropriate place to wind up a foreign company is the place of its incorporation and the domestic court would give primacy to that court. There is *no* separate or additional requirement for the domestic court to decline a winding up order against a foreign company on the ground that the company has been or will be wound up in the place of incorporation. Once the petitioner discharges the burden of showing that the foreign company is insolvent and the 3 core requirements are satisfied, the court will be prepared to make a winding up order against the company *unless* there is evidence to suggest that the debts will be paid from another source or that a viable restructuring proposal has

the support of the requisite majority of creditors. If the company is not able to do either, it is difficult to see how the mere fact that foreign company has already been or will be wound up in the place of incorporation would affect or displace the right of the creditors to seek a winding up order from the Hong Kong court against that company.

47. In the case of a non-Hong Kong company whose primary listing has been on HKEx, it would not be difficult for the petitioner to satisfy the 3 core requirements. This is because save where exempted by HKEx, such listed company invariably have:

(1) maintained a principal place of business in Hong Kong and have given an undertaking to comply with the Listing Rules;
(2) maintained sufficient management presence in Hong Kong;
(3) raised funds through the issue of shares, convertible notes or bonds and benefitted from the ability to trade such equities and financial instruments on HKEx;
(4) borrowed loans from banks and other financial institutions in Hong Kong;
(5) the obligation to comply with the provisions under the CO which apply to a non-Hong Kong company; and
(6) the obligation to comply with the Securities and Futures Ordinance (Cap.571) and the regulatory regime administered by the Securities and Futures Commission.

48. In respect of such listed company, it would be unreal or artificial to suggest that the court should ignore all the affairs carried out by the company in Hong Kong and the corresponding need to investigate them, and leave the control and supervision over the winding up to the court of the place of incorporation. This is particularly so where the company was incorporated in offshore jurisdictions like the BVI, Cayman Island and Bermuda which do not require the company to carry on any business or meaningful activity in the place of incorporation other than appointing agents to deal with the corporate filings and maintaining the registers of members, directors and charges.

49. The present case is a paradigm example. Other than maintaining its registers and complying with the statutory requirements of filings, the Company has not carried on any business or other activity in Bermuda. Nor does the Company have any assets in Bermuda. It is difficult to see why *all* the affairs arising in the liquidation of such company in Hong Kong should be left to the liquidators appointed in Bermuda.

B2. Second Core Requirement Ground

50. Ms Eu submits that in his Decision dated 31 August 2021, Harris J already decided (at [5]–[7]) that the second core requirement was not satisfied. Unless this Court is convinced that the Decision is wrong, this Court should "follow it as a matter of judicial comity" (*Kan Fat-tat also known as Kan Fat v Kan Yin-tat also known as Kan Tat* [1987] HKLR 516 at 534, *per* DHCJ Robert Tang QC). Given the long and consistent line of authorities in this area of the law both in Hong Kong and other common law jurisdictions, certainty, more than comity, is also important.

51. I am unable to accept the submission. As is clear from the Decision, Harris J, after hearing arguments from the parties, was not satisfied that this was a case where an *immediate* winding up order should be made. Had the learned Judge reached a firm conclusion or made a finding to the effect that the second core requirement had not or would not be satisfied, he would have dismissed the Petition. This was not his view. Instead, the learned Judge made clear at [8] of the Decision that "[i]f the judicial review is unsuccessful presumably the Company will be wound up either in Bermuda or possibly if there is no opposition, I may be prepared to make an order in Hong Kong.".

52. Mr Brown submits (and I agree) that the second core requirement is not a high threshold to discharge and the Petitioner is only required to demonstrate a real possibility of benefit. In this regard:

(1) In *Kam v Kam*, the second core requirement was described as "a reasonable prospect that the petitioner will derive a sufficient benefit from the making of a winding up order against the company".

(2) Recently, in *Re Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK2 Ltd* [2020] HKCA 670,[8] at [27], a case where the Mainland company which maintained dual primary listing on HKEx and Shenzhen Stock Exchange and did *not* have any asset in Hong Kong, the Court of Appeal affirmed Harris J's decision that "the leverage created by the prospect of a winding-up petition" constituted a reasonable prospect that the defendant would derive a benefit from a winding up order and the second core requirement can be "moderated".[9] The nature or extent of the benefit was explained by Barma JA (at [27]) in this way:

8 The judgment is under appeal and will be heard by the Court of Final Appeal on 17 May 2022

9 [29]–[30] of Harris J's judgment in HCMP 3060/2016

> Moreover, to insist on this requirement being met is clearly sensible, in that there would seldom be circumstances in which it would be justified to set in motion the court's winding-up machinery where to do so could provide no reasonable prospect of benefit of any kind to the petitioner. That said, the overarching nature of the enquiry, the purpose of which is to ascertain whether it would be appropriate to put into motion the winding-up machinery in respect of a particular overseas company, would, I think, allow for some flexibility as to the nature or extent of the likely benefit to the petitioner that should be shown in order to satisfy the second core requirement, as long as the benefit can be said to be a real possibility, rather than a merely theoretical one. (underlined added)

53. Ms Eu submits that the benefits and advantages identified by Mr Brown have not been pleaded in the Petition and it is not permissible for the Petitioner to rely on them. I disagree.

(1) While it is correct that normally a petitioner's case is confined to the matters pleaded in the petition, in the present case, it is the PLs who contend at the hearing on 10 January 2022 that there is *no* benefit for the court making a winding up order against the Company. The Petitioner must be allowed to respond to the point by identifying the benefits and advantages which will be available to the Petitioner and the creditors generally upon the court making a winding up order against the Company.

(2) In any event, as stated in [25]–[29] above, more than sufficient time and opportunity has been given to the parties to address the issue. There is no unfairness in the court considering the respective contentions raised by the parties.

54. It is indisputable that the Company has assets in Hong Kong which may be recovered by the liquidators appointed under CWUO for the benefit of the creditors:

(1) There is cash deposit in its bank account *presently* stands at HK$0.2 million.

(2) Although the PLs have *not* disclosed how much cash funds the Company has had during the past 5 years, it is reasonable to assume that the amount would be substantial as the Company had incurred substantial legal costs in dealing with resumption of trading, the Scheme, the Petition and the Bermuda Proceedings, and paying remuneration to the PLs.

Ms Lam confirms that these costs and remuneration were paid by the Company, part of which had been derived from the loans advanced by 2 funders, Kaisun and ICA. Upon the court making a winding up order against the Company, these payments insofar as they were made after the presentation of the Petition (being the date of the commencement of the winding up) and not sanctioned by the court are void and liable to be returned to the Company.

(3) The Company has at least 3 direct subsidiaries in Hong Kong namely, (a) UE HK; (b) UE Resources (which can readily be revived); and (c) UE Finance which has HK$6 million of receivables.

55. For this reason alone, I am satisfied that there is a reasonable prospect that the Petitioner will derive a sufficient benefit from the making of a winding up order against the Company. It follows that the second core requirement is satisfied.

B3. Recognition Ground

56. Mr Brown points to the following clear advantages which will be available to the liquidators if the Company is wound up by the court, but would not be available to the liquidators appointed in Bermuda (**Bermuda Liquidators**), *assuming* the court has power and is prepared to grant a recognition order in their favour:

(1) It would provide the Bermuda Liquidators with more extensive powers under CWUO;
(2) Some powers that may be provided under a recognition order are more effectively exercised by the liquidators appointed in Hong Kong (**HK Liquidators**); and
(3) There would be saving in time and costs in the court making a winding up order as opposed to the Bermuda Liquidators making an application for a recognition order.

57. So far as "more extensive powers" is concerned, Mr Brown submits that:

(1) In an ancillary liquidation, the liquidators are entitled to the full suite of powers of winding up as available in the ancillary jurisdiction (*Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, at 246E).
(2) By contrast, the power to provide assistance by way of a recognition order is limited to rendering assistance in respect of matters which could be done under the law by which they had been appointed (*Penta Investment Advisers Ltd v Allied*

Weli Development Ltd (formerly known as Hennabun Capital Group Ltd) (CACV 58/2016, [2017] HKEC 1475, 18 July 2017), at [7.5]).

(3) Thus, the powers granted under a recognition order are the "lowest common denominator" between the two jurisdictions.

(4) In the schedule prepared by the PLs, while there are overlaps between the powers under the Act and the CWUO, there are no equivalent provisions of ss.276 and 277 of the CWUO. The potential claim for misfeasance and wrongful trading provide a reasonable possibility of benefit to the petitioner and other creditors for the purpose of the second core requirement (*Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116, at [40], *per* Morritt LJ, as applied by Harris J in *Joint and Several Liquidators of China Medical Technologies Inc v Samson Tsang Tak Yung* (HCCW 435/2012, [2014] HKEC 1438, 28 August 2014), [14]–[17]).

(5) There is public interest in ensuring that the causes of the company's failure are properly investigated and any misconduct identified and sanctioned (*Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158, at 164, 172–173, 177, *per* Lord Walker). The ability to conduct investigations into the company's assets is sufficient to meet the second core requirement (*Re Zhu Kuan Group* (HCCW 874/2003, [2004] HKEC 1857, 2 August 2003), at [43]–[50]).

58. Ms Lam does *not* dispute that the Company and the HK Liquidators may benefit from the above advantages. However, she submits that the affairs of the Company in Hong Kong "can be sufficiently dealt with by way of recognition and assistance granted by the Hong Kong Court in the context of cross-border insolvency". Reliance is placed on:

(1) *Re Lamtex,* [7], [9], [13], [19], [22]; *Re Moody*, [16]–[25]; *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676, [8]–[13].

(2) Mr Tucker's opinion on Bermudian law, who opines that the recognition and assistance regime "would likely allow the liquidator appointed in Bermuda to deal with a range of matters in Hong Kong" such as (a) avoidance of disposition after commencement of winding up; (b) unfair preference; (c) fraudulent trading; (d) disclaiming onerous property; (e) examination of persons concerned with company's property and provision of information; and (f) delivery of property to liquidator.

(3) The *assumption* that the Hong Kong court has the power under common law to confer all the powers under the CWUO

to the Bermuda Liquidators if the same powers exist under the Act.

59. I shall first consider whether the court does have power under common law to make the provisions under the CWUO available to the Bermuda Liquidators or the Company in the absence of a winding up made by the Hong Kong court.

60. The starting point is that winding up is the creature of statute. The *only* way to bring into operation the statutory scheme of winding up is by the court making a winding up order against the company. The principle has been sufficiently explained in *Ayerst v C&K (Construction) Ltd* [1976] AC 167, at 176E–177D, *per* Lord Diplock; and *Re International Tin Council* [1987] Ch 419, 446A–447B, *per* Millett J. In *Re BCCI (No 10)* [1997] Ch 213, at 239F, Sir Richard Scott V-C said:

> Just as companies are creatures of statute, the law and procedure governing the dissolution of companies is statutory. Many of the rules of winding up have been borrowed from bankruptcy law and practice – rule 4.90 is an example – but, none the less, the power of the courts to wind up companies is a statutory power ….The courts have, in my judgment, no more inherent power to disapply the statutory insolvency scheme than to disapply the provisions of any other statute. (underlined added)

61. Unless and until the court makes a winding up order against the Company, there is no basis to bring into operation the statutory scheme for winding up under the CWUO. Nor is there any basis for the court to confer any of the powers or provisions under the CWUO to the Bermuda Liquidators or the Company.

62. The same conclusion can be reached by examining the provisions under the CWUO which apply to company wound up by the court. It can be seen that except s.268B, *all* the provisions, as mandated by their wordings, *only* apply to a company wound up by the court and liquidator appointed in Hong Kong. These include:

(1) s.182 which renders any disposal of assets after the commencement of the winding up void unless sanctioned by the court;
(2) s.183 which renders any attachment, sequestration, distress, or execution put in force against the estate after the commencement of the winding up void;
(3) s.199 which gives a wide range of powers to the liquidators specified in Schedule 25 some of which may be exercised without the sanction of the court or the committee of inspection;

(4) s.200 and s.204 which empower the court and the OR respectively to supervise and control over the conduct of the liquidators. They provide the avenues for the creditors to challenge any conduct which has fallen short of the standards required of the liquidators. These are important safeguards to ensure that the liquidators would faithfully perform their duties and observe all the requirements imposed on them by statutes, rules or otherwise with respect to the performance of their duties;

(5) s.211 which empowers the court to order any contributories, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender, or transfer to the liquidators any money, property, or books and papers in their hands to which the company is *prima facie* entitled;

(6) s.224 which empowers the court, on proof of probable cause, for believing that a contributory or any past or present officer of the company has absconded or is about to quit Hong Kong or otherwise to abscond or to remove or conceal any of his property for the purpose of evading payment of calls or debts due to the company or avoiding examination respecting the affairs of the company, to order that the contributory or officer be arrested and his books, papers and movable personal property seized and safely kept;

(7) the provisions which confer a right on the *liquidator* of a company wound up by the court (and no one else) to set aside antecedent transactions which were not in the interests of the company or otherwise upset the *pari passu* distribution of assets amongst the creditors including (a) s.264B in respect of extortionate transaction entered into by the company 3 years before the winding up order; (b) s.265D in respect of transaction at an undervalue; and (c) s.266 in respect of unfair preference;

(8) s.267 which renders invalid a floating charge on the undertaking or property of the company created in favour of any person in the period of 1 to 2 years before the commencement of winding up of the company;

(9) s.268 which empowers the liquidator to disclaim any onerous property of the company;

(10) s.269 which restricts the right of a creditor as to execution or attachment over the company's property to retain the benefit thereof unless he has completed the execution or attachment before the commencement of winding up;

(11) ss.271–274 which give "teeth" to the liquidator's exercise of power to require the past or present officer of the

company to provide information, disclose and deliver the property, books and papers to the liquidator by making it an offence if they fail to do so;

(12) s.275 which makes the directors liable for fraudulent trading, both in respect of having to compensate the company for the loss suffered and as a criminal offence;

(13) s.276 which provides for commencement of misfeasance proceedings against delinquent officer of the company, and makes them liable to pay damages to the company and as an offence; and

(14) s.268A which empowers the court to order public examination of promoters, directors, officers, provisional liquidator and provisional liquidator of the company, while s.268B empowers the court to order private examination of any person capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.

63. The above provisions have *no* application to a foreign company which has *not* been wound up by the Hong Kong court. No matter how one reads the wordings of the provisions, it is impossible to discern any basis for the court to make such provisions available to the foreign liquidator *as if* the company has been wound up when no such order has *in fact* been made by the court.

64. Although in the cases cited by Ms Lam the courts referred to the court's power under common law to recognise and assist foreign liquidators and the principle of "modified universalism", those statements were made in the context of the company having *already* been wound up in the place of incorporation (and carried on as principal liquidation) and in other jurisdictions (and carried on as ancillary liquidations) or where the courts were dealing with the specific cross-border issues arising in the course of liquidations in one or more jurisdictions.

65. The only case (cited by the parties) where the court identified and explained the source of the court's power to assist foreign liquidation is *Singularis* where Lord Sumption (at [10]) said this:

> The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent company. The power was founded partly on statute and partly on the practice of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations. The English court would order the winding up in

England of a company already in liquidation or likely to go into liquidation under the law of its incorporation, provided that there was a sufficient connection with England and a reasonable possibility of benefit to the petitioners. In theory, the effect of the winding up was to create a statutory trust of the worldwide assets of the company to be dealt with in accordance with English statutory rules of distribution: *Ayerst v C&K (Construction) Ltd* [1976] AC 167, *Banco Nacional de Cuba v Cosmos Trading Corpn* [2000] 1 BCLC 813, 819–820 (Sir Richard Scott V-C). In practice, as Millett J pointed out in *In re International Tin Council* [1987] Ch 419, 446–447, 'Although a winding up in the country of incorporation will normally be given extraterritorial effect, a winding up elsewhere has only local operation.' The English courts recognised the limits of the international reach of their own proceedings by treating the English winding up as ancillary to the principal winding up in the country of the company's incorporation. They exercised their power of direction over the liquidator by limiting his functions to getting in English assets and to dealing with them in such a way as to bring about a distribution of the company's worldwide assets on as uniform a basis as was consistent with certain overriding principles of English insolvency law. The earliest reported case in which the practice was recognised is the decision of Kay J in *In re Matheson Bros Ltd* (1884) 27 Ch D 225, but it is likely to have been older than that. In these cases, the court is exercising the ordinary powers of the English court to control the winding up of a company, which are wholly statutory. But the court was using them for a purpose which differed from that for which they were conferred, and on principles which departed from those applicable by law in the winding up of an English company. To that extent only, the English courts were exercising a common law power. (underlined added)

66. Much reliance has been placed by Ms Lam on the Privy Council's judgment in *Cambridge Gas* as authority in support of the proposition that the court has power under common law to assist a foreign liquidator in the absence of winding up in the domestic court. However, that part of the ratio has been held to be incorrect for the reasons explained by Lord Sumption in *Singularis*, at [18]:

Cambridge Gas [2007] 1 AC 508 marks the furthest that the common law courts have gone in developing the common law powers of the court to assist a foreign liquidation. It has proved to be a controversial decision. So far as it held that the domestic court had jurisdiction over the parties simply by virtue of its power to assist, it was subjected to fierce academic criticism and held by a majority of the Supreme Court to be wrong in *Rubin v Eurofinance*

> *SA (Picard intervening)* [2013] 1 AC 236. So far as it held that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, its authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, a case cited in argument in *Cambridge Gas* but not in the advice of the Board. Lord Walker, giving the advice of the Board in *Al Sabah*, had expressed the view that there was no inherent power to set aside the Cayman trusts at the request of a foreign court of insolvency, in circumstances where a corresponding statutory power existed under the Cayman Bankruptcy Law but did not apply in the circumstances. The Board considers it to be clear that although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. So far as *Cambridge Gas* suggests otherwise, the Board is satisfied that it is wrong for reasons more fully explained in the advice proposed by Lord Collins of Mapesbury. If there is a corresponding statutory power for domestic insolvencies there will usually be no objection on public policy grounds to the recognition of a similar common law power. But it cannot follow without more than there is such a power. It follows that the second and third propositions for which *Cambridge Gas* [2007] 1 AC 508 is authority cannot be supported. (underlined added)

67. The Hong Kong cases relied on by Ms Lam are all based on the principles expounded in *Singularis* or *Cambridge Gas* and do not take the point any further. In all these cases, the court was only concerned with recognising and assisting the foreign liquidators for the specific and limited purpose, such as implementing a restructuring or ordering a private examination against the persons within the jurisdiction. There was no analysis or conclusion as to how, in the *absence* of a winding up order made against the foreign company, the court could make the provisions under the CWUO available to the foreign liquidators.

68. Even if (which I do not think is right) the court does have power under common law to confer upon the Bermuda Liquidators the *powers* under the CWUO (such as ss.199, 200, 204, 211, 268A, 268B), one cannot equate the powers given to the foreign liquidators with the substantive provisions which *confer jurisdiction on the court* to set aside the specified types of antecedent transactions (ss.182, 183, 264B, 265D, 266–269) or the specific offences created by the provisions (ss.224, 271–276) and contend that the court can make such provisions or offences applicable to a foreign company which has not been wound up in Hong Kong. Neither Ms Lam nor

Ms Eu has been able to cite any authority in support of such proposition.

69. Ms Lam submits that the PLs' concerns are twofold. First, the court should weigh the pros and cons of making a winding up order against the Company specifically, whether the order would benefit the creditors and whether those powers are necessary at the present stage. Second, there is not a hint that the Bermuda Liquidators require broader powers under the CWUO to investigate the affairs of the Company in Hong Kong or to collect and sell the assets in Hong Kong at this stage. I disagree.

(1) The first point is based on the assumption that the court can through a recognition order make available those provisions to the Company if the same powers exist under the Act, which I do not think can be done.

(2) The second point is made in circumstances where the PLs admittedly have *not* carried out any meaningful investigations into the affairs of the Company. It does not seem to me that the PLs can rely on their own inaction to justify their view that there is no need for investigation. In any event, the PLs' view cannot be right. One of the basic functions of the liquidator is to investigate the causes of the Company's failure and the conduct of those concerned in the management of the Company in the interest of public (*Re Pantmaenog Timber Co Ltd,* as approved in *Re Kong Wah Holdings Ltd* (2006) 9 HKCFAR 766, [23], [26]). It is irrelevant that the PLs take a different view on the functions of liquidators.

70. I should add that Ms Lam acknowledges that it may be that the way to make the substantive provisions under the CWUO available to the Bermuda Liquidators is to seek a winding up order from the court and this can be done as and when the need arises in future. I am unable to accept the suggestion given that:

(1) the PLs have not carried on any meaningful investigation into the affairs of the Company; and

(2) the PLs are supposed to protect the interests of the unsecured creditors and to act in their best interests. The course suggested by Ms Lam is manifestly disadvantageous to the creditors as the commencement date of the winding up would be postponed by at least 6 years. This means that the Company would lose the benefits of most of the provisions whereby the Company or the HK Liquidators can seek to set aside the antecedent transactions entered into by the Company.

B4. Ancillary Winding-up Ground

71. In light of my holding on the Recognition Ground, it is not necessary to consider the Ancillary Winding-up Ground as all the submissions advanced by counsel are based on the assumption that in the absence of a winding up order, the court has power to make available the provisions under the CWUO to the Bermuda Liquidators if the same powers exist under the Act. Nevertheless, I will deal with the arguments advanced by the parties, in case this matter goes further.

72. Mr Brown submits that it is difficult, time consuming and costly for the Bermuda Liquidators to satisfy the court that it is appropriate for the court to grant a recognition order for the purpose of giving them the powers under the CWUO. The difficulty can be seen from *Re Rennie Produce (Aust) Pty Ltd (in Liq)* [2020] 3 HKLRD 685. In that case:

(1) the liquidators appointed in Australia sought an order for examination of and production of documents against certain parties in Hong Kong. The liquidators need to satisfy the court that the equivalent Australian legislation was at least as extensive as ss.286B and 286C ([17]).

(2) DHCJ Maurellet SC declined to make the order and adjourned the application to allow the liquidators to seek an order from the Australia court ([50]). As explained by the learned Judge, the issue was not whether an Australia court *could* make the order sought in Hong Kong but whether the Australia court *would* make the order if asked as a matter of that court's "settled practice" ([34]).

(3) Even if it was unnecessary to obtain mirror order from the court of the jurisdiction of incorporation ([47]), it would appear that at a minimum, expert evidence on the settled practice would be required, as stated in *Penta Investment Advisers Ltd v Allied Weli Development Ltd* (CACV 58/2016, 18 July 2017).

73. Ms Lam does not dispute the point. Instead, she submits that:

(1) The existence of additional powers under the CWUO is a "hypothetical benefit that potentially arise in all cases" (*Re China Huiyuan Juice Group Ltd* [2021] 1 HKLRD 255 at [26]). Whilst the powers may be seen as a "benefit", such approach would substantially widen the scope of the jurisdiction as previously exercised. It seems antithetical to

there being a "requirement" if the mere existence of powers itself satisfies the second core requirement.

(2) Such approach could also encourage parties to take a "race to the court" approach, disapproved in *Stichting Shell Pensioenfonds v Krys*.

(3) As a matter of comity, the Hong Kong court will also be astute to the sensitivities of fellow courts in common law jurisdictions which often deal with cross-border insolvency issues involving Hong Kong.

74. I shall deal with the last 2 points first. In my view, they are based on a misunderstanding of the nature of ancillary winding up and how it has been conducted by the liquidators in the past. In as early as 1997, the English Court of Appeal has already in *Re BCCI (No 10),* at 238G–246F, analysed and explained the concept of ancillary winding up and how it works in practice. As stated by Sir Richard Scott V-C (at 246C–F):

> This line of authority establishes, in my opinion, at least the following propositions. (1) Where a foreign company is in liquidation in its country of incorporation, a winding up order made in England will normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England will be ancillary in the sense that it will not be within the power of the English liquidators to get in and realise all the assets of the company worldwide. They will necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it will be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England will be ancillary in the sense, also, that it will be the liquidators in the principal liquidation who will be best placed to declare the dividend and to distribute the asses in the pool accordingly. (4) None the less, the ancillary character of an English winding up does not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which is brought before the court. It may be, of course, that English conflicts of law rules will lead to the application of some foreign law principle in order to resolve a particular issue.

75. Thus, the mere fact that a foreign company is wound up by the court of the place of incorporation does *not* obviate the need for a winding up order against the company in other jurisdictions. If and to the extent that there are assets within the domestic jurisdiction (which would normally be sufficient to satisfy the second

core requirement and possibly, the first core requirement), those assets will be taken and dealt with by the liquidators appointed in that jurisdiction and the liquidation will be carried on as ancillary liquidation.

76. As pointed out by Ms Maureen Chan, solicitor for the OR, where the company concerned had been wound up in its place of incorporation, normally the same individuals would be appointed as liquidators in both jurisdictions. These liquidators would enter into protocols, approved by the courts of both jurisdictions, to regulate and harmonise the liquidations, so as to reduce the conflicts and complications which may arise in cross-border insolvency matters. See eg, *Re Kong Wah Holdings Ltd & Anor (No 2)* [2004] 3 HKC 596, *per* Kwan J (as she then was). This has been how liquidations in respect of foreign companies have been carried out in the places of incorporation and in Hong Kong. There is no reason why the same practice cannot be followed by the Company.

77. Ms Lam submits that if a winding up order is made against the Company on a "may as well do so" basis, this could very well add to the burden of the estate rather than benefit it, given that:

(1) The funds received by the HK Liquidators from realising the Company's assets would be subject to an *ad valorem* duty payable to the OR pursuant to ss.203 and 296 of the CWUO and ss.6–7 and Item 1 of Table B of Schedule 3 to the Companies (Fees and Percentages) Order (Cap.32C, Sub.Leg.).
(2) The costs of liquidation, such as the costs of compliance with statutory filing and advertising requirements, may be increased or even duplicated, especially if 2 different sets of liquidators are appointed in Hong Kong and in Bermuda. This may result in further delay.

78. The costs and expenses identified by Ms Lam are not substantial, at any rate, as compared to the benefits of the court making a winding up order against the Company. The *ad valorem* fee is only payable out of the assets realised in Hong Kong, and the rate ranges from 10%[10] to 1%.[11] There will be little duplication of costs if the same persons are appointed as liquidators in both jurisdictions. As matter now stands, it is by no means clear that the PLs should be appointed or remain as liquidators of the Company. I say this because upon this Court's enquiry, Ms Lam confirms that the PLs have been acting with the benefit of the funding provided by the 2 funders. Although it has not been disclosed by the PLs as to whether they had entered into any funding agreement with the funders and, if so, on what terms, it is very likely that such

10 For the first HK$500,000 or fraction thereof
11 For assets realised in excess of HK$50,000,000

agreement exists. This may be a cause for concern if and to the extent that the PLs have agreed to subject themselves to the control or influence of the funders, such that the court should appoint other persons as HK Liquidators (*Re Goodway Ltd* [1999] 1 HKC 141, [23]–[29], *per* Yuen J). As the PLs have not carried out any meaningful investigation in respect of the Company's affairs, there is no question of any learning or costs being wasted if other persons are appointed as HK Liquidators.

79. In my view, far from avoiding parallel proceedings and saving any costs and time, if the Company were not wound up by the court, multiple proceedings would ensue which, in turn, would increase the time and costs for administering the affairs in Hong Kong. In this regard:

(1) Even if (which I do not think is right) the Bermuda Liquidators can through recognition and assistance ask the Hong Kong court to confer certain powers on them or make available certain substantive provisions to the Company, such application would involve the Bermuda Liquidators making an application to the Bermuda court for the order sought, follow by that court issuing a letter of request to the Hong Kong court. The Bermuda Liquidators would then rely on the letter of request and commence fresh proceedings in Hong Kong to seek the order. As it is not the practice of the court to give a *carte blanche* approval to foreign liquidators, it is likely that the Bermuda Liquidators would have to make successive applications to the court for recognition orders for the specific purposes or issues.
(2) In so far as the application affects any third parties, in fairness to such parties and as a matter of expedience (so that the order would bind such parties), the application would have to be made *inter partes* by commencing fresh proceedings against such parties.
(3) The PLs would not be able to benefit from the procedure under the CWUO and the Companies (Winding up) Rules (Cap.32H, Sub.Leg.), which permit applications to be made summarily through a summons issued in the winding up proceedings against anyone within or outside jurisdiction.

80. It cannot be in the interests of the creditors for the Company to have to bear the time and costs in making successive applications to the court for recognition orders as suggested by Ms Lam.

C. Disposition and Costs

81. For the reasons set out above, I hold that:

(1) The mere fact that the Company has been wound up by the Bermuda court is *not* a ground for the court to decline to make a winding up order against the Company;
(2) The Petitioner has demonstrated that there is a reasonable possibility of benefit to the creditors if a winding up order is made against the Company. This is sufficient for the purpose of the second core requirement;
(3) In the absence of a winding up order made against the Company, the court does not have power under common law to confer any powers on the Bermuda Liquidators or make any provisions under the CWUO available to the Company; and
(4) A winding up order against the Company would be in the interests of the creditors as it would avoid the need for the Bermuda Liquidators to make successive applications to the court for recognition and powers under the CWUO, even assuming the court has power to do so (which I do not think there is).

82. It follows that the Petitioner is entitled to a winding up order against the Company and I so order.

83. As for costs, I make a costs order *nisi* that:

(1) the costs of and occasioned by the hearings on 14 February 2022 and 1 April 2022 be paid by ICA and the PLs to the Petitioner and the OR, with certificate for two counsel, to be taxed if not agreed;
(2) For the purpose of O.62 r.6(2) of the Rules of the High Court (Cap.4A, Sub.Leg.), I direct that the PLs are not entitled to recover their costs from the estate of the Company; and
(3) Save as aforesaid, the costs of and occasioned by the Petition including one set of costs payable to the supporting creditors, shall be paid out of the assets of the Company.

84. It seems to me that it is appropriate to order the PLs and ICA to bear the costs of the two hearings, as such costs were incurred as a result of their opposition to the Petition when there is no valid ground for such opposition.

Reported by Adrian Lo

PICARD and BERNARD L. MADOFF INVESTMENT SECURITIES LLC (in liquidation)

v.

PRIMEO FUND (in liquidation)

Court of Appeal

(Chadwick, P., Mottley and Campbell, JJ.A.)

16 April 2014

Bankruptcy and Insolvency—assistance to foreign court—domestic insolvency proceedings—court may make ancillary order under Companies Law (2012 Revision), s.241(1) for purposes in s.241(1)(a)–(e)—s.242 guides purposes but incapable of creating new purposes for exercise of power—no general power to make any order court thinks appropriate

Bankruptcy and Insolvency—assistance to foreign court—domestic insolvency proceedings—court may entertain transaction avoidance claim under Companies Law (2012 Revision), s.241(e)—order for turnover of debtor's property guided by desire under s.242(1)(c) to prevent fraudulent transfers, notwithstanding that avoidance claim property of estate—court to order third party to transfer property to debtor and subsequently order turnover of debtor's property to foreign representative

The appellants brought an action in the Grand Court to avoid certain transactions performed before the appellant company (B) had gone into liquidation.

The respondent derived the majority of its investment income from B, a US company, and went into voluntary liquidation after it emerged that B has been operating as a large Ponzi scheme. B went into liquidation in New York and the first appellant ("the appellant") was appointed as its trustee in bankruptcy. The appellant, who had been recognized in the Cayman Islands as the trustee in the foreign bankruptcy (in proceedings reported at *2010 (1) CILR 231*), brought proceedings to set aside transactions by which money from B was paid to the respondent, on the basis that, as the payments were made to prevent the discovery of Ponzi scheme, they could be set aside as made by B to defraud creditors. He submitted, *inter alia*, that the Companies Law (2012 Revision), ss. 241–242 entitled him to bring avoidance claims governed by US law.

The Grand Court (in proceedings reported at *2013 (1) CILR 164*) held, *inter alia*, that the Companies Law (2012 Revision), s.241(1)(a)–(e) contained an exhaustive list of the powers available to the court when making an order ancillary to a foreign bankruptcy. There was therefore no general power under which it could make an order for transaction

avoidance. Section 241(1)(e) allowed the court to order turnover of any property "belonging to the debtor," but the court rejected the appellant's submission that this should be interpreted in the same way as the US courts had interpreted the US Bankruptcy Code (on which ss. 241–242 were based). The court therefore followed the English jurisprudence and held that it should recognize the distinction between the "property of the debtor" and the "property of the estate"—*i.e.* that the "property of the debtor" was restricted to property which B had held at the commencement of the liquidation. Section 241 could not, therefore, include the ability to avoid preferential transactions. The court further held that, even if it were entitled to make an order under s.241, such an order would be governed by Cayman law. Although the liquidation estate, and its management, were governed by foreign insolvency law, the court was not entitled to apply foreign law in relation to transaction avoidance. The appellant appealed against both of these findings.

The appellant submitted that the Grand Court should have found that it had jurisdiction to make an ancillary order under ss. 241–242 as s.241(1)(a)–(e) did not contain an exhaustive list of powers, but rather a list of purposes for which the court could exercise the general power contained in s.241(1). Further, the Grand Court had erred in holding that s.241 should be interpreted in a fundamentally different way from the US Bankruptcy Code. This section had been introduced to the Legislative Assembly as being based upon "corresponding provisions . . . with which local practitioners are familiar" and had used, without modification, a number of established technical terms from that Code. The legislature must, therefore, have intended that it be interpreted in the same way as the US Bankruptcy Code and be subject to the relevant US jurisprudence. As a result, the Grand Court should not have followed the UK authorities and should have found that there was no distinction between the phrases "property of the debtor" and "property of the estate." Accordingly, s.241(1)(e) could be used to reconstitute the debtor's estate through the avoidance of antecedent transactions. Moreover, s.242(1)(c)—which stated that the court should be guided by matters which assure an economic and expeditious administration of the estate consistent with the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate—made it clear that s.241 must be capable of being used to avoid preferential transactions.

The respondent submitted in reply that the court did not have any jurisdiction to hear a preference claim under ss. 241–242. Section 241(1), unlike the US Bankruptcy Code, did not provide a power giving discretion for the court to grant any "other appropriate relief" and s.241(1)(a)–(e) did not include a power to set aside transactions. There was therefore no basis to construe it as including a general power to make ancillary orders. Although s.241(1)(e) permitted the court to order turnover of property belonging to the debtor, it was well established in English law that this was distinct from the property of the estate—and that the proceeds of avoidance actions were property of the estate and not the debtor. If the

legislature had intended for a different meaning to apply, or for the court to be entitled to avoid transactions, it would have included an express provision to this effect. Further, whilst s.242(1)(c) referred to the prevention of preferential transactions, this did not extend to their reversal and could be satisfied by orders under s.241(1)(a) (recognition of the foreign representative) or s.241(1)(d) (ordering the production of documents relating to the business or affairs of the debtor to the foreign representative).

The appellant further submitted that the Grand Court should have found that, under ss. 241–242, it was entitled to apply US insolvency law. As the bankruptcy estate and its administration were entirely governed by foreign law and the court's order was ancillary to the foreign bankruptcy proceedings, it would be illogical for the order to be made under domestic law. The appellant also submitted, *inter alia*, that the US Bankruptcy Code had been interpreted in such a way as to allow the courts to apply foreign insolvency law. As ss. 241–242 were based on that code, it must have been intended that the domestic courts adopt this interpretation.

The respondent submitted in reply that ss. 241–242 could not be used to apply foreign insolvency law. Such a power would have been a significant enough change that it would have been explicitly provided for had the legislature intended it to be available. Although the US Bankruptcy Code had been interpreted to allow the application of foreign law, the starting point for the interpretation of ss. 241–242 must be that Cayman law should apply.

Held, allowing the appeal in part:

(1) The court had jurisdiction under the Companies Law (2012 Revision), s.241(1)(e) to entertain transaction avoidance claims in a foreign bankruptcy. Section 241(1) conferred the power on the court to make ancillary orders, but (as there was no general power to make any order the court thought appropriate) such orders could only be made for the purposes stated in paras. (a)–(e). These purposes would be guided by s.242, although this section was not itself capable of creating purposes for which the power under s.241 could be exercised. There was nothing to suggest that the guidance in s.242(1)(c) was limited to the exercise of powers under s.241(1)(a) and (d); the court's ability to order the turnover of property belonging to the debtor under s.241(1)(e) was therefore guided by the desire to avoid preferential or fraudulent transactions under s.242(1)(c). Accordingly, s.241(1)(e) must include the power to make a transaction avoidance order capable of restoring property to B, thus enabling the court to order the turnover of the property to the appellant. As the turnover referred to in s.241(1)(e) was therefore from the debtor's property, there was no difficulty in upholding the Grand Court's distinction between the phrases "property of the estate" and "property of the debtor." Although the Grand Court had correctly found that it was inappropriate for ss. 241–242 to be interpreted by reference to the US

Bankruptcy Code, this interpretation did not rely on any US authority and was based entirely on Cayman law (paras. 42–48).

(2) The Grand Court had been correct to find that orders made under ss. 241–242 would be governed by domestic law. The application of domestic law to insolvency proceedings governed by foreign law did create certain illogical or unusual effects, but the application of foreign law would be a radical departure from the common law and the legislature would have stated in clear terms if it had intended this to happen. Further, although ss. 241–242 had clearly been based on the US Bankruptcy Code, the Grand Court had correctly found that it was inappropriate to interpret them on the basis of the US jurisprudence. There was therefore nothing to support the appellant's submission that the court was entitled to apply foreign insolvency law under ss. 241–242. This result would be the same whether or not the company had registered as an overseas company under the Companies Law (2012 Revision), Part IX as such a distinction would be anomalous if the court, under s.242(2), made a winding-up order under Part V in respect of the company's local branch (paras. 53–54).

Cases cited:

(1) *Adams v. Cape Indus. PLC*, [1990] Ch. 433; [1990] 2 W.L.R. 657; [1991] 1 All E.R. 929; [1990] BCLC 479; [1990] BCC 786, referred to.

(2) *Ayala Holdings Ltd. (No. 2), Re*, [1996] 1 BCLC 467, referred to.

(3) *Cambridge Gas Transp. Corp. v. Navigator Holdings PLC (Creditors' Cttee.)*, 2005–06 MLR 297; [2007] 1 A.C. 508; [2006] 3 W.L.R. 689; [2006] 3 All E.R. 829; [2007] 2 BCLC 141; [2006] BCC 962; [2006] UKPC 26, referred to.

(4) *HSH Cayman, In re*, 2010 (1) CILR 375, considered.

(5) *Hilton v. Guyot* (1895), 16 S. Ct. 139; 159 U.S. 113, referred to.

(6) *MC Bacon Ltd. (No. 2), In re*, [1991] Ch. 127; [1990] 3 W.L.R. 646; [1990] BCLC 607; [1990] BCC 430, referred to.

(7) *Maxwell Communication Corp. PLC, In re, Maxwell Communication Corp. PLC v. Barclays Bank PLC* (1994), 170 B.R. 800; 25 Bankr. Ct. Dec. 1567, referred to.

(8) *Metzeler, Re* (1987), 78 B.R. 674, referred to.

(9) *Oasis Merchandising Ltd., In re*, [1998] Ch. 170; [1997] 2 W.L.R. 764; [1997] 1 All E.R. 1009; [1997] 1 BCLC 689; [1997] BCC 282, referred to.

(10) *Pepper (Insp. of Taxes) v. Hart*, [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42; [1992] STC 898, referred to.

(11) *Reserve Intl. Liquidity Fund Ltd. (In Liquidation), In re*, Grand Ct., April 1st, 2010, unreported, referred to.

(12) *Rubin v. Eurofinance SA*, [2013] 1 A.C. 236; [2012] 3 W.L.R. 1019; [2013] 1 All E.R. 521; [2012] 2 BCLC 682; [2013] BCC 1; [2012] UKSC 46, referred to.

(13) *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155, referred to.

Legislation construed:

Companies Law (2012 Revision), s.241. The relevant terms of this section are set out at para. 13.

s.242. The relevant terms of this section are set out at para. 13.

United States Code, Title 11 (Bankruptcy Code), s.304: The relevant terms of this section are set out at para. 37.

G. Moss, *Q.C.*, *S. Robins* and *J. Harris* for Picard and Bernard L. Madoff Investment Securities LLC;

M. Crystal, *Q.C.*, *P. Hayden* and *N. Fox* for Primeo Fund.

1**. CHADWICK, P.:** This is an appeal and a cross-appeal from the determination of Jones, J. in an order made on January 14th, 2013 (reported at *2013 (1) CILR 164*) of preliminary issues raised by the parties in proceedings brought by the trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("the trustee") and Bernard L. Madoff Investment Securities LLC (in Securities Investment Protection Act liquidation) against Primeo Fund (in official liquidation) ("the fund").

The underlying facts

2. Bernard L. Madoff Investment Securities LLC ("BLMIS") is a limited liability company incorporated under the laws of New York. At all material times it was owned and controlled by Bernard L. Madoff. On December 15th, 2008, the Securities Investor Protection Corporation filed an application in the District Court for the commencement of liquidation proceedings in respect of BLMIS. On the same day, the judge of that court made an order appointing Irving H. Picard as trustee in the liquidation of BLMIS and transferred the case to the US Bankruptcy Court for the Southern District of New York.

3. Primeo Fund was incorporated in the Cayman Islands on November 18th, 1993 and commenced business as an open ended investment fund under the Mutual Funds Law on January 1st, 1994. The fund operated at least two sub-funds—Primeo Select and Primeo Executive. Primeo Select invested exclusively, or almost exclusively, with BLMIS. Primeo Executive invested in Primeo Select and in two other funds, Alpha Prime Fund Ltd. ("Alpha") and Herald USA Segregated Portfolio One Fund, the single portfolio in Herald Fund SPC ("Herald"). Alpha and Herald invested exclusively with BLMIS. Following a restructuring on April 25th, 2007, Primeo Select exchanged all its direct investments with BLMIS for shares in Herald. Thereafter Primeo Select and Primeo Executive invested exclusively in Alpha and Herald and so, indirectly, in BLMIS. On January 23rd, 2009, Primeo Fund resolved to be wound up voluntarily. James Cleaver and Richard Fogerty, who are insolvency practitioners, were

appointed as joint voluntary liquidators of the fund. On April 8th, 2009, the Grand Court made an order that the voluntary liquidation should continue under the supervision of the court and Mr. Cleaver and Mr. Fogerty were appointed as joint official liquidators.

4. On February 5th, 2010, Jones, J. made an order under s.241(1)(a) of the Companies Law (2012 Revision) recognizing the right of the trustee to act in this jurisdiction on behalf of BLMIS. On December 9th, 2010, the trustee commenced these proceedings in the Grand Court seeking to recover some US$145m. which, it is said, the fund had received from BLMIS prior to June 2007 and any further funds received by the fund from BLMIS through intermediary feeder funds (Alpha and Herald) following the restructuring.

The trustee's claims in these proceedings

5. The statement of claim in these proceedings advances, on behalf of customers and creditors of BLMIS, transaction avoidance claims under two principal heads (so far as now material):

(a) Claims founded on transaction avoidance provisions of US bankruptcy law—including, in particular, (i) immediate transferee claims under s.548 of the United States Code, Title 11 ("the US Bankruptcy Code) (2-year fraudulent transfers), (ii) transferee claims under the New York Debtor and Creditor Law and other applicable law (6-year fraudulent transfers), (iii) subsequent transferee claims to recover payments avoided under ss. 547 and 550 of the US Bankruptcy Code (90-day preference payments), and (iv) subsequent transferee claims to recover payments avoided under ss. 548 and 550 of the US Bankruptcy Code (2-year fraudulent transfers). These claims are pleaded in Section VI of the statement of claim; and

(b) Claims founded on s.145 of the Companies Law (or on equivalent common law rules) to set aside, as preferences, transfers in the total sum of US$588m., or thereabouts, which were made within the 6 months immediately preceding the commencement of the liquidation. Those claims, which are made in reliance on s.241 of the Companies Law and/or the common law, are set out in Section X of the statement of claim.

The preliminary issues

6. On January 19th, 2011, the judge ordered preliminary issues of law to be tried. Those preliminary issues included (so far as material on these appeals):

(a) Whether the court has jurisdiction to apply transaction avoidance provisions under US insolvency law under s.241 and/or s.242 of the Companies Law and/or at common law ("Preliminary Issue 1"); and

(b) Whether the court has jurisdiction to apply transaction avoidance provisions of Cayman insolvency law in aid of a foreign insolvency proceeding as a matter of common law or under ss. 241 and 242 of the Companies Law ("Preliminary Issue 2").

7. The judge determined the first of those issues against the trustee. In his order of January 14th, 2013, he declared, on Preliminary Issue 1, that the Grand Court was not able to apply US insolvency law under s.241 and/or s.242 of the Companies Law or at common law. Accordingly, he ordered that Section VI of the statement of claim be struck out as disclosing no reasonable cause of action.

8. The judge determined the second of those issues against the fund. In his order of January 14th, 2013, he declared, on Preliminary Issue 2, that—

(a) the Grand Court did have jurisdiction at common law to apply avoidance provisions of Cayman insolvency law in aid of a foreign insolvency proceeding, irrespective of whether the Grand Court would have jurisdiction under s.91 of the Companies Law to make a winding-up order in respect of the foreign company in question; but

(b) the Grand Court did not have jurisdiction under ss. 241 and 242 of the Companies Law to apply avoidance provisions of Cayman insolvency law in aid of a foreign insolvency proceeding.

These appeals

9. The trustee filed notice of appeal on January 25th, 2013 (under reference CICA 1/2013) seeking orders declaring (a) on Preliminary Issue 1, that the court in this jurisdiction is able to apply US Bankruptcy Law under ss. 241 and 242 of the Companies Law; and (b) on Preliminary Issue 2, that the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply avoidance provisions of Cayman insolvency law in aid of a foreign insolvency proceeding. The trustee's memorandum of grounds of appeal was filed on August 9th, 2013.

10. The fund also filed notice of appeal on January 25th, 2013 (under reference CICA 2/2013). By that notice, the fund sought orders declaring, on Preliminary Issue 2, that (a) the court does not have jurisdiction at common law to apply avoidance provisions of Cayman insolvency law in aid of a foreign insolvency proceeding; or, in the alternative, (b) that the court does have jurisdiction at common law to apply avoidance provisions of Cayman insolvency law in aid of a foreign insolvency proceeding, provided that the court would have jurisdiction under s.91 of the Companies Law to make a winding-up order in respect of the foreign company in question. The fund's memorandum of grounds of appeal was filed on

August 29th, 2013. On September 11th, 2013, the trustee filed a respondents' notice.

11. When the appeal and cross-appeal came before this court for hearing on November 7th and 8th, 2013, it was common ground that there were three issues for determination:

(a) Whether the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply transaction avoidance provisions of foreign insolvency law (and, in particular, provisions of US Bankruptcy Law) in aid of foreign insolvency proceedings;

(b) Whether the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply transaction avoidance provisions in Cayman insolvency legislation in aid of foreign insolvency proceedings; and

(c) Whether the court has jurisdiction at common law to apply transaction avoidance provisions in Cayman insolvency law in aid of a foreign insolvency proceeding or, in the alternative, whether the court has such jurisdiction but only in a case where it would have jurisdiction under s.91 of the Companies Law to make a winding-up order in respect of the foreign company in question.

12. The oral arguments on the third of those issues were not completed in November 2013. It was necessary to adjourn the hearing for further argument. Further, the court was informed, correctly, that an issue central to that third issue—whether observations by Lord Hoffmann in *Cambridge Gas Transp. Corp.* v. *Navigator Holdings PLC (Creditors' Cttee.)* (3) should be followed in the light of the subsequent comments of Lord Collins of Mapesbury in *Rubin* v. *Eurofinance SA* (12)—was before the Court of Appeal in Bermuda and judgment was awaited. That judgment has subsequently been handed down and (we understand) is the subject of an appeal shortly to be heard by the Judicial Committee of the Privy Council. In those circumstances, this court was invited to hand down an interim judgment which addresses only the first two issues.

Sections 241 and 242 of the Companies Law

13. Before addressing those issues, it is convenient to set out the provisions of ss. 241 and 242 of the Companies Law (2012 Revision). Those sections are found in Part XVII of the Law (International Co-operation). They should be read with s.240:

"240. In this Part—

'debtor' means a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established;

'foreign bankruptcy proceeding' includes proceedings for the purpose of reorganising or rehabilitating an insolvent debtor; and

'foreign representative' means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding.

241. (1) Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of—

(a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;

(b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

(c) staying the enforcement of any judgment against a debtor;

(d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and

(e) ordering the turnover to a foreign representative of any property belonging to a debtor.

(2) An ancillary order may only be made under subsection (1)(d) against . . .

(b) a person who was or is a relevant person as defined in section 103(1).

242. (1) In determining whether to make an ancillary order under section 241, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with—

(a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

(b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

(c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

(d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;

(e) the recognition and enforcement of security interests created by the debtor;

(f) the non-enforcement of foreign taxes, fines and penalties; and

(g) comity.

(2) In the case of a debtor which is registered under Part IX, the Court shall not make an ancillary order under section 241 without also considering whether it should make a winding up order under Part V in respect of its local branch."

14. In his ruling on preliminary submissions (*2013 (1) CILR 164, at para. 10*), the judge set out the legislative history which led to the introduction into the laws of the Cayman Islands on March 1st, 2009, by the Companies (Amendment) Law 2007, of the provisions now contained in Part XVII of the Companies Law (2012 Revision). He went on (*ibid., at para. 13*) to make some general observations about those provisions. He said this:

"First, Part XVII supplements and partially codifies the common law. It does not abolish the common law rules which continue to exist alongside the new statutory provision. Secondly, the statutory provision reflects the traditional English common law rule that this court will recognize only the authority of a liquidator or trustee appointed under the law of the country of incorporation (Dicey, Morris & Collins, 2 *The Conflict of Laws*, 14th ed., at para. 30R–097 (2006)). This contrasts with the approach reflected in the UNCITRAL Model Law on Cross-Border Insolvency (1997), which recognizes the courts of the country in which an insolvent company has its 'centre of main interest' as being competent to exercise bankruptcy jurisdiction, which is not necessarily the country in which the company is incorporated. The Cayman legislature chose not to adopt this model. This court has no jurisdiction to provide judicial assistance under s.241 upon the application of a foreign representative of an insolvent company appointed by a court in any country other than the country of its incorporation. Thirdly, the recognition order which I made under s.241(1)(a) has two related consequences. It constitutes recognition that the trustee is the only person entitled to act as agent on behalf of BLMIS for the purpose of enforcing, in this jurisdiction, any cause of action belonging to the company. It also determined that the New York court is competent to exercise bankruptcy jurisdiction in respect of BLMIS and that the trustee, as its appointed officeholder, is therefore entitled to seek the assistance of this court pursuant to s.241 and/or at common law."

And he went on to say this (*ibid*):

"What I have to decide in this case is whether the scope of the assistance available to the trustee, whether under s.241 or at common law, enables him to pursue transaction avoidance claims against

Primeo and, if so, whether this court should apply the substantive foreign law applicable in the New York bankruptcy proceeding or the domestic law which would be applicable if a winding-up order had been made against BLMIS in this jurisdiction."

The judge's approach to the jurisdiction conferred by ss. 241 and 242 of the Companies Law

15. The judge found it convenient to address, first, the question of whether the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign insolvency proceedings before, secondly, addressing the question of whether (were such jurisdiction established) the applicable provisions were those of the foreign insolvency law or the law of the Cayman Islands.

16. He began to address the question (*ibid., at para. 14*) of whether the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign insolvency proceedings. After setting out the rival contentions advanced on behalf of the fund (by Mr. Michael Crystal, Q.C.) and the trustee (by Mr. Robin Dicker, Q.C.), he held (*ibid.*) that, on its true construction, s.241(1) was an exhaustive list of the court's statutory powers to grant ancillary relief in aid of foreign bankruptcy proceedings. In rejecting the submission of Mr. Dicker on this point—that s.241(1) conferred a single, general, power to make orders ancillary to a foreign bankruptcy proceeding and that paras. (a)–(e) merely described various purposes for which that single, general, power might be exercised—the judge said (*ibid.*):

"I do not accept this argument. It seems to me that paras. (a)–(e) describe *both* powers and the purposes for which they may be exercised. For example, the effect of para. (c) is that the court may make an order staying the enforcement of any judgment against a debtor. It seems to me that the draftsman is identifying a power (in this case, the power to make an order or injunction which is negative in effect) and describing the particular purpose for which it may be exercised (that is, to prevent enforcement of a judgment against an insolvent debtor). Paragraph (d) identifies a power to make an order or injunction which is mandatory in effect. It also describes the purpose for which it may be exercised, in this case requiring persons to give evidence and/or produce documents."

17. The judge then (*ibid., at para. 15*) turned to the question of whether, on its true construction, para. (e) of s.241(1)—which provides that the court may order a "turnover" to a foreign representative of any property belonging to a debtor—conferred a "power to make orders for the purpose of setting aside antecedent transactions and ordering the repayment of

money to the debtor." After referring (*ibid.*) to "the obvious point" that a power to set aside antecedent transactions is an essential feature of any personal or corporate insolvency regime," the judge observed that—

"... it would not have been surprising if the legislature had included within s.241(1) a power to make orders for the purpose of setting aside preferential payments or the fraudulent dispositions of property comprised in a debtor's estate. On the other hand, if this had been the legislature's intention, I think it is surprising that it is not stated expressly."

18. The judge was invited by counsel for the trustee to have regard to the legislative history as an aid to the construction of Part XVII of the Companies Law. He accepted (*ibid., at para. 16*) that it was open to the court to have regard to the Law Reform Commission's report entitled *Review of the Corporate Insolvency Law and Recommendations for the Amendment of Part V of the Companies Law*, April 12th, 2006 (to which he had, himself, been a party) for the purpose of identifying the statutory objective and the mischief at which the provisions in Part XVII were directed. After setting out two of the points made in the executive summary (*loc. cit.*, at 4) that—

"• there is currently a considerable degree of cross-border co-operation in respect of insolvency matters, but the basis upon which this co-operation is afforded depends largely upon judicial practice,"

and that—

• the Commission therefore recommends that the law relating to international co-operation in respect of insolvency matters be codified and included in a new Part [XVII] of the Companies Law,"

the judge went on to say this (*ibid.*):

"The Commission was clearly recommending 'codification' rather than reform. The mischief appears to have been the absence of 'black letter law.' The report itself is a very high-level summary which does not contain any real analysis of the issues which must have been considered by the Commission. The *Review*, sect. 17.3, at 16 merely recommends that this court be given a statutory power to make ancillary orders and states that—'the powers are set out in a proposed new Part [XVII] of the Companies Law and are based upon the corresponding provisions of the United States Bankruptcy Code with which local practitioners are very familiar.' It does not even identify the 'corresponding provisions.'"

19. The judge accepted also (*ibid., at para. 17*) that it would be open to the court to have regard to what was said by the Attorney General when

introducing the Companies (Amendment) Bill to the Legislative Assembly for the purpose of identifying its legislative objective—if satisfied that the criteria described by the rule in *Pepper (Insp. of Taxes)* v. *Hart* (10) were met. But he went on to say this (*ibid*):

"Even if I did think that Part XVII of the Law, or any part of it, is ambiguous or obscure (which I do not), what the Attorney General actually said in the Legislative Assembly would be of no real assistance. He merely said (*Official Hansard Report*, 2007/8 Session, at 456): 'The powers set out in Part [XVII] are based upon the corresponding provisions of the United States Bankruptcy Code with which local practitioners are familiar.' He said nothing more. He was merely repeating the statement in the *Review* without any explanation whatsoever."

20. Nevertheless, the judge accepted (*ibid.*) that it was "reasonably apparent" from the language of ss. 241 and 242 of the 2007 Amendment Law that the legislative draftsman must have paid some regard to s.304 of the US Bankruptcy Code "notwithstanding that it had been repealed long before the bill was published." He said this (*ibid., at para. 18*):

"It seems to me that he looked to s.304 only because he was not intending to enact provisions based upon the UNCITRAL Model Law as was done by the United States in October 2005 (Chapter 15 of the Bankruptcy Code) and by the United Kingdom in April 2006 (the Cross-Border Insolvency Regulations). The obvious alternative model to which the legislature might have looked for guidance is that reflected in s.426 of the UK Insolvency Act 1986. A key feature of this model is that the court is empowered to give assistance only in connection with insolvency proceedings pending in designated countries. The designated countries are limited to the British Overseas Territories and certain Commonwealth countries whose corporate insolvency laws are similar to, or based directly upon, the English law. The United States is not one of them. Rather than adopt this model, which would have relied upon the Governor in Cabinet to designate the countries whose courts could be assisted, the legislature decided to give the court a discretionary power to provide assistance provided that (a) the foreign bankruptcy proceeding is capable of recognition in accordance with the traditional common law rules; and (b) the substantive law of the foreign proceeding is consistent with Cayman policy objectives relating to the matters set out in s.242(1), including just treatment of all creditors, preferential or fraudulent dispositions and the recognition of security interests. Even if the foreign proceeding is recognized, as it has been in this case, this court could still decline to provide assistance if the order sought by the trustee would be likely to produce or contribute to an

economic result which is inconsistent with the policy objectives of the Cayman corporate insolvency law."

That, in the judge's view, was the extent to which it could be said that the Cayman legislature had had regard to a model reflected in s.304 of the US Bankruptcy Code—which, as he pointed out, had been repealed and replaced with Chapter 15 by the time that the 2007 Amendment Law was enacted.

21. But the judge went on to address the submission, advanced on behalf of the trustee, that, to the extent that the language of ss. 241 and 242 of the Companies Law is the same or similar to that used in s.304 of the US Bankruptcy Code, the court should construe and apply the Cayman Law in the same way as the US courts had construed and applied the US legislation.

22. The judge observed (*ibid., at para. 19*) that Mr. Dicker (counsel for the trustee) had relied upon the decision of Buschman, J. in *Re Metzeler* (8) as an authoritative statement of the way in which the US courts had interpreted and applied s.304 of the US Bankruptcy Code. The judge explained (*ibid.*) that that case concerned an ancillary petition filed in the New York court by Mr. Friedrich Metzeler, who had been appointed by a German court as trustee of an insolvent German company. He said this:

"[Mr. Metzeler] sought an order for the recovery of $508,952 as a preferential and fraudulent transfer. One of several issues was whether the trustee could rely upon the US law or was limited to reliance upon the German Bankruptcy Act. It was held that the US court would apply the foreign law. In the course of his judgment, Buschman, J. referred to a decision of the US Supreme Court in *US* v. *Whiting Pools Inc.* . . . and said (78 B.R. at 680):

'To be sure, this analysis depends in large part on the *Whiting Pools* analysis that estate property includes property recoverable under § 547 and § 548, and we have held above that the voidability powers of a foreign representative and the nature of the foreign estate must be tested by foreign law. In this, there is no inconsistency. The term "property of the estate" employed in § 109(a) is to be construed according to the definition adopted in *Whiting Pools.* Although, *Whiting Pools* refers to transfers avoidable under §§ 547 and 548, our task is to construe § 304. That Congress provided for turnover actions in § 1410(b) is sufficient indication of its expectation that the concept applies to similar avoidance actions based on foreign law in light of the policies sought to be achieved. It thus seems clear that Congress intended that foreign preference and fraudulent transfer actions seeking to recover property located here are a sufficient basis on which to ground a § 304 petition and we so hold.'"

23. The judge went on to say this (*ibid.*):

"It is clear that the expression 'property of the estate' includes property recoverable under the avoidable transfer provisions and that the expression 'turnover of the property of such estate' (as used in s.304) includes actions (referred to as 'turnover actions') to set aside antecedent preferential payments and fraudulent dispositions. Mr. Dicker focuses on the use of the word 'turnover' in s.241 and invites me give it an American meaning. In my view, this is not an approach which I am entitled to adopt for two reasons. First, for the reasons which I have explained, there is no sufficient basis upon which I can properly infer that the legislature intended that words and expressions used in Part XVII should be given the technical meanings which would likely be ascribed to them if those words had been used by the US Congress in a statute relating to the same general subject-matter. I think that the legislature merely looked to (the now repealed) s.304 of the US Bankruptcy Code as a general model which was thought to be more appropriate than the model reflected in s.426 of the UK Insolvency Act. Secondly, I should avoid falling into the error of focusing unduly on the single word 'turnover' and failing to pay proper regard to the provision as a whole. Section 241(1)(e) empowers the court to order 'the turnover to a foreign representative of any property of the debtor.' Property of the debtor means property of the company, which is not the same thing as 'property of the estate.'"

24. He explained (*ibid., at para. 20*) the "conceptual difference" between the "property of the debtor" and the "property of the estate," which, he said, was perfectly clear and well understood by insolvency practitioners:

"The expression 'property of the debtor' means the assets which are the property of a company at the time of the commencement of the liquidation and the property representing it, including rights of action which might have been pursued by the company itself prior to the liquidation. This contrasts with 'property of the estate,' which means the assets available for distribution to the creditors in a company's liquidation, including the rights of action which are available only to the official liquidator as a result of a winding-up order having been made. An official liquidator's right to pursue preference claims and the recoveries made are part of the 'property of the estate' available for distribution to creditors but not part of the 'property of the debtor' within the meaning of s.241(1)(e)."

And he went on to express the view that what the draftsman had in mind, when using the phrase "property of the debtor" in para. (e) of s.241(1), was a situation of the kind which arose in *In re Reserve Intl. Liquidity Fund Ltd. (In Liquidation)* (11). As he explained (*ibid*):

"[That] case concerned a company incorporated in the British Virgin Islands which carried on business as a money market daily liquidity fund. It got into financial difficulty as a result of the credit crunch in September 2008. Its directors believed that these difficulties could be overcome and resisted any form of liquidation or reorganization proceeding, but an unpaid creditor succeeded in persuading the High Court in the British Virgin Islands to make an order for its compulsory liquidation and the appointment of official liquidators. The company had $10m. on deposit with each of the Cayman Islands branches of two well-known banks. The official liquidators gave instructions for these funds to be transferred to an account in Tortola under their control. The company's directors refused to recognize the liquidators' authority and instructed the banks to transfer the funds to an account in New York which would be under their own control. This court made an order under s.241(1)(a), recognizing the BVI official liquidators as the persons entitled to give instructions to the banks on behalf of the company."

The facts in that case illustrated, the judge said, what is meant by "ordering the turnover to a foreign representative of property belonging to the debtor." It related to property belonging to a company prior to the commencement of its insolvent liquidation and did not include property which is recoverable only by an office holder pursuant to the transaction avoidance provisions of the applicable bankruptcy law. He went on to say that that interpretation was consistent, also, with the fact that Part XVII of the Companies Law provides foreign representatives with a simple procedural mechanism for obtaining various different kinds of ancillary relief in a single proceeding. Transaction avoidance and preference claims may give rise to complex legal and factual disputes which are best resolved in an action commenced by writ.

25. It followed, in the judge's view, that the trustee had no statutory right under s.241 of the Companies Law to pursue an action against the fund for recovery of the 6-month payments—or, it seems, any other pre-insolvency transfers.

26. The judge then turned to consider the question of whether (if, contrary to his view, such statutory jurisdiction were established) the applicable provisions were those of foreign insolvency law or the law of the Cayman Islands. As he put it (*ibid., at para. 21*): "I shall nevertheless go on to consider whether the foreign or the domestic law would be the substantive law applicable in the event that it is subsequently held that the trustee is entitled to pursue his claim under s.241." He concluded (*ibid., at para. 27*) that "if, and to the extent that, the trustee is entitled to proceed under s.241 at all, on its true construction I think that s.241 requires the application of Cayman Islands law."

27. In reaching that conclusion, the judge addressed six submissions advanced on behalf of the trustee in support of the contention that, if s.241 of the Companies Law applied, it would enable the trustee to assert transaction avoidance claims based upon US law. Those submissions may be summarized as follows:

(a) That the concept of making "orders ancillary to a foreign bankruptcy proceeding" implies that the focus is on the foreign proceeding and the foreign law. The word "ancillary" means "subservient, subordinate and ministering to something else";

(b) That, as a matter of principle, the application of the foreign substantive law to transaction avoidance and preference claims is the logical choice because this is the law applicable to the distribution regime. It is said to be illogical to "mix and match" by applying the domestic law to avoidance issues when the distribution regime is governed by a foreign law;

(c) That the application of foreign law is consistent with the reference in s.242(1)(c) to the "prevention of preferential or fraudulent dispositions of property comprised in a debtor's estate";

(d) That the application of foreign law would be consistent with the reference in s.242(1)(c) to property comprised in the "debtor's estate." The exercise of this court's jurisdiction to make orders ancillary to a foreign bankruptcy proceeding does not result in the establishment of a separate parallel liquidation proceeding in this jurisdiction. Nor does it result in the creation of a separate local estate on a territorial basis. It follows that the "debtor's estate" referred to in sub-s. (1)(c) must mean the estate as defined and constituted under the foreign law;

(e) That the reference to "comity" in s.242(1) demands the application of foreign law; and

(f) That the legislative history of Part XVII of the Companies Law points to the conclusion that the legislature must have intended this court to apply the foreign substantive law when deciding whether to make ancillary orders under s.241 (with the exception of orders for evidence under s.241(1)(d), which can only be made against a "relevant person" as defined by Cayman Islands law).

28. The judge was not persuaded by those submissions, or any of them. As to the first—that the concept of making "orders ancillary to a foreign bankruptcy proceeding" implies that the focus is on the foreign proceeding and the foreign law—he said this (*ibid., at para. 21*):

". . . s.241 should be interpreted in the light of the amendments made to Part V and enacted at the same time. As I have already observed, s.91(1)(d) expressly empowers this court to make winding-up orders

in respect of foreign companies and s.242(2) mandates that it must consider doing so before deciding to make any ancillary order if the company in question is registered under Part IX of the Companies Law . . . In these circumstances the Cayman Islands liquidation would be regarded as 'ancillary' to the foreign liquidation, but it is perfectly clear that a local liquidation proceeding can only be conducted in accordance with Part V of the Companies Law. I think that Mr. Dicker is attempting to read too much into the use of the word 'ancillary.'"

29. The judge accepted (*ibid., at para. 22*) the apparent illogicality of applying the domestic law to avoidance issues when the distribution regime is governed by a foreign law. But he pointed out that that was the result at common law and expressed the view that "if the legislature intended to change the common law it would have said so expressly."

30. The judge accepted (*ibid.*) that the reference in s.242(1)(c) of the Companies Law to the "prevention of preferential or fraudulent dispositions of property comprised in a debtor's estate" was to dispositions taking place before the commencement of the foreign bankruptcy proceeding and that it required that Part V of the Companies Law would be applied as if a local liquidation proceeding had commenced in respect of BLMIS on December 15th, 2008, with the result that the "suspect period" was calculated back from this date. But he held that that requirement did not point to the conclusion that ss. 241 and 242 of the Companies Law required the application of the foreign substantive law.

31. As to the fourth submission—that the application of foreign law would be consistent with the reference in s.242(1)(c) of the Companies Law to property comprised in the "debtor's estate"—the judge pointed out that he had already held that "the debtor's estate" meant the property available for distribution to creditors including the proceeds of preference claims. He went on to say this (*ibid., at para. 23*):

"The exercise of this court's jurisdiction to make orders ancillary to a foreign bankruptcy proceeding does not result in the establishment of a separate parallel liquidation proceeding in this jurisdiction. Nor does it result in the creation of a separate local estate on a territorial basis. It follows that the 'debtor's estate' referred to in sub-s. (1)(c) must mean the estate as defined and constituted under the foreign law. However, the purpose of an ancillary order is not to ensure the constitution of an estate in accordance with the foreign law in question. Its purpose is the more general one of assisting the foreign court to achieve an economic and expeditious administration of the estate in a manner consistent with Cayman policy objectives in respect of the matters reflected in s.242(1). However, laws relating to the avoidance of antecedent transactions vary significantly from

country to country and it could be said that mandating the application of a myriad of foreign laws would actually be *inconsistent* with this general objective." [Emphasis in original.]

32. The judge referred (*ibid., at para. 24*) to the concept of "comity" as explained by this court in *In re HSH Cayman (4)*, adopting terms used by the US Supreme Court in *Hilton* v. *Guyot* (5) (16 S. Ct. at 143):

"Comity . . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens, or of other persons under the protection of its laws."

He went on to say this (*2013 (1) CILR 164, at para. 24*):

"What this means in the present context is that the courts of two countries can be expected to seek and grant assistance in corporate insolvency proceedings for the purpose of achieving commonly held policy objectives, notwithstanding that the application of their own laws to any given set of factual circumstances would not necessarily produce exactly the same or even a similar economic result. Both the US Bankruptcy Code and Part V of the Cayman Companies Law recognize the need to set aside antecedent transactions in certain circumstances in order to achieve the policy objective of treating an insolvent company's creditors equally, but the actual rules of law are materially different. In principle, comity enables this court to lend its assistance to the New York proceeding notwithstanding that the application of the foreign versus the domestic law could produce materially different economic results. Adherence to the concept of comity does not necessarily mean that the New York court should be expected to apply Cayman law or that the Cayman court should be expected to apply US law in any given set of circumstances. For these reasons I do not think that the requirement to have regard to comity implies that the legislature intended applications for ancillary relief under s.241 to be governed by foreign law. The application of Cayman law is entirely consistent with an adherence to comity."

33. As to the sixth submission—that the legislative history of Part XVII, to which he had already referred, pointed to the conclusion that the legislature must have intended this court to apply the foreign substantive law when deciding whether to make ancillary orders under s.241 of the Companies Law—the judge acknowledged (*ibid., at para. 25*) that Mr. Dicker relied on the observations of Buschman, J. in *Re Metzeler* (8) that, as described by Jones, J. (*ibid.*), "a foreign representative may assert, under s.304 [of the US Bankruptcy Code], only those avoiding powers vested in him by the law applicable to the foreign estate." But he went on to say this (*ibid.*):

"For the reasons which I have already given, the fact that the US courts interpreted s.304 in this way does not lead me to infer that the legislature intended this court to interpret s.241 in the same way. If the legislature had intended to abolish the common law rule (which applies the domestic law), it would have said so expressly."

34. The judge also referred to the submission, advanced on behalf of the trustee, that it was implicit in s.241(2)(b) of the Companies Law that, upon its true construction, the whole of s.241 required the application of the substantive foreign law. In rejecting that submission the judge said this (*ibid., at para. 26*):

"Sub-section (2)(b) says that an order for evidence can only be made against someone who is a 'relevant person' within the meaning of s.103(1) of the Companies Law . . . This amounts to an express requirement to apply the substantive domestic law for this purpose, thereby implying, according to Mr. Dicker, that foreign law must be applicable in all other respects otherwise sub-s. (2)(b) would have been unnecessary. The difficulty with this argument is that it suggests an intention to 'mix and match' the application of both domestic and foreign law, which the legislature is inherently unlikely to have intended. For example, this approach might lead to the conclusion that this court must apply s.103(1) of the Companies Law for the purpose of identifying the target of an order for production of documents and at the same time apply the foreign law, rather than s.103(3)(b) . . . for the purpose of defining the subject-matter of the order. This is inherently unlikely. I think that the purpose of s.241(2)(b) is merely to emphasize that orders for evidence and production of documents will only be made against those whom the law regards as 'insiders.'"

35. The judge concluded his consideration of the question of whether (if, contrary to his view, statutory jurisdiction under ss. 241 and 242 of the Companies Law were established) the applicable provisions were those of foreign insolvency law or the law of the Cayman Islands with the observation (*ibid., at para. 27*):

"This court's common law jurisdiction to provide assistance in respect of foreign corporate insolvency proceedings (whatever its scope) depends upon the application of the domestic law. If the legislature had intended this rule to be abolished by the enactment of Part XVII, it would have said so expressly."

The first and second issues for determination on these appeals

36. As I have said, the judge found it convenient to address, first, the question of whether the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of

foreign insolvency proceedings, before then addressing the question of whether (were such jurisdiction established) the applicable provisions were those of the foreign insolvency law or the law of the Cayman Islands. I think he was right to take that course and I shall do the same.

37. The trustee places reliance on the provisions of s.304 of the US Bankruptcy Code. It is necessary to have those provisions in mind:

"(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a *petition* under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

(1) enjoin the commencement or continuation of—

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best ensure an economical and expeditious administration of such estate, consistent with:

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns." [Emphasis supplied.]

Section 304 of the US Bankruptcy Code must be read with the definitions in s.101:

"In this title—

. . .

(13) 'debtor' means person or municipality concerning which a case under this title has been commenced;

. . .

(23) 'foreign proceeding' means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization;

. . .

(24) 'foreign representative' means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding."

38. I start, therefore, with the question: does the court have jurisdiction under ss. 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign bankruptcy proceedings?

Does the court have jurisdiction under ss. 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign bankruptcy proceedings?

39. The trustee contends that the court does have such jurisdiction under those statutory provisions. The grounds upon which that contention is advanced are set out in the trustee's memorandum of grounds of appeal filed on August 9th, 2013. They are developed in a skeleton argument filed on September 24th, 2013; in a supplemental skeleton argument filed on October 30th, 2013; and in oral submissions to the court. They may, I think, fairly be summarized as follows:

(a) It is said that the judge erred in holding (*2013 (1) CILR 164, at para. 14*) that paras. (a)–(e) of s.241(1) constitute an exhaustive list of the court's powers and that the court's powers under s.241 are therefore cut down (or limited) by paras. (a)–(e) of sub-s. (1). It is said that the judge

ought to have held that s.241(1) confers a wide power on the court to make "orders ancillary to a foreign bankruptcy proceeding" for the purposes identified in paras. (a)–(e) of sub-s.(1) and that the power to make "orders ancillary to a foreign bankruptcy proceeding" enables the court to make orders which are necessary to the achievement of the purposes described in paras. (a)–(e);

(b) It is said that the judge erred in holding (*ibid., at para. 19*) that s.241 of the Companies Law is to be construed in a fundamentally different way from s.304 of the US Bankruptcy Code, on which it is based. It is said that, although the judge accepted that (i) s.241 of the Companies Law is based on s.304 of the US Bankruptcy Code, (ii) s.304 of the US Bankruptcy Code conferred jurisdiction on the US courts to apply foreign insolvency law in respect of the reversal of antecedent transactions, (iii) the Attorney General explained to the Legislative Assembly that s.241 of the Companies Law contains "powers . . . based upon the corresponding provisions of the United States Bankruptcy Code," and (iv) the Law Reform Commission's report described the proposed provision as being "based upon the corresponding provisions of the United States Bankruptcy Code with which local practitioners are very familiar," he failed to appreciate that s.241 of the Companies Law must be construed in a manner consistent with s.304 of the US Bankruptcy Code;

(c) In particular, it is said that the judge erred in failing to attach sufficient weight to the fact that s.241 of the Companies Law adopts, without modification, a number of established technical terms of US insolvency law, including the term "turnover" in s.241(1)(e). It is said that "turnover" is a word defined by the Supreme Court of the United States to include claims to avoid antecedent transactions, such as preferences. It is said that the deliberate use of language from s.304 of the US Bankruptcy Code "with which local practitioners are very familiar" meant that the new legislation (now in Part XVII of the Companies Law) would, in some respects, have material differences from the pre-existing common law and that these differences would be evident to local practitioners familiar with s.304 of the US Bankruptcy Code;

(d) Further, it is said that the judge erred in construing (*ibid., at paras. 19–20*) a provision and language taken from the US Bankruptcy Code by reference to English statute and case law which had not been used as the source or model for s.241 of the Companies Law. It is said that he ought to have held that the expression "property belonging to a debtor" in the turnover provision, s.241(1)(e), has the same meaning as "the property of such estate" in the equivalent turnover provision in s.304(2) of the US Bankruptcy Code;

(e) In particular, it is said that the judge erred in holding (*ibid.*) that the reference to "property of the debtor" in s.241(1)(e) of the Companies Law

is unconnected with the reconstitution of the debtor's estate through the avoidance of antecedent transactions and in holding that property which is recovered through the reversal of antecedent transactions will not be "property of the debtor" within the meaning of s.241(1)(e). It is said that the judge erred in holding that the Companies Law draws a distinction between "property of the debtor" and "property of the estate" and that assets recovered through transaction avoidance claims would form part of the "property of the estate" but would not form part of the "property of the debtor." It is said that he ought to have held that the Companies Law uses these terms interchangeably and that "property belonging to a debtor" in s.246(1)(e) has the same meaning as "property comprised in the debtor's estate" in s.242(1)(c); and

(f) Further, it is said that the judge ought to have held that s.242(1)(c) of the Companies Law makes clear that ss. 241 and 242 are concerned with the reversal of preferential and fraudulent dispositions; that assets recovered through the avoidance of antecedent transactions will be "property of the debtor" within s.241(1)(e); and that, accordingly, the court's power to make ancillary orders includes the power to make orders for the avoidance of antecedent transactions.

40. The submissions advanced on behalf of the fund in relation to the question of whether the court has jurisdiction under ss. 241 and 242 to apply transaction avoidance provisions (whether of foreign or domestic law) were set out in its skeleton argument dated September 25th, 2013 and developed in oral argument. Those submissions may be summarized as follows:

(a) Part XVII of the Companies Law, of which ss. 241 and 242 form part, sets out a means by which the court in this jurisdiction can provide assistance to the representative of a foreign company which is the subject of an insolvency proceeding in the place of its incorporation. The limitation of Part XVII to a foreign proceeding under the law of the place of incorporation reflects the common law rule that the court will recognize only the authority of a liquidator or trustee appointed under the law of the place of incorporation;

(b) The power to apply transaction avoidance provisions (whether domestic or foreign) in support of a foreign insolvency proceeding is not included in paras. (a)–(e) of s.241(1) of the Companies Law as one of the forms of relief which the court may grant in aid of a foreign bankruptcy. The relief which may be granted does not include the setting aside of dispositions of the debtor's property or the application of avoidance provisions, whether under the law of the Cayman Islands or under foreign law. In particular, (i) paras. (a)–(e) are intended as an exhaustive statement of the forms of relief that may be granted, and (ii) there is no residual power equivalent to "other appropriate relief" (compare s.304(b)(3) of the

US Bankruptcy Code). There is no basis for construing s.241(1) as conferring on the Grand Court an entirely general power to make any order which can be said to be ancillary to a foreign bankruptcy proceeding, provided that the making of such order is a necessary precursor to the achievement of any of the purposes specified in paras. (a)–(e);

(c) Section 242(1)(c) of the Companies Law provides no assistance for the trustee's contentions. Notwithstanding that that sub-section requires that, in determining whether to make an ancillary order under s.241, the court shall be guided by matters which will best ensure an economic and expeditious administration of the debtor's estate consistent with, *inter alia*, "the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate," it does not extend the powers to make ancillary orders under s.241. The powers conferred on the Grand Court are set out in s.241; s.242 merely sets out matters relevant to the exercise of the discretion as to whether or not to exercise those powers. Further, it does not follow from s.242(1)(c) that s.241 is concerned with the reversal of antecedent transactions. Section 242(1)(c) refers to the prevention of preferential or fraudulent dispositions rather than their reversal. Moreover, the objective of the prevention of such dispositions may be achieved by exercise of those powers which are granted under s.241(1) in (i) the grant of relief under s.241(1)(a) recognizing the title of the foreign officeholder to the debtor's property and the turnover of that property to the officeholder under s.241(1)(e), and (ii) the making of other ancillary orders to prevent a fraudulent or preferential disposition (by facilitating proceedings for relief in the foreign bankruptcy court or any other appropriate foreign court, by ordering the delivery of documents, or an examination under s.241(1)(d));

(d) The trustee's reliance on s.241(1)(e)—which permits the court to order "the turnover to a foreign representative of any property belonging to a debtor"—is misplaced because it is based on a *non sequitur.* It does not follow that, in empowering the court to turn over the debtor's property to a foreign officeholder, the legislature has necessarily empowered the court also to apply avoidance provisions in order to recover assets. Had the legislature intended to confer on the court power to apply avoidance provisions in support of a foreign insolvency, it would have done so in express terms. The natural construction of s.241(1)(e) is that it permits a remission of assets to a foreign insolvency proceeding in the same way as is possible at common law; and

(e) Section 241(1)(e) of the Companies Law applies only to the "property belonging to the debtor." This does not include the proceeds of avoidance claims. There is a clear and long standing distinction under English law between the property of the debtor and statutory causes of action vested in an officeholder, the proceeds of which form part of the insolvent estate. In support of that proposition, the fund cited *In re MC*

Bacon Ltd. (No. 2) (6), *Re Ayala Holdings Ltd. (No. 2)* (2) and *In re Oasis Merchandising Ltd.* (9). The Companies Law adopts the same approach: s.145 applies only after the commencement of a winding up as, following the reasoning in *Oasis*, the right of action in respect of a voidable preference and the fruits of such an action are not property of the company. Although s.140(1) of the Companies Law provides that "the property of the company shall be applied in satisfaction of its liabilities *pari passu*," that does not assist the trustee's argument. In the context of s.140(1), "the property of the company" includes the proceeds of avoidance actions which have become part of the estate and which therefore fall to be distributed rateably amongst the creditors of the company. But it does not follow that the different term "property belonging to the debtor" in the different context of s.241(1)(e) bears the same meaning. The different language used in s.242(1)(e) shows that the term "property belonging to the debtor" was intended to bear a different meaning to the term "property of the company" in s.140(1). In particular, the word "belonging" shows that s.241(1)(e) identifies the relevant property by reference to the debtor's ownership of that property: the same is not true of s.140(1), which does not use the word "belonging."

41. It is, I think, common ground that the question of whether the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign bankruptcy proceedings turns on the true construction of those statutory provisions. That is to be determined in accordance with the principles of statutory construction applicable in this jurisdiction. Having set out the contentions of the parties at some length, I can state my own conclusions on this question shortly.

42. First, I think that the judge was correct to hold that s.241 of the Companies Law does not confer a general power on the court to make such orders ancillary to a foreign bankruptcy proceedings as it thinks fit. The power conferred by s.241 is to be exercised only for one or more of the purposes described in paras. (a)–(e) of sub-s. (1). The relevant question, therefore, is whether a power to make transaction avoidance orders—that is to say, orders setting aside pre-insolvency (or pre-liquidation) transactions on the grounds that they are fraudulent or preferential (in the sense understood by insolvency practitioners)—is a power which is exercisable for one or more of those purposes. There is no power "to order other appropriate relief" (contrast s.304(b)(3) of the US Bankruptcy Code).

43. Secondly, s.242(1)(c) of the Companies Law—which requires that, in determining whether to make an ancillary order under s.241, the court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate consistent with ". . . the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate"—is, I think, a clear indication that it was intended

by the legislature that, in exercising the powers conferred by s.241(1), the court would have regard to the need, in the context of the foreign bankruptcy proceeding, to avoid preferential or fraudulent dispositions. I accept that s.242(1)(c) does not add to the purposes for which orders ancillary to a foreign bankruptcy proceeding may be made under s.241(1) of the Law, but it does point to the conclusion that the legislature contemplated that orders made for those purposes would include orders which had the effect of preventing preferential or fraudulent dispositions of property comprised in the debtor's estate.

44. Thirdly, I am not persuaded that s.242(1)(c) of the Companies Law was included among "the matters which will best assure an economic and expeditious administration of the debtor's estate" solely as a guide to the exercise of the power to make orders ancillary to a foreign bankruptcy proceeding for the purposes described in para. (a) (recognizing the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor) or para. (d) (requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative) of s.241(1). The better view, as it seems to me, is that s.242(1)(c) was also included as a guide to the exercise of the power to make orders ancillary to a foreign bankruptcy proceeding for the purpose described in s.241(1)(e) (ordering the turnover to a foreign representative of any property belonging to a debtor).

45. Fourthly, the above—as it seems to me—invites the question: can it properly be said that the making of a transaction avoidance order in aid of a foreign bankruptcy proceeding is the making of an order ancillary to a foreign bankruptcy proceeding for the purposes of, under s.241(1)(e), "ordering the turnover to a foreign representative of any property belonging to a debtor"? In my view, the answer to that question is "Yes." The making of a transaction avoidance order restores to the debtor the property which is the subject of that order and so enables the court to order "the turnover" of that restored property to the foreign representative.

46. Fifthly, so understood, the reference to "property belonging to a debtor" in s.241(1)(e)—rather than to "property comprised in the debtor's estate" (the expression used in s.242(1)(c))—gives rise to no difficulty. The avoidance of "preferential or fraudulent dispositions of property comprised in the debtor's estate" has the effect of restoring the property to the debtor, so enabling an order to be made for the turnover to the foreign representative of "property belonging to a debtor" in the strict sense. Properly understood, as it seems to me, the distinction between the reference to "property comprised in the debtor's estate" in s.242(1)(c)—and to "the debtor's estate" elsewhere in s.242(1)—and the reference to "property belonging to a debtor" in s.241(1)(e) is appropriate.

47. Sixthly, while recognizing the likelihood that the legislative draftsman drew on the provisions of s.304 of the US Bankruptcy Code in the course of settling the provisions which became ss. 241 and 242 of the Companies Law—in that the word "turnover" in s.241(1)(e) is likely to have been taken from s.304(b)(2) and that the provisions in s.242(1) follow closely the provisions in s.304(c) of the US Bankruptcy Code—I do not think it appropriate to construe ss. 241 and 242 of the Companies Law by reference to the US Bankruptcy Code. I think that the judge was right to reject that approach for the reason which he gave. I reach my conclusion on the basis of what I take to be the true construction of ss. 241 and 242 in accordance with the law of the Cayman Islands.

48. Accordingly, I would hold that the court does have jurisdiction under ss. 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign bankruptcy proceedings.

49. I turn now to the question of whether, if the court does have jurisdiction under ss. 241 and 242 to apply transaction avoidance provisions in aid of foreign bankruptcy proceedings, the applicable provisions were those of the foreign insolvency law or the law of the Cayman Islands.

Are the applicable provisions those of the foreign insolvency law or the law of the Cayman Islands?

50. The trustee contends that the applicable provisions are those of the foreign insolvency law—in the present case, the law of the United States. Again, the grounds upon which that contention is advanced are set out in the trustee's memorandum of grounds of appeal and developed in the skeleton arguments filed on his behalf and in oral submissions to the court. They may be summarized as follows:

(a) It is said that the judge erred in holding that the court's statutory power to make orders which are ancillary to foreign bankruptcy proceedings does not require or imply the application of the law which governs the conduct of those proceedings. It is said that, although the judge accepted that (i) the commencement of foreign bankruptcy proceedings will give rise to a bankruptcy estate (*2013 (1) CILR 164, at para. 23*); (ii) the parameters of that estate will be governed by the applicable foreign bankruptcy law (*ibid.*); (iii) the administration of that estate will involve the reversal of antecedent transactions (such as preferences and fraudulent transfers) in accordance with the applicable provisions of the foreign insolvency law (*ibid., at para. 15*); and (iv) the application of that foreign insolvency law to the reversal of such transactions will be an essential part of the conduct of the bankruptcy proceedings (*ibid.*), he erred in failing to draw the correct conclusion. He ought to have held that the court's jurisdiction to make orders which are ancillary to the foreign bankruptcy

proceedings requires (or at least permits) the application of the foreign bankruptcy law which governs the conduct of those proceedings and the parameters of the bankruptcy estate;

(b) In particular, it is said that, since the boundaries of the foreign bankruptcy estate will always be governed by the relevant foreign insolvency law, the judge ought to have held that s.242(1)(c) of the Companies Law requires, or implies, the choice (or at least the ability to choose) and/or the application (or at least the ability to apply) of the foreign insolvency law which governs the reconstitution of the relevant "estate";

(c) Further, it is said that the judge erred in holding (*ibid., at para. 24*) that the reference to "comity" in s.242(1) of the Companies Law does not require or imply the choice and/or application of the foreign insolvency law. It is said that, although he recognized (*ibid.*) that comity is "the recognition which one nation allows within its territory to the legislative ... acts of another nation," the judge failed to appreciate that, in the context of transaction avoidance claims in cross-border insolvencies, the "legislative acts" which must, should, or at least can be recognized within the Cayman Islands are the foreign transaction avoidance laws which apply to the relevant foreign insolvency proceedings. It is said that he ought to have held that the reference to "comity" in s.242(1) requires, or implies, the choice (or at least the ability to choose) and/or application (or at least the ability to apply) of the foreign insolvency law to transaction avoidance claims;

(d) It is said that the judge erred in holding (*ibid., at para. 26*) that s.241(2)(b) of the Companies Law does not show that s.241 as a whole requires the application of substantive foreign law. It is said that the judge ought to have recognized that, if the relief available under s.241(1) were always governed by Cayman insolvency law, the qualification in s.241(2)(b) would not be necessary because the limit imposed by s.103(1) of the Companies Law would always apply in any event; that s.241(2)(b) is necessary only if (as the trustee contends) s.241 requires (or at least permits) the court to grant relief in accordance with substantive foreign insolvency law; that s.242(2)(b) serves to impose a limit on the relief which might otherwise be available under substantive foreign insolvency law; and that s.241(2)(b) is a clear indication that s.241 as a whole requires (or at least permits) the application of foreign insolvency law;

(e) It is said that the judge erred in failing to interpret s.241 of the Companies Law in accordance with the principle of "modified universalism," as applied to s.304 of the US Bankruptcy Code in *In re Maxwell Communication Corp. PLC* (7)—and as applied to English common law in *Rubin* v. *Eurofinance SA* (12) and cases cited therein. It is said that "modified universalism" requires that, in general, all avoidance actions

relating to an estate should be governed by the same law, being the law of the relevant insolvency proceeding; and

(f) In particular, it is said that the judge erred in failing to interpret s.241 of the Companies Law in accordance with the principles of fairness, equity and equality—which (it is said) require that all creditors who are in a similar position should be treated alike and, in particular, require that the same substantive law should apply to all preference claims in relation to a particular insolvency proceeding. It is said that the judge failed to take account of s.242(1)(a) of the Companies Law, which expressly requires the court to achieve "the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled." Such "just treatment," it is said, cannot be achieved unless all creditors (wherever they may be domiciled) are bound by the same rules as to the adjustment of preferential transfers because the adjustment of preferential transfers are an important part of the foreign insolvency law's system of distribution and an essential mechanism for ensuring *pari passu* treatment of creditors in the relevant insolvency proceeding.

51. In the alternative, it is said that the judge should have held that s.241 of the Companies Law confers a power to apply Cayman Islands insolvency law, which reinforces the common law position.

52. The fund contends that there is no proper basis for an argument that, in enacting what became Part XVII of the Companies Law, the legislature intended a radical departure from the common law by conferring on the court a power to apply foreign law avoidance provisions in support of a foreign insolvency. Its submissions in support of that contention may be summarized as follows:

(a) The power to apply substantive provisions of foreign law would be so significant a power to confer on a court that, if that had been the intention of the legislature, it would have been conferred in express terms (compare s.426 of the UK Insolvency Act 1986). The forms of relief set out in s.241(1)(a)–(e) of the Companies Law do not require the application of foreign law and cannot be said to mandate the application of foreign law by implication;

(b) The premise underlying the trustee's submission that the avoidance laws of the relevant foreign jurisdiction form an essential part of the foreign insolvency proceeding is that, if the court is empowered to recognize a foreign insolvency proceeding and to make orders ancillary to that proceeding, it must necessarily be empowered to recognize and give effect to the avoidance provisions relating to that insolvency. This premise is flawed. Section 241 of the Companies Law does not empower the court to recognize a foreign insolvency proceeding; rather, it empowers the court to grant specific forms of relief (which are available under Cayman law) as orders ancillary to that proceeding;

(c) The trustee's reliance on the reference to "comity" in s.242(1)(g) of the Companies Law is misplaced. Comity is not a sufficient basis for giving effect to a foreign law or for the recognition of a foreign judgment. In support of that proposition, the fund cited *Schibsby* v. *Westenholz* (13) (L.R. 6 Q.B. at 159) and *Adams* v. *Cape Indus. PLC* (1) ([1990] Ch. at 513). It is possible for the court to give effect to the need to have regard to comity by granting one of the forms of relief set out in s.241(1)(a)–(e) without applying foreign law;

(d) The trustee's submission that the cross-reference in s.241(2)(b) of the Companies Law to s.103(1) would be redundant (because it is part of the insolvency law of the Cayman Islands) unless ss. 241 and 242 are construed as requiring (or at least permitting) the application of foreign law—because, it is said, if the relief available under s.241(1) were governed exclusively by Cayman insolvency law, the qualification in s.241(2)(b) would not be necessary—is not well-founded. Section 241(1)(d) provides a power to make an order for examination and discovery: the limit in s.241(2) is necessary to make clear that the power conferred by s.241(1)(d) is no wider than the power contained in s.103;

(e) The trustee can obtain no assistance from the "principle of modified universalism." The concept of universalism is that bankruptcy (whether personal or corporate) should be unitary and universal so that there should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and which applies universally to all the bankrupt's assets. But that is an aspiration, not a reality. Full universalism can be attained only by international treaty. The aspiration is no basis, as a matter of law, for founding any jurisdiction in a court to apply a foreign system of law;

(f) General concepts of fairness, equity and equality are no foundation for a finding that the legislature has conferred power on courts in its jurisdiction to apply the laws of another legal system; and

(g) The trustee's contention that the Cayman statute should simply be construed in the same way as s.304 in the US Bankruptcy Code is not well-founded. Although there may be similarities in expression in s.304 and s.241 of the Companies Law—such that it is possible to speculate that the legislative draftsman may have used the language of s.304 as a model for s.241 of the Companies Law—it does not follow that the legislature intended that all the US jurisprudence relating to s.304 was to be imported into Cayman law and was to inform the construction of s.241. The starting point is that s.241 is to be construed as part of the Companies Law. The trustee is unable to point to any materials admissible in accordance with normal principles of statutory construction which can be said to evidence any intention on the part of the legislature to import the US legal principles relating to s.304 into Cayman law. Further, there is an important

difference between s.241 of the Companies Law and s.304 of the US Bankruptcy Code. The critical provision in s.304 which led the US court to find jurisdiction to apply foreign law was the express power conferred to order any "other appropriate relief"; that power has not been included in s.241(1).

53. This question, whether the applicable provisions are those of foreign law or the law of the Cayman Islands, also turns on the true construction of the provisions in ss. 241 and 242 of the Companies Law. As I have said earlier in this judgment, I do not think it appropriate to construe those sections by reference to the US Bankruptcy Code or, I may add, by reference to decisions in the US courts.

54. I acknowledge, as did the judge, the apparent illogicality of applying domestic law to transaction avoidance issues when the distribution regime is governed by a foreign law. But, like the judge, I take the view that that would represent so radical a departure from the common law that, had the legislature intended that result, it could have been expected to say so in clear terms. It did not do so, either in clear terms or at all. Further, to hold that it was intended that the court should apply foreign law in cases in which the debtor company was not registered under Part IX of the Companies Law would give rise to an anomalous distinction in a case in which the court, acting in accordance with the direction in s.242(2), made a winding-up order under Part V.

55. Accordingly, I would hold that the court does not have power, pursuant to ss. 241 and 242 of the Companies Law, to apply the avoidance provisions of foreign insolvency law.

The first issue for determination on these appeals: whether the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply transaction avoidance provisions of foreign insolvency law (and, in particular, provisions of US Bankruptcy Law) in aid of foreign insolvency proceedings

56. As I have said, this issue is raised by the trustee in his notice of appeal, filed on January 25th, 2013 under reference CICA 1/2013. The trustee contends that the judge was wrong to hold, in answer to Preliminary Issue 1, that that the court was not able to apply US insolvency law under s.241 and/or s.242 of the Companies Law. It is said that he should have held that the court has such jurisdiction and, in particular, that it has jurisdiction under those sections to apply substantive provisions of foreign insolvency law for the purpose of reversing antecedent transactions such as preferences and fraudulent transfers.

57. For the reasons which I have set out, I think that the judge was right to hold as he did. I would answer this issue in the negative: the court has no jurisdiction under ss. 241 and 242 of the Companies Law to apply

transaction avoidance provisions of foreign insolvency law (and, in particular, provisions of the US Bankruptcy Law) in aid of foreign insolvency proceedings.

The second issue for determination on these appeals: whether the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply transaction avoidance provisions in Cayman Islands' insolvency legislation in aid of foreign insolvency proceedings

58. The trustee's notice of appeal, filed on January 25th, 2013 under reference CICA 1/2013, seeks an order declaring, on Preliminary Issue 2, that the court has jurisdiction under ss. 241 and 242 of the Companies Law to apply avoidance provisions of the Cayman Islands' insolvency law in aid of a foreign insolvency proceeding.

59. For the reasons which I have set out, I think that the judge was wrong to hold as he did. I would answer this issue in the affirmative: the court does have jurisdiction under ss. 241 and 242 of the Companies Law to apply transaction avoidance provisions of Cayman Islands insolvency law in aid of a foreign insolvency proceeding.

60. **MOTTLEY** and **CAMPBELL, JJ.A.** concurred.

Orders accordingly.

Higgs & Johnson for Picard and Bernard L. Madoff Inv. Secs. LLC; *Mourant Ozannes* for Primeo Fund.

[2020 (2) CILR 787]

IN THE MATTER OF LATAM FINANCE LIMITED

IN THE MATTER OF PEUCO FINANCE LIMITED

IN THE MATTER OF PIQUERO LEASING LIMITED

GRAND CT. (Kawaley, J.) August 24th, 2020

Conflict of Laws — companies — cross-border insolvency — approval of court-to-court communication protocol — common law duty to assist foreign insolvency courts

The court was asked to approve a court-to-court communications protocol.

Joint provisional liquidators (the JPLs) were appointed with "light-touch" powers to supervise a restructuring on the application of each of three companies. It was anticipated that the companies would seek relief under Chapter 11 of the US Bankruptcy Code. There were also proceedings in Chile and Colombia.

The JPLs applied for orders for directions that a cross-border court-to-court communications protocol be approved subject to the approval of the same by the relevant courts in the United States, Chile and Colombia. The JPLs relied on O.21 of the Companies Winding Up Rules 2018, Practice Direction No. 1 of 2018 (Court-to-court Communications and cooperation in cross-border insolvency and restructuring cases) and the court's practice of promoting cross-border cooperation in insolvency cases.

Held, granting the orders sought approving the protocol:

(1) The principal foundation of the court's jurisdiction to approve the protocol was the common law duty to assist foreign insolvency courts in service of the goal of a universal application of the regime for dealing with creditors' claims being applied in the main insolvency proceeding (modified universalism). The principle of comity had been identified as underpinning the common law assistance power. Subsidiary sources of jurisdictional rules included the court's inherent jurisdiction to manage its own processes. The JPLs had rightly identified as important Practice Direction No. 1 of 2018, which approved the American Law Institute/ International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the ALI/III Guidelines) and the Judicial Insolvency Network Guidelines for Communication and

Cooperation between Courts in Cross-Border Insolvency Matters (the JIN Guidelines). The Practice Direction and the Guidelines could be viewed as emerging sources of law which provided a jurisdictional basis for approving the protocol (paras. 17–26).

(2) The main governing principles applicable to an application for the court's approval of a court-to-court communication protocol were that (a) the court was under a positive duty to assist the primary foreign main insolvency or restructuring proceedings unless there were good reasons not to do so; (b) there was a starting assumption that a clear framework for communication between the court and any relevant foreign courts in cross-border insolvency cases would enhance the efficiency of the cross-border case; and (c) there was a starting assumption that the ALI/III Guidelines and the JIN Guidelines (approved in the Practice Direction) were suitable guidelines to adopt and apply in cross-border cases. It was consistent with constitutional principles of judicial independence, the more pragmatic principles of modified universalism and the inherent powers of the court to protect the efficiency and integrity of its processes that the particularities of how to advance the efficiency of cross-border insolvency proceedings at the operational case management level should predominantly be grounded in such soft law instruments, which could be viewed as a form of extra-judicial judge-made transnational procedural law. There was a long and substantial history of the court coordinating its hearings with parallel insolvency and restructuring proceedings in foreign courts and commun-icating indirectly with such courts. The cooperation and coordination between the court and foreign insolvency courts in past cases had been grounded in the court's common law duty to assist foreign courts and to promote the most economically efficient administration of transnational insolvency estates (paras. 26–32).

(3) In light of the clarity and depth of the common law principles commending judicial coordination and communication in cross-border insolvency cases, combined with the recent promulgation of the Practice Direction, it was obvious that the protocol could only properly be approved. The protocol merely sought formal approval of the already administratively pre-approved ALI/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases. The judicial approval sought also implicitly required the court to recognize the Chapter 11 proceeding as a foreign main proceeding which the court, in conjunction with the courts in Chile and Colombia, was willing to assist. This was also uncontroversial. The requisite recognition had already effectively been granted by the court's initial appointment of the JPLs for the explicit purpose of pursuing a restructuring. It was explicitly contemplated that such restructuring would take place primarily through Chapter 11 proceedings before the US Bankruptcy Court (paras. 33–34).

Cases cited:

(1) *BCCI (Overseas) Ltd., In re,* 2009 CILR 373, considered.

(2) *CW Group Holdings Ltd., Re*, FSD 113 and 122 of 2018, Grand Ct., August 3rd, 2018, unreported, considered.
(3) *Cambridge Gas Transport Corp.* v. *Creditors' Cttee. (Navigator Holdings plc)*, [2006] UKPC 26; [2007] 1 A.C. 508; [2006] 3 W.L.R. 689; 2005–06 MLR 297; [2006] 3 All E.R. 829; [2007] 2 BCLC 141; [2006] BCC 962, considered.
(4) *China Agrotech Holdings Ltd., In re*, 2019 (2) CILR 356, considered.
(5) *Da Yu Fin. Holdings Ltd., Re*, [2019] HKCFI 2531; October 17th, 2019, considered.
(6) *Impex Servs. Worldwide Ltd., In re*, 2003–05 MLR 115; [2004] BPIR 564, *dicta* of Deemster Doyle considered.
(7) *Lancelot Investors Fund Ltd., In re*, 2009 CILR 7, considered.
(8) *Nanfong Intl. Invs. Ltd., In re*, 2018 (2) CILR 321, considered.
(9) *Singularis Holdings Ltd.* v. *PricewaterhouseCoopers*, [2014] UKPC 36; [2015] A.C. 1675; [2015] 2 W.L.R. 971; [2014] 2 BCLC 597; [2015] BCC 66, considered.

Legislation construed:
Grand Court Law (2015 Revision), s.11: The relevant terms of this section are set out at para. 18.
M. Hecht and *Z. Nolan* for the joint provisional liquidators.

1 **KAWALEY, J.:**

Background

The JPLs were appointed with "light-touch" powers to supervise a restructuring on the application of each of the companies on May 28th, 2020 (LATAM Finance Ltd. ("LTM") and Peuco Finance Ltd. ("PF")) and on July 10th, 2020 (Piquero Leasing Ltd. ("PL")), respectively. It was anticipated by each petition that the companies would seek relief under Chapter 11 of the US Bankruptcy Code.

2 By *ex parte* summonses each dated July 22nd, 2020, the JPLs applied for orders for directions that:

> "1. The certain cross-border court-to-court communications protocol be approved subject to the approval of the same by each of the United States Bankruptcy Court for the Southern District of New York, the 2nd Civil Court of Santiago, Chile and the Superintendencia de Sociedades in Colombia."

3 The applications were supported by the first affidavit of Jeffrey Stower which explained how the protocol idea had developed (prompted by the suggestion of the Chilean court) and placed the proposed form of protocol before the court. Counsel for the JPLs addressed the court's jurisdiction to grant the applications, albeit by reference to general principles being

unable to identify any directly applicable previous published decision of this court. At the end of the hearing I granted the applications and made orders, *inter alia*, that:

> "1. The cross-border court-to-court communications protocol as appended hereto (the 'Cross-Border Protocol'), as it may be amended or supplemented by further order of this Honourable Court, be approved in all respects subject to approval of the same by each of the United States Bankruptcy Court for the Southern District of New York (the 'U.S. Court'), the 2nd Civil Court of Santiago, Chile and the Superintendencia de Sociedades in Colombia (the 'Courts')."

4 As this appears to be the first time that this court has approved a "court-to-court communications" protocol, and the jurisdictional basis for this decision was somewhat unclear, I now give reasons for this decision.

The JPLs' submissions

5 In the JPLs' skeleton argument, it was first submitted that the "law applicable to the presentation and consideration of international protocols is contained in Order 21 of the Companies Winding Up Rules, 2018 (the 'CWR')" (para. 10). It was further submitted that the scope of the proposed protocol was consistent with the requirements of CWR, O.21, r.3. As I observed in the course of hearing, this was a difficult basis to rely upon given the apparent non-alignment between the types of protocols contemplated by O.21 and the narrow scope of the proposed "cross-border protocol" ("the protocol").

6 It was then submitted as follows:

> "17. Importantly, Practice Direction No. 1 of 2018 ('PD') stipulates that consideration should be given by provisional liquidators to the incorporation of the certain guidelines into international protocols and that the protocol may, subject to the approval of the Court; cover other matters including court-to-court communications and cooperation as provided for in the Guidelines.
>
> 18. It is noted that the Cross-Border Protocol is a distilled version of the ALI/ABA/III Guidelines, which are expressly referred to in the PD as being appropriate to the jurisdiction of the Cayman Islands."

7 Footnote 36 pointed out:

> "There are two main sets of guidelines (the 'Guidelines') for court-to-court communications and cooperation which might be adopted in this jurisdiction, with appropriate modifications. These are the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (the 'ALI/ABA/III Guidelines') and The Judicial Insolvency

Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters."

8 In the course of the hearing, Mr. Hecht sensibly accepted that Practice Direction No. 1 of 2018 ("the practice direction") addressed the protocol more directly than any other source of jurisdiction advanced.

9 Reliance was also placed on the fact that the JPLs had been empowered by para. 5(h) of the order appointing them in respect of each of the companies—

"to enter into such protocol or other agreement as the JPLs deem appropriate for the co-ordination of these proceedings, the proceedings that have been commenced by the Company and other entities within the LATAM group of companies under Chapter 11 of Title 11 of the U.S. Bankruptcy Code and any other like proceedings for the winding up, restructuring and/or reorganisation of the Company and other companies within the LATAM group of companies, subject to the approval of this Court and the U.S. Bankruptcy Court for the Southern District of New York in the United States of America."

10 This power was potentially relevant because it contemplated protocols dealing with cross-border "co-ordination of . . . proceedings," but the present application related to a protocol to be entered into, on its face, between the respective courts, and the JPLs appeared to be acting as facilitators of the protocol rather than intending to actually enter into it.

11 Finally, most pertinently, reliance was placed on this court's established practice of promoting cross-border cooperation in insolvency cases. It was submitted by Mr. Hecht and Ms. Nolan in their skeleton:

"21. This Honourable Court has demonstrated its willingness, on various occasions, to cooperate with foreign Courts to ensure the efficient management of cross-border insolvency proceedings, including, by approving the entry into international protocols.

22. Indeed, this Honourable Court in the Matter of Lancelot Investors Fund Limited [2009 CILR 7], adopted the language of Lord Denning, who, when sitting in the Court of Appeal in Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp. (7) ([1978] A.C. at 560) stated that:

'It is our duty and our pleasure to do all we can to assist [the foreign] court, just as [the English court] would expect the [foreign] court to help us in like circumstances.'"

Legal findings: the jurisdictional basis for entering into a court-to-court communications protocol

Sources of jurisdiction

12 The Cayman Islands, so far as cross-border insolvency law is concerned, remains to a significant extent a "traditional" common law jurisdiction. The rules of private international law, or the conflict of laws, have not been codified and cannot be discerned in single set of statutory rules. The importance of international financial centres actively utilizing common law powers in the absence of comprehensive statutory international cooperation codes has long been recognized. As Deemster David Doyle opined in *Re Impex Services Worldwide Ltd.* (6) (2003–05 MLR 115, at para. 52):

> "52 Here on the Isle of Man, we are all citizens of the Island but we are also citizens of the global community in which we live, work and contribute. We need to recognize our international as well as our local responsibilities. If the English High Court requires assistance then the Manx High Court, if it has jurisdiction and subject to any necessary safeguards, should not, in a proper case, be slow to provide such assistance."

13 England and Wales was also primarily reliant on common law cross-border insolvency rules of private international law for many years. Then, partly under European Union influences, the ambit of the common law was narrowed in England and Wales by increased reliance on statutory rules. As Lord Hoffmann observed, dealing with a Privy Council appeal from the Isle of Man in *Cambridge Gas Transport Corp.* v. *Creditors' Cttee. (Navigator Holdings plc)* (3) ([2007] 1 A.C. 508, at paras. 16–22):

> "16 The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated. For example, in *Solomons* v. *Ross* . . . a firm in Amsterdam was declared bankrupt and assignees were appointed. An English creditor brought garnishee proceedings in London to attach £1,200 owing to the Dutch firm but Bathurst, J., sitting for the Lord Chancellor, decreed that the bankruptcy had vested all the firm's movable assets, including debts owed by English debtors, in the Dutch assignees. The English creditor had to surrender the fruits of the garnishee proceedings and prove in the Dutch bankruptcy.
>
> 17 This doctrine may owe something to the fact that 18th and 19th century Britain was an imperial power, trading and financing

development all over the world. It was often the case that the principal creditors were in Britain but many of the debtor's assets were in foreign jurisdictions. Universality of bankruptcy protected the position of British creditors. Not all countries took the same view. Countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors. But universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view.

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 and the Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), giving effect to the UNCITRAL Model Law. In the present case, however, we are concerned solely with the common law.

. . .

21 Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance.

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, s.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."

14 The following principles which are still largely uncontroversial can be extracted from the quoted extracts from *Cambridge Gas*:

(a) there is a common law rule of private international law which affirms the desirability that an insolvency proceeding which crosses jurisdictional borders should, so far as is practically possible, be administered on a global (or universal) basis within a single "main proceeding";

(b) where a single proceeding is not possible and the courts in an ancillary proceeding are requested to assist the foreign main proceeding, the ancillary court is under a common law duty to assist the foreign court, unless there are discretionary or mandatory statutory grounds for refusing relief; and

(c) the combination of these two common law rules is known as "modified universalism."

15 In the post-*Cambridge Gas* era, Anthony Smellie, C.J. identified the deeper underpinnings of the common law assistance power as being the wider, and older, principle of "comity." Writing extra-judicially in "A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-Operation," 2(4) *Beijing Law Review* 145 (2011), he opined as follows (at 147):

> "The over-arching principle is, of course, Comity—that civilized notion that requires reciprocity of co-operation and assistance between the courts of different countries, classically described by Lord Denning in the Westinghouse case in relation to a request by the United States Federal Court in this way:
>
> > 'It is our duty and pleasure to do all we can to assist that court, just as we would expect the United States Court to help us in like circumstances. Do unto others as you would be done by.'"

16 In *Singularis Holdings Ltd.* v. *PricewaterhouseCoopers* (9), in which actual decision in *Cambridge Gas* was disapproved, Lord Sumption described the sources of the modified universalism principle as follows ([2015] 1 A.C. 1675, at para. 19):

> "In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? *In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law.*" [Emphasis added.]

17 It is this common law duty to assist foreign insolvency courts in service of the goal of a universal application of the regime for dealing with creditors' claims being applied in the main insolvency proceeding, which is the principal foundation of this court's jurisdiction to approve the protocol in the present case.

18 However, it is important to acknowledge the relevance of other subsidiary sources of jurisdictional rules which are built on top of the foundations of comity and the common law duty to assist foreign insolvency courts. The next most important, in my judgment, is the inherent jurisdiction of the Grand Court to manage its own processes (*i.e.*, its procedures). Section 11 of the Grand Court Law (2015 Revision) provides:

> "11. (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by—
>
> (a) Her Majesty's High Court of Justice; and
>
> (b) the Divisional Courts of that Court,
>
> as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amending or replacing that Act."

19 This statutory provision incorporates into Cayman Islands law the common law rules of practice under which English superior courts of record have the right to manage their own procedures to prevent the court's processes being misused. Those inherent powers based almost entirely on judge-made law are supplemented by rules of court which are in substance made not by the executive or legislative branches of Government, by the judiciary itself.

20 Where a case management power is not found in legislation or, for present purposes, in the CWR, the gap may generally be filled by the court's inherent jurisdiction. In some contexts, an inherent common law power may overlap with or be supplemented by a rule of court. A helpful example is the case management stay in ordinary civil litigation. In *In re Nanfong Intl. Invs. Ltd.* (8), Moses, J.A. stated (2018 (2) CILR 321, at para. 42):

> "42 There is no specific power contained within Cayman Islands legislation for the imposition of a case management stay. The courts invoke their inherent jurisdiction and their general case management powers derived from the preamble to the Grand Court Rules 1995 (Revised) and the *Financial Services Division Guide*, 2nd ed., s.A4.

at 9–10 (2015), which reproduces the same text (see *CIGNA Worldwide* v. *ACE Ltd* . . . (2012 (1) CILR 55, at paras. 55–57))."

21 This passage illustrates, first, that case management powers as significant as the power to grant a stay of proceedings are derived from the court's inherent jurisdiction. But, further, the passage demonstrates that the exercise of the power may be derived not just from formally promulgated rules of court, but also from practice directions such as the Financial Services Division Guide which, incidentally, reproduces the overriding objective from the Preamble to the Grand Court Rules. It is this inherent jurisdiction, fortified it might be said by the constitutional protections for judicial independence,[1] which may be viewed as the source of the power to issue practice directions to signify the court's general view of the procedural approach to various types of cases and matters. In the present case, the JPLs' counsel rightly identified as important Practice Direction No. 1 of 2018, "Court-to-court Communication and cooperation in cross-border insolvency and restructuring cases," issued by Anthony Smellie, C.J. on May 31st, 2018 ("the practice direction").

22 The first section of the practice direction merits reproduction in full:

"The Guidelines—what they cover and when they should be used.

1. This practice direction deals with the use and adoption in cases pending before the Grand Court of the Cayman Islands (Court) of published guidelines relating to court-to-court communications and cooperation in cross-border insolvency and restructuring proceedings.

2. *There are two main sets of guidelines (Guidelines) for court-to-court communications and co-operation which might be adopted in this jurisdiction, with appropriate modifications. These are the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases and The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters.* Copies of the current versions of both sets of Guidelines are attached to this Practice Direction.

3. *The Guidelines primarily cover the procedural rules that may be adopted and applied in particular cross-border cases for regulating the manner of communications between the courts involved, the appearance of counsel in each court, notification to parties in parallel proceedings, the acceptance as authentic of official documents or orders made in the foreign jurisdiction or court and joint hearings.* They are to be applied either by being incorporated in a protocol between the respective officeholders which protocol is then approved

by the Court (and other courts involved as required) or by a separate order of the Court without a protocol (and orders of the other courts involved as required), in each case subject to such modifications as may be required in the circumstances.

4. *The Guidelines are relevant where the insolvency or restructuring proceedings are being supervised by, or involve related applications to, courts in more than one jurisdiction. Such proceedings will include liquidation (including provisional and voluntary liquidation) and other insolvency or restructuring proceedings involving applications to court.* Accordingly, the Guidelines will be relevant to schemes of arrangement relating to a company being supervised by the Court which also involve a parallel scheme (or debt adjustment proceeding) or ancillary proceedings in another jurisdiction (and may also be relevant in cases in which the Court has appointed a receiver or other officer of the Court and where the Cayman Islands Monetary Authority has appointed a controller pursuant to the Cayman Islands regulatory laws). The Guidelines can apply whether the officeholder is appointed by the Court or is appointed out of Court and whether the person is appointed in respect of a company (incorporated in the Cayman Islands or abroad) other legal entity (established in the Cayman Islands or abroad) or an individual.

5. *Officeholders appointed in the Cayman Islands, companies subject to restructuring proceedings supervised by the Court and other interested parties involved in cross-border insolvency cases should consider, at the earliest opportunity, whether to incorporate some or all of the Guidelines with suitable modifications either into an international protocol to be approved by the Court or an order of the Court adopting the Guidelines.*" [Emphasis added.]

23 The practice direction appears designed to achieve the following objectives:

(a) it informally and administratively approves the ALI/III Guidelines and the JIN Guidelines as suitable for use in cross-border insolvency cases;

(b) it explains that these Guidelines are relevant "where the insolvency or restructuring proceedings are being supervised by, or involve related applications to, courts in more than one jurisdiction"; and

(c) it recommends that Cayman Islands office-holders "consider, at the earliest opportunity, whether to incorporate some or all of the Guidelines with suitable modifications either into an international protocol to be approved by the Court or an order of the Court adopting the Guidelines."

24 It may immediately be seen that the practice direction, probably like all practice directions, does not seek to promulgate new law. It seeks to

nudge, rather than push, office holders towards considering in suitable cases inviting the court to adopt either one of the two annexed sets of guidelines. The practice direction approves the respective guidelines in principle as being in general terms "fit for purpose" for use in cross-border insolvency cases. The recommended guidelines are themselves international practice directions which various other courts pre-approved. The guidelines bear the *imprimatur* of distinguished sitting and former judges, not just from the United States, Canada and England and Wales, but from countries in Africa, Asia, Australasia and Eastern Europe as well. The introduction to the ALI/III Guidelines ("the guidelines") concludes as follows:

> "The Guidelines are not meant to be static, but are meant to be adapted and modified to fit the circumstances of individual cases and to change and evolve as the international insolvency community gains experience from working with them. They are to apply only in a manner that is consistent with local procedures and local ethical requirements. They do not address the details of notice and procedure that depend upon the law and practice in each jurisdiction.
>
> However, the Guidelines represent approaches that are likely to be highly useful in achieving efficient and just resolutions of cross-border insolvency issues. Their use, with such modifications and under such circumstances as may be appropriate in a particular case, is therefore recommended."

25 The guidelines then set out a series of practical operational principles, essentially different forms of communications, such as exchanging copies of court filings, communications between judges (on notice to the parties limited to logistical matters) and joint hearings. The overarching guiding principle is best encapsulated in Guideline 2:

> "A Court may communicate with another Court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other jurisdiction."

26 The practice direction and the ALI/III and JIN Guidelines may be viewed as emerging sources of law which have been described as "soft law instruments" (Gert-Jan Boon and Bob Wessels, "Soft Law Instruments on Restructuring and Insolvency Law: Why They Matter (or Not)").[2] It is these instruments that most directly provide a jurisdictional basis for approving the protocol, building on the more substantive common law principle mandating assisting foreign insolvency courts as far as possible and the inherent jurisdiction of the Grand Court to manage its own

processes. The main governing principles applicable to an application for this court to approve a court-to-court communication may be summarized as follows:

(a) the court is under a positive duty to assist the primary foreign main insolvency or restructuring proceeding unless there are good reasons not to do so;

(b) there is a starting assumption that a clear framework for communication between this court and any relevant foreign courts in cross-border insolvency cases will enhance the efficiency of the cross-border case; and

(c) there is a starting assumption that the ALI/III and/or the JIN Guidelines are suitable guides to adopt and apply in cross-border case.

27 In my judgment, it is consistent with both elevated constitutional principles of judicial independence, the more pragmatic principles of modified universalism and the even more functional inherent powers of this court to protect the efficiency and integrity of its processes, that the particularities of how to advance the efficiency of cross-border insolvency proceedings at the operational case management level should be predominantly grounded in such "soft law instruments." These instruments may be viewed as a form of extra-judicial "judge-made" transnational procedural law. As Lord Dyson has noted in "The Globalisation of Law":[3]

> "41. We are living in an increasingly interdependent world. Jurists read each other's judgments with ease on the internet. They meet at international conferences to discuss issues of common interest. The good sense of learning from each other and taking the best that each of us has to offer is now well appreciated . . ."

Past practice of the Grand Court

28 There is a long and substantial history of this court coordinating its hearings with parallel insolvency and restructuring proceedings in foreign courts and, in the process, communicating indirectly with such courts. The co-operation and coordination which occurs may usually be too uncontroversial to be formally addressed in published judgments, but notable judicial statements have occasionally been made. The JPLs' counsel aptly cited *In Lancelot Investment Fund Ltd.* (7), where Quin, J. held as follows (2009 CILR 7, at para. 71): "the Grand Court embraces the concept of facilitation of co-operation and co-ordination in cross-border insolvency proceedings."

1 Cayman Islands Constitution Order 2009, ss. 7(1) and 107.
2 law.ox.ac.uk/business-law-blog/blog/2018/07.
3 Pilgrim Fathers Lecture, November 6th, 2015, cited in Doyle, "International Judicial Cooperation," Notes in Respect of Talks to Trainee Manx Advocates, at para. 57.

29 The same volume of the Cayman Islands Law Reports contains a report on one of the later of the various decisions relating to the huge BCCI liquidation, *In re BCCI (Overseas) Ltd.*, where Anthony Smellie, C.J. stated (2009 CILR 373, at para. 1):

"The worldwide liquidation of the BCCI companies is now in its final stages. The bleak prospect of recoveries at the date of liquidation has since been transformed into the reality of actual dividends paid to creditors in the global liquidation of 86.5% to date. *A major reason for this level of success has been the close co-operation between the global liquidators of the principal BCCI companies*." [Emphasis added.]

30 The commercially driven rationale of the doctrine of modified universalism underpins the instinctive assumption by this court that it should manage insolvency cases with a cross-border element in way which fosters cooperation with overseas courts. In *Re CW Group Holdings Ltd.* (2), Raj Parker, J. (dealing with a dispute as to the identity of provisional liquidators) held (FSD 113 and 122 of 2018, at para. 67):

"67. *It makes sense to use entities from the same group to allow for better coordination and communication between Singapore and Hong Kong which is likely to be of value to the company as they further engage with creditors and seek to propose and implement a restructuring.* Following the approach of Hoffmann J in *Re Maxwell Communications Corp plc* [1992] BCC 372 it also seems to me that it makes sense to choose a firm which is already in possession of a great deal of information with which to carry on acting in the interests of efficiency and economy." [Emphasis added.]

31 An even more recent illustration of robust judicial support for the general desirability of coordination in cross-border insolvency cases may be found in Segal, J.'s remarks in *In re China Agrotech Holdings Ltd.* (4) (2019 (2) CILR 356, at para. 37). In the parallel Hong Kong proceedings, Segal, J.'s remarks on behalf of this court were echoed by William Wong, S.C., Deputy High Court Judge,[4] who reproduced those remarks in his own judgment:

"*Cross-border coordination*

46. Finally, I like to say a few words about cross-border coordination. In the Cayman Scheme Judgment, Mr Justice Segal made some apt and important remarks about the need for cross-border coordination (at §37):

4 *Re Da Yu Fin. Holdings Ltd.* (formerly known as China Agrotech Holdings Ltd.) (5).

'*Throughout this case I have reminded the liquidators (and Perfect Gate) of the need to consider the coordination of the applications made in this Court and the Hong Kong court (and the possible benefit of and need for common directions regarding the filing of evidence and submissions in both courts and even of court to court communication and simultaneous hearings).* For reasons of which I am not aware this has not proved to be possible in this case. I do not intend to be critical. There may be good reasons why these steps were considered to be inappropriate or unavailable in this case (and I would note with gratitude that Mr. Justice Harris in the Hong Kong court very helpfully sent me a copy of his Decision of 9 July). *But I would remind parties for the future to keep the need for such coordination firmly in mind.*'

47. I would respectfully echo Mr Justice Segal's remarks . . ." [Emphasis added.]

32 The cooperation and coordination between this court and foreign insolvency cases that has taken place in past cases has, even if only tacitly, been grounded in this court's common law duty to assist foreign courts and to promote the most economically efficient administration of transnational insolvency estates. Writing extra-judicially almost 10 years ago, Anthony Smellie, C.J. concluded a comprehensive review of early 21st century local case law with the following propitious remarks (*op. cit.*, at 154):

"In the light of such decisions emanating from the early exercise of the statutory jurisdiction under Part XVII of the Companies Law, there is every reason to believe that the strong tradition of co-operation in trans-national insolvency and bankruptcy matters at common law will continue by the Cayman Islands Courts.

Considerations such as whether the foreign court presides at the 'centre of main interests' of the debtor entity or whether the foreign proceedings are 'main' or 'non-main proceedings' or whether in that regard the debtor entity had an 'establishment' in the foreign jurisdiction—all matters of import under the UNCITRAL Model Law—can all be accorded due if not exclusive weight by the Cayman Courts in deciding whether or not to grant recognition to foreign proceedings and foreign representatives. *This ability to co-operate can, in large measure, be attributed to the flexibility provided by the wide discretion vested in the Court in exercise of the jurisdiction under Cayman Islands law.*

Accordingly, the Cayman Islands jurisprudence can be expected to develop well in pace with the development of the common law principles of comity, in keeping with the principles of the UNCITRAL

Model Law and in keeping with the legitimate demands of the international financial markets within the wider global economy." [Emphasis added.]

Findings: merits of application for approval of the protocol

33 In light of the clarity and depth of the common law principles commending judicial coordination and communication in cross-border insolvency cases, combined with the recent promulgation of the practice direction, it was obvious that the protocol could only properly be approved. The protocol merely sought formal approval of the already administratively pre-approved ALI/III "Guidelines Applicable to Court-to-Court Commun-ications in Cross-Border Cases."

34 The judicial approval sought also implicitly required the court to recognize the Chapter 11 proceeding as a foreign main proceeding which this court, in conjunction with the courts in Chile and Colombia, was willing to assist. This was also an entirely uncontroversial matter. The requisite recognition had already effectively been granted by this court's initial appointment of the JPLs in relation to the companies for the explicit purpose of pursuing a restructuring. It was explicitly contemplated that such restructuring would take place primarily through Chapter 11 proceedings before the US Bankruptcy Court.

Conclusion

35 For these reasons, on July 29th, 2020, I granted the JPLs the orders which they sought approving the protocol between each of the four courts concerned with the companies' restructuring under the primary supervision of the US Bankruptcy Court for the Southern District of New York, subject to approval of the three other courts.

Orders accordingly.

Attorneys: *Walkers* for the JPLs.

[2017 (2) CILR 526]

IN THE MATTER OF CHINA AGROTECH HOLDINGS LIMITED

GRAND CT. (Segal, J.) September 19th, 2017

Companies — liquidators — recognition of foreign liquidator — court has common law power to recognize and assist foreign liquidator appointed in jurisdiction other than that in which insolvent company incorporated — court to apply principle of modified universalism — foreign liquidators not to be given powers "as if" appointed as provisional liquidators by domestic court

Companies — liquidators — recognition of foreign liquidator — foreign-appointed liquidators of Cayman incorporated company authorized to apply under Companies Law (2016 Revision), s.86(1) for meeting of creditors to consider proposed scheme (parallel to foreign scheme), and to consent to scheme on company's behalf — company had substantial connection with overseas jurisdiction — no likelihood of Cayman winding up

Foreign liquidators applied for recognition and assistance.

The company was incorporated in the Cayman Islands but had very significant connections to Hong Kong where its shares had been listed on the Hong Kong Stock Exchange and where it was administered and registered. In 2014, a creditor of the company had presented a winding-up petition in Hong Kong on the ground that the company was insolvent and unable to pay its debts. In 2015, the High Court of the Hong Kong Administrative Region had granted a winding-up order and appointed liquidators.

The liquidators considered that the best option for maximizing recoveries for the company's creditors was to reorganize the company and give effect to a resumption proposal in order to allow the company's shares to be relisted on the HKSE. Pursuant to the resumption proposal, a capital reorganization of the company's share capital would take place so as to facilitate the issue of new shares in the company. Funds raised would be used to fund a settlement for the company's creditors under the proposed schemes of arrangement.

In order to give effect to the resumption proposal and to satisfy the HKSE's resumption conditions, the liquidators would apply on behalf of the company to the Hong Kong court for the approval and sanctioning of a scheme of arrangement. In addition, they deemed it necessary for a

parallel scheme to be implemented in the Cayman Islands, being the place of the company's incorporation. They considered it undesirable for a winding-up petition to be presented in this jurisdiction and for an application then to be made for the appointment of provisional liquidators who could promote the Cayman scheme.

On the liquidators' application, the Hong Kong court issued a letter of request seeking an order that the liquidators be recognized by the Grand Court and treated in all respects as if they had been appointed in this jurisdiction. The liquidators wished to be able to promote the Cayman scheme and to apply to the court for an order under s.86(1) of the Companies Law (2016 Revision) convening a meeting of creditors. An order was also sought that s.97 of the Law applied so that no action could be proceeded with or commenced against the company except with the leave of the court and on such terms as might be imposed. The liquidators applied *ex parte* for the orders sought.

The liquidators submitted *inter alia* that (a) the court had an inherent jurisdiction to recognize the powers given to, and to grant assistance to, foreign liquidators appointed in a country other than that in which the company was incorporated; and (b) such jurisdiction could and should be exercised at least where there would not be, or was unlikely to be, a winding up in the country of incorporation; probably also in any case in which the relief sought by the foreign liquidator would also be available to a Cayman official liquidator if appointed and there was no reason why, having regard to the company's creditors and members and applicable policy considerations, the foreign liquidator should be required to commence or procure the commencement of a domestic winding up; and where the company had submitted to the jurisdiction of the relevant foreign court.

Held, ruling as follows:

(1) Under Part XVII of the Companies Law, the court had a statutory jurisdiction to recognize and assist foreign representatives appointed in the place of a company's incorporation. In addition, the court had a common law power to recognize and assist foreign court appointed representatives. If the circumstances justified the use of that common law power, and subject to the limitations on its use, the power could be exercised by making suitable orders for the purpose of enabling the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of a company's affairs by the territorial limits of its powers. In deciding whether and if so how to exercise the power, the court would have regard to and apply the approach known as the principle of modified universalism. Suitable orders included any order that the court could make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to the proceedings before it). The court would use and rely on domestic law to fashion and find a form of relief for the foreign liquidator that achieved the purpose for which the power could

be exercised. But the domestic substantive or procedural law must be applicable to the particular case before the court. Therefore, the court could not grant relief by making an order that could only be made in reliance on a domestic statutory power which, by its terms, did not apply in the circumstances (*e.g.* by making an order that could only be made if a domestic scheme of arrangement had been applied for and approved but where there was no such scheme). Nor could the court make an order that granted relief to the foreign liquidator that depended on there being a domestic law right which did not exist in the circumstances. In each case the court must start by considering the nature and form of relief sought by the foreign liquidator. Sometimes the foreign liquidator would be asking the requested court only to apply its rules of private international law so as to permit the foreign liquidator to act in the name and on behalf of the company and to deal with its assets and rights. There might well be no need to rely on the common law power in such a case. Sometimes, the liquidator would be asking the requested court to exercise its case management powers in proceedings before it by adjourning or staying them or the execution of a domestic judgment arising therefrom (the exercise of such case management powers could be said to involve an exercise of the common law power). Sometimes, the foreign liquidator would seek to bring proceedings in the requested court based on a domestic statutory or common law cause of action available either to the foreign liquidator or the company. Where he only needed to establish his capacity and powers, as a matter of private international law, to bring the proceedings in the name of the company, there would be no need to rely on the common law power. Where the cause of action was vested in the foreign liquidator, or he was seeking additional relief in reliance on his powers as liquidator, then the common law power to recognize and grant assistance to the foreign liquidator would come into play. Where the foreign liquidator was appointed in the country of incorporation of the company concerned, the domestic private international law of the requested country would apply so that the liquidator was treated as being entitled to act for and on behalf of the company. To that extent he would be entitled to recognition of his powers. Therefore, technically, he would not need to rely on the exercise of the common law power (at least when he was only taking action in the name and on behalf of the company and those seeking to challenge the action were claiming through the company). However, if the foreign liquidator was not appointed in the country of incorporation, he could not rely on this rule of private international law and must instead invoke the common law power in order to be permitted to act on behalf of the company (paras. 20–26).

(2) In the present case, the liquidators wished to be able to promote a Cayman scheme and in particular to apply for an order under s.86(1) of the Companies Law convening a meeting of creditors. The liquidators could apply if they were entitled or permitted to act for and on behalf of the company. They were not entitled under Cayman private international law to act on behalf of the company because they had not been appointed

in the company's country of incorporation. Under Cayman law, having regard to the company's constitution and the Companies Law, the corporate organs entitled to act on behalf of the company were the company's directors and shareholders. The winding-up order, as an order of a foreign court, was not binding or enforceable in the Cayman Islands and did not prevent these corporate organs having the authority to act for and bind the company. The court would, however, exercise its common law power to recognize and assist the liquidators. The conditions for the exercise of the power were satisfied for the following reasons: (a) The relief that the liquidators required and which should be granted was an order authorizing them to make an application under s.86(1) of the Companies Law and to consent to the proposed scheme on the company's behalf. (b) The liquidators wished simply to be able to promote a parallel scheme of arrangement and to prevent any proceedings in Cayman being litigated in a manner that would disrupt or interfere with the scheme process, which could be achieved by the court making an order on the above terms and by making a direction to the effect that any proceedings commenced or any winding-up petition presented against the company be assigned to the present judge (who could ensure that appropriate case management orders were made). (c) In the present case the court was in substance dealing with a governance question, namely whether to permit the liquidators to act on behalf of the company in presenting an application under s.86(1) and consenting to the proposed scheme on behalf of the company. No issues arose involving competing claims by creditors which would result in different levels of recovery or returns depending on whether the liquidators were granted the relief they sought. It appeared that the company's board and directors were currently unable or unwilling to act. It also appeared that it would be impracticable and prejudicial to the interests of all stakeholders to delay matters by seeking shareholder approval for the liquidators' application. (d) There was no likelihood of an application being made for a winding-up order in Cayman. (e) It was clear from the evidence that the company had substantial contacts with Hong Kong. (f) There appeared to be no need for or reason why creditors or members would benefit from a Cayman winding up or from the appointment of a provisional liquidator in Cayman. (g) There were also no local reputational, regulatory or policy reasons requiring a local winding up. In the present case, the Hong Kong liquidation was the only proceeding that had been or was likely to be commenced in respect of the company and was taking place in a jurisdiction with which the company had substantial connections. The company's centre of main interests (as the term was used in EU insolvency law) was probably Hong Kong, which was a consideration of considerable weight when deciding whether the foreign, non-place of incorporation liquidation should be treated as competent and justifying assistance. In these circumstances, the purpose for which the power to recognize and assist might be exercised was fully engaged and justified the exercise of the power (paras. 29–30).

(3) The court expressed its preliminary view that the submission by a company to the jurisdiction of a foreign court in which a winding-up order was made and a foreign liquidator appointed could in principle be a sufficient basis for the recognition of the foreign liquidator's powers to act for the company. The court was not in a position to form a concluded view as to whether registration of a company in a foreign jurisdiction was sufficient to constitute submission for these purposes (para. 33).

(4) In a case such as the present in which the court was proposing to exercise the common law power on the basis and assumption that no application for a Cayman winding up would be made, that the company's directors and shareholders had not sought and did not intend to exercise any residual powers and rights that they might have to act on behalf of the company and that the relief sought by the liquidators was demonstrably in the interests of all stakeholders, it was important that the directors, stakeholders and creditors were notified of the summons and given an opportunity to notify the liquidators and the court of any objections, to make submissions and to apply to the court if they wished to do so. The court therefore proposed to make an order that authorized the liquidators to apply under s.86(1) of the Companies Law but that also required the liquidators to notify, by a suitable means and within an appropriate timescale, the directors, stakeholders and creditors of the summons and to make available copies of the summons and supporting evidence to any person who wished to receive a copy before the liquidators made any such application. If there were objections or submissions, or if a person wished to be heard, there would be a further hearing of the summons. The directors, stakeholders and creditors would thus have adequate notice and opportunity to object, without unduly delaying the scheme process by holding a further hearing which might not be necessary (paras. 36–37).

(5) The court was unable, in the exercise of the common law power, to grant the order sought by the liquidators which would recognize them and treat them as having all the powers of provisional liquidators appointed by the Grand Court, as it was contrary to the principle outlined in English case law that it was impermissible to grant relief that was only available to provisional liquidators appointed by this court in circumstances in which no such provisional liquidators had been appointed, and to grant relief "as if" provisional liquidators had been appointed. Nor could the court make the order sought pursuant to s.97 of the Companies Law, as that section could not apply in the absence of a provisional liquidator appointed by the court. The liquidators' objectives could, however, be achieved by an order in a different form, authorizing them to convene the scheme meetings, to make such other applications as were required and to consent to the scheme on behalf of the company. Furthermore, relief having the same effect as s.97 could be achieved by a direction that required all proceedings commenced or to be commenced against the company to be allocated to and heard by the present judge, which would enable him to make

suitable case management orders for adjournments or stays (paras. 38–42).

Cases cited:

(1) *African Minerals Ltd. (Joint Administrators)* v. *Madison Pacific Trust Ltd.*, HCMP 865/2015; [2015] HKEC 641, referred to.
(2) *Anderson*, *In re*, [1911] 1 K.B. 896, *dicta* of Phillimore, J. considered.
(3) *BCCI (Overseas) Ltd.* v. *BCCI (Overseas) Ltd. (Macau Branch)*, [1997] HKLRD 304, considered.
(4) *Basis Yield Alpha Fund (Master), In re*, 2008 CILR 50, referred to.
(5) *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)*, 2005–06 MLR 297; [2006] UKPC 26; [2007] 1 A.C. 508; [2006] 3 W.L.R. 689; [2006] 3 All E.R. 829; [2006] 2 All E.R. (Comm) 695; [2006] BCC 962; [2007] 2 BCLC 141, considered.
(6) *Davidson's Settlement Trusts*, *In re* (1873), L.R. 15 Eq. 383; 37 J.P. 484; 42 L.J. Ch. 347; 21 W.R. 454, considered.
(7) *Dickson Group Holdings Ltd.*, *Re*, [2008] Bda LR 34, followed.
(8) *Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co. Ltd.*, [1927] A.C. 95, considered.
(9) *Felixstowe Dock & Ry. Co.* v. *U.S. Lines Inc.*, [1989] Q.B. 360; [1989] 2 W.L.R. 109; [1988] 2 All E.R. 77; [1987] 2 Lloyd's Rep. 76, referred to.
(10) *Fu Ji Food & Catering Servs. Holdings Ltd.*, *In re*, Grand Ct., FSD Cause No. 222 of 2010, unreported, followed.
(11) *HIH Casualty & Gen. Ins. Ltd.*, *In re*, [2008] UKHL 21; [2008] 1 W.L.R. 852; [2008] 3 All E.R. 869; [2008] Bus. L.R. 905; [2008] BCC 349; [2012] 2 BCLC 655; [2008] BPIR 581; [2008] Lloyd's Rep. I.R. 756, considered,
(12) *Hooley Ltd.*, *Re*, [2016] CSOH 141; 2017 SLT 58; [2016] BCC 826, distinguished.
(13) *International Tin Council*, *In re*, [1987] Ch. 419; [1987] 2 W.L.R. 1229; [1987] 1 All E.R. 890; (1987), 3 BCC 103; [1987] BCLC 272, referred to.
(14) *Kilderkin Invs. Grand Cayman* v. *Player*, 1984–85 CILR 63, referred to.
(15) *Lee Wah Bank Ltd.*, *Re*, [1926] 2 M.C. 81, considered.
(16) *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.*, [1974] A.C. 133; [1973] 2 All E.R. 943; [1973] F.S.R. 365; [1974] R.P.C. 101; (1973), 117 Sol. Jo. 567, referred to.
(17) *Opti-Medix Ltd.*, *Re*, [2016] 4 SLR 312; [2016] SGHC 108, considered.
(18) *Picard* v. *Primeo Fund*, 2013 (1) CILR 164, considered.
(19) *Queensland Mercantile & Agency Co. Ltd.* v. *Australasian Inv. Co. Ltd.* (1888), 15 R. 935, considered.
(20) *Rome* v. *Punjab National Bank (No. 2)*, [1989] 1 W.L.R. 1211; [1990]

1 All E.R. 58; [1989] 2 Lloyd's Rep. 354; (1989), 5 BCC 785; [1990] BCLC 20, considered.

(21) *Rubin* v. *Eurofinance SA*, [2012] UKSC 46; [2013] 1 A.C. 236; [2012] 3 W.L.R. 1019; [2013] 1 All E.R. 521; [2013] 1 All E.R. (Comm) 513; [2013] Bus. L.R. 1; [2012] 2 Lloyd's Rep. 615; [2013] BCC 1; [2012] 2 BCLC 682, followed.

(22) *Singularis Holdings Ltd.* v. *PricewaterhouseCoopers*, [2014] UKPC 36; [2015] A.C. 1675; [2015] 2 W.L.R. 971; [2015] BCC 66; [2014] 2 BCLC 597, followed.

(23) *Stewart & Matthews Ltd.*, *Re* (1916), 10 WWR 154; 26 Man. R. 277, considered.

(24) *Stichting Shell Pensioenfonds* v. *Krys*, [2014] UKPC 41; [2015] A.C. 616; [2015] 2 W.L.R. 289; [2015] 2 All E.R. (Comm) 97; [2015] BCC 205; [2015] 1 BCLC 597, followed.

Legislation construed:

Companies Law (2016 Revision), s.86(1): The relevant terms of this sub-section are set out at para. 27.

C. Stanley, *Q.C.* and *S. Maloney* for the liquidators.

1 **SEGAL, J.:**

The application, the relief sought and a summary of the orders to be made

I have before me an *ex parte* summons ("the summons") issued by the Hong Kong liquidators of a Cayman company, China Agrotech Holdings Ltd. ("the company"). In the summons, the Hong Kong liquidators seek orders from this court giving them certain powers and the authority to act on behalf of the company for the limited purpose of presenting a petition for a scheme of arrangement between the company and its creditors in Cayman as part of a corporate rescue of the company involving a parallel scheme of arrangement with creditors to be filed in the High Court of the Hong Kong Administrative Region ("the Hong Kong court") and a restructuring of the company's capital with shareholder approval.

2 The summons was supported by two affirmations made by Chan So Fun ("Mr. Chan"), a solicitor in Hong Kong in the firm of solicitors advising the Hong Kong liquidators (Michael Li & Co.), two affidavits made by David Yen Ching Wai (one of the Hong Kong liquidators and a managing director of Ernst & Young Transactions Ltd.), one affirmation made by Stephen Liu Yiu Keung (the other Hong Kong liquidator and also a managing director of Ernst & Young Transactions Ltd.) and one affidavit made by David Andrew Freeman (a paralegal with Ogier, the firm of attorneys acting for the liquidators). David Yen Ching Wai and Stephen Liu Yiu Keung are referred to as the liquidators. As I have said, this was an

ex parte summons and so no notice has yet been given to the company's directors, shareholders or creditors.

3 The summons was issued pursuant to a letter of request dated July 19th, 2017 from the Hong Kong court addressed to this court, which was issued pursuant to an order of Harris, J. ("the letter of request"). The letter of request sets out the orders which this court is requested to make. I shall explain and discuss the precise terms of the proposed orders shortly.

4 For the reasons explained below, I have concluded that I can and should permit the liquidators to apply in the name and on behalf of the company for and promote a parallel scheme in Cayman and that I should take steps that will ensure that proceedings commenced against the company pending the consideration and sanctioning of the scheme can be adjourned or stayed in order to allow the scheme process to be completed. However, I consider that the order to be made should be in a different form from and grant relief in a different manner from that detailed in and set out in the letter of request (although the order will be in accordance with and respond to the letter of request, which invited this court to give such further or other relief by way of cross-border judicial assistance at common law as this court considers just and convenient). I also consider that the liquidators should only be permitted to apply for an order convening the scheme meeting(s) after the company's directors, shareholders and creditors have been notified of the summons and given an opportunity to file objections or submissions and be heard by this court. If no such objections or submissions are filed, and if no one notifies the liquidators of their intention to appear and be heard, the liquidators may proceed to file the company's petition for an order convening the scheme meeting(s) without the need for a further hearing.

The background to the summons

5 The company has various significant connections with Hong Kong. In particular, its shares have been listed on the Main Board of the Hong Kong Stock Exchange (HKSE) since January 14th, 2002. However, since September 18th, 2014 the company's shares have been suspended from trading. Furthermore, the corporate business of the company has been administered from Hong Kong and the company was registered under Part XI of the former Companies Ordinance (*cap.* 32) on November 4th, 1999.

6 On November 11th, 2014, a creditor of the company presented a winding-up petition on the ground that the company was insolvent and unable to pay its debts. On August 17th, 2015, the Hong Kong court made a winding-up order ("the winding-up order") and appointed the liquidators.

7 Since their appointment, the liquidators have considered what action to take in order to maximize recoveries for and protect the interests of the

company's creditors. They have concluded that the best option available involves giving effect to a resumption proposal and reorganization of the company. The company, with Fine Era Ltd. ("the vendor"), which is a BVI company, submitted a resumption proposal to the HKSE on August 24th, 2016. The purpose of the resumption proposal is to permit the company to satisfy the HKSE's conditions for allowing the company's shares to be re-listed, and to inject into the company an active and profitable business, sufficient funds to permit the company to make a payment to its creditors and for working capital and the payment of the fees involved in the process.

8 The resumption proposal involves an agreement between the company and the vendor with various terms and steps. Under the agreement, the company will purchase from the vendor for a consideration of HK$400,000,000 the entire equity interest in Yu Ming Investment Management Ltd. ("Yu Ming"). Yu Ming is a licensed corporation carrying on various regulated activities including dealing in securities, advising on securities and asset management. Following the acquisition by the company of the equity interests in Yu Ming there will be a capital reorganization of the share capital of the company (comprising a capital reduction, share consolidation and increase in the company's authorized share capital) so as to facilitate the issue of new shares in the company under a placing and open offer. The placing will raise funds of approximately HK$462,222,000 which will be used for the partial settlement of the consideration payable by the company for the acquisition of the equity interests in Yu Ming and also to fund a settlement to be offered to the company's creditors under the proposed schemes of arrangement. Further funds of approximately HK$78,137,000 will also be raised under the proposed open offer. The company will transfer HK$80,000,000 from the placing to the proposed schemes of arrangement for distribution to the company's creditors in settlement of their debts. In addition, the vendor will provide a cash advance to the company and additional funding to finance fees.

9 In order to give effect to the resumption proposal and to satisfy the HKSE's resumption conditions, the liquidators will apply on behalf of the company to the Hong Kong court for the approval and sanctioning of a scheme of arrangement and will also apply for the permanent stay of the Hong Kong winding up upon the successful implementation of the scheme. In addition to the Hong Kong scheme, the liquidators wish to promote a Cayman scheme. After consulting legal advisers in both Hong Kong and Cayman, the liquidators concluded that it was necessary for an inter-conditional scheme to be implemented in the company's place of incorporation, that is the Cayman Islands, in parallel with the proposed Hong Kong scheme.

10 The liquidators also concluded that it would not be possible or appropriate in the present case for a winding-up petition to be presented in Cayman in respect of the company and for an application to be made in Cayman for the appointment of provisional liquidators who would then promote the Cayman scheme. Such an approach has, of course, been taken in a number of other cases in the past—in which a company subject to a foreign insolvency proceeding and proposing to implement a corporate reorganization or rescue has, following the presentation of a winding-up petition, applied for the appointment of a provisional liquidator under s.104(3) of the Companies Law (2016 Revision) ("the Companies Law") so that the provisional liquidator, working in conjunction with the foreign representative, could apply under s.86(1) of the Companies Law on behalf of the company for the convening of meetings of creditors to approve and the sanction by the court of a Cayman scheme (with the benefit of the statutory stay and moratorium). The liquidators took advice from Richard de Lacy, Q.C. (who sadly died recently and to whom I should like to pay tribute as a fine Cayman and English lawyer and a true gentleman). Based on this advice they concluded that there were various uncertainties that made it undesirable to seek to present a winding-up petition in Cayman, particularly if an alternative option was available. Mr. de Lacy had expressed a concern that before the company's directors could present a winding-up petition they would need to obtain a special resolution from the company's shareholders, which would not only be time consuming and costly but would create difficulties for a listed company the trading of whose shares had been suspended (although I note that it does appear that the company's articles of association give the directors the power to petition without shareholder approval). Mr. de Lacy also noted that it was unclear whether the directors would be treated by this court as having the power and authority to present a winding-up petition following the appointment of the liquidators. He had therefore recommended that the liquidators apply to the Hong Kong court for the issue of a letter of request to this court in which the Hong Kong court would ask this court to make orders in a suitable form that would allow the liquidators to promote the proposed scheme in Cayman.

The letter of request

11 The liquidators, as I have noted, did apply to the Hong Kong court for the issue of a letter of request and Harris, J. ordered that a letter of request be issued. The letter of request was issued on July 19th, 2017. The following points emerge:

(a) The letter of request recited the appointment of the liquidators and that—

"the Liquidators have demonstrated to the satisfaction of this Court that it is necessary and desirable for the purposes of implementing

the rescue and restructuring of the Company for the benefit of the Company's creditors and shareholders and that it is in the interest of justice to assist the Lliquidators in exercising all the powers, duties and discretions afforded to them by the [winding-up order] (and applicable law); and that it is just and convenient that [the letter of request] be issued."

(b) The letter of request requested this court "pursuant to its inherent jurisdiction and all other powers vested in it, to assist and act in aid of the Hong Kong court" in the winding-up proceedings in respect of the company by making the orders requested.

(c) The orders requested were as follows:

"1. Making an order if [this court] thinks fit that the Liquidators . . . be recognised by [this court] and be treated in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by [this court], including recognition of the powers and authority of the Liquidators to act on behalf of the Company, amongst other things:

(1) to secure the alteration [of] or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;

(2) to pay a class or classes of creditors in full;

(3) to make a compromise or arrangement with—

(a) creditors or persons claiming to be creditors;

(b) persons having or alleging themselves to her of [*sic*] any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or for which the Company may be rendered liable.

(4) to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the company and—

(a) a contributory;

(b) an alleged contributory; or

(c) any other debtor or person apprehending liability to the Company.

(5) to bring or defend any action or other legal proceedings in the name and on behalf of the Company;

(6) to sell the real and personal property and things in action of the Company by public auction or private contract with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

(7) to do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal;

(8) to appoint an agent to do any business that the Liquidator is unable to do in person; and

(9) to employ legal advisers to assist the Liquidators in performing the liquidators' duties.

2. If thought fit, making such further or other Orders as may be required in accordance with such recognition and, in particular, an Order (having the same or substantially the same effect as section 186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) [Ordinance] (CAP 32)) that section 97 of the Cayman Islands Companies Law (2016 Revision) shall apply to the company so that no action or proceeding shall be proceeded with or commenced against the company within the jurisdiction of [this court] except by leave of [this court] and subject to such terms as [this court] may impose;

3. Giving such further or other relief or assistance by way of cross-border judicial assistance at common law as [this court] may think just and convenient; and

4. The Liquidators [to] have liberty to apply for further relief to [this court]."

The summons and the draft order

12 The summons seeks orders in similar terms as follows:

"1. That the [order of the Hong Kong court dated August 17th, 2015 appointing the liquidators (the appointment order)] and [the liquidators] be recognised by this Court such that the Appointment Order be treated in all respects in the same manner as if the Appointment Order had been made and [the liquidators] had been appointed as the joint and several provisional liquidators of the company by this Court, including recognition of the powers and authority of [the liquidators] to act on behalf of the Company, including, inter alia;

a. to alter or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;

b. to pay a class or classes of creditors in full;

c. to make a compromise or arrangement with—

  i. creditors or persons claiming to be creditors;

  ii. persons having or alleging themselves to her of [*sic*] any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or for which the Company may be rendered liable.

d. to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the Company and—

  1. a contributory;

  2. an alleged contributory; or

  3. any other debtor or person apprehending liability to the Company.

e. to bring or defend any action or other legal proceedings in the name and on behalf of the Company;

f. to sell the real and personal property and things in action of the Company by public auction or private contract with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

g. to do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal;

h. to appoint an agent to do any business that the Liquidator is unable to do in person; and

i. to employ legal advisers to assist the Liquidators in performing the Liquidators' duties.

2. [That in accordance with such recognition as set out in para. 1 above and for the avoidance of doubt] section 97 of the Companies Law (2016 Revision) shall apply to the Company so that no action or proceedings shall be proceeded with or commenced against the Company within the jurisdiction of this Court except by leave of this Court and subject to such terms as this Court may impose.

3. That the [liquidators] shall have liberty to apply to this Court in respect of any matter concerning the Company and arising during the

period of the appointment of the [liquidators] as Joint Provisional Liquidators of the Company and by doing all such things as may be necessary to assist the [liquidators] (or one or more of them) in connection with their appointment as the joint and several provisional liquidators of the Company."

13 The draft order filed by the liquidators sets out the orders sought in the summons in the same form, save that the words in square brackets at the beginning of para. 2 were omitted.

The liquidators' submissions

14 The submissions of Ms. Stanley, Q.C. for the liquidators can be summarized as follows:

(a) The court has an inherent jurisdiction (at common law) to recognize the powers given (and to grant assistance) to a foreign liquidator appointed by an order of a competent court and to send and receive letters of request relating to the recognition of such court-appointed liquidators (citing in support, in relation to letters of request,)).

(b) The common law jurisdiction to recognize (and assist) foreign insolvency officeholders appointed in the country of incorporation of the company is well established in Cayman—see, for example, in relation to the recognition of a receiver appointed by a foreign court in the company's place of incorporation, –83) and also) (Ms. Stanley notes that the Cayman legislature has, in Part XVII of the Companies Law, also codified and extended the court's powers in relation to foreign representatives appointed in the country of incorporation).

(c) But the non-statutory jurisdiction is not limited to foreign insolvency officeholders, including liquidators, appointed by a court in the country of incorporation of the relevant company. The court has jurisdiction to recognize and grant assistance to liquidators appointed by other courts in certain circumstances.

(d) Such jurisdiction can and should be exercised—

(i) at least where the evidence establishes that there will not be, or that it is unlikely that there will be, a winding up in the country of incorporation;

(ii) probably also in any case in which the relief sought by the foreign liquidator would be available to a Cayman official liquidator if appointed and there is no reason why, having

regard to the interests of the company's creditors and members and applicable policy considerations, the foreign liquidator should be required to commence or procure the commencement of a domestic winding up; and

(iii) where the company concerned has submitted to the jurisdiction of the relevant foreign court.

(e) As regards (d)(i), in the present case the evidence demonstrates that it is unlikely that any application will be made for a Cayman winding up. Accordingly, the basis for exercising the jurisdiction to recognize and assist on the first ground is established. The court should exercise the jurisdiction because the company has the right under the Companies Law to apply to the court and commence the scheme approval process and since the liquidators are acting on behalf of the company, their action is in accordance with the statutory power and Cayman law; it is manifestly in the interests of all the company's stakeholders to permit the liquidators to proceed with the Cayman scheme and granting the relief sought involves the court cooperating, in accordance with the principle of comity, with the Hong Kong court and the liquidators it has appointed (as the only proceeding commenced and to be commenced in relation to the company and a court with which the company has substantial and significant connections) in circumstances where there are no policy or other reasons which require a local winding up or which would require and justify refusing the relief sought by the liquidators.

(f) As regards (d)(ii), a local liquidator would be able to petition the court to convene meetings of creditors to vote on the scheme but a local winding up is unnecessary as it would involve unnecessary expense and no additional benefits to creditors and members (unless, of course, a Cayman winding up is necessary in order for there to be a Cayman scheme).

(g) A Cayman winding up is unlikely because none of those with standing to present a winding-up petition are able or willing to do so. As David Yen Ching Wai stated in his second affidavit, the company's directors (those directors who have not resigned) have been unwilling to contact and cooperate with the liquidators and appear unwilling to exercise any residual power which the directors might retain to act on behalf of the company and present a petition. Indeed, it was arguable that the directors could not exercise any such power (at least without the consent of the liquidators) following the making of the winding-up order. Furthermore, it was unlikely that the shareholders would wish or be prepared to present a petition. In addition, the company's creditors (many of whom had already participated and filed proofs in the Hong Kong liquidation) also have not indicated any intention to present a petition for or wish to have a Cayman winding up. The winding-up order was made

over two years ago and no creditor has sought a Cayman winding up since then.

(h) A Cayman winding up is unnecessary because it has already been determined that the resumption proposal is in the best interests of the company's creditors and shareholders and a Cayman winding up is not needed to implement that proposal or to protect the interests of creditors or other stakeholders (the resumption proposal will not require a distribution by the liquidators to creditors and will involve a stay of the Hong Kong liquidation so that there will be no risk of any differences between the rules regulating distributions or avoidance actions in Hong Kong and Cayman giving rise to differences of outcomes for creditors or members). The liquidators with the support of the Hong Kong court have concluded that they should give effect to the resumption proposal and exit from the Hong Kong liquidation without the need for a Cayman winding up by obtaining the approval of creditors to and the sanction of the Hong Kong and Cayman courts for the schemes (and to a capital reduction and reorganization).

(i) As regards (d)(iii), since the company submitted to the jurisdiction of the Hong Kong court by registering as an overseas company in Hong Kong, this court should recognize and give effect to the winding-up order, at least the powers of the liquidators thereunder or resulting therefrom to act on behalf of the company (including the power to act on behalf of the company for the purpose of presenting a petition under s.86(1) of the Companies Law for an order convening a meeting of creditors and for the sanctioning of a scheme of arrangement in respect of the company).

(j) The company registered under Part XI of the former Companies Ordinance (*cap.* 32) on November 4th, 1999 (Part XI has now been superseded by Part 16 of the Companies Ordinance (*cap.* 622), to which the company is now subject). Part XI (and Part 16) relate to overseas companies, that is companies incorporated outside Hong Kong, which have established a place of business in Hong Kong. According to Mr. Chan (see para. 9 of his second affirmation):

> "By registering under Part XI of the former Companies Ordinance (Cap 32), the company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong Kong (the Rules), compliance with Part XI means that the company is 'within the jurisdiction' and can therefore be served with a winding up petition in accordance with Order 10, rr.1–5 of the Rules . . . and sections 326(1) and (2) and section 327 of the Companies (Winding Up Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014) . . ."

15 Ms. Stanley relied on a number of textbooks and cases in support of her submission that the court had jurisdiction to and could recognize the

appointment and powers of a liquidator appointed by a court in a jurisdiction other than the place of incorporation. In particular, she noted and relied on a judgment of Kawaley, J. in the Supreme Court of Bermuda (in 2008, *Re Dickson Group Holdings Ltd.* (7)) in a case which was based on similar facts and circumstances to the present case in which the learned judge had permitted a Hong Kong liquidator appointed in respect of a Bermudian company to summon a meeting of creditors to consider a scheme of arrangement in Bermuda. She also noted and relied in particular on an unreported judgment of this court (*In re Fu Ji Food & Catering Holdings Servs. Ltd.* (10)), delivered by the Chief Justice, involving a provisional liquidator appointed in Hong Kong in respect of a Cayman company and in which the Chief Justice made orders recognizing the provisional liquidator's powers to alter and deal with the capital structure of the company and staying proceedings against the company.

16 Ms. Stanley's submissions on the grounds I have identified in para. 13(d)(i) and (ii) above can be summarized as follows:

(a) Ms. Stanley referred to the discussion in Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed. (2012) and submitted that the starting point in the analysis was Rule 179 (para. 30R–100, at 1581) which is in the following terms: ". . . [T]he authority of a liquidator appointed under the law of the place of incorporation is recognised in England."

(b) But, Ms. Stanley pointed out, in the commentary on Rule 179, Dicey, Morris & Collins amplify their analysis and suggest that the non-statutory jurisdiction to recognize and assist may extend beyond liquidators appointed in the place of incorporation. The commentary suggests that recognition may be permissible where the appointment is made in (under the law of) the country where the company concerned carries on business or, where there is no likelihood of a liquidation in the country of incorporation, in another country. The relevant parts of the commentary are as follows (paras. 30–102 – 30–104, at 1581–1582):

"30–102

The effect of a foreign winding-up order in England has seldom been before the courts. Rule 179 is however justified because the law of the place of incorporation determines who is entitled to act on behalf of a corporation. If under that law a liquidator is appointed to act then his authority should be recognised here.

30–103

Rule 179 should not, however, be construed, in the light of existing authorities, as stating the only circumstances in which an English court will recognise the authority of a liquidator appointed under foreign law. It merely states the position which has been established to date. First, and generally, in determining whether to exercise its

jurisdiction to wind up a foreign corporation, we have seen that the English court will consider whether there is any other jurisdiction which is more appropriate for the winding up and it is possible that a more appropriate jurisdiction might be in a country other than the place of incorporation. This does not suggest that in the admittedly different context of recognition, that such recognition should only be accorded to an appointment under the law of the place of incorporation. More particularly, it has been suggested that an appointment made in a country other than the place of incorporation may be recognised in England if it is recognised under the law of the place of incorporation of the company. *More speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised.*

30–104

Recognition of a liquidator's authority may be sought by reference to an appointment made in the exercise of a foreign jurisdiction similar to that conferred on the English courts in regard to companies incorporated outside the United Kingdom. The protagonist of recognition in such a case could urge that 'it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves.' However, even if an appeal to comity has any force in this context (which is doubtful), it has been rejected in the context of company insolvency, though it is possible that the liquidator's authority would be recognised as extending to those affairs of the company which are local to the country where the appointment was made. *Where there is no likelihood of a liquidation in the country of incorporation it may be possible that the liquidator's authority may be held to extend beyond those affairs. This treatment of the argument based on comity is defensible because where there is a liquidation in the country of incorporation and the English courts exercise their own jurisdiction to make an order, they seem concerned to ensure that the liquidator should not go beyond dealing with the company's English affairs without special direction. Such concern is not shown where there is no likelihood of liquidation in the country of incorporation.*" [Emphasis added. Footnote omitted.]

(c) Ms. Stanley noted that in *Rubin* v. *Eurofinance SA* (21) ("*Rubin*") Lord Collins had referred to Rule 179 and said ([2012] UKSC 46, at para. 13) that—

"the general rule is that the English court recognises at common law *only* the authority of a liquidator appointed under the law of the place of incorporation: *Dicey*, 15th ed, para 30R-100. That is in contrast to

the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) ('the EC Insolvency Regulation') and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties)." [Emphasis added.]

However, she submitted, this statement was not inconsistent with the commentary set out above since a general rule need not be, and should not be treated as, the exclusive rule (I also note Lord Collins's comment (*ibid.*, at para. 31) that "the common law assistance cases . . . [had] involved cases in which the foreign court was a court of competent jurisdiction in the sense that the . . . company, was incorporated there.")

(d) Ms. Stanley also noted that in *In re HIH Casualty & Gen. Ins. Ltd.* (11) Lord Hoffmann had indicated (*obiter*) that a test other than the place of incorporation test might be more appropriate for determining whether the foreign court was competent for recognition purposes ([2008] 1 W.L.R. 852, at para. 31):

> "I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the 'centre of a debtor's main interests' as a test, with a presumption that it is the place where the registered office is situated: see article 3(1). That may be more appropriate."

While Lord Collins in *Rubin* (21) had referred to this passage ([2012] UKSC 46, at para. 121) and refused (*ibid.*, at para. 129) to change the settled law on the recognition and enforcement of foreign judgments by formulating a judge-made, common law rule which would recognize judgments in foreign insolvency proceedings where the foreign court conducting the insolvency proceeding was to be regarded as being competent by reason of the connections between the court and company concerned (such as the country where the insolvent entity has its centre of interests or the country with which the judgment debtor has some other sufficient or substantial connection), his judgment and analysis did not affect this part of Lord Hoffmann's judgment or the cogency of the comments he had made as they relate to the scope of the common law jurisdiction to recognize foreign liquidators.

(e) Ms. Stanley noted that another leading English law textbook dealing with cross-border insolvency also supported the view that recognition

should be granted to a liquidator appointed by a court outside the place of incorporation in a case where there was no likelihood of a liquidation being commenced in the country of incorporation. In Sheldon *et al.* (eds.), *Cross-Border Insolvency*, 4th ed., ch. 6 (2015), the point is made as follows (para. 6.81, at 281):

> "If the English rules on recognition were restricted to the place of incorporation and an insolvency proceeding has not or even cannot there occur, then no foreign insolvency whatsoever could be recognised. Plainly this would be most unsatisfactory. Accordingly, it is suggested that recognition is possible 'where there is no likelihood of a liquidation in the country of incorporation.'"

(f) Ms. Stanley, as I have mentioned, relied on the judgment of Kawaley, J. in Bermuda in *Re Dickson Group Holdings Ltd.* (7). The decision in *Dickson Group* and Ms. Stanley's submissions based on the decision can be summarized as follows:

(i) In this case, *Dickson Group Holdings Ltd.* was a company incorporated in Bermuda in respect of which a winding-up order had been made in Hong Kong. Although the company had been incorporated in Bermuda, no business activities took place there but instead the main focus of the company's business was Hong Kong and the People's Republic of China. The liquidators wished to promote a scheme of arrangement which would restructure the company's affairs and leave it in a solvent position. They had decided that there was no need for a winding up in Bermuda but there was a need for a Bermudian scheme as well as a scheme in Hong Kong. Accordingly, a summons was issued by the company acting by the Hong Kong liquidators under s.99 of the Bermuda Companies Act 1981 for leave to summons a meeting of creditors to consider the scheme.

(ii) The liquidators did not separately and explicitly seek an order recognizing their appointment and powers under the Hong Kong winding-up order but Kawaley, J. considered that recognition was required. The learned judge considered ([2008] Bda LR 34, at para. 6) recognition to be necessary even though the company's directors had "remained in place for Bermuda law purposes, and . . . had passed a resolution supporting the . . . application." While the directors might, from a Bermudian perspective, retain powers to bind the company, the scheme and the application were in substance controlled by the liquidators and therefore it would be artificial to proceed on the basis that the company was effectively acting, in making the application, just by its directors (an argument which Kawaley, J. labelled (*ibid.*, at para. 28) "a Temple point"!) and grant the company leave to summon a meeting of creditors without

deciding that it was permissible and appropriate to recognize the liquidators' appointment and powers to act on behalf of the company.

(iii) Counsel for the liquidators argued that there was an exception to the requirement that the foreign liquidator be appointed in the place of incorporation in a case in which there was no likelihood of a winding up taking place there, and that this was such a case. After noting that—

> "it seemed to be unprecedented, however, for this Court to recognise and enforce insolvency orders of a foreign court in respect of a Bermudian company in circumstances where (a) no parallel insolvency proceedings have been commenced in Bermuda, and (b) the Bermudian company has not only been placed into a restructuring proceedings abroad, but has been placed into 'full-blown' liquidation in what amount to primary (as opposed to ancillary) proceedings abroad"—

Kawaley, J. referred to the commentary on Rule 179 in *Dicey, Morris & Collins* (*op. cit.*) which I have set out above (although in 2008 Lord Collins was yet to be recorded as a co-author and the textbook was referred to as *Dicey & Morris*, and was in its 12th edition, with r.179 being r.160), to a passage in the second edition of Philip Wood's *Principles of International Insolvency* (2005) (in which Mr. Wood had said that there was a disadvantage to recognizing only a liquidation in the country of incorporation as many companies were incorporated in one jurisdiction but carried on their principal place of business elsewhere so that it would seem odd to refuse to recognize a liquidation where the main assets are located) and to a passage in Professor Ian Fletcher's *Insolvency in Private International Law* (2007), in which Professor Fletcher stated that where there were no winding-up proceedings in the place of incorporation, insolvency proceedings taking place in another jurisdiction might be considered to be the most appropriate way to wind up the company.

(iv) After referring to the "high judicial authority" and the analysis of the court's "common law discretion" in the judgment of Lord Hoffmann in *Cambridge Gas Transp. Corp.* v. *Navigator Holdings plc (Creditors' Cttee.)* (5) ("*Cambridge Gas*"), Kawaley, J. concluded ([2008] Bda LR 34, at para. 19):

> "All of this learning suggests the following principles which I adopt: (a) the fact that this Court would in similar circumstances entertain primary winding-up proceedings in respect of a foreign company is an important factor in deciding whether or not to recognize a foreign principal winding-up proceeding in relation to a local company which is not being wound-up at all its own domicile [*sic*]; and (b) the main practical consideration

is whether or not a foreign primary proceeding is the most convenient means of winding-up the company's affairs, having regard to all relevant commercial and/or public policy concerns in the case at hand. These two broad considerations must in my judgment be applied having regard to two fundamental principles of insolvency law: (a) the universalist principle under which all reasonable efforts ought normally to be made to subject a company's liquidation to a single coherent regime so that all creditors share ratably, irrespective of the accidental location of creditors outside the jurisdiction of the primary liquidation court; and (b) the presumption that most creditors dealing with the company before it became insolvent would reasonably have contemplated that their rights in any insolvency would be dealt with in accordance with the law of the company's place of incorporation, irrespective of the accidental location of assets outside of that jurisdiction. The application of all of these guiding principles will vary depending on the facts of the specific case."

(v) Kawaley, J. noted that since it was no longer intended to wind up the company (the winding up was to be stayed and the company rescued) it was unnecessary to consider in depth the circumstances in which a Bermudian court would decline to recognize a foreign winding-up proceeding in respect of a Bermudian company (and insist on a local Bermudian liquidation). He stated however (*ibid.*, at para. 24) that there should not be an expectation that the court in Bermuda would rubber stamp and always give recognition to such foreign proceedings. In any liquidation of substance, it will be impossible for the place of incorporation to be ignored because, for example, absent a local winding up, creditors not subject to limitation constraints could apply for a local winding up after and despite the foreign winding up, the directors remain in office and there may be local reputational, regulatory and policy reasons requiring a local proceeding.

(vi) The learned judge in exercising his discretion concluded as follows (*ibid.*, at paras. 34–37):

"34. When the commercial realities are looked at in isolation from the legal formalities, the Hong Kong Joint Liquidators in promoting parallel schemes of arrangement in Hong Kong and Bermuda are in essence requesting this Court to assist the Hong Kong Court to restructure the Company. It is impossible on the facts to identify any or any cogent reasons why this assistance may properly be declined.

35. The aim of the Scheme, most directly, is to eliminate the Company's existing unsecured debt. But this debt restructuring will only become operative if the Restructuring Agreement in relation to the Company's share capital become[s] effective, outside of the Scheme. Under the latter arrangements, an Investor will acquire most of the Company's shares. The purchase monies will fund the creditors' Scheme claims. The Company will be returned to solvency, its shares will be re-listed and the Hong Kong winding-up proceedings will be permanently stayed. As Ms. Fraser rightly submitted, the foreign winding-up order will (if the scheme is implemented) fall away, and no question of the need for a winding-up in Bermuda will arise.

36. This Court is being invited to assist the Hong Kong Court through implementing a parallel scheme of arrangement in Bermuda in circumstances where (a) the Company was registered as an overseas company in Hong Kong where its principal business and the majority of its assets are clearly located, (b) the estate is apparently not a large one and (c) there is no suggestion of any prejudice to local interests. In these circumstances there is no apparent reason why this Court should decline to assist the Hong Kong Joint Liquidators merely because no winding-up proceedings have been started here. As I observed in the context of parallel receivership proceedings:

'In the present case, with its centre of gravity clearly more in Hong Kong than Bermuda, this Court has, in my view rightly, been content to accord a leading role as regards assessment of costs and otherwise to the High Court of Hong Kong. In cases where Bermuda-based office holders subject to the primary supervisory jurisdiction of this Court were involved, this jurisdiction would logically expect to play a larger role.'

37. At the end of the day this Court was not asked to recognize a foreign winding-up order which purported to wind-up, for all purposes, the business of a Bermuda-incorporated company."

(g) Ms. Stanley noted and accepted that Kawaley, J.'s approach had been based on and followed the analysis of Lord Hoffmann in *Cambridge Gas* (5) and that his judgment had been delivered before the decision of the Supreme Court in *Rubin* (21) and the important decision of the Privy Council (sitting on appeal from Bermuda) in *Singularis Holdings Ltd.* v. *PricewaterhouseCoopers* (22) ("*Singularis*"). Both decisions had (as is well known amongst insolvency lawyers and practitioners) included

comments critical of Lord Hoffmann's approach and reasoning (in *Singularis*, Lord Sumption had noted ([2014] UKPC 36, at para. 18) that *Cambridge Gas* had "[marked] the furthest that the common law courts [had] gone in developing the common law powers of the court to assist a foreign liquidation [and had] proved to be a controversial decision"). However, Ms. Stanley submitted that none of the criticisms and *dicta* declaring that *Cambridge Gas* was (at least in part) wrongly decided meant that Kawaley, J.'s decision was wrong and should not be followed. The challenge to *Cambridge Gas* affected the decision in so far as it held that a foreign insolvency judgment could be recognized and enforced at common law even when the normal common law rules did not permit this and that the court could by way of common law assistance order that foreign liquidators could rely on and exercise rights under local statutes that did not otherwise apply (by acting as if a local statutory insolvency or restructuring procedure had been commenced and the related statutory powers had been available and applied). But Kawaley, J. had relied on neither of these aspects, nor on any of the other aspects of the *Cambridge Gas* judgment that had been criticized in *Rubin* and *Singularis*.

(h) Ms. Stanley also relied, as I have mentioned, on the 2010 decision of the Chief Justice in *In re Fu Ji Food & Catering Servs. Holdings Ltd.* (10). She pointed out that this is another pre-*Rubin* and pre-*Singularis* case. The judgment is not reported but the Chief Justice gave a helpful summary of the facts and his decision in an article published in 2 *Beijing Law Review* 145–154 (2011) ("A Cayman Islands Perspective on Transborder Insolvencies and Bankruptcies: The Case for Judicial Co-operation"). The following is the relevant section in the Chief Justice's article (*ibid.*, at 150–151):

> "*The Matter of FU JI Food and Catering Services Holdings Limited* (FSD Cause No: 222 of 2010, Grand Court of the Cayman Islands) involved an unusual request for judicial assistance from the High Court of Hong Kong to the Grand Court.
>
> Fu Ji Food and Catering Services, is a Cayman Islands holding company which has subsidiaries operating a substantial business in the People's Republic of China (PRC). The group's underlying business interests—principally in food production, restaurants and related services—experienced massive strain in 2009 and the trading of the company's shares on the Hong Kong Stock Exchange (HKSE) was suspended.
>
> As the company was also registered in Hong Kong, the High Court there was persuaded to place it into provisional liquidation to allow for its capital restructuring, an eminently attainable objective, given the substantial underlying value of the company and the then active interest of potential buyers.

This objective would not have been realised, however, if, despite its provisional liquidation in Hong Kong, creditors remained able to petition for the winding up of the company in the Cayman Islands, the place of its incorporation and domicile, or remained able otherwise to sue the company for recovery of indebtedness before the Cayman Courts.

The company therefore needed the protection of a stay of proceedings by the Cayman Courts and the ability of its provisional liquidators (the JPLs) to act for the company in the Cayman Islands. Hence the request from the High Court of Hong Kong.

The Grand Court first noted the existence of its inherent jurisdiction at common law to send or receive letters of request for judicial assistance.

Recognising and accepting that the objectives of the restructuring involved the protection of the interests of all the creditors of the company and its subsidiaries, as well as the interests of the company itself (in being allowed to resume listing and trading on the HKSE and so to be divested as a going concern), the request of the High Court was regarded as justified. In granting the request, the Grand Court accepted that, although it was asked to act in aid of the provisional liquidation order of a foreign court over a Cayman Islands company, doing so in the circumstances presented no public policy objections but complied with the need to ensure the protection of the legitimate interests of all stakeholders in keeping with the principle of universality. The following further dicta from *Cambridge Gas* was noted and applied:

> '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 (para 22, page 518).'

In accepting the request, the Grand Court also accepted that the company (Fu Ji Food Ltd) had a real and substantial connection to Hong Kong, being the jurisdiction from which its underlying business interests in the PRC were administered and in which its financing and working capital were raised. The restructuring was aimed at restoring the company to the HKSE and, with the new investor, to enable it to carry on its business in Hong Kong, where the provisional liquidation would close without a winding up.

It was ordered that the JPLs and their Appointment Order be recognized in all respects as if appointed and made by the Grand Court, including, in particular, the power and authority of the JPLs to

alter or otherwise deal with the capital structure of Fu Ji Food in accordance with the terms of the Appointment Order.

It was further ordered, therefore, that section 97 of the Cayman Islands Companies Law shall apply in relation to the company so that no action or proceeding shall be commenced or proceeded with against the company within the jurisdiction of the Grand Court except by leave of that court and subject to such terms as it may impose. It was additionally ordered that the JPLs have liberty to apply to the Grand Court in respect of any matter concerning the company and arising during the period of the JLPs' appointment.

Difficulties in deciding whether to accede to foreign insolvency proceedings may, however, arise when there are compelling reasons for winding up in the Cayman Islands or where there are already insolvency proceedings underway before the Cayman Courts involving the same company or involving related companies. These difficulties are likely to be addressed on the case-by-case basis, although the emergent principles of private international law, as recognised in Article 29 of the UNCITRAL Model Law, would maintain the pre-eminence of local insolvency proceedings over foreign proceedings."

(i) Ms. Stanley also relied on the recent decision of Aedit Abdullah, J.C. sitting in the High Court of Singapore in *Re Opti-Medix Ltd.* (17) in which the Singapore court recognized a Japanese liquidation of BVI companies. This is a post-*Rubin* (21) case.

(i) The case involved two BVI companies in respect of which bankruptcy orders had been made by the Tokyo District Court. The companies had assets (in the form of funds credited to bank accounts) in Singapore and the Japanese trustee wanted to exercise his powers under the Japanese bankruptcy orders to deal with, collect in and remit to Japan the funds in the bank accounts. For this purpose he sought an order recognizing his appointment and for the appointment of a foreign bankruptcy trustee by the Singapore court. The trustee also gave an undertaking to pay all preferential debts and other debts in Singapore before remitting any funds out of Singapore.

(ii) The Japanese trustee argued that since there were no competing claims by liquidators from different jurisdictions, the Singapore court should recognize his appointment (no prejudice would be suffered as there were only three Singapore creditors, the notes issued by the company had been sold only in Japan, any debts in Singapore were incurred only for administrative services and notice of the liquidation had also been advertised in Singapore, and no one had contacted the trustee's solicitors). Accordingly, the trustee submitted that his appointment should be recognized even though he

was not a liquidator appointed in the place of incorporation of the companies because there was no likelihood of insolvency proceedings in the BVI. He relied in particular on Rule 179 and the commentary thereto in *Dicey, Morris & Collins* (*op. cit.*) (at that date Rule 166 of the 14th edition (2006)) and Tom Smith, Q.C.'s chapter in *Cross-Border Insolvency* (ch. 6, in particular para. 6.81 (*loc. cit.*)).

(iii) The learned judge granted the relief sought. He noted that the Singapore court had in the past recognized foreign liquidators (citing *Re Lee Wah Bank Ltd.* (15), which appears to be a case involving the recognition of a liquidator appointed in a jurisdiction other than the country of incorporation); referred to and agreed with Lord Hoffmann's statements in *HIH* (11) ([2008] UKHL 21, at para. 31) and noted Lord Collins' conclusion in his judgment in *Rubin* ([2012] UKSC 46, at paras. 129–130) that it was not open to the courts to introduce a new basis for recognition of foreign judgments by reference to the connection between the judgment creditor and the jurisdiction in which the foreign insolvency proceedings had been commenced in respect of it) and cited and agreed with the following passage from *Cross-Border Insolvency* (*op. cit.*, para. 6.80, at 281):

> ". . . there is a measure of authority that the law of the place of incorporation does not occupy an exclusive position; other foreign insolvency proceedings may also be granted recognition in the English court. However, the issues which arise in light of the comments of Lord Collins in *Rubin* are, first, whether the existing authorities do provide sufficient support for a test of recognition based on factors other than the place of incorporation; and, secondly, whether there is any ability for the common law to develop in this area without legislative intervention.
>
> As to the first issue, it is suggested that Lord Collins in Rubin may well have overstated the extent to which the existing common law authorities give an exclusive role to the place of incorporation in determining whether foreign insolvency proceedings should be recognised. As to the second issue, it is difficult to see why the common law could not develop a broader test based on the concept of 'centre of main interests', as envisaged by Lord Hoffmann in *HIH*."

(iv) So Aedit Abdullah, J.C. concluded that he was able to recognize the Japanese trustee even though not appointed in the BVI and was prepared to use, as the test for determining whether the Japanese court was competent for these purposes, the centre of main interests test (which he held was satisfied since Japan was essentially the sole place in which actual business was carried on). He noted ([2016] 4 SLR 312, at para. 18):

"A consequence of a greater sensitivity to universalist notions in insolvency is a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings. As the winding up of a company by the court of the place of incorporation accords with legal logic, there may be a natural tendency to regard a liquidator appointed by that court as having primacy or legitimacy. However, the place of incorporation may be an accident of many factors, and may be far removed from the actual place of business. The approach of identifying the COMI has much to commend it as a matter of practicality. The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there."

(v) But he also considered that it was also possible to justify the recognition of the Japanese trustee on other "practical grounds." He said (*ibid.*, at para. 26):

"Aside from a common law COMI test, the recognition of the Tokyo order could also be justified on practical grounds. Where the interests of the forum are not adversely affected by a foreign order, the courts should lean towards recognition. This approach could be justified on the bases of not only comity but also of business practicality. In the present case, the interests of Singapore creditors were protected by the undertaking . . . and there was no competing jurisdiction interested in the winding up of the Companies. On the other hand, the jurisdiction which had the greatest interest, Japan, had moved in favour of liquidation. To hinder the orderly dissolution of the Companies in this situation would serve no purpose. The decisions in both *Re Lee Wah Bank* . . . and *Re Russo-Asiatic Bank* . . . could perhaps be explained on this practical basis."

(j) Ms. Stanley also noted that Harris, J. in the Hong Kong court in *African Minerals Ltd. (Joint Administrators)* v. *Madison Pacific Trust Ltd.* (1) had been prepared to assume without deciding that the Hong Kong court could in principle recognize liquidators or (administrators) appointed in a jurisdiction other than the place of incorporation (although he noted that the point was open to argument, citing Millett, J. in *In re International Tin Council* (13) ([1987] Ch. at 447) and Lord Collins in *Rubin* (21)). She also referred to the various cases discussed in *Cross-Border Insolvency*, *op. cit.*, at paras. 6.68–6.80, at 275–281, under the sub-heading "Place of incorporation not exclusive," in which courts had recognized the effect of a liquidation taking place in a jurisdiction other than that of the place of incorporation. She referred in particular to the following cases:

(i) *Queensland Mercantile & Agency Co. Ltd.* v. *Australasian Inv. Co. Ltd.* (19), a decision of the Court of Session (Inner House) involving liquidations both in the place of incorporation and another jurisdiction. The case related to a Queensland incorporated company which was being wound up in Queensland but there was also a subsequent (ancillary) winding-up order made in England. In the course of the English proceedings, the English court made an order staying proceedings in Scotland against the company. The effect of this order was considered by the Court of Session in Scotland, which gave effect to the English order and thus recognized a liquidation other than that under the law of the place of incorporation.

(ii) *BCCI (Overseas) Ltd.* v. *BCCI (Overseas) Ltd. (Macau Branch)* (3), a decision of the Hong Kong court. BCCI (Overseas) Ltd. was incorporated in Cayman and had opened a branch in Macau. The officers of the Macau branch placed funds from the branch on deposit with a Hong Kong bank. Subsequently the company was put into liquidation pursuant to an order of this court and then the branch was ordered to be liquidated out of court pursuant to an order of the Governor of Macau. Under the law of Macau, the assets recovered by the Macau liquidator would be ring-fenced. Both the Cayman liquidator and the Macau liquidator claimed the funds held on deposit in Hong Kong. The Hong Kong court allowed the Macau liquidator, as the representative of creditors entitled to prove in the Macau liquidation, to be a party to the proceedings in Hong Kong and to that extent the Macau liquidation was recognized but the rights to the funds on deposit in Hong Kong were governed by Hong Kong law as the *lex situs.* The Hong Kong court ordered the funds to be paid to the Cayman liquidator.

(iii) *Re Lee Wah Bank Ltd.* (15), a decision (as was noted in *Re Opti-Medix Ltd.* (17)) of the High Court of Singapore. Here a Hong Kong bank had a branch in Saigon. The branch had an account in Singapore at a time when winding-up proceedings were commenced in Hong Kong and Saigon. The Hong Kong liquidator and the Saigon liquidator both claimed the money. The Singapore court held that either liquidator could give a good receipt for the money and that the court had a discretion to direct payment to either liquidator.

(iv) I note that it is stated at para. 6.74 of *Cross-Border Insolvency* with reference to *BCCI (Overseas) Ltd.* v. *BCCI (Overseas) Ltd. (Macau Branch)* (3) and *Re Lee Wah Bank Ltd.* (15) (*op. cit.*, at 278) that—

> "although the results in both these cases are by no means surprising, the important point to note is that the liquidator of the relevant branch was recognised: the courts did not take the

approach that, because there was a liquidation in the place of incorporation, that in itself automatically put an end to any dispute."

(v) *Re Stewart & Matthews Ltd.* (23), a Canadian case. In this case a company incorporated in Manitoba carried on all of its business in Minnesota. The company petitioned the bankruptcy court in Minnesota and a trustee in bankruptcy was appointed. Subsequently a winding-up order was made in Manitoba. On an application supported by the majority of the company's creditors, the Canadian court stayed the Manitoban winding up in favour of the US bankruptcy. In *Cross-Border Insolvency*, *op. cit.*, para. 6.78, at 280, it is suggested that "it can only be that the court of the domicile of the company was prepared to grant recognition to the foreign (American) liquidation; otherwise, Canadian assets would not have been transferred to America."

(k) Finally, Ms. Stanley drew to my attention a Scottish case in which Lord Tyre in the Court of Session (Outer House) refused to grant relief in support of a foreign liquidation taking place outside the country of incorporation of the company concerned. The case is *Re Hooley Ltd.* (12). Ms. Stanley pointed out that since Lord Tyre's judgment contained certain *dicta* that, and because his decision, might be considered to be inconsistent with her submissions, she considered it necessary to refer the court to the case:

(i) As Ms. Stanley explained the case involved three Scottish companies. One of the companies (T Ltd.) was placed into insolvent winding up by the Indian court. In 2012, an administration order was made by the Scottish court in relation to T Ltd. The administrators agreed and entered into contracts for the sale of T Ltd.'s underlying assets to Hooley Ltd. (the petitioner), and then Hooley Ltd., having paid the purchase consideration, sought a declaration from the Scottish court as to its rights under the agreement and that the agreements were valid and enforceable and that the administrators had been entitled to enter into the agreements (without the need for the Scottish court's approval). The respondent to the petition was a creditor of T Ltd. It objected to the order sought and argued that "the court should refrain from hindering the Indian winding up by making any order which appeared to confirm the effectiveness of the exercise by the administrator of any power regarding assets in India or governed by Indian law."

(ii) The administrator's response was summarized by Lord Tyre as follows (2017 SLT 58, at para. 30):

". . . [I]t was not suggested on behalf of Hooley that this court should not apply the principle of modified universalism as

> defined by Lord Sumption in *Singularis* (above). The principle was, however subject to domestic law and public policy, and the court could only act within the limits of its own statutory and common law powers. Most importantly, its purpose was to assist a court exercising insolvency jurisdiction *in the place of the company's incorporation* to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction. The principle could not be applied to winding up proceedings in a country other than the place of incorporation. That indeed would hinder universalism. The Scottish courts could recognise and assist ancillary windings up (i.e. winding up processes taking place other than in a court in the place of incorporation), but they did not and could not defer to such ancillary windings up." [Emphasis in original.]

(iii) Lord Tyre accepted the administrators' submissions and granted the declarations sought (confirming that the administrators had been authorized and entitled to sell and refusing to require the Scottish administrators to refrain from exercising their powers so as to avoid any interference with the Indian insolvency proceeding). Lord Tyre said as follows (*ibid.*, at para. 35):

> "The principle of modified universalism has not, to date, been the subject of examination by a Scottish court. For present purposes it is sufficient for me to say that nothing was placed before me that might indicate that it should not be recognised. There is nothing new in a Scottish court lending assistance to foreign winding up proceedings: see e.g. *The Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd.* The same case demonstrates that Scots law has long recognised that there may be a principal liquidation in the country of the company's incorporation and an ancillary liquidation in another jurisdiction. In my opinion, however, Hooley is well founded in its submission that *the principle of modified universalism has not been recognised by the Supreme Court or the Privy Council as applying beyond the situation where winding up proceedings are taking place in the jurisdiction in which the company is incorporated.*" [Emphasis added.]

(iv) Ms. Stanley submitted that *Hooley* (12) was distinguishable from the present case, in particular because Lord Tyre was required to deal with a very different type of fact pattern. *Hooley* involved an asserted inconsistency or conflict (asserted by a creditor rather than the foreign liquidator or foreign court) between a domestic (Scottish) insolvency proceeding (taking place in the country of incorporation of the companies concerned) and the foreign liquidation and an application for relief that challenged and sought to limit the powers

of the Scottish officeholder. In stark contrast, in the instant case there is no conflict and no question of subordinating the Cayman court (or its officeholder) to the Hong Kong court; rather, the court is being asked to recognize the Hong Kong orders with a view to promoting a single coordinated process via parallel schemes of arrangement.

17 Ms. Stanley's arguments as to the ground I have identified in para. 13(d)(iii), based on the company's submission to the jurisdiction of the Hong Kong court, can be summarized as follows:

(a) In the circumstances of this case, the company has submitted to the jurisdiction of the Hong Kong court, and it could not be heard to say that it was not bound by the winding-up order and the order appointing the liquidators (including the liquidators' powers to act on behalf of the company for the purpose of applying for orders under s.86(1) of the Companies Law).

(b) The analysis set out in *Cross-Border Insolvency*, *op. cit.*, correctly summarized the applicable law. Paragraph 6.88 states as follows (at 284):

> "However, the Privy Council in *Cambridge Gas* had plainly proceeded on the basis that submission would be sufficient, and it is suggested that there is no reason for regarding this part of the reasoning as having been overruled by *Rubin.* Accordingly, where a corporation invokes the insolvency jurisdiction of a foreign court, or otherwise validly submits thereto, the proceedings may be accorded recognition by the English court."

(c) As is stated in para. 6.84 of *Cross-Border Insolvency* (at 283), it is clearly established as a matter of personal bankruptcy law that foreign proceedings may be recognized if the debtor submitted to the jurisdiction of the foreign court. Ms. Stanley relied on *In re Davidson's Settlement Trusts* (6). This case involved the bankruptcy in Queensland of Walter Davidson based on his own petition, and the subsequent application to the English court by the official assignee appointed in Queensland for an order that he be entitled to withdraw and remit to Australia funds held in court in England for Mr. Davidson (representing funds settled on Mr. Davidson by his deceased father). After Mr. Davidson had presented his own bankruptcy petition to the Queensland court, he died intestate, leaving a widow; his widow was appointed to represent Mr. Davidson's estate and she opposed the official assignee's application. Ms. Stanley referred me to the following passage from the judgment of James, L.J. (L.R. 15 Eq. at 385–386):

> "Whether the domicil of the insolvent was English or colonial, for the purpose of trading or otherwise, is immaterial. It seems to me that the proceedings under the insolvency in *Queensland* cannot be disputed by the representative of the insolvent, who became an

insolvent upon his own petition, who voluntarily submitted himself to the Insolvency Court in the colony, and in whose lifetime debts were proved in the insolvency to a much larger amount than the sum in Court will provide for. It is clear that neither the insolvent's representative nor his next of kin can have any legal right to anything until after the payment of all his debts, and a surplus here is only in the imagination."

(d) Lord Hoffmann in *Cambridge Gas* (5) had referred to *In re Davidson's Settlement Trusts* and confirmed the principle on which the decision was based as follows ([2006] UKPC 26, at para. 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 movables 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*: Re Davidson's Settlement Trusts* . . . 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." [Emphasis added].

(e) The effect of submission should, in principle, be the same in the case of a corporate insolvency as in the case of a personal bankruptcy (although, as is acknowledged in para. 6.84 (*ibid.*) of *Cross-Border Insolvency*, "submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon"). The only material difference between bankruptcy and corporate insolvency is that there is no need for a vesting order in the latter because the foreign assets of the company remain in the company, whereas in the case of a trustee in bankruptcy those assets need formally to be vested in him. Ms. Stanley submitted that this difference does not, and should not, lead to different rules for recognition.

(f) Submission by the company to the jurisdiction of the foreign court prevented anyone claiming through the company from challenging or denying the foreign liquidators' powers to act on behalf of the company, which powers were granted by or resulted from (in a case in which the powers were granted by a foreign statute following the making of) the foreign court's order.

(g) Ms. Stanley noted that in *Cambridge Gas* (5) the issue of submission had arisen but the discussion in that case related to submission not by

the company but by a shareholder, who was treated as a third party. In *Cambridge Gas*, the issue was whether the New York Bankruptcy Court's confirmation order in the chapter 11 proceedings relating to Navigator Holdings plc ("Navigator"), a Manx corporation, pursuant to which the shares in Navigator held by Cambridge Gas Transport Corporation ("Cambridge Gas"), a Cayman company, were to be transferred to Navigator's chapter 11 creditors' committee, was to be recognized. In these circumstances, there was, for the purpose of deciding whether the common law rules for recognizing and enforcing foreign judgments applied, an issue as to how to characterize the Bankruptcy Court's confirmation order (as well, of course, as to whether these common law rules applied differently to judgments obtained in the course of bankruptcy and insolvency proceedings). Was it an *in personam* order against Cambridge Gas (as shareholder) so that Cambridge Gas must have submitted to the chapter 11 proceedings for it to be bound or was it to be characterized in some other way which avoided the need to find a submission by Cambridge Gas? If the confirmation order was to be treated as an *in personam* order against Cambridge Gas under the ordinary common law rules regulating the recognition of foreign judgments, Cambridge Gas would have had to submit. It had not directly done so and had not participated directly in the chapter 11 proceedings (but its parent company had done so, perhaps on its instructions) and therefore the Deemster in the High Court of the Isle of Man concluded that Cambridge Gas had not submitted. His decision on this point was not appealed. But it seems that Lord Hoffmann thought this result surprising (presumably because he thought, on the facts, that Cambridge Gas's involvement in the chapter 11 proceedings albeit indirect was on the evidence sufficient to give rise to a submission (*ibid.*, at para. 10)). In any event, submitted Ms. Stanley, *Cambridge Gas* did not involve a decision on or analysis of the effect of a submission by the company on the recognition of the powers of a foreign liquidator to act on behalf of the company (and of other corporate organs, such as the board of directors, to act on the company's behalf). Furthermore, Ms. Stanley submitted that there was nothing in the Supreme Court's judgment in *Rubin* (21) that was inconsistent with or undermined the validity of the proposition that where the company submitted to the foreign court the powers of the foreign liquidator to act for the company would be recognized.

(h) Further, even though in the present case the Hong Kong winding up had not been commenced by a petition presented by the company, the company's registration under Part XI of the former Companies Ordinance (*cap.* 32) was sufficient to constitute a submission to any order made by the Hong Kong court, including the winding-up order. Ms. Stanley relied on the statement made by Mr. Chan in his second affirmation, which I have quoted above, as to the effect of the registration as a matter of Hong Kong law. Ms. Stanley did not appear (nor on the evidence did it appear

possible for the liquidators) to rely on participation by the company's directors or shareholders in the Hong Kong liquidation, which should be treated as sufficient to amount to a submission to those proceedings.

Discussion and decision—the issues to be decided

18 It seems to me that the following four main issues arise:

(a) Does the court have jurisdiction or the power to grant the relief sought by the liquidators in the present circumstances (the jurisdiction or power issue)?

(b) If it does have jurisdiction or the power, should the court make an order and exercise the jurisdiction or power in the present circumstances (the exercise of discretion issue)?

(c) Assuming the court is otherwise able and willing to grant the relief sought, should the court do so without notice being, and before notice is, given of the summons to the company's directors, shareholders and creditors (the notice issue)?

(d) What form of relief should the court grant and order should the court make (the nature of the relief issue)?

The jurisdiction or power issue

19 The first question is whether the court is able to grant the relief sought in the present circumstances. There are three sub-issues:

(a) What is the juridical nature and scope of the court's non-statutory jurisdiction to recognize and assist foreign court-appointed liquidators?

(b) What is the relief being sought by the liquidators?

(c) Is that relief within the scope of the court's jurisdiction or powers?

20 The juridical nature and scope of the court's non-statutory jurisdiction to recognize and assist foreign court-appointed liquidators has, as is well known, been the subject of much judicial comment and academic and practitioner commentary and has generated a voluminous body of secondary literature, in particular since the decisions in *Rubin* (21) and *Singularis* (22). Some, but not all, of the decisions and only a small proportion (thankfully) of the literature have been cited to me on this application and I will confine my comments (with limited exceptions) to the materials which have been cited to me.

21 It seems to me that the most recent, detailed and significant analysis of the juridical nature and basis of the non-statutory jurisdiction to recognize and assist is to be found in the majority judgments in *Singularis*, in particular the judgment of Lord Sumption. For this reason, this seems to me the proper place to start any discussion of this jurisdiction.

22 Before considering the decision and approach taken in *Singularis*, I should make two preliminary points. First, as I have noted, in Cayman we have a statutory jurisdiction to recognize and assist foreign representatives under Part XVII of the Companies Law. This statutory jurisdiction is only available where the foreign representative is appointed in the place of incorporation (see the definition of "debtor" in s.240, which states that "debtor" for the purposes of the definition of a foreign representative—a liquidator appointed in respect of a debtor—means a foreign corporation or other foreign legal entity subject to a bankruptcy proceeding in the country in which it is incorporated or established—"established" in this context appears only to be the equivalent of the place of incorporation in cases of, and is to be applied to, other foreign entities and not foreign corporations). But the statutory jurisdiction has not pre-empted or removed the non-statutory, common law based jurisdiction. This was the view of Jones, J. in), where the learned judge said as follows: "Part XVII [of the Companies Law] supplements and partially codifies the common law. It does not abolish the common law rules which continue to exist alongside the new statutory provision." This seems to me to be correct. Secondly, *Singularis* is, as I have noted, a decision of the Privy Council (on appeal from Bermuda). Ms. Stanley did not address the question as to the extent to which this court should follow *Singularis* but for the purpose of this application I intend to treat the decision and analysis as authoritative albeit not technically binding on me.

23 The analysis in *Singularis* (22) (as well as in *Rubin* (21)) used a particular terminology to describe the jurisdiction that the court was exercising—there are repeated references to common law powers to be applied having regard to common law principles. The following extracts from the core parts of Lord Sumption's judgment illustrate the use of this terminology and his analysis of the basis, nature and scope of the jurisdiction ([2014] UKPC 36, at paras. 10–12, para. 19, para. 23 and para. 25):

> "10 The English courts have for at least a century and a half exercised a *power* to assist a foreign liquidation by taking control of the English assets of the insolvent company. The *power* was founded partly on statute and partly on the *practice* of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations . . .
>
> 11 . . . The question [of] what if any *power* the court has to assist a foreign liquidation without conducting an ancillary liquidation of its own, must depend on the nature of the assistance sought. Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First the proceedings are a

'mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established', to use the expression of Lord Hoffmann in *Cambridge Gas* . . . Inherent in this function of a winding up is the statutory trust of the company's assets . . . and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction . . . Fourth, it brings into play procedural powers generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities . . .

12 . . . *[E]ven without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation.* For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English moveable assets of a foreign bankrupt which had been transferred to an office-holder in an insolvency proceeding under the law of his domicile. Moreover, while the same rule did not apply to immovable property, the court would ordinarily appoint the foreign office-holder a receiver of the rents and profits: see Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed, rules 216 and 217 . . .

19 . . . In the Board's opinion, the *principle of modified universalism* is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? *In the absence of a relevant statutory power*, they must depend on the common law, including any proper development of the common law. *The question how far it is appropriate to develop the common law so as to recognise an equivalent power* does not admit of a single, universal answer. *It depends on the nature of the power that the court is being asked to exercise* . . .

23 . . . *The principle of modified universalism is a recognised principle of the common law.* It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets

and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can . . .

25 In the Board's opinion, *there is a power at common law to assist a foreign court of insolvency jurisdiction* by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. *In recognising the existence of such a power*, the Board would not wish to encourage the promiscuous creation of *other common law powers* to compel the production of information. *The limits of this power are implicit in the reasons for recognising its existence.* In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, *it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers.* It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, *the power is subject to the limitation* in *In re African Farms Ltd* and in *HIH* and *Rubin*, *that such an order must be consistent with the substantive law and public policy of the assisting court*, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in *Norwich Pharmacal* and *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* (at both levels) shows, *common law powers of this kind* are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency. Finally, *as with other powers of compulsion exercisable against an innocent third party*, its exercise is conditional on the applicant being prepared to

pay the third party's reasonable costs of compliance." [Emphasis added.]

24 In *Singularis* (22), Lord Collins also referred to the court's common law power (*ibid.*, at paras. 51–58):

"51 The UK Supreme Court accepted, and re-confirmed, in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 that *at common law the court has power to recognise and grant assistance to foreign insolvency proceedings*: para 29 . . .

53 *The common thread in those cases in which assistance has been given is the application or extension of the existing common law or statutory powers of the court.*

54 Most of the cases fall into one of two categories. *The first group consists of cases where the common law or procedural powers of the court* have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA*, para 33. They include (subject to what is said below) *In re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency) . . .

58 A second group of cases is where *the statutory powers of the court have been used in aid of foreign insolvencies.* The best known example is the use of *the long-standing power to wind up foreign companies* which are being wound up (or even have been dissolved) in the country of incorporation." [Emphasis added.]

25 Lord Collins also used the power terminology in *Rubin* (21) and summarized the position in this way ([2012] UKSC 46, at para. 29):

"Fourth, 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." [Emphasis added.]

26 It seems to me that, based on these statements concerning the nature and scope of the non-statutory jurisdiction to assist, the following points can be made:

(a) The court is to be treated as having a power to recognize and grant assistance to foreign proceedings and liquidators (at least where those proceedings are commenced in and the liquidators are appointed by a court). This is a power of the court. If the circumstances justify its use, and subject to the limitations on its use, the power can be exercised by making suitable orders for the purpose of enabling the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of its powers. This is the purpose for which the power can be exercised.

(b) The court's power as so described is in substance a non-statutory jurisdiction which is based on and justified by the public interests identified by Lord Sumption. In deciding whether and how to exercise the power, the court has regard to and applies the approach which has been labelled the principle of modified universalism. This term is a convenient shorthand for the approach that the court takes when exercising the power which recognizes both the purpose for which the power is to be exercised (to allow a foreign liquidator appointed by a competent court to conduct the liquidation across borders despite the territorial limitations to which his powers are otherwise subject) and also the applicable limitations which apply to the power or condition or qualify its exercise. (I would, for myself, note that there appears to be an unhelpful tendency in the writings of some commentators to mischaracterize the status and effect of this guiding and flexible principle by elevating it into a rigid rule of law that independently generates rights and remedies and is to be treated, and applied, as if it were a doctrine in metaphysics or theology.)

(c) Suitable orders include any order which the court can make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to proceedings before it). The court is using and relying on its domestic law to fashion and find a form of relief for the foreign liquidator that achieves the purpose for which the power can be exercised. But the domestic substantive or procedural law must be applicable to the particular case before the court. Accordingly, the court cannot grant relief by making an order which can only be made in reliance on a domestic statutory power which, by its terms, does not apply in the circumstances—for example by making an order which could only be made if a domestic scheme of arrangement had been applied for and approved where no such scheme can be or has been applied for. Nor can the court make an order that grants relief to the foreign liquidator which depends on there being a domestic law right which does not in the circumstances exist—for example, in the view of both the majority and the

minority in *Singularis* (22), the court cannot order that an auditor subject to the *in personam* jurisdiction of the court provide information to the foreign liquidator when the auditor is not subject to a domestic law duty or obligation in the circumstances to provide it and when there is no right under domestic law for a party in the position of the foreign liquidator to such information. It is an interesting question, which I do not need to resolve on this application, whether the Privy Council created—or recognized—a special common law right or remedy enforceable by the Cayman liquidators which responded to and arose out of the liquidators' need to have the information sought or whether the Board was merely recognizing a right, which was analogous to the *Norwich Pharmacal* right or remedy (see *Norwich Pharmacal Co.* v. *Customs & Excise Commrs.* (16)) available to any litigant in a similar position (of course the Board refused to grant the relief sought because the Cayman liquidators were said—or perhaps more accurately on the case as argued, assumed—not to have the power under Cayman law to obtain the relevant information from the auditors, although one wonders why, if the common law of Bermuda recognized their entitlement to the information, or the Bermudian court's power to make an order requiring the information to be provided, such an entitlement or power was not available under Cayman law and in this court).

(d) The court must in each case start by considering the nature and form of relief sought by the foreign liquidator. This can take a number of different forms and the legal analysis varies depending on the nature of the relief sought. Sometimes, the foreign liquidator is asking the requested court only to apply its rules of private international law so as to permit the foreign liquidator to act in the name and on behalf of the company and to deal with its assets and rights. There may well be no need to rely on or exercise the common law power in this case. Sometimes, the foreign liquidator is asking the requested court just to exercise its case management powers in proceedings before it by adjourning or staying those proceedings or the execution of a domestic judgment arising therefrom. The exercise of such case management powers can be said to involve an exercise of the common law power. Sometimes the foreign liquidator will seek to bring proceedings in the requested court based on a domestic statutory or common law cause of action available either to the foreign liquidator or the company. Where he only needs to establish his capacity and powers, as a matter of private international law, to bring the proceedings in the name of the company, there will be no need to rely on the common law power. Where the cause of action is vested in the foreign liquidator or he is seeking additional relief in reliance on his powers as liquidator then the common law power to recognize and grant assistance to the foreign liquidator comes into play.

(e) Where the foreign liquidator is appointed in the country of incorporation of the company concerned, the domestic private international law of the requested court will apply so that the liquidator is treated as being entitled to act for and on behalf of the company. To that extent he will be entitled to recognition of his powers. As I have pointed out, the principles of domestic private international law produce that result. Therefore, technically, the foreign liquidator does not need to rely on, and this result does not depend on the exercise of, the common law power (at least when the foreign liquidator is only taking action in the name of and on behalf of the company and those seeking to challenge the foreign liquidator's action are claiming through the company). However, when the foreign liquidator is not appointed in the country of incorporation, he cannot rely on this rule of private international law and instead must invoke the common law power in order to be permitted to act on behalf of the company.

(f) The limitations on the common law power (both as to its scope and the circumstances in which it will be exercised) are those described by Lord Sumption and those I have set out above.

27 In the present case, the liquidators wish to be able to promote a Cayman scheme and in particular to apply to the court for an order under s.86(1) of the Companies Law convening a meeting of creditors. Section 86(1) states:

> "Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, *on the application of the company* or of any creditor or member of the company, or where the company is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs." [Emphasis added.]

28 Accordingly, the liquidators can apply if they are able or permitted to act for and on behalf of the company. Two main questions therefore arise. First, are the liquidators able—are they treated under Cayman private international law as being entitled—to act on behalf of the company (and therefore able to cause the company to make an application under s.86(1) of the Companies Law)? If not, can and should the court exercise its power to recognize and assist so as to permit them to do so, and if so how?

The position under private international law rules where the foreign liquidator is not appointed in the place of incorporation

29 As regards the first question, the answer is no:

(a) Because the liquidators are not appointed in the company's country of incorporation they are not, as a matter of Cayman private international law, treated as being empowered to act on behalf of the company. As Professor Briggs notes in *Private International Law in English Courts*, paras. 10.15, 10.16 and 10.22, at 804–805 and 808 (2014):

> "10.15 A corporation is an artificial creation, a legal person. The question whether, and with what powers, a body corporate has been created can only be determined by the law under which its creation took place, which for the common law rules of private international law means the *lex incorporationis*.
>
> 10.16 Likewise, the question who is empowered to act on behalf of the corporation, and in what circumstances, is a matter for the *lex incorporationis* to specify . . .
>
> . . .
>
> 10.22 Likewise, the question of who is entitled to sue in the company's name . . . is almost inevitably a matter for the *lex incorporationis* . . ."

(b) Under Cayman law, having regard to the company's constitution and the Companies Law, the corporate organs entitled to act on behalf of the company are the company's directors and shareholders. The winding-up order without more does not, as a matter of Cayman law, prevent these corporate organs from having the authority to act for and bind the company. The winding-up order is not, as an order of a foreign court, of itself binding or enforceable in Cayman (see *Felixstowe Dock & Ry. Co.* v. *U.S. Lines Inc.* (9) ([1989] Q.B. at 375)). Of course, before taking any action the directors would need to consider the effect (both legal and practical) of the winding-up order and would be unlikely to act, and are likely to be advised not to act, without the consent of the liquidators, certainly where they are subject to the *in personam* jurisdiction of the Hong Kong court and save in a case where there was some proper justification for not acting as directed by the liquidators.

(c) It was no doubt the Hong Kong liquidators' lack of authority, as a matter of Bermudian private international law, which resulted in the directors in *Re Dickson Group Holdings Ltd.* (7) remaining in place for Bermuda law purposes and passing a resolution supporting the Hong Kong liquidators' application for leave to summon a meeting of creditors. This meant that, under the law of incorporation, a corporate organ recognized as having authority to act for the company, and to authorize the company to apply for an order to convene a meeting of creditors, had approved and authorized the issue of the summons. At the very least, this was a prudent belt and braces approach (the application in the *Dickson Group Holdings Ltd.* case had been issued by and in the name of the

company). This step has not been taken in the present case because, as the second affidavit of David Yen Ching Wai makes clear, despite the liquidators' best efforts, the directors are not cooperating and have failed to respond to the liquidators' efforts to contact them (it appears that one director has been disqualified from acting while others have resigned—including the two Hong Kong based directors—or indicated that they intend to resign from the board).

The exercise of discretion issue

30 As regards the second question:

(a) It seems to me that the power to recognize and assist arises and applies even in a case where the foreign liquidator has been appointed in a place other than the country of incorporation. It is true that, as I have explained, the private international law rule which requires recognition of the power of a foreign liquidator appointed in the country of incorporation to act for the company does not apply. But, in light of the nature and scope of the power to recognize and assist, as I have explained it above, I see no reason for concluding that the power is wholly unavailable and cannot be used just because the foreign liquidator has been appointed in a place which is not the country of incorporation.

(b) The significance and impact of the appointment being made in the country of incorporation was also discussed in *Stichting Shell Pensioenfonds* v. *Krys* (24) ("*Stichting Shell*"), another important and recent decision of the Privy Council (sitting on appeal from the Eastern Caribbean Court of Appeal in a case involving the BVI). In that case, the advice of the Board was given in a judgment of Lord Sumption and Lord Toulson. They commented as follows ([2014] UKPC 41, at para. 14):

> "In the British Virgin Islands, as in England, the making of an order to wind up a company divests it of the beneficial ownership of its assets, and subjects them to a statutory trust for their distribution in accordance with the rules of distribution provided for by statute . . . In the case of a winding up of a BVI company in the BVI, this applies not just to assets located within the jurisdiction of the winding up court but all assets world-wide . . . *It reflects the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets.* They will fall to be distributed in the BVI liquidation . . ." [Emphasis added.]

(c) This confirms that at least one of the important reasons why an appointment in the place of incorporation is significant is because it brings with it the effects under private international law that I have already mentioned. Liquidators appointed by a court in the place of incorporation can take advantage of these rules of private international law (which are

applied in many jurisdictions), and therefore in practice expect to be able to conduct the liquidation and be effective, and act for the company, in multiple jurisdictions.

(d) I also note that there are some highly respected commentators who suggest that the powers of a liquidator appointed in a country other than the place of incorporation should be limited to dealing with the assets of and acting on behalf of the company in that territory and not beyond it. For example, Professor Ian Fletcher says the following in the latest and recent edition of *The Law of Insolvency*, 5th ed., para. 30–057, at 959 (2017):

> "A liquidator appointed under the law of the company's place of incorporation will be recognised at English law as having authority to wind up the company and to [be] represented in legal proceedings brought either against or on behalf of the company provided that such representative authority is conferred upon him by the law governing his appointment. Conversely, there is no reported incidence of recognition having been accorded in England to a liquidator appointed under the law of some other jurisdiction than that in which the company underwent incorporation. With respect to liquidations of this kind, the inference which most readily suggests itself is that, the effects of such a liquidation being regarded as of necessity, confined to the territorial limits of the jurisdiction in which the winding up is taking place, the liquidator's capacity to act on the company's behalf and to deal with its assets must be deemed to be similarly restricted so as to be limited to property situate[d] within the jurisdiction of the foreign court."

(e) But it seems to me that the inapplicability of the rules of private international law that treat a foreign liquidator appointed in the country of incorporation as having proper authority to act for and to bind the company or as effecting in substance a universal succession to the company's assets does not preclude the court exercising its non-statutory power to assist a foreign liquidator appointed outside the place of incorporation where the conditions for the exercise of that power are satisfied. The power is capable of having a wider application than these rules of private international law so that the power can be exercised even when the rules of private international law do not apply to require recognition of the foreign liquidator's powers or status.

(f) It seems to me that in the present case the conditions for the exercise of that power are in principle satisfied for the following reasons:

(i) It seems to me that the relief that the liquidators need and should be granted is an order authorizing them to make an application under s.86(1) of the Companies Law and to consent to the proposed scheme on the company's behalf.

(ii) The liquidators wish (as Ms. Stanley confirmed during the hearing) simply to be able to promote a parallel scheme of arrangement and to prevent any proceedings in Cayman being litigated in a manner that would disrupt or interfere with the scheme process. This can be achieved by the court making an order in the terms I have just mentioned and by making a direction to the effect that any proceedings commenced or any winding-up petition presented against the company be assigned to me (so that I can ensure that appropriate case management orders are made to stay or adjourn such proceedings pending the completion of the scheme process save in exceptional circumstances which would justify a different approach).

(iii) In the present case, the court is in substance dealing with a governance question, namely whether to permit the liquidators to act on behalf of the company in presenting an application under s.86(1) of the Companies Law and in consenting to the proposed scheme on behalf of the company. The issue is who should be entitled to act and bring proceedings for a scheme on behalf of the company (in the context of a corporate rescue or reorganization—albeit not one that involves all creditors being paid in full). No issues arise involving competing claims by creditors which would result in different levels of recovery or returns depending on whether the liquidators were granted the relief they seek. It appears that currently the company's board and its directors are unable or unwilling to act (while the directors could, I assume, act and support or authorize the making by the company of an application under s.86(1), with the consent of the liquidators they have shown no sign that they will take any steps to support or oppose the liquidators' plans or this application). It also appears that it would be impracticable and prejudicial to the interests of all stakeholders to delay matters by seeking shareholder approval for the liquidators' application (although as I explain below, I think that it is important to ensure that there really is no objection and to give all those affected an opportunity to be heard, to give notice to the directors and shareholders of the liquidators' plan to promote a parallel scheme in Cayman, the summons and the order that I make on this application).

(iv) It also appears to be the case that there is no likelihood of an application being made for a winding-up order in Cayman. The winding-up order was made on February 9th, 2015. As David Yen Ching Wai explains in his second affidavit, creditors have participated in the Hong Kong liquidation and 39 proofs of debt have been lodged. If creditors considered it to be in their interests to have a Cayman winding up they are expected to have made that clear and either applied in Hong Kong for permission or taken steps in Cayman to present a petition in Cayman. They have not done so in

over two and a half years and it appears from the evidence filed in support of the summons that creditors are aware of and not objecting to the proposed schemes of arrangement (although, once again, as I explain below, I think it important to ensure that creditors are given proper notice of the liquidators' plan to promote a parallel scheme in Cayman, the summons and the order that I make on this application).

(v) It is clear on the evidence that the company has substantial contacts with Hong Kong. As I have already noted, the company's shares have been listed and are to be relisted on the Main Board of the HKSE; the corporate business of the company has been administered from Hong Kong (with all the directors having addresses in Hong Kong or the PRC); the company was registered under Part XI of the former Hong Kong Companies Ordinance on November 4th, 1999; virtually all the company's shareholders have addresses in Hong Kong (the company's largest registered shareholder, HKSCC Nominees Ltd., which owns and operates the Hong Kong Central Clearing and Settlement System (CCASS), held as at August 17th 99.02% of the company's shares and all CCASS participants were registered with Hong Kong addresses) and 2.7% of the value of all proofs of debt lodged in the Hong Kong liquidation have been filed by persons located in Hong Kong and 74.9% of proofs have been lodged by persons located in the PRC.

(vi) There appears on the evidence to be no need for or reason why creditors or members would benefit by a Cayman winding up or from a provisional liquidator being appointed in Cayman. The liquidators consider that a Cayman liquidation or provisional liquidation would just incur additional cost and result in unnecessary delays and there is no risk of prejudice to stakeholders in not having such a proceeding. This, on the evidence, seems right to me.

(vii) This is also not a case in which there are any local reputational, regulatory and policy reasons requiring a local proceeding. I agree with, and wholeheartedly endorse, the approach explained and the caveats identified by Kawaley, J. in his judgment in *Dickson Group* (7) ([2008] Bda LR 34, at para. 29). In appropriate cases, the requested court may have to refuse to grant assistance and the relief sought by a foreign liquidator where a local liquidation or provisional liquidation is needed (and I also note that the Chief Justice made the same point in his summary of his judgment in *Fu Ji Food* (10) and expressed the same reservations, commenting that there may be cases in which there are "compelling reasons" for a Cayman winding up).

(g) Therefore, in the present case the Hong Kong liquidation is the only proceeding which has been or is likely to be commenced in respect of the

company and is taking place in a jurisdiction with which the company has substantial connections. I note that the company's centre of main interests, as that term is used in the EU Insolvency Regulation or the UNCITRAL Model Law, is probably in Hong Kong and that seems to me to be a consideration of considerable weight to be taken into account when deciding whether the foreign, non-place of incorporation liquidation should be treated as competent and justifying assistance, although I do not consider it to be determinative. There is therefore a foreign liquidation taking place in a jurisdiction which should be treated as competent, no other insolvency proceeding in prospect and a proper need (endorsed and supported by a well-respected foreign court) for the foreign liquidator to be able to exercise his powers to represent the company in the local court and jurisdiction in order to be able effectively to conduct and achieve the purposes of the liquidation in the interests of creditors and other stakeholders. It seems to me that in these circumstances the purpose for which the power to recognize and assist may be exercised is fully engaged so as to justify the exercise of the power (and the authorities relied on by Ms. Stanley support its exercise in the present case).

(h) None of the limitations which Lord Sumption identified applies in the present case to prevent the exercise of the power to recognize and assist the liquidators. They have a power as a matter of Hong Kong law to act for and on behalf of the company and to promote schemes of arrangement. Furthermore, while the liquidators wish to use and rely on the statutory jurisdiction to apply for a Cayman scheme (under s.86(1)) that jurisdiction (and the applicable statutory provision) is available in the circumstances. Section 86(1) permits an application to be made by the company and the liquidators can be authorized by the court to make such an application on the company's behalf. This does not involve the heresy or impermissible exercise of the common law power identified by Lord Collins in *Singularis* (22) ([2014] UKPC 36, at paras. 78–83) in which the court applies legislation which otherwise does not apply "as if" it applied. Provided that the liquidators can properly make an application in the company's name and are authorized to do so on the company's behalf, the statutory jurisdiction to apply for an order convening a meeting of creditors may be invoked in accordance with its terms. It seems to me that the court may without the need to rely on a statutory power not otherwise available and in a manner that is in accordance with domestic law make an order against and in respect of a Cayman company authorizing a foreign liquidator to make such an application and giving him powers to act on behalf of the company for that purpose.

(i) In my view, *Re Dickson Group Holdings Ltd.* (7) was correctly decided and I see myself as following in general terms the approach taken in that case by Kawaley, J., although I have sought to update and modify the analysis of the common law power and how it is to be applied to

reflect the judgments in *Rubin* (21) and *Singularis* (22). I also consider that I can rely on and am following the approach of the Chief Justice in *Fu Ji Food* (10) subject to a similar updating of and adjustment to the analysis of the common law power (and consequently to the form and nature of the relief to be granted to the foreign liquidator). I also agree with the result in *Re Opti-Medix Ltd.* (17) although I have sought to provide a different and more detailed analysis of the common law power. I agree with Ms. Stanley that the result and reasoning of Lord Tyre in *Hooley* (12) is not inconsistent with the approach I have adopted or the liquidators' application. It is hardly surprising that a Scottish court would refuse to interfere with a sale agreed and entered into by Scottish administrators (whom it had appointed) on a post-transaction application made by a creditor rather than the foreign liquidator and without a request of the Indian court. The present case is very different and presents wholly different issues. I also regard the commentary in both *Dicey, Morris & Collins* and *Cross-Border Insolvency* to be helpful and broadly correct and take comfort from the various cases cited in those texts and by Ms. Stanley in which courts, in admittedly different contexts, have been prepared to recognize and assist foreign liquidators appointed outside the country of incorporation.

The submission to jurisdiction point

31 Ms. Stanley, as I have noted, also argues that submission by the company to the jurisdiction of the foreign court in which the winding-up order is made and the foreign liquidator is appointed is a separate ground which justifies the requested court recognizing (and indeed requires the requested court to recognize) the powers of the foreign liquidator to act on behalf of the company and that the company has submitted to the jurisdiction of the Hong Kong court in the present case.

32 It seems to me that two main issues arise:

(a) Is submission a sufficient and separate basis for recognition of the foreign liquidator's powers to act for the company?

(b) If so, what constitutes submission for these purposes—in particular is registration as an overseas company sufficient or is it necessary that the company applies for the commencement of (or actively participates in) the foreign liquidation?

33 As regards the first issue, I would make the following comments, subject to the caveat that my views are preliminary since, as the textbooks cited to me make clear, the issue has not been the subject of a full consideration by any previous decision and this has been an *ex parte* application in which the counter-arguments have not been aired and tested:

(a) In my view, submission can in principle be sufficient for certain purposes.

(b) At para. 6.84 of *Cross-Border Insolvency*, Mr. Smith notes, prior to reaching the conclusion relied on by Ms. Stanley and quoted above, that there is no clear authority on the effect on a foreign liquidator's application for recognition or assistance of a submission by the company to the jurisdiction of the foreign court (at 283):

> "In the case of bankruptcy, it is clearly established that foreign proceedings may be recognised in England if the debtor submitted to the jurisdiction of the foreign court. However, submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon."

(c) But it does appear that (in addition to Lord Hoffmann in *Cambridge Gas* (5) in the passage referring to *In re Davidson's Settlement Trusts* (6) relied on by Ms. Stanley and quoted above) both Lord Collins and Lord Mance in *Rubin* (21) accepted, or perhaps assumed, that submission by a corporate debtor (as well as an individual bankrupt) would be sufficient.

(i) In *Rubin*, when discussing *Cambridge Gas*, Lord Collins said as follows ([2012] UKSC 46, at para. 46):

> "The first sense is the jurisdiction of the US Bankruptcy Court in relation to the Chapter 11 proceedings themselves. The entity which was in Chapter 11 was Navigator. The English courts exercise a wider jurisdiction in bankruptcy and (especially) in winding up than they recognise in foreign courts. *At common law, the foreign court which is recognised as having jurisdiction in personal bankruptcy is the court of the bankrupt's domicile or the court to which the bankrupt submitted (Dicey, 15th ed, vol 2, para 31R-059) and the foreign court with corresponding jurisdiction over corporations is the court of the place of incorporation (Dicey, 15th ed, para 30R-100).* Under United States law the US Bankruptcy Court has jurisdiction over a 'debtor', and such a debtor must reside or have a domicile or place of business, or property in the United States. *From the standpoint of English law, the US Bankruptcy Court had international jurisdiction because although Navigator was not incorporated in the United States, it had submitted to the jurisdiction by initiating the proceedings.*" [Emphasis added.]

(ii) The second italicized passage is quoted and relied on by Ms. Stanley. I think that the first quoted passage is also worth noting. (I also think that Ms. Stanley is right to say that there is nothing in the subsequent criticisms of Lord Hoffmann's analysis or the result in

Cambridge Gas which prevents a court concluding that a submission by a company would be a sufficient ground for recognizing the foreign liquidator's powers to act for the company.) The significance of submission has been highlighted and strengthened by the Board's judgment in *Stichting Shell* (24). Furthermore, there is an argument that the result in *Cambridge Gas* can be justified on the basis of there having been a submission—the submission by Navigator having been sufficient to constitute a submission by its shareholders, at least to the extent of preventing them challenging the orders of the foreign court: see Briggs, "Judicial assistance still in need of judicial assistance" ([2015] 2 LMCLQ 179–193).

(iii) Lord Mance said the following in his dissenting judgment in *Rubin* ([2012] UKSC 46, at para. 189):

> "Lord Clarke takes a different view from Lord Collins, but does not define either the circumstances in which a foreign court should, under English private international law rules, be recognised as having 'jurisdiction to entertain' bankruptcy proceedings or, if one were (wrongly in my view) to treat the whole area as one of discretion, the factors which might make it either unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings . . . *The scope of the jurisdiction to entertain bankruptcy proceedings which English private international law will recognise a foreign court as having is described in Dicey (in para 31–064 in the 14th and 15th editions) as a 'vexed and controversial' question. But it would include situations in which the bankrupt or insolvent company had simply submitted to the foreign bankruptcy jurisdiction.* On Lord Clarke's analysis, in such a case (of which *Rubin v Eurofinance* is an example), it would be irrelevant that the debtor under the avoidance order had not submitted, and was not on any other basis subject, to the foreign jurisdiction. It would be enough that the judgment debtor had had the chance of appearing and defending before the foreign court. For the reasons given by Lord Collins, I do not accept that this is the common law." [Emphasis added.]

(iv) The personal bankruptcy rule in Dicey, Morris & Collins, *op. cit.*, to which Lord Mance was referring (para. 31R–059, at 1750) states that—

> "(2) . . . English courts will recognise that the courts of any other foreign country have jurisdiction over a debtor if—
>
> (a) he was domiciled in that country at the time of the presentation of the petition or

> (b) he submitted to the jurisdiction of its courts, whether by himself presenting the petition or by appearing in the proceedings."

Paragraph 31–064 states as follows (at 1751):

> "Clause (2) of the Rule . . . must be regarded as somewhat speculative, because the question is a vexed and controversial one which English courts have had few opportunities of considering. It was at one time supposed that English courts would recognise the bankruptcy jurisdiction of a foreign court only if the debtor was domiciled in the foreign country. But it has since become clear that they will also do so if the debtor submitted to the jurisdiction of the foreign court, whether by presenting the petition himself, or by appealing against the adjudication, or by appearing in the proceedings at some stage either personally or by his counsel or solicitor."

(v) *Dicey, Morris & Collins*, *op. cit.*, refers to and relies on *In re Davidson's Settlement Trusts* (6) to support the proposition that the presentation by the personal debtor of his own petition will be sufficient. They also refer to *In re Anderson* (2). In this case a debtor, whose domicile was English and who was entitled to a reversionary interest in personalty (a fund) in England, was adjudicated bankrupt in New Zealand on a creditor's petition. Subsequently, he was adjudicated bankrupt in England. The reversionary interest, which by an oversight was not disclosed in the New Zealand bankruptcy, was discovered by the trustee in bankruptcy in England and he at once gave notice of his title to the trustees of the fund and argued that he was entitled to it as against the New Zealand trustee. Phillimore, J. held that the New Zealand trustee was entitled, as against the trustee in bankruptcy in England, to the reversionary interest. The record in the New Zealand proceedings showed that though not a consenting party, he was a party by his solicitor to the adjudication in bankruptcy and had recognized the adjudication by applying some time afterwards for his discharge and obtaining it. Phillimore, J. said ([1911] 1 K.B. at 902):

> "Therefore, I think, upon principle and authority, that the adjudication in New Zealand, being a valid adjudication according to the law of New Zealand, passed the right to movable property of the bankrupt in any country to his official assignee in bankruptcy in New Zealand. *If he had not been a party to the adjudication, if it had been made against him in his absence, other considerations might very well have applied; but he certainly was a party to the adjudication, though he did not invoke it, as in In re Davidson's Settlement Trusts . . . and In re*

Lawson's Trusts . . . Therefore I think that the adjudication passed, as against him and, therefore, as against anybody claiming under or through him, his personal property wherever situate . . ." [Emphasis added.]

(vi) It seems to me that Ms. Stanley is right to say that, at least as regards the issue of whether anyone other than the foreign liquidator should be recognized and treated as having the right and power to act on behalf of the company, there is no principled basis for distinguishing between the effect of submission by an individual and a corporate debtor. As Phillimore, J. says, it is the fact that the debtor has become and made itself a party to the foreign proceedings that is key and affects anyone claiming under or through the debtor. The fact that under personal bankruptcy law there is a vesting and transfer of title in the debtor's property to the trustee is of no consequence in this context. The vesting or transfer of property outside the foreign jurisdiction is not recognized as a matter of the private international law of the requested court. In a corporate context, if the company has submitted to the foreign court and the insolvency proceedings by applying for the appointment of the liquidator or participating in the foreign insolvency proceedings, its board or shareholders cannot be heard to deny the effects of the appointment (in a case where the company presents its own petition or application in the foreign court) requested by the company and (in any case in which the company through its proper officers has participated in the foreign liquidation or otherwise acted so as to give rise to a submission) the consequences, as regards corporate authority and the power to act on behalf of the company, that follow from the appointment and the foreign court's order.

34 As regards the second question, I would make the following comments (which once again must also be subject to a caveat to the effect that I express here only preliminary views since not only were the arguments not tested on an *inter partes* hearing but the evidence of Hong Kong law was not detailed and limited and Ms. Stanley did not explore the issue or relevant authorities in any depth):

(a) As I have noted, the liquidators rely on the company's registration under Part XI of the former Companies Ordinance as establishing its submission to the jurisdiction of the Hong Kong court generally and in particular with respect to the Hong Kong winding-up proceedings. As I have already noted, Mr. Chan in para. 9 of his second affirmation says as follows:

"By registering under Part XI of the former Companies Ordinance (Cap. 32), the company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong

> Kong (the Rules), compliance with Part XI means that the company is 'within the jurisdiction' and can therefore be served with a winding up petition in accordance with Order 10, rr.1–5 of the Rules . . . and sections 326(1) and (2) and section 327 of the Companies (Winding Up Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014) . . ."

(b) Part XI applies to an overseas company which has established a place of business in Hong Kong (see s.332). In common with similar English statutory and procedural rules, Part XI and the Rules (as defined in Mr. Chan's second affirmation) permit service to be effected in Hong Kong on the overseas company either by service addressed to any person in Hong Kong whose name has been delivered to the Registrar as being authorized to accept service or where the overseas company makes default in filing these details by service at any place of business established by the overseas company in Hong Kong or if the company no longer has a place of business in Hong Kong by sending the document to the company's principal place of business in its place of incorporation or to any place in Hong Kong at which the company had a place of business within the previous three years (see s.338).

(c) The question arises as to the legal effect of these provisions and as to whether they result in mere registration constituting a submission for the purposes of recognition of the foreign liquidator's powers.

(d) As regards what is required for there to be a submission, I note that in their judgment in *Stichting Shell* (24) Lord Sumption and Lord Toulson ([2014] UKPC 41, at para. 31) comment that—

> "a submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the Defendant lodged a proof."

The company must by some voluntary act accept that it is subject to and bound by the jurisdiction of the foreign court pursuant to which the order in question is made. Registration *prima facie* appears to be a voluntary act by which the overseas company concerned allows itself to become subject to the foreign court's jurisdiction and to accept that such jurisdiction may be taken and assumed by service of process on the company's appointed authorized representative. If the applicable rules regulating the effect of registration provide for and permit service of a winding-up petition as well as originating process relating to ordinary civil litigation then it should follow that there is also a voluntary acceptance of the foreign court's winding-up jurisdiction.

(e) However, the difficulty I have is that it appears to be arguable that registration by an overseas company of particulars (of a person authorized to accept service), when required only where the overseas company has established a base of business in the foreign jurisdiction, is to be treated as permitting the foreign court to take and assume jurisdiction by reason of the company's presence in the foreign jurisdiction rather than its submission. Furthermore, the analysis of the legal effect of the registration gives rise to questions of construction of the relevant foreign legislation and requires proper evidence of foreign law (which is not available on this application) and appears, at least by reference to the English authorities of which I am aware (but which were not cited to me or the subject of submissions by Ms. Stanley) to raise difficult issues which may be contested and would require further submissions before I would be prepared to form a view.

(f) In Professor Richard Fentiman's *International Commercial Litigation*, 2nd ed. (2015) he says as follows (para. 9.13, at 324):

> "It has been said that a foreign company having a branch in England submits to the jurisdiction merely by complying with its Companies Act obligation to file an address for service.[35] In such cases, however, the basis for jurisdiction is the defendant's presence in England. By providing an address for service the company is merely ensuring that service may be effected easily. This is confirmed by the rule that such a company may be served at its place of business even if it has provided no address.
>
> [35] *Employers Liability Assurance Corp v Sedgwick, Collins & Co* [1927] AC 95, 104, 107, 114 (HL)."

(g) So, Professor Fentiman considers that registration of particulars by an overseas company does not permit the court of the place where the registration is made to take jurisdiction because the overseas company has submitted generally to the jurisdiction of the foreign court. It is presence through the place of business that is the operative factor. Having a presence or place of business in the country of the foreign court is, of course, in the current context insufficient and is different from submitting to the jurisdiction of the foreign court, which is what is required (I also note that *Dicey, Morris & Collins* (*op. cit.*) state that the statutory and procedural rules relating to overseas companies are "exclusively concerned with *service*" and therefore are perhaps of limited significance and effect—see para. 11–117, at 416).

(h) It does appear, however, that the judgments in *Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co. Ltd.* (8) were based on the proposition that the foreign company concerned had submitted to the jurisdiction of the English courts. In that case, as Sir John May noted in

the Court of Appeal in *Rome* v. *Punjab National Bank (No. 2)* (20) ([1989] 1 W.L.R. at 1218):

> "The judgment debtor was a Russian company which had carried on business in London before the 1914–1918 war and had registered a Mr. Collins as its agent to accept service. After 1917 the company's business and assets were transferred to the Soviet government under the revolutionary legislation. In 1923 a writ was served on Mr. Collins, and, in default of appearance, judgment was signed against the defendants despite Mr. Collins' protest that the company had ceased to exist. In both tribunals the validity of the service was challenged, but having found that the company continued to exist *both the Court of Appeal and the House of Lords held that the Russian company, by filing Mr. Collins' name and address, had submitted voluntarily to the jurisdiction of the English courts and that so long as his name remained on the register, service on him was good service.*" [Emphasis added.]

(i) In *Rome* v. *Punjab National Bank (No. 2)*, the Court of Appeal held that on a true construction of the relevant provisions of the Companies Act 1985 (s.695(1)) a writ was sufficiently served on an overseas company if addressed to a person whose name and address had been delivered to the registrar of companies and left at or sent by post to that address, notwithstanding that the company had ceased to carry on business in Great Britain, that the persons so named were no longer resident there, and that those facts had been notified to the registrar under the 1985 Act. The decision is not referred to by Professor Fentiman and does, as it seems to me, suggest that the basis for jurisdiction in cases involving overseas companies is not presence (or at least presence alone) in the foreign jurisdiction.

(j) Furthermore, I note that the Hong Kong Companies Ordinance in terms provides for service on the overseas company even if it no longer has a place of business in Hong Kong. This suggests that the existence of a place of business is not the key factor or the only relevant basis on which the Hong Kong court is to be treated as taking jurisdiction.

(k) It seems to me that the basis on which jurisdiction over the overseas company is taken is properly to be treated as statutory and therefore whether registration gives rise to and is to be characterized for present purposes as a submission to the foreign jurisdiction is in part a question of statutory construction and in part a question as to whether as a matter of Cayman law the effects of the foreign statute are to be treated as sufficient to amount to a submission.

(l) My provisional view is that they are but, as I have said, there are doubts and issues which require evidence of foreign law and fuller consideration and I therefore do not wish on this application to express a

firm view. I would also wish to consider carefully whether if registration can be treated as a submission it constitutes a submission for the purpose of a liquidation taking place in that jurisdiction. I note that Lord Mance in the passage from *Rubin* (21) quoted above referred to the need for there to be a submission to "the foreign bankruptcy jurisdiction" and it seems to me to be arguable that what is required is that the company apply for the commencement of the foreign liquidation or that its directors or shareholders (or other proper representatives) authorize participation in the foreign liquidation. As I have noted, neither of these conditions is satisfied in the present case.

(m) Accordingly, where the position is not settled and there has only been a limited opportunity for the citation of authority or argument, I do not consider that I am in a position to form a concluded view on this issue. I am reassured by the fact that in this case, in view of the conclusion I have reached regarding the availability of and the justifications for the exercise of the common law power, I am able to grant the relief sought by the liquidators without the need to determine that the company has submitted to the insolvency jurisdiction of the Hong Kong court.

The notice issue

35 As I have noted above, there is a further issue which needs to be considered. This is whether I should grant the relief sought by the liquidators before notice has been given to the company's directors, shareholders and creditors. The summons has been applied for on an *ex parte* basis and while notice of the resumption proposal and the liquidators' plans to promote parallel schemes of arrangement in Hong Kong and Cayman has been given and details notified to shareholders and creditors, the directors, shareholders and creditors have not seen the summons or the evidence in support and have not been given an opportunity to notify the liquidators of any objections or views or to make submissions or appear on the summons.

36 In a case such as the present one, where I am proposing to exercise the common law power on the basis and assumption that no application for a Cayman winding up will be made; that the company's directors and shareholders have not sought and do not intend to exercise any residual powers and rights which they may have to act on behalf of the company and that the relief sought by the liquidators is demonstrably in the interests of all stakeholders, it seems to me to be important that the directors, shareholders and creditors are notified of the summons specifically and given an opportunity to notify the liquidators and the court of any objections, to make submissions and to apply to the court should they wish to do so.

37 It would be open to me to direct the liquidators to give notice of the summons before making the order sought and to require a further hearing if any objections are received or to give the directors, shareholders or creditors an opportunity to appear and make submissions. However, this seems to me to be unnecessary. Instead I propose to make an order in the form discussed below which will authorize the liquidators to apply under s.86(1) of the Companies Law and to petition the court for an order convening the meetings required in connection with the proposed scheme but which will also require the liquidators to notify, by a suitable means and within an appropriate timescale, the directors, shareholders and creditors of the summons and to make available copies of the summons and evidence in support to any such person who wishes to receive a copy before the liquidators make any such application. This will ensure that the directors, shareholders and creditors are given adequate notice of the summons and an opportunity to object or to make an application to this court before the liquidators proceed to petition the court for an order convening the scheme meetings. If there are any objections or submissions, or if any such person wishes to be heard, a further hearing of the summons will be listed in order to consider such objections or submissions and hear any person who wishes to appear and the court can then decide how to proceed. If, however, no such objections, submissions or notices of an intention to appear are received before the time to be specified in the order, then the liquidators will be authorized and permitted to proceed thereafter to apply to the court for an order convening the scheme meetings. This will balance the need to ensure that anyone wishing to raise an objection has the opportunity to do so before the liquidators proceed with the scheme without unduly delaying the scheme process by requiring a further hearing, which may be unnecessary.

The nature of relief issue

38 The letter of request and the draft order provided by the liquidators, as I have explained, sought an order which would recognize the liquidators and treat them "in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by this Court . . ." The order would then recognize the powers and authority of the liquidators to act on behalf of the company generally and also for the various purposes set out in the letter of request and draft order.

39 The letter of request and the draft order also sought an order that s.97 of the Companies Law shall apply to the company (and which would have the same or substantially the same effect as s.186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance) so that no action or proceeding shall be proceeded with or commenced against the company within the jurisdiction of this court except by leave of this court and subject to such terms as this court may impact.

40 It seems to me that the court is unable, in the exercise of the common law power, to make either of these orders. Granting relief which is only available to provisional liquidators appointed by this court in circumstances when no such provisional liquidators have been appointed, and granting relief "as if" provisional liquidators had been appointed seems to me to be precisely what Lord Collins in *Rubin* (21) and *Singularis* (22) had said was impermissible. The same applies to an order that would declare that s.97 applies to the company in circumstances where that section does not and cannot so apply in the absence of a provisional liquidator being appointed by this court. It seems that the letter of request and the draft order were drafted so as to reflect the form of order made by the Chief Justice in the *Fu Ji Food* case (10).

41 However it seems to me that the objective of the liquidators can properly be achieved by an order in a different form. I have already outlined above the form of order that I have in mind. The liquidators wish and need to be able to apply to this court for an order convening the scheme meetings, to make such other applications as are required in connection with and to promote the proposed Cayman scheme and to consent to such scheme on behalf of the company. This objective can be achieved by an order which authorizes the liquidators to take this action. Furthermore, relief having the same effect as s.97 of the Companies Law can be achieved by a direction that requires all proceedings commenced or to be commenced (including proceedings for injunctive relief or to execute a judgment) against the company be allocated to and heard by me. This order will ensure that any action taken by creditors or shareholders will become before me and will allow me to make suitable case management orders for adjournments or stays to allow the scheme to proceed (unless there are exceptional circumstances that justify the commencement or continuation of proceedings).

42 Ms. Stanley indicated at the hearing that this approach would be acceptable to the liquidators. Accordingly, I shall make an order in these terms, the precise form of which is to be proposed by Ms. Stanley and approved by me.

Order accordingly.

Attorneys: *Ogier* for the liquidators.

A

Privy Council

Singularis Holdings Ltd *v* PricewaterhouseCoopers

[2014] UKPC 36

[on appeal from the Court of Appeal for Bermuda]

B

2014 April 29, 30; Nov 10

Lord Neuberger of Abbotsbury PSC, Lord Mance, Lord Clarke of Stone-cum-Ebony, Lord Sumption JJSC, Lord Collins of Mapesbury

Bermuda — Insolvency — Jurisdiction — Company wound up in Cayman Islands — Liquidators seeking order in Bermuda requiring auditors to produce information relating to company's affairs — Judge purporting to exercise common law power to order production of information which could have been ordered under statute in domestic insolvency — Whether power at common law to assist foreign court of insolvency jurisdiction by making order — Whether order appropriate in circumstances where foreign court could not make equivalent order — Whether court able to exercise powers analogous to statutory powers which were exercisable in domestic insolvency but did not apply to foreign insolvency — Companies Act 1981 (No 59 of 1981), s 195

C

D

A Cayman Islands company was wound up in the Cayman Islands and liquidators were appointed. In order to trace the company's assets, the liquidators wished to obtain information relating to the company's affairs from the company's auditors, a Bermuda registered partnership. They obtained from the Cayman Islands court an order requiring the auditors to transfer or deliver up certain documents but, under Cayman Islands law, that order only extended to material belonging to the company. In order to obtain material belonging to the auditors themselves, the liquidators made an application in Bermuda for an order requiring the auditors to produce all documents in their possession relating to the affairs of the company. Under section 195 of the Bermudan Companies Act 1981[1], the Supreme Court of Bermuda had power to make such an order but only in relation to a company which that court had ordered to be wound up. However, the Chief Justice, sitting in the Supreme Court of Bermuda, exercised what he termed a common law power to order the auditors to produce information which they could have been ordered to produce under section 195 if the company had been wound up in Bermuda. On the auditors' appeal, the Court of Appeal for Bermuda doubted whether there was jurisdiction to make such an order in circumstances where section 195 did not apply but set aside the order on the basis that, in any event, it was not an appropriate exercise of discretion because it was an order made in support of a Cayman Islands liquidation which could not have been made by the Cayman Islands court.

E

F

G

On the liquidators' appeal—

Held, advising that the appeal be dismissed, (1) (Lord Neuberger of Abbotsbury PSC and Lord Mance JSC dissenting) that there was a power at common law to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers by ordering the production of information in oral or documentary form which was necessary for the administration of a foreign winding up, but the power was not available to enable them to do something which they could not do under the law by which they had been appointed; and that, although the fact that express provision was made in Bermuda for the powers exercisable on the winding up of companies to which the Companies Act 1981 applied did not exclude the use of

H

[1] Companies Act 1981, s 195: see post, para 4.

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common law powers in relation to other companies which lay outside the scope of the statute altogether, it was not a proper exercise of the power of assistance for the Bermudan court to make the order sought by the liquidators since the material which they sought in Bermuda was not obtainable under the domestic law of the court which had appointed them (post, paras 19, 25, 28–29, 31, 33, 109–115).

Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133, HL(E), *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, HL(E) and *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236, SC(E) applied.

(2) That the common law power of the court to recognise and grant assistance to foreign insolvency proceedings was primarily exercised through the existing powers of the court; that, although those powers could be extended or developed through the traditional judicial law-making techniques of the common law, the judiciary could not, by analogy, extend the scope of insolvency legislation to cases where it did not apply, and a domestic court did not have power to assist a foreign court by doing anything which it could properly have done in a domestic insolvency and could not acquire jurisdiction by virtue of any such power; and that, accordingly, the Bermudan court could not, by analogy, apply the statutory powers under the Companies Act 1981 as if the foreign insolvency were a domestic insolvency (post, paras 18, 32, 36, 38, 64, 82–83, 94, 108, 109, 122, 134, 149, 162).

Dicta of Lord Walker of Gestingthorpe in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, para 35, PC applied.

Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, PC and *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61 not followed.

Quaere. Whether information which the auditors acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property (post, para 30).

Decision of the Court of Appeal for Bermuda [2013] CA (Bda) 7 Civ affirmed.

The following cases are referred to in the judgments:

African Farms, In re [1906] TS 373
Al Sabah v Grupo Torras SA [2005] UKPC 1; [2005] 2 AC 333; [2005] 2 WLR 904; [2005] 1 All ER 871, PC
Arab Monetary Fund v Hashim (No 5) [1992] 2 All ER 911
Ashworth Hospital Authority v MGN Ltd [2002] UKHL 29; [2002] 1 WLR 2033; [2002] 4 All ER 193, HL(E)
Ayerst v C & K (Construction) Ltd [1976] AC 167; [1975] 3 WLR 16; [1975] 2 All ER 537, HL(E)
Banco Nacional de Cuba v Cosmos Trading Corpn [2000] 1 BCLC 813, CA
Bank of Credit and Commerce International SA (No 10), In re [1997] Ch 213; [1997] 2 WLR 172; [1996] 4 All ER 796
Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112
Bent v Young (1838) 9 Sim 180
CCIC Finance Ltd v Guangdong International Trust & Investment Corpn [2005] 2 HKC 589
Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26; [2007] 1 AC 508; [2006] 3 WLR 689; [2006] 3 All ER 829; [2006] 2 All ER (Comm) 695, PC
Colonial Government v Tatham (1902) 23 Natal LR 153
Crédit Suisse Fides Trust SA v Cuoghi [1998] QB 818; [1997] 3 WLR 871; [1997] 3 All ER 673, CA
Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs [2006] UKHL 49; [2007] 1 AC 558; [2006] 3 WLR 781; [2007] 1 All ER 449, HL(E)
Dreyfus v Peruvian Guano Co (1889) 41 Ch D 151
England v Smith [2001] Ch 419; [2000] 2 WLR 1141, CA

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Gurr v Zambia Airways Corpn Ltd [1998] ZASCA 16; [1998] 2 All SA 479 (A)
HIH Casualty and General Insurance Ltd, In re [2008] UKHL 21; [2008] 1 WLR 852; [2008] Bus LR 905; [2008] 3 All ER 869, HL(E)
Impex Services Worldwide Ltd, In re [2004] BPIR 564
Incorporated Council of Law Reporting for England and Wales v Attorney General [1972] Ch 73; [1971] 3 WLR 853; [1971] 3 All ER 1029, CA
International Tin Council, In re [1987] Ch 419; [1987] 2 WLR 1229; [1987] 1 All ER 890
Jones v Kaney [2011] UKSC 13; [2011] 2 AC 398; [2011] 2 WLR 823; [2011] 2 All ER 671, SC(E)
Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349; [1998] 3 WLR 1095; [1998] 4 All ER 513, HL(E)
McKerr, In re [2004] UKHL 12; [2004] 1 WLR 807; [2004] 2 All ER 409, HL(NI)
Masri v Consolidated Contractors International (UK) Ltd (No 4) [2009] UKHL 43; [2010] 1 AC 90; [2009] 3 WLR 385; [2009] Bus LR 1269; [2009] 4 All ER 847; [2010] 1 All ER (Comm) 220; [2009] 2 Lloyd's Rep 473, HL(E)
Matheson Bros Ltd, In re (1884) 27 Ch D 225
Modern Terminals (Berth 5) Ltd v States Steamship Co [1979] HKLR 512
Moolman v Builders & Developers (Pty) Ltd [1989] ZASCA 171; [1990] 2 All SA 77 (A)
Norwich Pharmacal Co v Customs and Excise Comrs [1974] AC 133; [1973] 3 WLR 164; [1973] 2 All ER 943, HL(E)
Orr v Diaper (1876) 4 Ch D 92; 25 WR 23
P & O Nedlloyd BV v Arab Metals Co (No 2) (The UB Tiger) [2006] EWCA Civ 1717; [2007] 1 WLR 2288; [2007] 2 All ER (Comm) 401; [2007] 2 Lloyd's Rep 231, CA
Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd [2009] EWHC 1912 (Ch); [2009] 2 BCLC 400; *(Revenue and Customs Comrs intervening)* [2011] UKSC 38; [2012] 1 AC 383; [2011] 3 WLR 521; [2011] Bus LR 1266; [2012] 1 All ER 505, SC(E)
Phoenix Kapitaldienst GmbH, In re [2012] EWHC 62 (Ch); [2013] Ch 61; [2012] 3 WLR 681; [2012] 2 All ER 1217
Picard v Primeo Fund 2013 (1) CILR 164, Grand Ct (Jones J); 2014 (1) CILR 379, CA (Cayman Islands)
Prest v Prest [2013] UKSC 34; [2013] 2 AC 415; [2013] 3 WLR 1; [2013] 4 All ER 673, SC(E)
PricewaterhouseCoopers v Saad Investments Co Ltd [2014] UKPC 35; [2014] 1 WLR 4482, PC
R v Bourne [1939] 1 KB 687; [1938] 3 All ER 615, CCA
R (Child Poverty Action Group) v Secretary of State for Work and Pensions [2010] UKSC 54; [2011] 2 AC 15; [2011] 2 WLR 1; [2011] PTSR 185; [2011] 1 All ER 729, SC(E)
R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2008] EWHC 2048 (Admin); [2009] 1 WLR 2579, DC
R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening) [2014] UKSC 38; [2015] AC 657; [2014] 3 WLR 200; [2014] 3 All ER 843, SC(E)
R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2011] EWCA Civ 1587, CA
R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 1737 (Admin); [2013] 1 All ER 161, DC; [2013] EWCA Civ 118; [2014] QB 112; [2013] 3 WLR 439; [2013] 3 All ER 95, CA
Rubin v Eurofinance SA (Picard intervening) [2012] UKSC 46; [2013] 1 AC 236; [2012] 3 WLR 1019; [2013] Bus LR 1; [2013] 1 All ER 521; [2013] 1 All ER (Comm) 513; [2012] 2 Lloyd's Rep 615, SC(E)
Seagull Manufacturing Co Ltd, In re [1993] Ch 345; [1993] 2 WLR 872; [1993] 2 All ER 980, CA

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Smith Kline and French Laboratories Ltd v Global Pharmaceutics Ltd [1986] RPC 394, CA A
Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs) [2012] UKSC 19; [2012] 2 AC 337; [2012] 2 WLR 1149; [2012] Bus LR 1033; [2012] 3 All ER 909, SC(E)
Tucker (RC) (A Bankrupt), In re, Ex p Tucker (KR) [1990] Ch 148; [1988] 2 WLR 748; [1988] 1 All ER 603, CA
Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme" [1997] 2 NZLR 110 B
Upmann v Elkan (1871) LR 12 Eq 140; LR 7 Ch App 130
Williams v Central Bank of Nigeria [2014] UKSC 10; [2014] AC 1189; [2014] 2 WLR 355; [2014] 2 All ER 489, SC(E)

The following additional case was cited in argument:

Atlas Bulk Shipping A/S, In re; Larsen v Navios International Inc [2011] EWHC 878 (Ch); [2012] Bus LR 1124 C

APPEAL from Court of Appeal for Bermuda

On 4 March 2013 Kawaley CJ in the Supreme Court of Bermuda made an order (i) recognising the status of the joint official liquidators of Singularis Holdings Ltd, a Cayman Islands company ordered by the Grand Court of the Cayman Islands to be wound up, and (ii) requiring the company's auditors, PricewaterhouseCoopers, a Bermuda registered partnership, to produce all documents in their possession relating to their affairs. D

The auditors appealed against the production order. On 18 November 2013 the Court of Appeal for Bermuda (Zacca P, Auld JA and Bell AJA) [2013] CA (Bda) 7 Civ allowed the appeal against the production order.

The liquidators appealed pursuant to permission granted on 21 March 2014 by the Court of Appeal for Bermuda (Zacca P, Evans and Scott Baker JJA). The issues for the Privy Council, as set out in the parties' statement of agreed facts and issues, were (1) whether the court had power at common law to make an order by way of judicial assistance under or in terms analogous to section 195 of the Bermudan Companies Act 1981 in respect of a company in liquidation in the Cayman Islands; (2), if so, whether assistance should be granted or refused, as a matter of discretion; and (3) in particular, whether the liquidators were entitled to relief which would not be available to them in the Cayman Islands under Cayman Islands law. E F

The facts are stated in the judgment of Lord Sumption JSC.

Gabriel Moss QC, *Felicity Toube QC*, *Stephen Robins* and *Rod Attride-Stirling* (of the Bermudan Bar) (instructed by *Blake Morgan LLP*) for the liquidators. G

The Supreme Court of Bermuda's common law power to grant judicial assistance in cross-border insolvencies supplies the jurisdiction to require the auditors to disclose documents relating to the company. The fact that the liquidators cannot obtain the relevant documents from the auditors in the Cayman Islands is no basis for refusing to provide such assistance as a matter of discretion. It is necessary to distinguish between (1) "recognition" and "judicial assistance" and (2) "recognition of insolvency proceedings" and "recognition of judgments". In its strict narrow sense, "recognition" refers to mandatory rules by which one jurisdiction gives direct effect in its H

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A own jurisdiction to a legal act in another. Thus if a winding up order is made in the Cayman Islands as the place of the company's registration, Bermuda in accordance with its common law conflicts rules gives effect to that to the extent of recognising the Cayman Islands liquidators as the sole authorised agents of the company under Cayman Islands law, able to act on behalf of the company in Bermuda: see *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), vol 2, rule 179. Bermudan conflicts rules do not B however recognise mandatory "effects" of the Cayman Islands winding up proceedings, such as the statutory stay: see *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117. Beyond mandatory common law recognition rules, the case law has developed discretionary judicial assistance: see *Dicey, Morris & Collins*, 15th ed, paras 30-107, 30-108. Common law judicial assistance has two key differences from recognition: C (1) recognition is mandatory, whereas judicial assistance is discretionary; (2) recognition gives effect to foreign law, whereas judicial assistance applies domestic law: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508. It is also important to distinguish between recognising foreign insolvency proceedings and recognising judgments arising from foreign insolvency proceedings. Common law mandatory conflicts rules make D entirely different provision for each. Thus a winding up proceeding in the Cayman Islands for a company registered there must be recognised in Bermuda to the extent of the appointment and authority of the liquidators. However, a judgment in personam is only recognised if certain criteria such as submission to jurisdiction are met: see *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236. Where a foreign winding up proceeding is E recognised, in the sense that the authority of the liquidators is accepted, the recognising court is not obliged to offer any assistance. However, absent good reason not to assist, such as the need to protect local creditors, such assistance should be given: see *Rubin v Eurofinance SA*, para 29.

Outside the European Union and in countries where the UNCITRAL Model Law has not been enacted, judicial assistance in cross-border F insolvencies may be classed as of two different types. Model 1 involves the provision of assistance through the commencement of an ancillary insolvency proceeding such as liquidation. The doctrine of ancillary liquidations is one by which the court has a common law power to assist a foreign liquidator by granting relief governed by the local law alone, even if that local law gives rise to the right to obtain relief of a type or character not available in the primary liquidation; conversely, there may be relief available G under the law of the main proceedings which is not available under the law of the ancillary winding up: see *In re Matheson Bros Ltd* (1884) 27 Ch D 225 and *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213. Model 2 involves the provision of assistance without the commencement of an ancillary liquidation. Relief of this type is available where the relief sought is the examination of individuals and the production of documents: see *Rubin v Eurofinance SA* [2013] 1 AC 236, paras 29, 31, H 33. Two alternative conceptual foundations for the model 2 power emerge from the authorities. Route A involves a common law hypothesis by which the court may grant assistance as if the foreign company were being wound up locally—on that basis, the foreign company is treated as if it were a company to which the local winding up legislation applies, even if it could

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not in fact fall within the definitions required to make it such a company: see *In re African Farms* [1906] TS 373; *Moolman v Builders & Developers (Pty) Ltd* [1990] 2 All SA 77 (A) and *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, para 22. Route B involves the provision of assistance through the exercise of the assisting court's general, non-statutory powers, including inherent equitable and common law powers, or non-insolvency statutory powers, without any reliance on any particular provision of the local winding up legislation. On either basis, in the present case, the liquidators were able to obtain the assistance of the Bermudan Supreme Court, and it is right for them to have that assistance.

The most authoritative statement of the common law assumption in route A continues to be the *Cambridge Gas* case, para 22. The judgment has two distinct limbs. Firstly, the ordinary rules of private international law relating to the enforcement of foreign judgments do not apply to insolvency—this limb of the judgment was disapproved in *Rubin v Eurofinance SA* [2013] 1 AC 236 but it is of no relevance to the present appeal, which is not concerned with recognition of a judgment. Secondly, route A means that a domestic court can provide assistance by doing whatever it could have done in the case of a domestic insolvency. This second limb has been followed widely: see *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61, para 62; *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] 2 BCLC 400, para 48; *In re Atlas Bulk Shipping A/S* [2012] Bus LR 1124, paras 30–32 and *Picard v Primeo Fund* 2013 (1) CILR 164, para 41. The development of this common law jurisdiction is a legitimate and typical example of the necessary evolution of the common law to meet the changing needs of the times: see *Jones v Kaney* [2011] 2 AC 398, para 112. The ability of the common law to adapt itself to new circumstances and changing needs is one of its strengths. Such changes are not necessarily incremental but may be radical: see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 377–379. The role of the common law is to cover those areas which are not governed by statute. Those considerations are particularly relevant in the field of cross-border insolvency. Commercial necessity in the modern globalised world requires judicial assistance to be given to foreign insolvency proceedings, particularly where large sums are involved and assets or documents are missing: see *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, 827, and *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110, 126. It is also essential for offshore jurisdictions to be able to ensure that they can apply their laws and procedures to make sure that the use of their jurisdiction in cross-border business does not facilitate fraud or the hiding of assets or documents. Such policies have led to the development of the principle of modified universalism: see the *Cambridge Gas* case [2007] 1 AC 508; *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 and *Rubin v Eurofinance SA* [2013] 1 AC 236. Where there is a local proceeding, such as ancillary liquidation, the court having control over that local proceeding is required to assist the main proceeding. Where there is no local proceeding, the argument for judicial assistance is even more compelling, since there is no alternative insolvency proceeding. Whatever needs to be done in the local jurisdiction can only be done by way of judicial assistance. Common law judicial assistance does not require reciprocity. Local creditors and policies

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A are protected by the fact that the giving of judicial assistance is discretionary. The provision of such assistance at common law is not inconsistent with *Al Sabah v Grupo Torras SA* [2005] 2 AC 333. The observations, at para 35, in relation to the position at common law are obiter. Further and in any event, the views expressed are not persuasive, since the point was not fully developed in argument. Moreover, para 35 was superseded by the *Cambridge Gas* case [2007] 1 AC 508, in which the Privy Council set out B detailed views on the question of common law assistance having heard full argument. There is nothing in the local legislation in the present case to forbid the court from granting assistance in this way in cross-border insolvencies. Accordingly, as a matter of jurisdiction, route A enables the court to make an order under section 195 of the Bermudan Companies Act 1981 on the basis of the common law hypothesis identified in the *Cambridge* C *Gas* case [2007] 1 AC 508, para 22, as if the company were in ancillary liquidation in Bermuda.

Alternatively, route B involves the provision of assistance through the exercise of the assisting court's general and non-statutory powers (including inherent and common law powers), without any reliance on any specific provisions of the local winding up legislation: see *In re Impex Services Worldwide Ltd* [2004] BPIR 564 and *Perpetual Trustee Co Ltd v BNY* D *Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening)* [2012] 1 AC 383. Those powers are present in the instant case. There is an inherent and/or common law and/or equitable power to compel discovery or a power in a statutory provision which is not limited in application to local liquidations. The inherent powers of a court of equity are vested in the Supreme Court of Bermuda: see section 12 of the Supreme Court Act 1905. E As a consequence, the equitable jurisdiction to compel discovery in aid of proceedings in some other court remains exercisable by the Supreme Court of Bermuda. A non-statutory power to compel discovery can be exercised by way of judicial assistance in a cross-border insolvency case: see *In re Impex Services Worldwide Ltd* [2004] BPIR 564 and *Rubin v Eurofinance SA* [2013] 1 AC 236. The power to order discovery under Ord 24, r 12 of the F Bermudan Rules of the Supreme Court 1985 applies only to cases falling within that rule, outside its scope the court's general equitable power to compel discovery continues to apply. Accordingly, route B enables the court to make an order under Ord 24, r 12, if it is applicable, or, if it is not, under the court's general equitable jurisdiction to compel discovery, which is preserved by section 12 of the Supreme Court Act 1905. [Reference was made to *Dreyfus v Peruvian Guano Co* (1889) 41 Ch D 151 and *In re Atlas* G *Bulk Shipping A/S; Larsen v Navios International Inc* [2012] Bus LR 1124.]

As a matter of discretion, such assistance should be provided to the liquidators. The documents sought are in the possession of the auditors, are not available from any other source and will be crucial to the recovery of assets for the benefit of the company's creditors and to the ascertainment of the company's liabilities. The fact that the Cayman Islands court could not itself make an order for production of the documents provides no basis for H refusing assistance. First, the objection does not apply to assistance through the commencement of an ancillary liquidation in which local statutory provisions are applied without any such restriction and there is no principled reason why it should apply to assistance without an ancillary liquidation, which will apply only domestic law. Secondly, to withhold assistance on

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that basis would largely undermine the concept of assistance. If the Grand Court of the Cayman Islands were able to make an effective order in those terms, the liquidators would not require assistance from the Supreme Court of Bermuda. The requested court providing common law judicial assistance can only apply its own law. That law will invariably differ in some respects from the courts having jurisdiction over the applicant who seeks judicial assistance. It cannot be unfair or unreasonable vis-à-vis the auditors to apply the law of its own country of incorporation in requiring disclosure. Accordingly, the court has jurisdiction at common law to assist the liquidators by requiring the auditors to disclose relevant documents and there is no reason for declining to assist as a matter of discretion.

David Chivers QC, *Paul Smith* and *Scott Pearman* (of the Bermudan and English Bars) (instructed by *Herbert Smith Freehills LLP*) for the auditors.

The Bermudan court has no jurisdiction at common law to grant assistance to a foreign liquidator by ordering the disclosure of documents or the examination of witnesses. Developments in the common law of Bermuda may be modelled upon equivalent developments in England or in other common law jurisdictions but it is essential to understand why any particular development is necessarily to be incorporated as part of the common law of Bermuda and special care must be taken where the statutory landscape is different. The common law principle identified in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 was that there had developed a practice whereby the English court permitted an English liquidator to transmit to a foreign liquidator funds to enable a pari passu distribution to worldwide creditors to be made. Subject to that principle, an English liquidator was bound by English law, including English insolvency law. Indeed, an English ancillary liquidation might, due to the overriding requirement of English rules of set-off, prevent rather than promote the worldwide parri passu distribution of assets. Where there is an English liquidation of a foreign company there is no additional "assistance" given to a foreign liquidator. Any remedies sought in the winding up will have to be through the actions of the English liquidator. Further, the common law consequence of the English winding up may either assist or not assist the foreign liquidator depending upon the provisions under consideration. The "long arm" reach of the English winding up jurisdiction has meant that English courts have considered assistance from the perspective of an English liquidation. The only common law intervention was to suspend the operation of the English statutory scheme in favour of the foreign liquidation by "disapplying" the statutory scheme and directing the remission of assets: see *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, para 9. Beyond that, English law has not developed a general common law power of assistance. The analysis of common law powers in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 was undertaken in the context of an English jurisprudence based upon the disapplication of English statutory law in the context of a "long arm" jurisdiction to wind up. In countries which have not adopted that model of winding up the question of assistance is very different. The issue is the source—indeed the very existence—of a power which a foreign liquidator seeks to be exercised by a local court. That cannot be resolved by reference

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A to the existence of a very different English common law power in the context of a very different English juridical position, but if anything can be taken from the English common law position it is that the common law is recognising a single system of distribution under the principles of universalism.

The principles of universalism, modified or not, provide no juridical basis to credit the Bermudan court with the power to make an order in terms of B section 195 of the Companies Act 1981 in respect of a foreign entity not the subject of its winding up jurisdiction. The principle is concerned with the collection and distribution of assets: see *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, para 6 and *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236, paras 11–20. However, it says nothing, and can say nothing, about the powers of different local courts C around the world to make collateral orders as regards how assets are to be collected, let alone what coercive powers of the local court may be exercised in favour of the foreign liquidator. The principle can provide no justification for recognising common law powers to provide assistance to foreign liquidators beyond those which are necessary to give effect to the principle, viz, the powers to ensure that there is a unitary system for the collection and D distribution of assets. Neither *In re African Farms* [1906] TS 373 nor the principle of modified universalism leads to the conclusion that the assisting court has common law powers to treat a foreign liquidator as if he were a domestic liquidator of a domestic company. *In re African Farms* was concerned with enforcing foreign rights as a matter of comity. It was no part of its ratio that the court had common law powers beyond those involving the collection and distribution of assets. There is no principle brought into E play by *Moolman v Builders & Developers (Pty) Ltd* [1990] 2 All SA 77 (A) which requires local powers to be given to a foreign liquidator where those powers do not exist in the liquidator's home jurisdiction. The case is not authority for the proposition that assistance at common law may include making orders for examination which could not be ordered in a foreign jurisdiction. *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 concerns F the enforcement of a foreign judgment. The question of what would happen if the foreign liquidation involved a company which could not be wound up in the domestic court was not addressed. It does not stand as authority for the proposition that a domestic court has a common law power to make orders in favour of a foreign liquidator simply because had the company been a domestic company such an order could have been made in favour of a G domestic liquidator. It did not directly address the application of a statutory provision at all. *Al Sabah v Grupo Torras SA* [2005] 2 AC 333 was cited in the *Cambridge Gas* case [2007] 1 AC 508 but the analysis at para 35 of the *Al Sabah* case of the limits on the power of the courts to give assistance was not questioned. The Board should follow its own decision in the *Al Sabah* case since para 35 is directly on point and should be determinative of the appeal. *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61 was wrongly H decided and was in any case prior to the decision in *Rubin v Eurofinance SA* [2013] 1 AC 236. Accordingly, the court has no jurisdiction at common law to grant assistance to a foreign liquidator by ordering the disclosure of documents or the examination of witnesses. The court has no inherent power or equitable power or power under its rules of court to give such

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disclosure. There are no grounds for extending the common law to give such powers to a foreign liquidator. The application of Cayman law in Bermuda was a universalist principle, but the liquidators' claim to the application of a law which went beyond Cayman law was not. Principles of universalism do not require or justify such an extension and any such extension and the circumstances in which such powers may be exercised are matters to be considered by the legislature of Bermuda. [Reference was made to *Bent v Young* (1838) 9 Sim 180.]

Moss QC replied

The Board took time for consideration.

10 November 2014. The following judgments were handed down.

LORD SUMPTION JSC

Introduction

1 This appeal is closely connected with the concurrent appeal in *PricewaterhouseCoopers v Saad Investments Co Ltd* ("SICL") [2014] 1 WLR 4482. The two appeals concern related companies incorporated in the Cayman Islands, both of which have been ordered by the Grand Court of the Cayman Islands to be wound up. Hugh Dickson, Stephen Akers and Mark Byers of Grant Thornton Special Services (Cayman) Ltd were appointed by that court as the joint official liquidators of both companies. The background to both appeals is set out in the advice of the Board on that appeal, delivered by Lord Neuberger of Abbotsbury PSC, and it need not be repeated here.

2 The common feature of both appeals is that they concern attempts on the part of the liquidators to obtain from the companies' former auditors PricewaterhouseCoopers ("PwC"), information, whether in oral or documentary form, relating to the companies' affairs. The evidence is that the liquidators have been unable to trace certain assets which they consider must have existed, and that relevant information about those assets is likely to be in the possession of PwC. This has not been accepted in terms, but neither has it been disputed. The Board will proceed on the footing that it is correct.

3 The Grand Court of the Cayman Islands has power under section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Islands, who has a relevant connection to a company in liquidation (including its former auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company." The Grand Court has made such an order against PwC, and the Board was told that PwC has complied with it. Consistently with the provision conferring the power, it extends only to material belonging to the companies.

4 Both the SICL and the Singularis appeals concern attempts by the liquidators to obtain material belonging to the auditors themselves, principally their working papers, by invoking the corresponding powers conferred on the Supreme Court of Bermuda. They are in wider terms, which are not limited to information belonging to the company. Section 195 of the Companies Act 1981 of Bermuda provides:

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"*Power to summon persons suspected of having property of company etc*

"(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.

B

"(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."

C

5 The power of the Bermuda court under section 195 is exercisable only in respect of a company which that court has ordered to be wound up. It was therefore dependent in this case on the existence of a power to wind up a company incorporated outside Bermuda. In the case of SICL the Supreme Court of Bermuda made a winding up order, and then made an order for production and oral examination against PwC in the winding up. However, in the SICL appeal the Board has advised Her Majesty [2014] 1 WLR 4482 that the winding up order must be stayed because (with immaterial exceptions) the court had no jurisdiction to wind up a company incorporated outside Bermuda. The consequence is that all proceedings in the winding up of SICL have ceased to be effective, including the order made under section 195.

D

E

6 In the case of Singularis a different procedure was adopted. No winding up order was ever sought or made in Bermuda. Instead, Kawaley CJ made an order recognising in Bermuda the status of the liquidators by virtue of their appointment by the Grand Court of the Cayman Islands, and exercising what he termed a common law power "by analogy with the statutory powers contained in section 195 of the Companies Act" to order PwC and Paul Suddaby (an officer of PwC) to produce the same documents which they could have been ordered to produce under section 195. PwC were also ordered to have a partner, employee or agent acceptable to the liquidators available to answer oral or written interrogatories. The liquidators were given leave to serve the proceedings on Mr Suddaby and any other "partners or officers" of PwC out of the jurisdiction.

F

G

7 The Court of Appeal (Bell AJA, Zacca P and Auld JA) [2013] CA (Bda) 7 Civ set aside the Chief Justice's order. Bell AJA and Zacca P doubted whether there was jurisdiction to make a section 195 order at common law in circumstances where section 195 did not apply. But the ground of their decision was that it was not in any event an appropriate exercise of discretion, because the court should not make an order in support of a Cayman liquidation which could not have been made by the Cayman court itself. They regarded the liquidators' claim as "unjustifiable forum shopping". Auld JA agreed with this, but went further. In his view, there

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was no jurisdiction because the Bermuda court could not disregard the limitation of section 195 of the Bermuda Act to cases where a winding up order could be and had been made.

8 Accordingly two issues arise on the present appeal. The first is whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form), in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.

A common law power?

9 The common law of Bermuda is the same, in every relevant respect, as that of England. The difficulty is that in England the common law concerning cross-border insolvencies has developed to fill the interstices in what is essentially a statutory framework, and the statutory framework differs in significant respects in Bermuda. The main difference is that the English courts have jurisdiction to wind up unregistered companies, including those incorporated outside the United Kingdom. This jurisdiction has existed since it was first conferred by section 199 of the Companies Act 1862 (25 & 26 Vict c 89). It is currently conferred by section 221 of the Insolvency Act 1986. The Bermuda courts have no equivalent power.

10 The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent company. The power was founded partly on statute and partly on the practice of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations. The English court would order the winding up in England of a company already in liquidation or likely to go into liquidation under the law of its incorporation, provided that there was a sufficient connection with England and a reasonable possibility of benefit to the petitioners. In theory, the effect of the winding up order was to create a statutory trust of the worldwide assets of the company to be dealt with in accordance with English statutory rules of distribution: *Ayerst v C & K (Construction) Ltd* [1976] AC 167, *Banco Nacional de Cuba v Cosmos Trading Corpn* [2000] 1 BCLC 813, 819–820 (Sir Richard Scott V-C). In practice, as Millett J pointed out in *In re International Tin Council* [1987] Ch 419, 446–447, "Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation." The English courts recognised the limits of the international reach of their own proceedings by treating the English winding up as ancillary to the principal winding up in the country of the company's incorporation. They exercised their power of direction over the liquidator by limiting his functions to getting in the English assets and to dealing with them in such a way as to bring about a distribution of the company's worldwide assets on as uniform a basis as was consistent with certain overriding principles of English insolvency law. The earliest reported case in which the practice was

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A recognised is the decision of Kay J in *In re Matheson Bros Ltd* (1884) 27 Ch D 225, but it is likely to have been older than that. In these cases, the court is exercising the ordinary powers of the English court to control the winding up of a company, which are wholly statutory. But the court was using them for a purpose which differed from that for which they were conferred, and on principles which departed from those applicable by law in B the winding up of an English company. To that extent only, the English courts were exercising a common law power.

11 In Bermuda, the court has no jurisdiction to conduct an ancillary liquidation, except in the (irrelevant) case of a company to which Part XIII of the Companies Act is expressly applied. The question what if any power the court has to assist a foreign liquidation without conducting an ancillary liquidation of its own, must depend on the nature of the assistance sought. C Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First, the proceedings are a "mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established", to use the expression of Lord Hoffmann in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, para 14. D Inherent in this function of a winding up is the statutory trust of the company's assets, to which I have already referred, and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction. These powers are less extensive E in Bermuda than they are in England, but include the avoidance of dispositions after the commencement of the winding up and fraudulent preferences. Fourth, it brings into play procedural powers, generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities. In Bermuda these include the power under section 195 of the Companies Act to order the production of information. In England, the corresponding statutory powers would all be exercisable in an F ancillary liquidation.

12 The main purpose of the winding up order in England is usually to enable the court to take control of the English assets of the company, so as to remove them from the free-for-all which would have resulted if creditors were entitled to gain priority by levying execution on them. But, even without a winding up, the court could, on ordinary principles of private G international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation. For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English moveable assets of a foreign bankrupt which had been transferred to an office-holder H in an insolvency proceeding under the law of his domicile. Moreover, while the same rule did not apply to immovable property, the court would ordinarily appoint the foreign office-holder a receiver of the rents and profits: see *Dicey, Morris & Collins, The Conflict of Laws*, 15th ed (2012), vol 2, rules 216 and 217. The more difficult question in such cases was whether the court, in the absence of winding up proceedings, could impose a

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stay on creditors trying to levy execution against the English assets equivalent to the automatic stay that would by statute have followed the initiation of winding up proceedings.

13 That question appears to have been first addressed in the common law world in the important decision of the full court of the Supreme Court of the Transvaal in *In re African Farms Ltd* [1906] TS 373. African Farms Ltd was an English company with substantial assets in the Transvaal. It was in liquidation in England. There was no power to wind it up in the Transvaal because the number of members had fallen below the minimum required to qualify it as a "company" for the purpose of the statutory power of winding up. The leading judgment was given by the great South African judge Sir James Rose Innes, then Chief Justice of the Transvaal. Having recognised the absence of a statutory power to wind up the company, he continued, at p 377:

> "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 acknowledgment of the fact that the liquidator has been appointed as such in England, and that he is the 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 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. If we are able in that sense to recognise and assist the liquidator, then I thin[k] we should do so; because in that way only will the assets here be duly divided and properly applied in satisfaction of the company's debts. If we cannot do so, then this result follows, that the directors cannot deal with the property here, and that the liquidator cannot prevent creditors seizing it in execution of their judgments. Unnecessary expenses will be incurred, and the estate will be left to be scrambled for among those creditors who are in a position to enforce their claims."

Innes CJ then considered (p 378) the objection that "the grant of assistance to the English liquidator, in a case where the court could not wind up itself, may possibly be open to the objection that we are doing by indirect means what the law has given us no power to do directly." He rejected the submission because its acceptance would have prevented the court from recognising the power of the liquidator to dispose of property or rights of the company under the law of its incorporation, contrary to ordinary principles of private international law: see pp 378–380. He went on, at pp 381–382:

> "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 liquidation is actually prohibited by any local rules; whether it is against the policy of our laws, or whether its consequences would be unfair to local creditors, or on other grounds undesirable . . . So far from such circumstances being present here, the case before us is one in which every consideration of equity and convenience demands that the position of the English liquidator should be recognised. Unless that can be done then, as

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A already pointed out, the Transvaal assets are at the mercy of the first creditor who can manage to secure a writ of execution."

In the result, the court recognised the liquidator by virtue of his appointment in England as being entitled to the sole administration of the company's assets in the Transvaal, on terms that the liquidator:

B "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."

C The proved claims of local creditors were ordered to be satisfied rateably from the local assets and the balance made available for distribution to other creditors. Execution of the local judgment creditor's judgment was stayed to enable this to be done.

14 It is right to point out (i) that the recognition of the English liquidator's power of disposition over the company's assets in the Transvaal was no more than what he was entitled to as a matter of private international D law; (ii) that the conduct of what amounted to an ancillary liquidation in the Transvaal was expressed as a discretionary condition of the court's recognition order; and (iii) that the Transvaal court no doubt had the same inherent power as the English court to stay enforcement of its own judgments. But the decision is nevertheless a significant one, because in substance what the court was doing was to direct the assets of the company E to be dealt with as if it was in liquidation in the Transvaal, when there was no power to conduct a liquidation there. It also deprived an existing judgment creditor of what was on the face of it an accrued and absolute right under his judgment and exposed him to having his debt written down to a figure consistent with the rateable distribution of assets in the Transvaal. The court therefore unquestionably modified the rights of the company and its creditors. Moreover, the sole basis on which it did so was the inherent F power of the court to assist the orderly liquidation of the company's affairs pursuant to a foreign winding up order. As Innes CJ put it, at p 377, "recognition . . . carries with it the active assistance of the court." Or, in the words of the concurring judgment of Smith J (at p 390), the basis of the order was the recognition and enforcement of rights and the recognition of a status acquired under a foreign law, unless they conflict with the law or policy of G the jurisdiction in which they were sought to be enforced.

15 The flexibility and breadth of the English court's powers in an ancillary liquidation, together in more recent times with the incorporation into English law of a number of international schemes of judicial co-operation, have had the effect of arresting the development of the common law in England in this area. However, the issue returned in 2006 with the decision of the Privy Council in *Cambridge Gas Transportation* H *Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508. In this case the Privy Council, affirming the decision of the Staff of Government Division in the Isle of Man, held that effect should be given in the Isle of Man to the judicial reorganisation by a Federal Bankruptcy Court in the United States of a group of Liberian ship-owning

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companies. The effect of the reorganisation was to vest the shares of an Isle of Man company in the committee of creditors, in circumstances where the US court had neither jurisdiction in rem over the shares (because they were rights situated outside its territorial jurisdiction) nor jurisdiction in personam over the shareholders (because they were not present in the US and took no part in the US proceedings). The principal shareholder, Cambridge Gas, objected on the ground that it was not bound by the decision of the US court. The advice of the Board was given by Lord Hoffmann. He discerned in the English case law a consistent "aspiration" to produce a result equivalent to that which would obtain if there were a single universal bankruptcy jurisdiction. He regarded this "principle of universality" as having been the foundation of the decision in *In re African Farms* [1906] TS 373, and considered that it justified the Isle of Man courts in giving effect to the US reorganisation plan [2007] 1 AC 508, paras 16–21. In his view, and that of the Board, the absence of jurisdiction in rem or in personam in the US court was irrelevant, because the jurisdiction was founded not on any obligation on the part of Cambridge Gas to comply with the judgments of the Federal Bankruptcy Court but on the duty of the Isle of Man court to assist a foreign principal liquidation so as to achieve a universal distribution of the assets on, as far as possible, a common basis. At paras 13–14, he said:

> "13. . . . Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds on which it did so. The judgment itself is treated as the source of the right.
>
> "14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."

The essence of the decision and the reasoning which supported it is to be found, at paras 20–22:

> "20. . . . But the underlying principle of universality . . . 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 *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' . . .
>
> "21. Their Lordships consider that these principles are sufficient to confer on the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan . . .
>
> "22. . . . 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

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A 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."

The provisions of the domestic system of insolvency of the Isle of Man, B which were relevant in *Cambridge Gas*, were the statutory provisions for sanctioning a scheme of arrangement in the course of a winding up. Because the Isle of Man courts would have had power to wind up Navigator and sanction a scheme of arrangement on terms substantially the same as those of the judicial reorganisation approved by the Federal Bankruptcy Court, it could give effect to the reorganisation plan at common law. "Why therefore," asked Lord Hoffmann (para 25), "should the Manx court not C provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man?" *Cambridge Gas* is authority, if it is correct, for three propositions. The first is the principle of modified universalism, namely that the court has a common law power to assist foreign winding up proceedings so far as it properly can. The second is that this includes doing whatever it could D properly have done in a domestic insolvency, subject to its own law and public policy. The third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction in rem or in personam according to ordinary common law principles is irrelevant.

16 The first and second propositions were revisited by Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. HIH E was an Australian insurance company in liquidation in Australia. A winding up petition had been presented in England and provisional liquidators appointed to conduct an ancillary liquidation. The question at issue was whether the English court should accede to a letter of request from the Australian court inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators, in circumstances F where they would be distributed there in accordance with statutory priorities which differed from those applicable in a domestic winding up in England. At paras 6–7, Lord Hoffmann said:

"6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based on what English judges have for many G years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.

"7. This was very much a principle rather than a rule. It is heavily H qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of 'modified universalism': see also *Fletcher, Insolvency in Private*

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International Law, 2nd ed (2005), pp 15–17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one."

Reviewing the English case law, Lord Hoffmann discerned in it a "golden thread running through English cross-border insolvency law since the 18th century" which, adopting a label devised by Professor Jay Westbrook, he called the "principle of (modified) universalism" (para 30):

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

17 The Committee in *HIH* was unanimous in holding that the assets should be remitted to Australia, but they were divided in some aspects of their reasoning. Lord Hoffmann, with whom Lord Walker of Gestingthorpe agreed, considered that the court had an inherent power to direct the remittal of the assets at common law. However, that view was not adopted by the rest of the Committee. Lord Scott of Foscote and Lord Neuberger of Abbotsbury considered that the power was wholly derived from section 426 of the Insolvency Act 1986. Lord Phillips of Worth Matravers held that the statutory power was a sufficient jurisdictional basis for the proposed direction, and declined to decide whether jurisdiction could have been established at common law. It is, however, important to appreciate that this difference of opinion related not to the principle of universalism itself, nor to the juridical basis of the power to assist a foreign liquidation in general. The difference was about whether that power could be exercised in a manner which would deprive creditors proving in England of their statutory right under section 107 of the Insolvency Act 1986 to a pari passu distribution according to English rules of priority. The principle justifying judicial assistance in a foreign insolvency which was stated in *In re African Farms* [1906] TS 373 and affirmed in *Cambridge Gas* was [1906] TS 373, 377 subject to "such conditions as the court may impose for the protection of local creditors, or in recognition of the requirements of our local laws" or, as it was put more broadly in *HIH* itself [2008] 1 WLR 852, para 30, "justice and UK public policy". The division in the Committee in *HIH* was about whether this meant that it was subject to the mandatory requirements of section 107 of the Insolvency Act 1986. The relevance of section 426 in the view of Lord Scott and Lord Neuberger was that on their construction of that section it authorised the treatment of the assets in accordance with the law of the foreign jurisdiction notwithstanding its inconsistency with mandatory rules of English law: see Lord Scott, at para 61, and Lord Neuberger, at para 68. Absent that provision, the remittal of the assets to Australia would have been contrary to English law. Lord Phillips did not, any more than Lord Scott and Lord Neuberger, question the principle of modified universalism. Indeed, he regarded it as determinative of the manner in which the discretion should be exercised, albeit leaving open the question of its juridical source: see para 44.

18 *Cambridge Gas* [2007] 1 AC 508 marks the furthest that the common law courts have gone in developing the common law powers of the

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A court to assist a foreign liquidation. It has proved to be a controversial decision. So far as it held that the domestic court had jurisdiction over the parties simply by virtue of its power to assist, it was subjected to fierce academic criticism and held by a majority of the Supreme Court to be wrong in *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236. So far as it held that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, its B authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, a case cited in argument in *Cambridge Gas* but not in the advice of the Board. Lord Walker, giving the advice of the Board in *Al Sabah*, had expressed the view that there was no inherent power to set aside Cayman trusts at the C request of a foreign court of insolvency, in circumstances where a corresponding statutory power existed under the Cayman Bankruptcy Law but did not apply in the circumstances. The Board considers it to be clear that although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar D power must exist at common law. So far as *Cambridge Gas* suggests otherwise, the Board is satisfied that it is wrong for reasons more fully explained in the advice proposed by Lord Collins of Mapesbury. If there is a corresponding statutory power for domestic insolvencies there will usually be no objection on public policy grounds to the recognition of a similar common law power. But it cannot follow without more that there is such a power. It follows that the second and third propositions for which E *Cambridge Gas* [2007] 1 AC 508 is authority cannot be supported.

19 However, the first proposition, the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by Lord Phillips, Lord Hoffman and Lord Walker in *HIH* [2008] 1 WLR 852, and by Lord Collins of Mapesbury (with whom Lord Walker and Lord Sumption JJSC agreed) in *Rubin v Eurofinance SA* F [2013] 1 AC 236. Nothing in the concurring judgment of Lord Mance JSC in that case casts doubt on it. At paras 29–33, Lord Collins summarised the position in this way:

> "29. Fourth, 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 office-holders in G 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 US Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under Chapter 11': *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.
>
> H "30. In *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said: 'In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention . . . It is becoming widely

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accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.'

"31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, 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 . . .

"33. One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf *In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship 'Cornelis Verolme'* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). 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."

In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so.

20 The fundamental question is whether a power of compulsion of this kind requires a statutory basis. For this purpose, it is important to distinguish between evidence and information. By evidence, the Board

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A means evidence to prove facts in legal proceedings. The power to compel a person to give evidence in legal proceedings was not originally statutory. Like the power to order discovery, it was an inherent power of the Court of Chancery, devised by judges to remedy the technical and procedural limitations associated with the proof of fact in courts of common law. In England, it was first put on a statutory basis by the Perjury Act 1563 (5 Eliz 1, c 9), which extended the power to issue a subpoena ad testificandum to all B courts of record. In Bermuda, its basis is now section 4 of the Evidence Act 1905. The origins of these powers in the procedural history of the English courts go some way to explain why those courts have always disclaimed any inherent power to compel the furnishing of evidence for use in foreign proceedings: see *Bent v Young* (1838) 9 Sim 180, 192 (Shadwell V-C); *Dreyfus v Peruvian Guano Co* (1889) 41 Ch D 151; *R (Omar) v Secretary of* C *State for Foreign and Commonwealth Affairs* [2013] 1 All ER 161 (Divisional Court), paras 58–63. No such power existed in England until it was created by statute, initially by the Foreign Tribunals Evidence Act 1856 (19 & 20 Vict c 113).

21 What is sought in this case, however, is not evidence for use in forensic proceedings but information required for the performance of the D liquidators' ordinary duty of identifying and taking possession of assets of the company. In *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112, para 12 the Court of Appeal doubted whether the distinction between evidence and information was helpful, and their doubt was probably justified in that case, where information was being sought for use in foreign proceedings. But the distinction is of broader legal significance. The courts have never been as E inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy calls for it.

22 The classic modern illustration is the jurisdiction recognised by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133. The House, drawing mainly on the earlier decisions in *Orr v* F *Diaper* (1876) 4 Ch D 92; 25 WR 23 and *Upmann v Elkan* (1871) LR 12 Eq 140; LR 7 Ch App 130, recognised a common law power to order the production of information about the identity of a wrongdoer where the defendant had been involved, even innocently, in the wrong. Such an order, as they recognised, would not have been available to compel the giving of evidence, because of the long-standing objection of courts of equity to a bill of discovery against a "mere witness": see, in particular, pp 173–174 (Lord G Reid). In *Smith Kline and French Laboratories Ltd v Global Pharmaceutics Ltd* [1986] RPC 394 the Court of Appeal in England applied the same principle to information about the identity of a wrongdoer outside the jurisdiction. These decisions were founded not on the procedural requirements for proving facts in English litigation, but on the recognition of a duty to provide the information in certain circumstances. The duty of a H person who had become involved in another's wrongdoing was held [1974] AC 133, 175 (Lord Reid) to be to "assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers"; cf p 195 (Lord Cross of Chelsea). It is, however, clear that this duty was of a somewhat notional kind. It was not a legal duty in the ordinary sense of the term. Failure to supply the information would not give

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rise to an action for damages. The concept of duty was simply a way of saying that the court would require disclosure. Indeed, Lord Morris of Borth-y-Gest (pp 181–182) thought that the duty would not arise until the court had held that the conditions were satisfied. Viscount Dilhorne (p 190) agreed and so, it seems, did Lord Cross: p 198. Lord Kilbrandon, citing with apparent approval the South African decision in *Colonial Government v Tatham* (1902) 23 Natal LR 153, observed (p 205) that the duty lay "rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff."

23 The present case is not a *Norwich Pharmacal* case. The significance of *Norwich Pharmacal* in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle. In the Board's opinion, an analogous power arises in the present case. Relief is not being sought by way of assistance to a litigant who can rely on ordinary forensic procedures for the purpose. It is being sought by the officers of a foreign court. The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can. The Bermuda court has properly recognised the status of the liquidators as officers of that court. The liquidators require the information for the performance of the ordinary functions attaching to that status. Their acknowledged right to take possession of the company's worldwide assets is of little use without the ability to identify and locate them, if necessary with the assistance of the court. The information is unlikely to be available in any other way. None of the reasons which account for the common law's inhibition about the compulsory provision of evidence have any bearing on the present question. The right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the company's title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holder's right to act on the company's behalf in the same way as any other agent of a company appointed in accordance with the law of its incorporation. The recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

24 There are two reported cases in which an order for the production of documents or information has been made by way of common law assistance to a foreign court. The first is *Moolman v Builders & Developers (Pty) Ltd*

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A [1990] 2 All SA 77 (A), a decision of the Supreme Court of South Africa. The appeal arose out of the winding up in the Transkei of a company incorporated there, at a period of South African history when the Transkei was in law a foreign country. The liquidator sought an order of the South African court for the examination of certain persons in South Africa with a view to locating assets of the company. Such an order would have been available to him by statute if there had been an ancillary liquidation in South B Africa, but there was no statutory power to wind up this particular company in South Africa. The court held that a power to make such an order at common law was within the principle of *In re African Farms Ltd* [1906] TS 373. The second case is *In re Impex Services Worldwide Ltd* [2004] BPIR 564, a decision of the High Court of the Isle of Man. Section 206 of the Isle of Man Companies Act 1931 conferred a power to order an examination but C only in relation to a Manx company. Deemster Doyle nevertheless gave effect by way of common law judicial assistance to a letter of request of the High Court in England seeking the examination of persons in the Isle of Man on behalf of the liquidator of an English company. The Board would not wish to endorse all of the reasoning given in these judgments, in particular those parts which appear to support the concept of applying statutory powers by mere analogy in cases outside their scope. But the Board D considers that the decisions themselves were correct in principle.

25 In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation E of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power F of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is G subject to the limitation in *In re African Farms Ltd* [1906] TS 373 and in *HIH* [2008] 1 WLR 852 and *Rubin* [2013] 1 AC 236, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in *Norwich Pharmacal* [1974] AC 133 and *R (Omar) v Secretary of State for Foreign and* H *Commonwealth Affairs* [2013] 1 All ER 161; [2014] QB 112 (at both levels) shows, common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or

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potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency. Finally, as with other powers of compulsion exercisable against an innocent third party, its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance.

26 Order 11, rule 1(2) of the Rules of the Bermuda Supreme Court (as applied by order 11, rule 9(1)) authorises the service of an originating summons, petition, notice of motion or similar originating process out of the jurisdiction without leave in respect of any "claim which by virtue of any enactment the court has power to hear and determine". Because the common law power of the court to compel the production of information in aid of a foreign liquidation is not statutory nor derived from any analogy with the statute, this rule had no application to it. There is a more general power to serve originating process (other than a writ) out of the jurisdiction with the leave of the court under Order 11, rule 9(4), but it is not exercisable against persons whose engagement in the affairs of a foreign company has no connection with Bermuda and there is no implicit statutory authority for such a course: see *In re Seagull Manufacturing Co Ltd* [1993] Ch 345. It follows that on any view the Chief Justice had no power to authorise the service out of the jurisdiction on Mr Suddaby or other partners or officers of PwC who were not within the jurisdiction of the court. The most that he could do, in a case within the ambit of the power, was order PwC, as the only party present within the jurisdiction, to comply for their own part and to take reasonable steps to procure the co-operation of others.

Application to the present case

27 The Board has summarised the limitations on the common law power to compel the production of information. Of these limitations, two are potentially relevant in the case of Singularis.

28 The first arises from PwC's argument that the order sought against them is not consistent with the law or public policy of Bermuda, because the statutory power to compel the production of information under section 195 of the Bermuda Companies Act impliedly excludes the possibility of an equivalent power at common law. The argument is that because section 195 is limited to cases where the company is being wound up in Bermuda, it would be inconsistent with the statutory scheme to recognise a common law power which, if it existed, would be subject to no such limitation. The Board is not persuaded by this. The existence of a statutory power covering part of the same ground may impliedly exclude a common law power covering the whole of it. But it does not necessarily do so. An implied exclusion of non-statutory remedies arises only where the statutory scheme can be said to occupy the field. This will normally be the case if the subsistence of the common law power would undermine the operation of the statutory one, usually by circumventing limitations or exceptions to the statutory power which are an integral part of the underlying legislative policy: see *Deutsche Morgan Grenfell Group plc v Inland Revenue Comrs* [2007] 1 AC 558, para 19 (Lord Hoffmann); *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15, paras 27–34 (Lord Dyson JSC). There is, however, no reason to suppose that the limitation of the power under section 195 of the Companies Act to

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A companies in the course of winding up in Bermuda reflects a legislative policy adverse to assisting foreign courts of insolvency jurisdiction. It simply reflects the limits of the ambit of the Act. The relevant provisions of the Act have been analysed in the advice of the Board in *PricewaterhouseCoopers v Saad Investments Co Ltd* [2014] 1 WLR 4482. In summary, the effect of section 4 is that it applies to companies incorporated in Bermuda or authorised to carry on business there. However, the fact that express B provision is made for the powers exercisable on the winding up of companies to which the Act applies, does not in the Board's opinion exclude the use of common law powers in relation to other companies which lie outside the scope of the statute altogether.

29 The second limitation which is relevant presents more formidable problems for the joint liquidators. The material which they seek in Bermuda C would not be obtainable under the law of the Cayman Islands pursuant to which the winding up is being carried out there. Where a domestic court has a power to grant ancillary relief in support of the proceedings of a foreign court, it is not necessarily an objection to its exercise that the foreign court had no power to make a corresponding order itself. Thus in *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, the English court made a D worldwide *Mareva* injunction in support of Swiss proceedings against Mr Cuoghi in circumstances where the Swiss court could not have made such an order. But that decision cannot be taken to reflect a universal principle. The critical factors which justified the order in that case were that there was an unqualified statutory power to give ancillary relief and that the Swiss court's inability to make the order was due to the fact that Mr Cuoghi was not resident in Switzerland whereas he was resident in England. Rather E different considerations apply to the common law power with which the Board is presently concerned. Its whole juridical basis is the right and duty of the Bermuda court to assist the Cayman court so far as it properly can. It is right for the Bermuda court, within the limits of its own inherent powers, to assist the officers of the Cayman court to transcend the territorial limits of that court's jurisdiction by enabling them to do in Bermuda that which they F could do in the Cayman Islands. But the order sought would not constitute assistance, because it is not just the limits of the territorial reach of the Cayman court's powers which impede the liquidators' work, but the limited nature of the powers themselves. The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the Board to be a proper use of the power of assistance to make good a limitation on the powers of a G foreign court of insolvency jurisdiction under its own law. This was in substance the ground on which the liquidators failed in the Court of Appeal when they characterised the present application as "forum shopping". In the opinion of the Board it is correct.

30 The liquidators have not contended at any stage of this litigation that the order which they seek can be justified at common law independently of H the power of the Bermuda court to assist a foreign court of insolvency jurisdiction. Moreover, they have accepted before the Board that the information which they seek belongs to PwC and was therefore properly excluded from the order made by the Grand Court of the Cayman Islands. Whether this was correct was not therefore a point argued before the Board. None the less, the Board would not wish to part with this case without

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expressing their doubts about whether information which PwC acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property.

Conclusion

31 The Board will humbly advise Her Majesty that this appeal should be dismissed.

LORD COLLINS OF MAPESBURY

Introduction

32 In my opinion the appeal should be dismissed because the ground on which the joint liquidators based their appeal is unsupportable, namely that the court has at common law the ability to exercise powers which are analogous to statutory powers which would have been exercisable in the case of a domestic insolvency, but which do not apply in the international context. This opinion is intended to explain why that conclusion is inescapable in the light of the relationship between the judiciary and the legislature.

33 As the Supreme Court confirmed in *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236 the court has a common law power to assist foreign winding up proceedings so far as it properly can. In my view, in common with Lord Sumption JSC and despite Lord Mance JSC's powerful opinion to the contrary, the Bermuda court has the power to make an order against persons subject to its personal jurisdiction in favour of foreign liquidators for production of information for the purpose of identifying and locating assets of the company, provided they have a similar right under the domestic law of the court which appointed them. I therefore agree with Lord Sumption JSC that this was not a proper case for exercise of that power.

34 The existence of a common law power to order information (otherwise than by analogy with local statutory powers) was not pursued by the liquidators on the appeal, and it was virtually disclaimed by them until questioning by the Board (quoted in Lord Mance JSC's opinion at para 128) may have led them to adopt it as a subsidiary basis for their appeal.

35 Consequently the parties are entitled to have the views of the Board on the argument which was actually put before it, in essence whether *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 ("*Cambridge Gas*") correctly decided that the court has a common law power to assist foreign winding up proceedings by exercising powers which are analogous to statutory powers which would have been exercisable in the case of a domestic insolvency, but do not apply to the international insolvency.

36 The primary way in which the case was put by the liquidators was that the common law develops to meet changing circumstances and that in international insolvencies the common law should be developed by the adoption of a principle that where local legislation does not provide for relevant assistance to a foreign office holder, the legislation should be applied by analogy "as if" the foreign insolvency were a local insolvency.

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A This argument was accepted by the Chief Justice. But it involves a fundamental misunderstanding of the limits of the judicial law-making power, and should not go unanswered.

37 A second reason for dealing with the main point of the liquidators' appeal was that the question whether local legislation could be applied by analogy arose in an appeal in the Cayman Islands Court of Appeal, and that court gave only an interim judgment pending the decision of this Board on B this appeal: *Picard v Primeo Fund* 2013 (1) CILR 164. That case, as will appear below, involved anti-avoidance proceedings for the recovery of assets, and not (as in the present case) proceedings to obtain information to recover assets. On the principal argument of the liquidators, there is no material difference between this case and the Cayman Islands case. In each case the argument was that the local legislation should, if it does not apply C according to its terms (and there is a question about this in the Cayman Islands case), be applied by analogy or on an "as if" basis. The Board took the view that it would be failing in its duty if it did not reach this question on this appeal, and simply left the Cayman Islands Court of Appeal to decide the matter with a possible further appeal to the Privy Council. That appeal has recently been settled, but the point of principle may still arise.

38 In my judgment the answer to the present appeal is to be found in the D following propositions. First, there is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings. Second, that power is primarily exercised through the existing powers of the court. Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law. Fourth, the very limited application of legislation by E analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply. Fifth, in consequence, those powers do not extend to the application, by analogy "as if" the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case.

The practical issue

F

39 Both the Cayman Islands and Bermuda have statutory provisions for the examination of persons connected with an insolvent company. In England the statutory power is contained in the Insolvency Act 1986, section 236.

40 This is an exclusively statutory power, which goes back a very long way. As early as the Statute of Bankrupts Act 1542 (34 & 35 Hen 8, c 4), the G authorities (including, among others, the lord chancellor and the chief justices) were given power to examine on oath persons who were suspected of having property (including debts) belonging to the debtor. The Joint Stock Companies Act 1844 (7 & 8 Vict c 110) gave a similar power to the court in the case of companies, and there is a continuous line of statutory authority in both corporate and personal insolvency confirming (and extending) the power thereafter to the present day.

H

41 The provisions of neither the Cayman Islands nor Bermuda statutes apply to the material sought by the liquidators in this case. That is because: (1) the power in section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Cayman Islands, who has a relevant connection with a company in liquidation (including its former

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auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company" extends only to material belonging to the companies (subject to what Lord Sumption JSC says at para 29); and (2) the "power to summon persons suspected of having property of company etc" in section 195 of the Companies Act 1981 of Bermuda does not apply because the power is exercisable only in respect of a company which that court has ordered to be wound up, and in the SICL appeal the Board has advised that the winding up order must be stayed because the court has no jurisdiction to wind up a company incorporated outside Bermuda, to which Part XIII of the Companies Act is not expressly applied: *PricewaterhouseCoopers v Saad Investments Co Ltd* [2014] 1 WLR 4482.

42 The problem in this and other similar or analogous cases has arisen largely in relation to those British colonies, dependencies, and overseas territories, such as Bermuda, and the Isle of Man, which do not have the statutory powers to assist foreign office-holders which exist under United Kingdom law. Consequently, except in a rare situation to which I will revert, the practical result of this appeal is largely confined to such countries, or those countries (such as the Cayman Islands) where the extent of the statutory powers is controversial.

43 Some of these territories do have such powers. The British Virgin Islands has given effect to the UNCITRAL Model Law in the Insolvency Act 2003, Part XIX, which contains powers to assist foreign office-holders, but only from countries or territories which are designated by the Financial Services Commission. There are nine such countries or territories, including the United States and the United Kingdom. Section 470 of the Insolvency Act 2003 preserves the power of the court to provide assistance under any other rule of law.

44 The Cayman Islands Companies Law, section 241, gives the court power to make orders ancillary to a foreign bankruptcy proceeding (including the power to require a person in possession of information relating to the business or affairs of a bankrupt: section 241(1)(d)). But the application of these powers to anti-avoidance proceedings has been controversial. The Cayman Islands Court of Appeal reserved pending the outcome of this appeal the question whether the anti-avoidance provisions of its law can be used at common law (in addition to, or alternatively to, its statutory power to do so) in aid of a US bankruptcy proceeding: *Picard v Primeo Fund* 2014 (1) CILR 379. As mentioned above, the appeal has recently been settled.

45 In the United Kingdom, except where the EU Insolvency Regulation (Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160, p 1)) applies, the English court has a very wide power to wind up foreign companies, and where a foreign company is being wound up in England the liquidator is generally free to invoke the relevant provisions of the Insolvency Act 1986 in discharge of his functions, which would include the power to ask for examination under the Insolvency Act 1986, section 236.

46 Where the foreign company is not being wound up in England, under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030), which give effect to the UNCITRAL Model Law, the court may co-operate to the maximum extent possible with foreign courts or foreign representatives: article 25(1). By article 21(1) of the 2006 Regulations, on recognition of a

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A foreign proceeding, the English court may grant appropriate relief, including the examination of witnesses, and the taking of evidence or the delivery of information concerning (inter alia) the debtor's assets. Secondary proceedings may be opened in the United Kingdom, but only where the debtor has an establishment in the United Kingdom and only as regards assets in the United Kingdom.

B **47** Under section 426 of the Insolvency Act 1986 the English court with jurisdiction in relation to insolvency is to assist the courts having the corresponding jurisdiction in any other part of the United Kingdom "or any relevant country or territory" (section 426(4)) by applying the law of either jurisdiction (section 426(5), a very difficult section: see *Dicey, Morris & Collins, Conflict of Laws*, 15th ed (2012), vol 2, para 30-110 et seq). These powers apply to only a limited numbers of countries (including Australia, C the Bahamas, and the Isle of Man).

48 An order for examination may be made under this section in aid of a foreign liquidation. In *England v Smith* [2001] Ch 419 it was held, in a case of an order for examination under Australian law of a person concerned with the affairs of a company, that application of the law of the requesting state should not be circumscribed by limitations to be found in the D corresponding provisions of section 236 of the 1986 Act unless some principle of English public policy were infringed.

49 Where the EU Insolvency Regulation applies, a foreign officeholder may exercise all the powers conferred on him by the law of the state of the opening of proceedings: article 18(1).

50 Accordingly the statutory powers of the UK courts to assist foreign office-holders to trace assets are very extensive. It follows that the existence E of a common law power to order examination will almost certainly never arise in England, and the same is true of the other statutory powers of which foreign office-holders may wish to take advantage. This is subject to what is said below about *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61, where clawback under the Insolvency Act 1986, section 423 (transactions at an undervalue) was sought and granted, in a case where the EU Insolvency F Regulation did not apply because the German company involved was an investment undertaking; the UNCITRAL Model Law did not apply because the 2006 Regulations were not in effect at the relevant time; and Germany was not a relevant country for the purposes of section 426(4).

Assistance at common law in international insolvency

G **51** The UK Supreme Court accepted, and re-confirmed, in *Rubin v Eurofinance SA* [2013] 1 AC 236 that at common law the court has power to recognise and grant assistance to foreign insolvency proceedings: para 29.

52 In my judgment in *Rubin v Eurofinance SA*, at para 29, I quoted what Millett LJ had said in *Crédit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827:

> H "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention . . . It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not

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inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

53 The common thread in those cases in which assistance has been given is the application or extension of the existing common law or statutory powers of the court.

54 Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33. They include (subject to what is said below) *In re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme"* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency).

55 In my judgment too much has been read into *In re African Farms Ltd* [1906] TS 373. It was not mentioned in any English case until it was cited in argument in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, 219, for the proposition that the English court will not allow funds to be transmitted to the jurisdiction of the foreign court of the principal winding up without first making provision for the local secured, preferential and statutory creditors, and then subsequently approved in *Cambridge Gas*. It had never been mentioned in the classic company law texts, *Buckley*, *Gore-Browne*, and *Palmer* (nor in *Williams on Bankruptcy*), nor in *Fletcher, Insolvency in Private International Law*, 2nd ed (2005). It received only a passing mention in the successive editions of *Forsyth* on South African private international law now called *Private International Law: The Modern Roman-Dutch Law* (now 5th ed (2012), p 456), although it has been mentioned (obiter) with approval by the Supreme Court of Appeal of South Africa: *Gurr v Zambia Airways Corpn Ltd* [1998] 2 All SA 479 (A).

56 Apart from the stay of execution ordered against a secured creditor (Standard Bank) which had obtained a judgment, the only part of the order in *In re African Farms Ltd* [1906] TS 373 which is relevant for present purposes is the order that all questions of mortgage or preference be regulated by Transvaal law as if the company had been placed in liquidation in the Transvaal. It is not stated how that was to be achieved, but it is significant that Innes CJ said, at p 382: "Such conditions are not easy to devise; and it is possible that to place the foreign liquidator in such a position as to ensure beyond doubt a distribution such as I have indicated would require reciprocal legislation in the two countries". Even though the company could not have been wound up in the Transvaal, the decision is

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A certainly not authority for the proposition that local statutory law may be applied by analogy.

57 *In re Impex Services Worldwide Ltd* [2004] BPIR 564 also falls into the category of the use or extension of the existing powers of the court. In that case a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company. B That was referred to in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33 as a case of judicial assistance in the traditional sense because the order was based on a request by the English court, but the decision was not the subject of examination before the Supreme Court and cannot be said to have been approved by it. The request could not be accommodated under the Manx Companies Act 1931, or under the inherent jurisdiction of the court, but the order was made at common law without articulation of its basis.

C 58 A second group of cases is where the statutory powers of the court have been used in aid of foreign insolvencies. The best known example is the use of the long-standing power to wind up foreign companies which are being wound up (or even have been dissolved) in the country of incorporation. In *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 Sir Richard Scott V-C conducted an exhaustive D analysis of the cases on ancillary liquidations, and concluded (at p 246): (1) Where a foreign company was in liquidation in its country of incorporation, a winding up order made in England would normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England would be ancillary in the sense that it would not be within the power of the English E liquidators to get in and realise all the assets of the company worldwide: they would necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it would be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England would be ancillary F in the sense, also, that it would be the liquidators in the principal liquidation who would be best placed to declare the dividend and to distribute the assets in the pool accordingly. (4) None the less, the ancillary character of an English winding up did not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which was brought before the court.

59 *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 G also falls within this category because the majority in the House of Lords decided that the power of the English court to accede to the letter of request from the Australian court, inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators derives from section 426 of the Insolvency Act 1986.

60 As part of the majority in *HIH* Lord Scott of Foscote (at para 59) H re-affirmed what he had said in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213:

> "The English courts have a statutory obligation in an English winding up to apply the English statutory scheme and have, in my opinion, in respectful disagreement with my noble and learned friend Lord

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Hoffmann, no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme." A

See also Lord Neuberger of Abbotsbury at para 72.

The liquidators' argument and the Chief Justice's decision

61 The primary argument of the liquidators before the Board, which had found favour with the Chief Justice as the principal ground of his B decision (which he described as "more principled" at para 49), was that the Bermuda court should apply directly the examination provisions of section 195 of the Companies Act 1981 by analogy.

62 That was said to be based on what Lord Hoffmann had said in *Cambridge Gas* [2007] 1 AC 508, para 22:

> "What are the limits of the assistance which the court can give? . . . At C 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 D 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."

63 In the Court of Appeal in the present case Auld JA had described the development of the common law jurisdiction to grant assistance to a foreign liquidator as if the foreign company were being wound up locally as E amounting to impermissible "legislation from the bench." In answer, the liquidators in their argument to the Board relied on many dicta to the effect that the common law develops to meet changing circumstances.

64 In my view to apply insolvency legislation by analogy "as if" it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain F usurpation of the legislative function.

Judicial law-making

65 The liquidators are plainly right to say that the common law develops, sometimes radically, to meet changing circumstances. It hardly requires citation of authority to make that point. No one now doubts that judges make law, although English and Scottish judges were slow to G acknowledge it until the seminal writings by Lords Reid, Denning and Devlin, citation of which is unnecessary. But there are limits to their power to make law. In *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 378 Lord Goff of Chieveley said:

> "When a judge decides a case which comes before him, he does so on H the basis of what he understands the law to be. This he discovers from the applicable statutes, if any, and from precedents drawn from reports of previous judicial decisions. Nowadays, he derives much assistance from academic writings in interpreting statutes and, more especially, the effect of reported cases; and he has regard, where appropriate, to decisions of

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A judges in other jurisdictions. In the course of deciding the case before him he may, on occasion, develop the common law in the perceived interests of justice, though as a general rule he does this 'only interstitially,' to use the expression of OW Holmes J in *Southern Pacific Co v Jensen* (1917) 244 US 205, 221. This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing B principle and so can take its place as a congruent part of the common law as a whole. In this process, what Maitland has called the 'seamless web,' and I myself (*The Search for Principle*, Proc Brit Acad vol LXIX (1983) 170, 186) have called the 'mosaic,' of the common law, is kept in a constant state of adaptation and repair . . ."

C **66** What Justice Holmes said in the passage to which Lord Goff referred was: ". . . I recognise without hesitation that judges do and must legislate, but they can do so only interstitially." The point was developed by Justice Cardozo in *The Nature of the Judicial Process* (1921), at pp 103, 113:

"We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other D judges through the centuries of the common law have set to judge-made innovations . . . We do not pick our rules of law full-blossomed from the trees . . . [The judge] legislates only between gaps. He fills the open spaces in the law . . ."

67 More recently similar points have been made by eminent judges of our time. Judge Richard Posner said in *How Judges Think* (2008), p 86: E "The amount of legislating that a judge does depends on the breadth of his 'zone of reasonableness'—the area within which he has discretion to decide a case either way without disgracing himself."

68 And Lord Bingham of Cornhill said, in *The Business of Judging* (2000), p 32: "On the whole, the law advances in small steps, not by giant bounds."

69 The approach which is articulated by Lord Sumption JSC is itself an F example of the development of the common law since, as Lord Mance JSC's opinion clearly shows, it goes beyond what has previously been understood to be the power of the court to order information.

The judiciary and legislation

70 But that is not the issue on this part of the appeal, which is whether, G as the liquidators argue, legislation may be extended by the judiciary to apply to cases where the legislature has not applied it. It raises a much more radical question than the familiar question whether a common law rule should be extended or developed or whether the extension or development should be left to Parliament.

71 The latter question arises frequently and yields different answers. In the human rights context, it was the subject of intense debate in the recent case H on assisted suicide: *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 657. In the private law area, for example, the majority in *Jones v Kaney* [2011] 2 AC 398 decided to remove immunity from expert witnesses. The minority thought that that was a question which should be left to consideration by the Law Commission and reform by Parliament.

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72 By contrast, in *Rubin v Eurofinance SA* [2013] 1 AC 236 the majority considered that a change in the law relating to foreign judgments to apply a different rule (removing the need for a jurisdictional basis) in the context of insolvency was a matter for the legislature. Similarly members of the present Board have at various times made the same point in other contexts: *Prest v Prest* [2013] 2 AC 415, para 83 (Lord Neuberger of Abbotsbury PSC); *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs)* [2012] 2 AC 337, para 200 (Lord Sumption JSC); *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd (Revenue and Customs Comrs intervening)* [2012] 1 AC 383, para 174 (Lord Mance JSC).

73 But I emphasise that that is not the issue here. Nor is the issue the question whether legislation may influence the development of a common law rule. A famous early example where that was regarded as legitimate was *R v Bourne* [1939] 1 KB 687, where a direction was given that the eminent obstetrician Aleck Bourne was entitled as a defence to an abortion charge to rely by analogy on the provision of the Infant Life (Preservation) Act 1929 that infanticide could be justified to preserve the life of the mother.

74 The question of the extent to which statutes may influence the development of the common law is a well known and controversial one. Professor Atiyah addressed the questions in this way ("Common Law and Statute Law" (1985) 48 MLR 1, 6):

> "is [it] possible for the courts to take account of statute law, in the very development of the common law itself? Can the courts, for instance, use statutes as analogies for the purpose of developing the common law? Can they justify jettisoning obsolete cases, not because they have been actually reversed by some statutory provision, but because a statute suggests that they are based on outdated values? Could the courts legitimately draw some general principle from a limited statutory provision, and apply that principle as a matter of common law?"

75 In each of those situations it is not difficult to find cases which justify the forms of reasoning which Professor Atiyah identifies. But none of them comes anywhere near what the Board is asked to do in this case.

76 Nor is the issue whether a statutory rule may be taken into account in the exercise of a discretion. An example is the use of statutory limitation periods in the exercise of the equitable doctrine of laches: *P & O Nedlloyd BV v Arab Metals Co (No 2)* [2007] 1 WLR 2288; *Williams v Central Bank of Nigeria* [2014] AC 1189, para 12.

77 Nor is the issue whether the courts may develop the common law by entering or re-entering a field regulated by legislation. As Lord Nicholls of Birkenhead said in *In re McKerr* [2004] 1 WLR 807, para 30, the courts have been slow to do that because "otherwise there would inevitably be the prospect of the common law shaping powers and duties and provisions inconsistent with those prescribed by Parliament."

The equity of a statute

78 What the liquidators propose is very much more radical. It is that the court should apply legislation, which ex hypothesi does not apply, "as if" it applied.

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A 79 That proposition is reminiscent of the concept of the "equity of a statute". When used properly today, it means no more than interpreting a statute by reference to its purpose or the mischief which it was designed to cure: e g *Incorporated Council of Law Reporting for England and Wales v Attorney General* [1972] Ch 73, 88.

80 But it once meant something which "has been relegated to the limbo of legal antiquities" (Loyd, "The Equity of a Statute" (1909) 58 U Pa L Rev 76), and had been formulated in this way: "Equitie is a construction made by the judges that cases out of the letter of a statute yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth . . ." (Co Litt Lib I, Ch II, para 21, quoting Bracton).

B

81 Under that doctrine the courts felt themselves free to enlarge a statute so as to apply it to situations which were not covered by the words of the statute but were regarded by the courts as within its spirit and analogous: Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 LQR 232, 241; Atiyah, "Common Law and Statute Law" (1985) 48 MLR 1, 7–8. That concept of the "equity of a statute" fell into disfavour in the 18th century and was abandoned by the beginning of the 19th century, and the judges were no longer able in effect to exercise a direct legislative function.

C

D

82 The liquidators' argument is that the common law rule of assistance in insolvency matters extends to the application of local legislation even though as a matter of its legislative scope it does not apply to the case in hand. In the present case the argument is that, even if section 195 of the Companies Act 1981 does not apply to foreign companies, it should be applied by analogy or "as if" the Cayman Islands company were a Bermuda company.

E

83 In my judgment, that argument is not only wrong in principle, but also profoundly contrary to the established relationship between the judiciary and the legislature. To the extent that it depends on some part of the opinion in *Cambridge Gas* [2007] 1 AC 508, that decision was not only wrong in its recognition of the New York order regulating the title to Manx shares, as decided in *Rubin v Eurofinance SA* [2013] 1 AC 236, it was also wrong to apply the Manx statutory provisions for approval of schemes of arrangement by analogy or "as if" they applied.

F

Cambridge Gas

G 84 The essence of the decision in *Cambridge Gas* [2007] 1 AC 508 was that the New York order would be recognised, and would be given effect because a similar scheme could have been sanctioned as a scheme of arrangement under the Isle of Man law.

85 The facts of *Cambridge Gas* are set out in *Rubin* [2013] 1 AC 236, paras 36 et seq. For present purposes it is only necessary to recall that a gas transport shipping business venture ended in failure, and resulted in a Chapter 11 proceeding in the US Bankruptcy Court in New York. The question for the Privy Council on appeal from the Isle of Man was whether an order of the New York court was entitled to implementation in the Isle of Man. The New York court had rejected the investors' plan and accepted the bondholders' plan.

H

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86 The corporate structure of the business was that the investors owned, directly or indirectly, a Bahaman company called Vela Energy Holdings Ltd ("Vela"). Vela owned (through an intermediate Bahaman holding company) Cambridge Gas, a Cayman Islands company. Cambridge Gas owned directly or indirectly about 70% of the shares of Navigator Holdings plc ("Navigator"), an Isle of Man company. Navigator owned all the shares of an Isle of Man company which in turn owned companies which each owned one ship.

87 The New York order vested the shares in Navigator (the Isle of Man company) in the creditors' committee, which subsequently petitioned the Manx court for an order vesting the shares in their representatives. The Manx Staff of Government Division acceded to this petition by making an order under the Manx Companies Act 1931, section 101, rectifying the share register by entering the creditors' committee as shareholders. In the Privy Council [2007] 1 AC 508, para 23, Lord Hoffmann rejected this solution on this basis: the power was exercisable when "the name of any person is, without sufficient cause, entered in or omitted from the register". But for that purpose it was necessary to show that by the law of the Isle of Man the company was obliged to do so. The source of such an obligation could be found only in an order of the court, pursuant to its common law power of assistance, which required the company to make such an entry. Consequently, the argument based on section 101 was therefore circular. The prior question was whether the court has power to declare that the Chapter 11 plan should be carried into effect.

88 The Privy Council held that the plan could be carried into effect in the Isle of Man. The reasoning was as follows. First, if the judgment had to be classified as in personam or in rem the appeal would have to be allowed, but bankruptcy proceedings did not fall into either category. Second, the principle of universality underlay the common law principles of judicial assistance in international insolvency, and those principles were sufficient to confer jurisdiction on the Manx court to assist, by doing whatever it could have done in the case of a domestic insolvency. Third, exactly the same result could have been achieved by a scheme of arrangement under the Isle of Man Companies Act 1931, section 152.

89 In *Rubin* [2013] 1 AC 236, a majority of the Supreme Court (Lord Collins of Mapesbury with whom Lords Walker of Gestingthorpe and Sumption JJSC agreed) decided that *Cambridge Gas* was wrongly decided because the shares in Navigator owned by Cambridge Gas (a Cayman Islands company) were, on ordinary principles of the conflict of laws, situated in the Isle of Man, and the shareholder relationship between Navigator and Cambridge Gas was governed by Manx law. Consequently the property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man. Lord Mance JSC, in his concurring judgment, left the correctness of the decision open, and Lord Clarke of Stone-cum-Ebony JSC, dissenting, thought that it was correctly decided.

90 I have already quoted the passage in *Cambridge Gas* [2007] 1 AC 508, para 22 in which Lord Hoffmann said that "the domestic court must at least be able to provide assistance by doing whatever it could have done in

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A the case of a domestic insolvency" and that the purpose of recognition of the foreign office-holders was to "to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

91 The effect of this part of the opinion in *Cambridge Gas* was to make an order equivalent to one which could have been made under a Manx scheme of arrangement without going through the statutory procedures for approval of a scheme. The passages in the opinion which are relevant are these:

B

> "24. In the present case it is clear that the New York creditors, by starting proceedings to wind up the Navigator companies and then proposing a scheme of arrangement under section 152 of the Companies Act 1931, could have achieved exactly the same result as the Chapter 11 plan. The Manx statute provides: '(1) Where a compromise or arrangement is proposed between a company and its creditors . . . the court may on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors . . . to be summoned in such manner as the court directs. (2) If a majority in number representing three-fourths in value of the creditors . . . agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors . . . and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.'
>
> "25. The jurisdiction is extremely wide. All that is necessary is that the proposed scheme should be a 'compromise or arrangement' and that it should be approved by the appropriate majority. Why, therefore, should the Manx court not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man? . . .
>
> "26. . . . as between the shareholder and the company itself, the shareholder's rights may be varied or extinguished by the mechanisms provided by the articles of association or the Companies Act. One of those mechanisms is the scheme of arrangement under section 152. As a shareholder, Cambridge is bound by the transactions into which the company has entered, including a plan under Chapter 11 or a scheme under section 152. It is the object of such a scheme to give effect to an arrangement which varies or extinguishes the rights of creditors and shareholders. Thus, in the case of an insolvent company, in which the shareholders have no interest of any value, the court may sanction a scheme which leaves them with nothing . . . The scheme may divest the company of its assets and leave the shareholders with shares in an empty shell. It may extinguish their shares and recapitalise the company by issuing new shares to others for fresh consideration. Or it may, as in this case, provide that someone else is to be registered as holder of the shares. Whatever the scheme, it is, by virtue of section 152, binding on the shareholders when it receives the sanction of the court. The protection for the shareholders is that the court will not sanction a scheme, even if adopted by the statutory majority, if it appears unfair. And no doubt the discretion to refuse assistance in the implementation of an equivalent plan

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which has been confirmed in a foreign jurisdiction would be exercised on similar lines. But no such question arises in this case. Although it must be accepted that Cambridge did not technically submit to the jurisdiction in New York, it had no economic interest in the proceedings and ample opportunity to participate if it wished to do so. It would therefore not be unfair for the plan to be carried into effect. Their Lordships therefore consider that the Court of Appeal was right to order its implementation."

92 It is to be noted that Lord Hoffmann said that the New York creditors *could have achieved* exactly the same result as the Chapter 11 plan by a scheme of arrangement under the Companies Act 1931, section 152, and asked why the Manx court could not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man.

93 Those proceedings required the calling of meetings and the passage of appropriate resolutions. The majority of the UK Supreme Court decided in *Rubin v Eurofinance SA* [2013] 1 AC 236 that *Cambridge Gas* was wrongly decided on the ground that the New York court did not have jurisdiction over title to shares in a Manx company. The question whether there was any lawful basis for applying the legislation on an "as if" basis, or of dispensing with the statutory procedure, did not therefore arise in *Rubin v Eurofinance SA*. But for the reasons I have given, in my judgment there can be no doubt that, unless Manx law allowed the relaxation of the statutory procedures for the approval of schemes of arrangement, the judiciary was not entitled to apply those procedures by analogy at common law.

The application of Cambridge Gas

94 It follows in my view that those courts which have relied on these passages to apply legislation which the legislature had not itself seen fit to apply are wrong, including the decision of the Chief Justice in the present case.

95 That conclusion also applies to the decision in *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61. In that case a company incorporated in Germany for the apparent purpose of investing individuals' funds in futures trading was used as a vehicle for a worldwide fraud. The German administrator applied for relief pursuant to the Insolvency Act 1986, section 423 (transactions at an undervalue) against former investors of the company who were resident in England, claiming back initial investment funds and fictitious profits for the benefit of the company's creditors by setting aside transactions entered into at an undervalue.

96 As I have said, the EU Insolvency Regulation did not apply because the German company involved was an investment undertaking; the UNCITRAL Model Law did not apply because the 2006 Regulations were not in effect at the relevant time; and Germany was not a relevant country for the purposes of section 426(4).

97 Proudman J decided that the court had the power at common law to recognise a foreign administrator and to provide him with the same assistance as it was entitled to provide in a domestic insolvency; and that since proceedings to set aside antecedent transactions were central to the purpose of an insolvency the court therefore had jurisdiction to authorise the administrator to invoke section 423. Applying *Cambridge Gas* Proudman J

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A held that the power to use the common law to recognise and assist an administrator appointed overseas "includes doing whatever the English court could have done in the case of a domestic insolvency": para 62.

98 In my judgment that decision is wrong because it involved an impermissible application of legislation by analogy.

99 In *Picard v Primeo Fund* 2013 (1) CILR 164 the US bankruptcy trustee of the principal Bernard Madoff company sought to claw back B payments made by the company to a Cayman Islands company. The claims were based on US law (fraudulent transfers and preferential payments) and on Cayman law (preferential payments). The Cayman Islands have mutual assistance provisions (Companies Law (2012 Revision), sections 241–242), but the judge (Jones J) held that they did not apply because the power to make orders "ordering the turnover to a foreign representative of any C property belonging to a debtor" did not apply to property which was only recoverable under transaction avoidance provisions.

100 The judge then went on to decide that the Cayman court was able to apply the Cayman voidable preferences provision of its law (section 145) to the payments made by the US company to the Cayman company, by applying *Cambridge Gas* and *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61.

D 101 On 16 April 2014 the Court of Appeal of the Cayman Islands (consisting of Sir John Chadwick P and Mottley and Campbell JJA)2014 (1) CILR 379, reversed Jones J on the first part of the case and held that the Cayman court was entitled to apply the Cayman anti-avoidance provisions under the assistance provisions of Cayman company law, because the making of a transaction avoidance order restores to the debtor the property E which is the subject of that order, and so enables the court to order the "turnover" of that restored property to the foreign representative: para 45.

102 The Court of Appeal did not reach the question whether Jones J was entitled to apply the Cayman anti-avoidance provision at common law. The court had been informed that an issue central to that question, namely whether *Cambridge Gas* should be followed, was before the Court of Appeal for Bermuda. Because the matter was before this Board and shortly to be F heard, the Court of Appeal was invited to hand down an interim judgment dealing only with the issues on the mutual assistance statutory provisions. The appeal has now been settled. It follows from what I have said that the decision of Jones J on the present aspect of the case was wrong.

Al Sabah v Grupo Torras SA

G 103 There was also a prior opinion of the Privy Council, in which what was said is directly contrary to the approach in *Cambridge Gas* advocated by the liquidators. In *Al Sabah v Grupo Torras SA* [2005] 2 AC 333 the trustee in bankruptcy of a debtor in The Bahamas obtained from the Bahaman court a letter of request directed to the Grand Court of the Cayman Islands seeking its aid in setting aside two Cayman trusts established by the debtor. The Grand Court (affirmed by the Court of H Appeal of the Cayman Islands) held that it had jurisdiction to provide such assistance under either section 156 of the Bankruptcy Law of the Cayman Islands or section 122 of the Bankruptcy Act 1914 (which provided for mutual assistance between bankruptcy courts throughout the UK and the Empire) or under the court's inherent jurisdiction, and that it should as a

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matter of discretion grant the Bahaman trustee powers under section 107 of the Cayman Bankruptcy Law to enable him to set aside the trusts. The Privy Council held that (i) section 156 of the Cayman Bankruptcy Law did not apply, but that (ii) section 122 had not been repealed in its application to the Cayman Islands and did apply, so that there was jurisdiction to authorise the Bahaman trustee to exercise the statutory power even though it might not have been available to him if the trusts had been governed by Bahaman law.

104 But the Board in an opinion given through Lord Walker of Gestingthorpe said, at para 35:

> "The respondents relied in the alternative . . . on the inherent jurisdiction of the Grand Court. This point was not much developed in argument and their Lordships can deal with it quite shortly. If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope [citing what is now *Dicey, Morris & Collins, Conflict of Laws*, 15th ed (2012), vol 2, paras 31R-059 et seq] and the inherent jurisdiction of the Grand Court cannot be wider."

105 The Board plainly considered that the court had no power to apply the Bankruptcy Law "in circumstances not falling within" the Law. In *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61, above, Proudman J distinguished this clear statement on the basis that she should follow what she described as "the later and more considered views expressed by Lord Hoffmann and approved by Lord Walker" in the *HIH* case [2008] 1 WLR 852, namely that the court was able, if consistent with justice and UK public policy, to achieve the aim of a unitary and universal bankruptcy law. In *Picard v Primeo Fund* 2013 (1) CILR 164 Jones J explained the dictum in *Al Sabah* as meaning that the common law cannot be invoked to apply provisions of the Bankruptcy Law to achieve an objective outside its scope.

106 Neither of these supposed distinctions is valid. There is nothing in *HIH* to support Proudman J's suggestion that Lord Walker had changed his view, and Jones J's suggestion that Lord Walker was only directing his intention to objectives outside the scope of the Bankruptcy Law is wholly inconsistent with Lord Walker's plain words that the court does not have an inherent jurisdiction to exercise the powers conferred by the Bankruptcy Law "in circumstances *not falling within the terms* of that section." (Emphasis added.)

107 In my judgment Lord Walker's dictum in the opinion in *Al Sabah v Grupo Torres* [2005] 2 AC 333, para 35 (in which, among others, Lords Hoffmann and Scott concurred) was plainly right, and, to the extent it is inconsistent with the passage in *Cambridge Gas* applying the Isle of Man scheme of arrangement provisions on an "as if" basis, it is to be preferred to *Cambridge Gas*.

108 I would therefore humbly advise Her Majesty not only that the appeal should be dismissed, but also that to have allowed it on the basis of the liquidators' primary argument would have involved Her Majesty's judges in a development of the law and their law-making powers which

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A would have been wholly inconsistent with established principles governing the relationship between the judiciary and the legislature and therefore profoundly unconstitutional.

LORD CLARKE OF STONE-CUM-EBONY JSC

109 I agree that this appeal should be dismissed for the reasons given by Lord Sumption JSC. I add a short judgment of my own on the first issue B raised by Lord Sumption JSC in para 8, namely whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form) in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in C Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.

110 I have reached the conclusion that, for the reasons given by Lord Sumption JSC, the answer to the first issue is that the Bermuda court does have such a power. The steps which lead me to that conclusion are these. While the recognition of such a power in an ancillary liquidation has not D thus far been recognised at common law, it is common ground that the common law has developed step by step and that it may be extended or developed in appropriate circumstances. It follows that the question is whether the circumstances are appropriate to justify the recognition of such a power in this class of case.

111 As Lord Sumption JSC demonstrates in para 20, significant E developments have been made by the common law in the past. They included the power to compel a person to give evidence, which was not originally statutory. As Lord Sumption JSC puts it, like the power to order discovery, it was an inherent power of the Court of Chancery devised by judges to remedy the technical and procedural limitations associated with the proof of facts in courts of common law. I agree with Lord Sumption JSC (at para 23) that the significance of the *Norwich Pharmacal* case [1974] AC F 133 in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when it is necessary to do so in order to give effect to a recognised legal principle.

112 The recognised legal principle in the present case is the principle of modified universalism derived from *Cambridge Gas* [2007] 1 AC 508: see G paras 19 and 23 in Lord Sumption JSC's judgment. I agree with him that it is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis notwithstanding the territorial limits of their jurisdiction. An important aspect of that public interest is a recognition that in a world of global H businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. I also agree with Lord Sumption JSC at para 23 (i) that this is a public interest which has no equivalent in cases where information may be sought for commercial

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purposes or for ordinary adversarial litigation; (ii) that the Bermuda court has properly recognised the status of the liquidators as officers of that court; (iii) that the liquidators require the information for the performance of the ordinary functions attaching to that status; (iv) that the information is unlikely to be available in any other way; (v) that none of the reasons which account for the common law's inhibition about the compulsory provision of evidence have any bearing on the present question; (vi) that the right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the company's title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holder's right to act on the company's behalf in the same way as any other agent of a company appointed in accordance with the law of its incorporation; and (vii) that the recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

113 These are powerful factors. What then are the limits? I agree with Lord Sumption JSC that, as he puts it at para 25, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information but that the limits of this power are implicit in the reasons for recognising its existence. He gives four reasons. (1) It is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. (2) It is a power of assistance and exists for the purpose of enabling those courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers; so that it is not available to enable them to do something which they could not do even under the law by which they were appointed. (3) It is available only when it is necessary for the performance of the office-holder's functions. (4) It is subject to the limitation that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. I further agree with Lord Sumption JSC that it follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. Common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency.

114 I further agree with Lord Sumption JSC, for the reasons he gives in para 28, that the common law power is not impliedly excluded by reason of section 195 of the Bermuda Companies Act but that it cannot be applied on the facts of this case because there is no similar power in the Cayman Islands and it would not be a proper use of the power of assistance to make good a

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A limitation on the powers of a foreign court of insolvency jurisdiction under its own law.

115 Like Lord Sumption JSC, I appreciate that it is important that this development should not open the floodgates to different unrelated classes of case. However, I see no reason why it should. I appreciate that Lord Mance JSC has reached a different conclusion. I do not pretend that it is B possible to predict precisely how the development of the principle, which has been identified by Lord Sumption JSC and which both Lord Collins of Mapesbury and I support, will proceed. I agree with Lord Mance JSC that it is a step forward but do not agree that it is a step leap. I also agree with him (at para 137) that courts have tended to confine remedies of the kind we are discussing to situations where there is a recognisable legal claim to protect, based either on a title or right to property or on some wrongdoing supported C by appropriate evidence. However, there is no reason why the common law should not be developed, provided that the development is measured and supports a recognised principle.

116 It will not always be easy to draw the line between permissible applications and impermissible applications. However, Lord Sumption JSC has identified, not only the policy, but also the principle derived from the D policy and some of the limitations to its exercise, which to my mind provide a sensible approach for the future. I respectfully disagree with Lord Mance JSC when he says at para 146 that this is a development which is neither permissible nor appropriate. In doing so, I express no view on Lord Mance JSC's concerns (expressed in paras 120 and 121) as to the breadth of the terms of the order and as to the lack of safeguards to protect against costs E or loss. These may well be sound and can be investigated in a case where such issues fall for decision. That is not this case because of the narrow ground on which the appeal must be dismissed.

LORD MANCE JSC

117 There are two potential issues of importance on this appeal: (a) whether the common law power to assist a foreign (Cayman Islands) F liquidation enables the Bermudan courts to order anyone within its jurisdiction who may have relevant information or documentation about the company's assets (or, possibly also, its affairs generally) to attend for questioning about and disclose the same; (b) whether, if this power exists, it should be exercised by ordering such disclosure and questioning when the Cayman Islands courts have no equivalent power over persons within their G jurisdiction.

118 I agree with Lord Sumption JSC that the short answer to the second question is negative. So it is unnecessary on this appeal to answer the first question, although Lord Sumption JSC has devoted the major part of his opinion to this question. I understand why it might be helpful if the Board could give a clear answer to it, but I think it unfortunate that it should try to do so on this appeal, bearing in mind the limitations in the way in which the H question has been argued at all lower stages (see para 122 below) and its largely unexplored ramifications: see generally paras 130–145 below.

119 Before addressing the second issue in detail, it is relevant—and in my view important—to note three points. The first is the Chief Justice's order which the Court of Appeal set aside, and which the liquidators ask the

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Board to restore. The respondents, PwC, were (by clause 3a) ordered within 14 days to provide to the joint official liquidators ("JOLs")

> "all information they may have, including information and documentation in their possession, power, custody or control, concerning the promotion, formation, trade, dealings, affairs or property of the company [and] for the avoidance of doubt, such information and documentation to be provided is not to be limited to audit information . . ."

In addition PwC was (by clause 3d)

> "required to have a partner and/or employee or agent acceptable to the JOLs, examined on oath forthwith, within ten (10) days of being called on to meet by the JOLs, concerning the matters aforesaid, by word of mouth and on written interrogatories, and be required to reduce his/her answer to writing and require him/her to sign this . . ."

By clause 3e the JOLs were given leave to serve "Paul Suddaby and any other partners or officers of PwC . . . out of the jurisdiction", specific liberty was given to examine Paul Suddaby and he was specifically ordered to produce information in accordance with clause 3a. Clause 3f provided that

> "If PwC . . . does refuse to comply with any of the orders set out herein, it and its partners and officers shall be in contempt of court and they may be imprisoned, fined or their assets seized."

120 No doubt in case clause 3 did not go far enough, clause 4 provided:

> "Further and without limiting the generality of the foregoing, that the documentation referred to in Exhibit HD-7 of Hugh Dickson's third affidavit dated 7 February 2013 be produced within seven days by PwC . . . , in relation to [Singularis] . . . That the JOLs be able to obtain all information and documentation described herein that is in the possession, power, custody, or control of PwC . . . , whether this be in Bermuda, Dubai, or wherever it may be located."

Redaction was only to be permitted where necessary to protect information of a confidential nature belonging to third parties, and clause 4b required that:

> "the relevant partners and officers of PwC . . . do confirm on oath that all the documents requested have been produced."

The only exempt documents were to be those required to be produced in the Cayman Islands—that is documents actually belonging to Singularis.

121 No provision was made for the JOLs to meet, still less secure, any costs that PwC or its partners, officers or agents would incur complying with such an order, and no undertaking was given to meet any such costs or any other loss or liability that might result from doing so—even though PwC had asked the Chief Justice to deal with this aspect. This omission was raised in the Court of Appeal, where it remained relevant in relation to the order against SICL which that court upheld. PwC suggested that costs could be in the order of $500,000 and the JOLs argued that management time spent in compliance could not be recovered. The Court of Appeal declined to make any order or require any undertaking "in the absence of authority" and "particularly in circumstances where the cost of compliance is far from

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A clear". "Absence of authority" is hardly surprising in relation to an order which was itself effectively unprecedented. PwC's costs of compliance would clearly be likely to be very substantial. Whether or not they were or could be quantified when the order was made, PwC should have been protected in respect of them. Common justice and established practice relating to freezing injunctions, *Anton Pillar* orders and *Norwich Pharmacal* relief should have confirmed the need for an appropriate order or B undertaking in that respect.

122 The second point is that, in respect of Singularis, the only basis of Kawaley CJ's order against PwC and its officers was that the Bermudan courts have a common law power to grant assistance in aid of the Cayman Islands liquidation by applying local procedural remedies, in particular either "by directly applying" or "by analogy with" section 195 of the C Bermudan Companies Act 1981, although it was common ground that this section does not in terms apply. This was also the only case put by the JOLs' written submissions to or adjudicated on by the Court of Appeal as well as the only basis on which permission was sought to appeal to the Board. Kawaley CJ considered that he could none the less rely directly on section 195 by virtue of inter alia *In re African Farms* [1906] TS 373, D *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 and *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236 (paras 8, 49–74), or alternatively that he could proceed "by analogy with" it: paras 8, 36–48. The Court of Appeal held the contrary: see para 52, per Bell AJA, para 1, per Zacca P, and paras 4–59, per Auld JA. There is a hint in paras 49(1) and 50 of Auld JA's case that the JOLs may have begun to put their case more E widely in oral submissions by suggesting some wider power based on "modified universalism" and independent of the Bermudan statutory power. But, if this is so, it can have received little prominence. Only before the Board has focus been directed to such an argument. As to the submission which was pursued below and accepted by Kawaley CJ, I agree with Lord Sumption JSC and Lord Collins of Mapesbury that there is no basis for F judicial re-fashioning of, or action outside the bounds of but by analogy with, domestic legislation such as section 195. The Chief Justice's order cannot therefore be justified on the basis on which he made it. But it is perhaps ironic that so firm a rejection of any possibility of the domestic court exercising the powers conferred on domestic liquidators should be replaced by an embrace of the possibility of the domestic court giving effect to the wishes and/or powers of foreign liquidators: see paras 130 et seq below.

G **123** Neither court below addressed any observations to the question whether any jurisdiction existed or, if it existed, could properly be exercised to make orders against and serve Paul Suddaby and other partners or officers of PwC outside the jurisdiction of the Bermudan court. As paras 119 and 120 above show, the Chief Justice's order did that, though without joining Mr Suddaby or any other officer or partner in their personal capacities. In H their written submissions before the Court of Appeal, the JOLs submitted that section 195 gave jurisdiction to serve abroad and relied on the English authority of *In re Seagull Manufacturing Co Ltd* [1993] Ch 345 (decided under a section of the Insolvency Act 1986 using similar terms to section 195). Once one concludes, as the Board has, that section 195 is applicable neither directly nor by analogy, the question becomes whether there can be

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any such common law jurisdiction to order service out, on pain of sanctions, as that for which the JOLs argue.

124 Approaching the matter on that basis, it is clear that the Chief Justice's order must on any view have gone well beyond any jurisdiction which exists at common law in relation to PwC's partners and officers outside the Bermudan jurisdiction, as opposed to PwC itself which was within such jurisdiction. The area was examined in *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90, para 12, where the House of Lords (in a judgment given by myself with which all other members of the House concurred) spoke in these terms of:

> "the limitation of the court's power to enforce the attendance of witnesses or fine defaulting witnesses. From the Statute of Elizabeth 1562 (5 Eliz 1, c 9) onwards, this had been regulated by statute and had never extended beyond the United Kingdom. The procedure enacted in relation to other jurisdictions involves the taking of evidence, on commission or otherwise, with the assistance of the foreign court. The service of a writ of subpoena is still only possible under section 36 of the Supreme Court Act 1981 in respect of persons in one of the parts of the United Kingdom. The limitation of the court's power in this respect corresponds with the principle of international law, summarised robustly by Dr Mann in his Hague lecture 'The Doctrine of Jurisdiction in International Law', *Recueil des Cours*, 1964-I, *The Definition of Jurisdiction,* p 137): 'Nor is a state entitled to enforce the attendance of a foreign witness before its own tribunals by threatening him with penalties in case of non-compliance. There is, it is true, no objection to a state, by lawful means, inviting or perhaps requiring a foreign witness to appear for the purpose of giving evidence. But the foreign witness is under no duty to comply, and to impose penalties on him and to enforce them either against his property or against him personally on the occasion of a future visit constitutes an excess of criminal jurisdiction and runs contrary to the practice of states in regard to the taking of evidence as it has developed over a long period of time.' "

125 The issue in *Masri* was whether a power under rules (CPR r 71) made under statutory authority extended to enable an order for examination of an officer of a judgment creditor company, who was out of the jurisdiction. The House held that, in view of the presumption against extra-territoriality, it did not. In the course of so doing, it considered prior authority on other powers with a statutory basis. In *In re Tucker (RC) (A Bankrupt), Ex p Tucker (KR)* [1990] Ch 148, section 25(1) of the Bankruptcy Act 1914 gave the court power to summon before it for examination "any person whom the court may deem capable of giving information respecting the debtor, his dealings or property". But the Court of Appeal set aside an order obtained by a trustee in bankruptcy for the examination of the debtor's brother, a British subject resident in Belgium. Dillon LJ, after noting the limitations of the powers to serve out of the jurisdiction (then contained in RSC Ord 11) and to subpoena witnesses, said against this background that he "would not expect section 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court": p 158E–F.

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A **126** In contrast, in *In re Seagull Manufacturing Co Ltd* [1993] Ch 345, section 133 of the Insolvency Act 1986 authorised the public examination of a narrower category of persons, viz

> "any person who— (a) is or has been an officer of the company; or (b) has acted as liquidator or administrator of the company or as receiver or manager . . . or (c) not being a person falling within paragraph (a) or B (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company",

and rule 12.12 of the Insolvency Rules 1986 (SI 1986/1925) gave the court express authority to order service out of the jurisdiction of any process or order requiring to be so served for the purposes of insolvency proceedings. The Court of Appeal upheld an order made for the public examination of a C former director living in Alderney. Peter Gibson J, with whose judgment the other members of the court concurred, said (p 354F–H) that:

> "Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in D public. Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice."

127 Although the House in *Masri* [2010] 1 AC 90 regarded E impracticability of enforcement as a factor of greater significance than Peter Gibson J had suggested, it acknowledged the public interest served by section 133, and referred (in para 23) to "The universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate". That factor being absent in *Masri*, it could lend no assistance to the argument that CPR r 71 extended extra-territorially. But the important F feature of all these cases is that they turned on express statutorily conferred powers. There was no suggestion in any of them of any relevant common law power in any of the areas discussed.

128 The third point is that the JOLs' case has been at all times and is advanced solely on the basis that PwC have documents and information which it would help the JOLs to inspect and about which it would be helpful for them to be able to question PwC and its officers. The basis is not that G PwC have property or assets of Singularis (beyond the documents which they have already been ordered by the Cayman Islands court to produce); nor is it that PwC have themselves done anything wrong or that they have been or are mixed up in any third party's wrongdoing. The House of Lords authority *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 was not relied upon, or even among the authorities put, before the H Supreme Court. It was mentioned in passing during the final oral submissions in reply of Mr Moss QC for the JOLs, when the transcript records this exchange:

> "*Lord Mance JSC.* If they are accountants, as you told me earlier that they were, then on the face of it there is an advisory relationship and if

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you wish to know something which you yourself have mislaid or don't have from your accountant advisers one might think there was quite a good case for saying they owed a duty to disclose it to you, to help you.

"*Mr Moss*. There might be an arguable case relating to that advice, but what we're interested in are these audit documents which go to the assets of the company. I don't know whether the accounting had anything to do with that at all.

"*Lord Collins*. Is there nowhere a *Norwich Pharmacal* order can be obtained?

"*Mr Moss*. Well, yes. We've had a discussion about this. The problem with *Norwich Pharmacal* is that it is based on fraud.

"*Lord Collins*. Any wrongdoing, I think.

"*Lord Sumption JSC*. It is based on wrongdoing generally.

"*Mr Moss*. Yes, but it does involve alleging wrongdoing. You would have to allege that PwC became innocently mixed up in that wrongdoing—

"*Lord Clarke JSC*. They only have to be innocently mixed up.

"*Mr Moss*. Yes.

"*Lord Sumption JSC*. That's a fairly low threshold, after all the Customs and Excise were about as innocent mixed up people almost that you could probably want.

"*Mr Moss*. Yes. The result of that would be if we can get *Norwich Pharmacal* relief, then the Bermuda courts do have common law powers to give us exactly the type relief that we have here. It actually comes to the same thing. It wouldn't make much sense to send us right back to the Chief Justice to then ask for *Norwich Pharmacal* relief—

"*Lord Mance JSC*. It may not be as easy as that. You haven't formulated it as *Norwich Pharmacal*.

"*Mr Moss*. Yes, it would have to be abandoned and reformulated as a *Norwich Pharmacal*, but in substance it comes to the same sort of end. What that perhaps illustrates is that what we have and what we seek to maintain, or rather we have at one stage and the Court of Appeal have taken it away on a rather narrow ground, but we seek to have back is not something that radical in these types of circumstances, where there is a gigantic deficit, there has clearly been wrongdoing, documents have been taken and not available. It's exactly the kind of context in which one would expect relief to be given. It's not extravagant in any shape or form."

129 Contrary to Mr Moss's submission, the JOLs are seeking to do something very radical, and there is a deep dividing line between the basis on which they put their case and *Norwich Pharmacal*. The JOLs are seeking (a) to justify a far wider and more stringent order than could ever be obtained in *Norwich Pharmacal* proceedings and (b) to do so on the basis of an unverified assertion that they would, if they had tried, have been able to obtain a *Norwich Pharmacal* and without exposing themselves to the trouble and difficulty of showing that PwC were mixed up in any sort of wrongdoing about which they have any relevant information or documentation. I see neither force nor attraction in Mr Moss's invitation to prejudge the outcome of normal procedures by short-cutting them.

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A 130 In the light of these points, I come to the substance of the argument now presented. That is that a common law power exists to assist any foreign liquidation by ordering any person (whether or not an officer or agent of the company) to attend and be interrogated and produce documentation and information, on pain of contempt, in the manner which the JOLs advocate. The only explicit limits to the jurisdiction for which the JOLs now contend is that it should not be inconsistent with the law or policy of the forum. The B negative answer which the Board is giving to the second issue on this appeal means that there would exist a further limitation, that the jurisdiction would not exist or be exercisable to enable an order which could not be made against a person within the jurisdiction of the country of the insolvency.

131 Lord Sumption JSC now suggests that the principle should be further limited to any court-ordered liquidation (though that, in turn, leaves C uncertain the status of any winding up under supervision in any jurisdiction where that possibility, which existed formerly under section 311 of the English Companies Act 1948, still exists). Although Lord Sumption JSC speaks at one point of this as a "means of identifying or locating" assets (para 23), elsewhere he speaks of "enabling [foreign] courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers": para 25. The order in fact made by D the Chief Justice was, as noted, of great width. The scope of the proposed common law jurisdiction is therefore uncertain.

132 The suggested jurisdiction is said to follow from the principle of "modified universalism". This is a principle developed in English common law over the last 20 years with the strong support of Lord Hoffmann, though recognised over a 100 years ago in a Transvaal case which was itself until E recently lost in (unfair) obscurity. *In re African Farms* [1906] TS 373, was decided by Sir James Innes, who in addition to his own great legal distinction was grandfather of the distinguished wartime humanitarian lawyer Helmuth James von Moltke. The essence of the principle consists, as Lord Sumption JSC notes in his para 14(i), in the recognition by one court of the foreign liquidator's power of disposition over the company's assets in the domestic jurisdiction. That justified an order restraining their disposition or F seizure inconsistently with the foreign liquidation. The novelty of this decision lay in the making of such an order in circumstances where there was no power to wind up the company in the domestic forum. In this respect, therefore, the co-operation extended in *In re African Farms* went a step further than that demonstrated in *In re Matheson Bros Ltd* (1884) 7 Ch D 225, where Kay J was, in the light of the fact that the English courts would G have had power to wind the relevant foreign company up in England, prepared to secure English assets to prevent English creditors executing against them, pending steps in the company's winding up in its country of incorporation to make the assets available for the company's English creditors pari passu with its foreign creditors.

133 The principle may also justify an order for the remission of the H assets out of the jurisdiction to the foreign liquidator, if the foreign liquidation rules would distribute them in the same way as the domestic jurisdiction. Even if the foreign liquidation rules would distribute them differently, but there is express statutory power enabling the remission to take place none the less, the principle may lend support to the exercise of that express statutory power. Beyond that, I do not read the majority of the

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House in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 as going, and anything that any of its members did say more widely about the existence or scope of a common law power was on any view obiter, since the appeal was decided on the basis that there existed express statutory authority for a remission although the assets would be distributed in the Australian liquidation differently from the way in which they would have been distributed in the English liquidation.

134 I agree with Lord Sumption JSC and Lord Collins that the second and third propositions for which *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 stands cannot be supported. A domestic court does not have power to assist a foreign court by doing anything which it could properly have done in a domestic insolvency; and it cannot acquire jurisdiction by virtue of any such power. As to the first proposition, for reasons which I explained in *Rubin v Eurofinance SA* [2013] 1 AC 236, *Cambridge Gas* can, if correct, stand for no more than the proposition that a domestic court should, so far as it can consistently with its own law, recognise a foreign bankruptcy order and deal with identifiable assets within its jurisdiction consistently with the way in which the foreign insolvency would deal with them. In another earlier decision of the Board, *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, para 35, Lord Walker said, aptly in my view, that the Cayman court "might have had some limited inherent power" to act in aid of the Bahaman winding up, but that it could not have the suggested power to set aside a voidable disposition modelled on a section in the Cayman Island bankruptcy legislation governing domestic liquidation which did not in terms apply in relation to a Bahaman winding up.

135 Where I part company with Lord Sumption JSC is in his assertion that the hitherto limited principle of modified universalism which I have just described extends to or justifies (or would be "an empty formula" without) the assumption or exercise of a common law power to "haul" anyone before the court (to use Dillon LJ's word in *Ex p Tucker* [1990] Ch 148), to be interrogated and to produce documentation on pain of being in contempt, simply because it would be useful for the foreign liquidator to be able to do so and might enable him to locate some assets (or better understand the company's affairs). There is a step leap between enforcing rights to identifiable assets and obliging third parties to assist with documentation and information in order to discover a company's assets (or, still more widely, in order to enable insolvency practitioners to understand a company's affairs). Lord Sumption JSC relies in para 23 on the House of Lords' decision in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133 as illustrating "the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle." But the reference to "a recognised legal principle" begs the question whether the principle of modified universalism extends beyond the protection of identifiable assets within the jurisdiction, to enable orders to be made compelling third parties to assist with the provision of information and documentation which may assist the tracing of such assets (or otherwise assist the insolvency practitioners in their understanding of the company's affairs).

136 Information is a precious commodity, but it is not one which is generally capable of being extracted in court from private individuals

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A without special reason; and the potentially intrusive, vexatious and costly nature of the exercise of any power to do so is apparent from the form of the Chief Justice's order in this case. The common law has not hitherto accepted any such jurisdiction. The existence of foreign insolvency proceedings, conducted for the benefit of creditors, does not appear to me to provide any justification for doing so now. The mere fact that insolvency practitioners are, at least in a compulsory liquidation, officers of the foreign court charged B with winding up its affairs seems quite insufficient at common law, though it may be a factor which assists determine the scope of Parliament's likely intention where relevant legislation exists. There are many ordinary creditors, litigants and other persons who would like a facility to gather information to discover or trace assets or to assist them to pursue claims or to conduct their affairs generally. It is unclear what the logic is or would be C for restricting the suggested common law power to foreign insolvencies. However much it may be intended, by using adjectives like "promiscuous", to discourage attempts to bring within this new jurisdiction either domestic insolvencies (if and where no complete common law scheme exists) or situations entirely outside the insolvency context, such attempts seem bound to occur. In the absence of any clear justification for giving insolvency practitioners the unique common law privilege which the JOLs now claim, D such attempts may well be difficult to resist. Although I disagree with it, such attempts can only be encouraged by the statement at the end of para 21 of Lord Sumption JSC's opinion that "The courts have never been as inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy calls for it."

E 137 In reality, far from displaying uninhibited willingness to develop appropriate remedies requiring the provision of information, courts have in my view been careful to confine such remedies to situations where there is a recognisable legal claim to protect, based either on a title or right to property or on some wrongdoing supported by appropriate evidence. Thus: (i) A court has jurisdiction to protect identifiable property rights, which would include ordering a person shown to be likely to have property belonging to F the company to deliver it up or disclose its whereabouts. (ii) A sustainable case of wrongdoing is the basis for the well-established jurisdiction to order the disclosure of information by or in conjunction with the making of an asset freezing (formerly *Mareva*) order or a search (*Anton Pillar*) order. (iii) The legal principle recognised in *Norwich Pharmacal* is that persons innocently mixed up in wrongdoing could be expected to disclose a limited G amount of information and documentation about it to assist the victims.

138 On this appeal, no case has been advanced under any of these heads. The first could cover the disclosure by an agent of information which he held for, or owed a duty to pass to, his principal. As the transcript extract quoted in para 128 above confirms, no case is advanced on any such basis. Moreover, auditors are not agents, they are independent contractors H engaged to review a company's accounts and report in accordance with statutory and professional requirements—in which connection there has been no suggestion of any failure or shortcoming on PwC's part. The second and third situations depend on evidence of wrongdoing, which has again not been asserted or attempted to be established. The third situation in particular bears no resemblance to the present case, in which it is said that

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innocent third parties can be compelled to produce information and documentation, without any allegation or evidence of wrongdoing, on insolvency practitioners showing that this could be useful to enable them to locate assets or better to understand the company's affairs.

139 It is notable that, even in the context of wrongdoing, the courts have been at pains to emphasise the narrow scope of the *Norwich Pharmacal* jurisdiction. It is "an exceptional one": *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, para 57, per Lord Woolf CJ. It depends on the existence of wrongdoing. The person with information must have been mixed up, however innocently in wrongdoing: *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112. Originally the jurisdiction was confined to discovery of the identity of the wrongdoer: *Ashworth Hospital Authority*, para 26, per Lord Woolf CJ; *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911, 914, per Hoffmann J, emphasising that it was "no authority for imposing on 'mixed up' third parties a general obligation to give discovery or information when the identity of the defendant is already known."

140 More recently, the Divisional Court has said that *Norwich Pharmacal* may extend beyond the discovery of the identity of a wrongdoer or of a "missing piece of the jigsaw", but under the strict caveat that "the action cannot be used for wide ranging discovery or the gathering of evidence and is strictly confined to necessary information": *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2009] 1 WLR 2579, para 133, cited by the Court of Appeal in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2011] EWCA Civ 1587 at [4].

141 Lord Sumption JSC suggests (para 20) that it will be possible in the present situation to draw a distinction between information which can permissibly be sought and evidence which cannot. At least two problems arise in this connection. First, it is, as I have noted, unclear whether any distinction or limitation is proposed between on the one hand information and documentation relating to assets and on the other hand information and documentation relating more generally to the company's affairs. Any such distinction or limitation seems likely in any event to be in practice illusory. An insolvency practitioner is ultimately only interested in assets and their distribution. Any questioning put, or information or documentation sought, will be scrutinised with a view to identifying assets, in whatever form, even if they only consist of potential claims for maladministration or negligence.

142 The second problem is that the distinction between information and evidence seems likely also to be illusory. Evidence is at least confined to the issues in identified litigation, domestic or foreign. In contrast, the proposed relief sought against PwC is completely unconfined, in nature and scope. The later *Omar* case [2014] QB 112 highlights (para 12) a justified scepticism about maintaining a distinction between information and evidence which gives cause for caution about further extension by analogy of the *Norwich Pharmacal* jurisdiction to circumstances where identifiable wrongdoing is not in issue. The Chief Justice's remark in para 80 that "PwC . . . is not an overt target for adverse litigation brought by the JOLs at this stage" was I think also shrewd. Who can doubt that the JOLs would, in their examination both of the working papers and other documents and information disclosed by PwC and in their questioning of the partners and

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A officers attending under an order such as that made by the Chief Justice, have a close eye on the possibility that this might show some possible claim against PwC as auditors? The Chief Justice's ensuing comment that the court should take "a healthily sceptical approach in evaluating the complaints made about the validity and scope of the ex parte orders", because "it seems clear that a combative and sophisticated defensive strategy has been engaged" appears to me in contrast unjustified. The jurisdiction to B make or justification for such an order cannot depend on the defensive strategy adopted to resist it.

143 The principle now advanced by the JOLs lacks any substantial authority. The two first instance authorities cited by Lord Sumption JSC in para 24 offer the weakest of encouragement for the novel jurisdiction now proposed. *Moolman v Builders & Developers (Pty) Ltd* [1990] 2 All SA 77 C (A) treats the issue as one of applying *In re African Farms* [1906] TS 373, giving as the only reason that information is necessary if the ultimate aim of recovery of assets is to be realised. The court then in fact applied the statutory provisions of the forum on an "as if" basis [1990] 2 All SA 77 (A), sub-paragraph (d) on pp 4–5 and p 16. That I agree with Lord Sumption JSC and Lord Collins is not a sustainable approach.

D 144 The judgment in *In re Impex Services Worldwide Ltd* [2004] BPIR 564 suggests a breadth of common law power which would again be completely unlimited in its scope, enabling the Manx court "if it thinks fit" to make "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": para 106(8). Deemster E Doyle explained this on the basis that (para 107):

> "Friendly and sophisticated jurisdictions which respect the rule of law and human rights need to be aware that if things go wrong in their jurisdiction and entities in the Isle of Man have information, documentation and evidence in their possession custody control or power that would assist them, then the Manx courts, in a proper case and subject to suitable safeguards and protections where necessary, will F offer judicial co-operation and assistance where that is reasonably requested by the judicial authority in that friendly jurisdiction. When the call for help comes the Manx courts will, in proper cases, answer the call positively and provide the necessary co-operation and assistance."

G English liquidators were the beneficiary of the far reaching principle thus promulgated, but I cannot accept that it represents English or Bermudan common law. If there might seem to be a hint in the Deemster's phrase "if things go wrong" that the reasoning and order may have been based on wrongdoing, that does not appear to be borne out by the full account of the background and proposed questions given earlier in his judgment. Like the order made by the Chief Justice in the present case, the Deemster's ready H acceptance of the scope of the assistance which might be provided as extending to any information about the company's promotion, formation, trade, dealings and affairs or property as well as to evidence once again indicates the difficulty that there could be in keeping this novel power within bounds.

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145 Lord Collins's approving dictum in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33, quoted by Lord Sumption JSC in his para 19, is found in a paragraph listing a series of authorities on modified universalism, in circumstances where there was no examination in argument or in the Board's opinion of differences between them, or between situations where identifiable assets were in issue and other situations. But another dictum of Lord Collins in that case is in my view relevant. At para 129, he said that:

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> "The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, 'if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it': *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 489."

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That stands in stark contrast with the development of common law powers which the majority on this appeal supports.

146 The description of *In re Impex* [2004] BPIR 564 as a case of "judicial assistance in the traditional sense" can be seen now to be on any view unsustainable, and Lord Sumption JSC himself says (para 24) that he "would not wish to endorse all of the reasoning given" in the judgments in either *Moolman* [1990] All SA 77 (A) or *In re Impex*. He instances "in particular" those parts which appear to support the concept of applying statutory powers by mere analogy. That leaves open—in the context of the JOLs' present case that the Bermudan court can assist the Cayman Islands' liquidation without relying on Bermudan law—how far his approach accepts or disapproves the breadth of the reasoning and orders in *In re Impex* (see the previous paragraph)—or indeed in the present case: see paras 119–120 above. That is another of the unresolved uncertainties about the scope of the proposed new jurisdiction.

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147 In these circumstances, and although anything said may be obiter, I am not at present persuaded that it is appropriate to extend the common law power to assist by ordering the provision of information beyond categories which have some recognisable basis in current law, that is cases where there is (a) evidence that the person ordered to provide the information or documentation has property belonging to the insolvent company, or (b) evidence of some wrongdoing by the person so ordered or (c) evidence of some wrongdoing by another person in which the person so ordered was or is innocently mixed up. A general common law power to order the disclosure of information and documentation by, and the questioning of, anyone, either because a foreign liquidator shows that this may assist him identify or recover assets anywhere in the world or, a fortiori, because it would enable him understand the company's affairs, goes not only beyond anything which it is necessary to contemplate on this appeal, but is also beyond anything that I can, as at present advised, regard as permissible or appropriate.

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148 I therefore consider that the appeal must be dismissed, because of the negative answer given to the second issue. But I would, if necessary, also have considered that it should be dismissed on the ground that a negative answer should be given on the first issue.

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A **LORD NEUBERGER OF ABBOTSBURY PSC**

149 I agree with the other members of the Board that we should humbly advise Her Majesty that this appeal should be dismissed. However, there is an issue which divides the members of the Board. It is whether, as Lord Sumption and Lord Clarke of Stone-cum-Ebony JJSC and Lord Collins of Mapesbury consider, the appeal should only be dismissed on the grounds (i) that there is no common law power to apply legislation which applies to B domestic insolvencies by analogy to foreign insolvencies, and (ii) that the Bermudan courts should not exercise a common law power ("the Power") described by Lord Sumption JSC in para 25, because, as he explains in paras 29–30, the Cayman Islands courts have no such power, or whether, as Lord Mance JSC concludes, the appeal should also be dismissed on the ground (iii) that the common law power in question does not exist. On that C issue, if it is appropriate to decide whether the alleged power exists, I would be in agreement with Lord Mance JSC.

150 As this is a judgment which dissents from the majority view on ground (iii), and there is little which I wish to add to the judgment of Lord Mance JSC, I can express my reasons relatively shortly.

151 It is unnecessary to decide whether the Power exists, because we are D all agreed that, even if it does, it should not be exercised. I accept, of course, that we can decide (albeit, at least arguably, strictly only obiter) whether the Power exists. However, as it is not necessary for us to rule on that issue in order to dispose of this appeal, we should, in my opinion, be very cautious of doing so. While judges in a final court of appeal, perhaps particularly in a common law system, should give as much guidance as they can as to the substantive and procedural law in any area, they must always bear in mind E the risks inherent in determining issues which do not have to be decided in order to dispose of the case before them.

152 As new problems arise, and as societal values and practices, technological techniques and business practices change, it is inevitable that judges can and should introduce new common law principles or procedures or make alterations to established common law principles and procedures. F However, such developments should always be adopted cautiously, not least because, even with the benefit of submissions from advocates and consideration of previous cases, textbooks and articles, the wider implications of any new principle or alteration to an existing principle are very hard to assess. The need for caution in this connection is, in my view, supported by the judicial observations cited by Lord Collins in paras 65–68, although those observations were made in relation to a different aspect of G the need for caution.

153 In the present case, there is obvious force in the point that the Board should determine whether the common law power alleged by the liquidators exists, as it is an important issue on which the sooner an authoritative decision is given the better, especially in the light of the somewhat confused state of the law as revealed in the judgments in this case.

H 154 However, that very confusion underlines the need for caution. The extent of the extra-statutory powers of a common law court to assist foreign liquidators is a very tricky topic on which the Board, the House of Lords and the Supreme Court have not been conspicuously successful in giving clear or consistent guidance: see the judgment of Lord Hoffmann on behalf of the Board in *Cambridge Gas Transportation Corpn v Official Committee of*

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Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508, all five opinions in the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, and the judgment of Lord Collins of Mapesbury for the majority of the Supreme Court in *Rubin v Eurofinance SA (Picard intervening)* [2013] 1 AC 236, discussed by Lord Sumption JSC at paras 16–19, and the judgment of Lord Collins in this case.

155 The message I take from those cases is that, at least in this area, it would be better for the Board to approach any case in this field with a view to deciding it on a relatively minimalist basis, rather than by seeking to lay down general principles which it is not necessary to determine, particularly when those principles involve extending the court's powers in a way which may have substantial ramifications. While Lord Sumption JSC's explanation of the nature and extent of this alleged common law power appears very attractive, I think it could lead to all sorts of problems and uncertainties, as is implicit in the qualifications which Lord Sumption JSC makes, at para 25. It is all very well saying that they can be dealt with when they arise, but the fact that it is apparent that there will be problems and complications if the law is developed in a certain way suggests to me that the development should not be adopted unless it is necessary to do so. Accordingly, as it is unnecessary to decide whether the common law power exists, I would have preferred to leave the issue to be decided when it needs to be—with the benefit of the powerful arguments either way contained in the judgments on this appeal, which, with all respect to counsel, range more widely and deeply than the arguments which the Board heard during the hearing.

156 If, however, it is incumbent on me to express a view, I would conclude, in agreement with Lord Mance JSC, that the alleged common law power does not exist. He has set out the grounds for that conclusion convincingly, and they include reasons both of principle and of practicality. Accordingly, I do not propose to repeat those reasons, but there are one or two points I would like to emphasise.

157 The extreme version of the "principle of universality", as propounded by Lord Hoffmann in *Cambridge Gas*, has, as Lord Sumption JSC explains, effectively disappeared, principally as a result of the reasoning of Lord Collins speaking for the majority in *Rubin*, and speaking for the Board in this appeal. However, as with the Cheshire Cat, the principle's deceptively benevolent smile still appears to linger, and it is now invoked to justify the creation of this new common law power. It is almost as if the Board is suggesting that, while we went too far in *Cambridge Gas* and should pull back as indicated in *Rubin*, we do not want to withdraw as completely as we logically ought. In my view, the logic of the withdrawal from the more extreme version of the principle of universality is that we should not invent a new common law power based on the principle.

158 The limitation of the Power to insolvency cases may be seen by many to be questionable. More specifically, the limitation to liquidations which are being conducted by officers of a foreign court seems to me to be potentially arbitrary. Companies may be in court-imposed liquidation in many jurisdictions when it is "just and equitable" to wind them up, even if they are solvent: I do not see why liquidators in such a case should be able to invoke the Power when other people running solvent companies could not do so. Further, there is no reason why a statutory regime should not provide

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A that voluntary liquidations are to be conducted under the aegis of the court, and, if so, the Power would seem to apply in such cases. And the status of administrators in administrations may be unclear in this connection.

159 The need to make subtle distinctions also concerns me. Thus, the distinction between information and documentation which is obtainable under this power, and "material for use in actual or anticipated litigation", appears very likely to give rise to difficult practical problems. I appreciate B that these problems can arise in other circumstances, but that is not a reason for extending the circumstances in which these problems may arise; and, as the facts of this case suggest, I suspect that they are particularly likely to arise in relation to the exercise of the Power. Similarly, the question what is necessary for the performance of a liquidator's functions, which is said to be a prerequisite for the exercise of the Power, seems to be a fertile area for C uncertainty and dispute.

160 More broadly, these distinctions seem to me to embody the sort of requirements one would expect to see in a statutory code rather than in judge-made law. As the judicial observations cited by Lord Collins suggest, judge-made law should be limited to "very modest development[s] . . . of existing principle", and should be made "in small steps" or "within . . . interstitial limits". Although I accept that the United Kingdom courts have D been prepared to recognise a new common law right in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, the right involved was only exercisable in very specific circumstances where a serious wrong had been committed. I do not consider that that decision alters the fact that the creation of the Power would represent a development in the law which is, as Lord Mance JSC puts it, "radical". It may not seem radical in the sense that E it can be said to be a fairly routine feature of the extreme "principle of universality" enunciated by Lord Hoffmann in *Cambridge Gas* [2007] 1 AC 508, but that view is no longer maintainable given that extreme principle has now been rejected by Lord Collins, speaking for the majority of the House of Lords in *Rubin* [2013] 1 AC 236 and for the Board on this appeal.

161 The contention that judges should not be creating the Power is reinforced when one considers the extent of domestic statutory law and F international convention law in the area of international insolvency. Examples of such laws are described and discussed in paras 40–50 of Lord Collins's judgment. In this highly legislated area, I consider that the Power which is said to arise in this case is one which should be bestowed on the court by the legislature, and not arrogated to the court of its own motion.

162 I acknowledge the force of the arguments the other way, which are G so clearly set out by Lord Sumption JSC. However, as already intimated, while I agree with the judgment of Lord Collins and otherwise agree with the judgment of Lord Sumption JSC, I would for my part reject the existence of the Power, if it is appropriate to decide that issue at all.

JILL SUTHERLAND, Barrister

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In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 238

IN THE MATTER OF THE COMPANIES ACT 1981

AND IN THE MATTER OF TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED (IN LIQUIDATION)

BETWEEN:

STEPHEN JOHN HUNT

Applicant

-and-

TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED (IN LIQUIDATION)

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Lewis Preston, Kennedys Chudleigh Ltd, for the Applicant**

Mr Tom Smith QC, Mr Keith Robinson, Carey Olsen Bermuda Limited, for Transworld Payment Solutions Limited

Dates of Hearing: **11 – 12 February 2020**

Date of Judgment: **6 March 2020**

JUDGMENT

Cross-border insolvency; recognition of a liquidator appointed in the jurisdiction of incorporation of the company; application to set aside the recognition order on the ground that the purpose of such recognition was to obtain evidence in relation to contemplated proceedings in a foreign court; alleged failure to make full and frank disclosure at the application to obtain the recognition order

Introduction

1. On 19 July 2019 the Court made an ex parte Order that the appointment on 17 November 2014 in England and Wales of Stephen John Hunt, a partner of Griffins, (the **"Liquidator**") as liquidator of Transworld Payment Solutions U.K. Limited (the "**Company") pursuant** to a compulsory winding up Order made in the High Court of England and Wales on 22 September 2014, be recognised in this jurisdiction.

2. The Court also made an order that, save with the leave of the Court or with the consent of the Company:

   1. No proceedings may be commenced within the jurisdiction of the Court for the winding up of the Company;
   2. No receiver or administrative receiver over any part of the property or undertaking of the Company within the jurisdiction shall be appointed;
   3. No attachment, sequestration, distress or execution shall be put in force against the property or effects of the Company within this jurisdiction;
   4. Where any claim against the Company secured by a charge on the whole or any part of the property, effects or income of the Company within this jurisdiction, no action may be taken to realise the whole or any part of such security;
   5. No steps may be taken to repossess goods within the jurisdiction in the Company's possession under any hire purchase agreement; and
   6. No proceedings within this jurisdiction may be commenced or continued in relation to the Company by any person other than the Liquidator or the Company.

3. By summons dated 11 October 2019, Transworld Payment Solutions Limited (**"TWPS"**), a company incorporated in Bermuda, applies for an order discharging the ex parte Order made by the Court on 19 July 2019 on the grounds that:

   1. The recognition of Mr Hunt's appointment in Bermuda is inappropriate and would serve no legitimate purpose because the principal purpose of the recognition

is to facilitate the use of the powers of the Bermudian Court for information gathering, but the Bermudian Court would be bound to refuse such a relief since the information is sought in support of litigation which Mr Hunt has already determined to bring.

2. Further, the information requests are barred by the terms of certain settlement agreements entered into by Mr Hunt and the issue as to the effect of these agreements is presently pending before the Curaçao courts.

3. There was a breach by Mr Hunt of his duty to provide full and frank disclosure at the hearing at which the ex parte Order was made.

The Background

4. The background to this matter is set out in the First Affidavit of Richard Charles East dated 11 September 2019 sworn on behalf of TWPS. The Company is one of a number of Transworld companies which are ultimately owned by Mr John Deuss. Through his ownership of Transworld Energy Limited ("**TEL**"), which is a Bermuda entity, Mr Deuss was the ultimate beneficial owner of the Company. Mr Deuss was not at any stage a director, officer, employee, consultant or agent of the Company.

5. Mr Deuss was also the President and CEO of the First Curaçao International Bank NV ("**FCIB**"). FCIB was formerly a commercial bank in Curaçao and has been subject to a statutory winding down mechanism since 2006. As part of this procedure, the Central Bank of Curaçao and Sint Maarten ("**CBCS**") exercises FCIB's managing and supervisory powers through proxy holders who were appointed on its behalf to run FCIB. Pursuant to a service agreement with FCIB, prior to 2006, the Company introduced prospective customers and intermediaries to FCIB and its products and services.

The Missing Trader Intra-Community Fraud

6. Before this Court Mr Hunt maintains that the Company has been presented with a number of claims from companies involved in the missing trader intra-community fraud ("**MTIC**") VAT fraud. In short, MTIC fraud involves the theft of VAT from the government by exploiting the differences in how VAT is treated in different jurisdictions. In simple MTIC cases, fraudsters sell the goods and charged the VAT to buyers without remitting the value to the tax authorities. In more complex cases, known as carousel frauds, the goods are imported and sold through a series of companies before being exported again with the first company in the domestic chain charging VAT to a customer, but not paying this to the government, becoming what is known as a "missing trader". The subsequent exporters of these goods then claim and receive the reimbursement of VAT payments that never occurred.

7. In the present case, it has been alleged that the fraud was facilitated by the banking services provided by FCIB. It is also said that the Company has liability "*for dishonestly assisting in the frauds by, amongst other things, "on boarding" them as customers of FCIB without conducting effective due diligence and without properly carrying out the compliance duties assigned to the Company by FCIB".*

The Earlier Settlement Agreements

8. TWPS considers the proposed claims to be particularly surprising as Mr Hunt has previously participated in settlement arrangements with FCIB (and it is asserted by extension, Mr Deuss) concerning the same MTIC fraud.

9. Mr East explains that the British authorities' investigations into some of FCIB's customers for MTIC fraud led to the British authorities asking the Dutch authorities to investigate and prosecute FCIB in connection with the alleged MTIC fraud, to which the Dutch public prosecutor agreed. Since FCIB could no longer function as a bank because of the actions of the Dutch public prosecutor, FCIB voluntarily underwent "emergency measures"

whereby it was subject to the direct control of the CBCS and wound down. There arose the question of what to do about the account balances of the companies that had engaged in MTIC fraud, many of which were placed into liquidation on account of the sums owed to HMRC. Whilst the companies sought access to the deposits held on their behalf, FCIB sought recompense for the companies' role in its collapse.

10. Both Mr Hunt and his colleague at Griffins, Mr Bramston, are, or have been, liquidators (both jointly and individually) of a number of these companies that allegedly engaged in the MTIC fraud and held accounts at FCIB (the "**Griffins Companies**"). Throughout 2014, Mr Hunt, Mr Bramston and/or their English solicitors took the lead to engage in negotiations with FCIB and the Central Bank in respect of the Griffins Companies' involvement in MTIC fraud. There were other companies in a position similar to that of Griffins Companies that were in liquidation and their respective insolvency practitioners (from firms such as Baker Tilly, Grant Thornton and Kingston Smith) also participated in parallel negotiations throughout 2014. These negotiations culminated in a series of settlements entered into on or about 6 February 2015 (the "**Settlement Agreements**") between, *inter alia*, the Griffins Companies and their officeholders and FCIB under which the companies released FCIB and related parties from any and all claims and demands in exchange for receiving a percentage of account balances held at FCIB.

11. Mr East contends that the intended effect of the Settlement Agreements was to release, *inter alia*, FCIB, its former officers, directors and employees, and any corporation or entity under common control with any of them from any new claims or demands, such as requests for examination, from insolvency practitioners such as Mr Hunt or Mr Bramston. The IP Settlement Agreements, which are subject to Curaçao law and the jurisdiction of the Curaçao courts, were entered into almost a year before the present claims were asserted on behalf of the Company.

The Appointment of Mr Hunt as the Liquidator

12. The appointment of Mr Hunt, as the liquidator of the Company, took place in unusual circumstances. On 27 May 2010, the directors of the Company applied for voluntary striking off under section 1003 of the English Companies Act 2006. On 5 October 2010, pursuant to that application, the Company was dissolved. Mr East explains that unbeknownst to the directors of the Company, Chubb Electronic Security Ltd ("**Chubb**") had obtained a judgment in default in the sum of £1,833.06 in the Kingston-upon-Thames County Court on 26 May 2010.

13. On 27 June 2014, and for reasons that remain unclear to TWPS, the judgment debt is said to have been assigned by Chubb to TC Catering Supplies Limited (in liquidation) ("**TC Catering**"). Mr Bramston of Griffins was the liquidator of TC Catering at the time and has since been replaced by Mr Kevin Goldfarb, also of Griffins. Instead of approaching the former directors of the Company with a request to pay the £1,833.06 judgment debt, in a petition dated 6 August 2014, TC Catering applied to restore the Company to the register of companies and to wind it up on the basis that the judgment debt assigned by Chubb remained outstanding. Mr Bramston paid £1, 250 (by way of deposit for the winding up petition) in respect of the recovery of the debt of £1,833.06. On 22 September 2014, the High Court ordered that the Company should be restored to the register of companies and wound up. The Secretary of State appointed Mr Hunt (also of Griffins) as the liquidator of the Company on 17 November 2014. Counsel for TWPS complains that none of this was revealed by Mr Hunt to FCIB prior to the signing of the IP Settlement Agreements in February and April 2015.

14. At a meeting of the Company's creditors held on 30 September 2015, the creditors approved a remuneration policy whereby Mr Hunt is to receive 50% of all realisations in the liquidation of the company. The Liquidator's Progress Report for the period ending 16 November 2015 suggests that TC Catering (acting by way of its liquidator, Mr Bramston also then of Griffins) was the only creditor of the Company and accordingly it appears that

Mr Hunt's entitlement to receive 50% of all realisations was, in effect, approved by his partner, Mr Bramston.

Litigation in England

15. It appears that the sole asset and the sole object of the liquidation of the Company is to pursue potential claims against FCIB and other entities or individuals. Thus, in Mr Hunt's Annual Progress Report to Members and Creditors for the year ending 16 November 2017 Mr Hunt notes that: *"The principal activity in the last year has been to continue to undertake investigations in support of the Company's claim against the First Curaçao International Bank ("FCIB")".* Mr Hunt further states that he had to date received unsecured creditor claims of just under £1 billion and that based on information requests from at least another 50 potential creditors, the value of claims against the Company could double to £2 billion. In that report Mr Hunt anticipates claims of at least £180 million will be made against FCIB.

16. On 5 February 2016 a letter before action was sent by Blake Morgan solicitors, on behalf of Mr Hunt as the liquidator of the Company to, *inter alia*, FCIB. The letter advised that the Company faced claims from companies which had been involved in the MTIC fraud, and that Mr Hunt and/or the Company in turn had claims against FCIB for fraudulent trading under section 213 of the Insolvency Act 1986 and unlawful means conspiracy.

17. Subsequently Mr Hunt expanded his claims both against FCIB and Mr Deuss. The expanded claims are set out in a draft Particulars of Claim settled by Mr Christopher Parker QC and provided on 9 April 2018 and the letter from Gowling WLG ("**Gowlings**"), acting for the Company, to Quinn Emanuel, acting for Mr Deuss, dated 21 May 2019. In these documents, Mr Hunt claims that FCIB and Mr Deuss dishonestly assisted the MTIC fraud, that Mr Deuss breached fiduciary duties which he owed as a de facto and/or shadow director of the Company and made claims under section 213 of the Insolvency Act 1986 and section 1 of the Civil Liability (Contribution) Act 1978. The letter dated 21 May 2019 requested a response by 4 pm on 19 July 2019. The letter ended by advising: *"We hereby*

put you on notice that, in the absence of either your firm and/or FCIB's solicitors providing our clients with sufficient reason not to, it is our clients' intention for me to commence the Claim after the period set out at paragraph 6.1 above [4 pm on 19 July 2019] has expired."

18. In the anticipated English proceedings Jones Day, acting on behalf FCIB, has raised a number of concerns in relation to threatened claims and in respect of requests for information from both FCIB and Mr Deuss.

19. In its letter of 23 May 2018 Jones Day states that Mr Hunt's position as liquidator of the Company is clearly in direct conflict with his position, and that of his partner, Mr Goldfarb, as liquidators of all but one of the English claimants. In his capacity as the liquidator of the Company, Mr Hunt has accepted claims from the English claimants notwithstanding that those same companies are entirely under his control and/or that of his partner at Griffins, Mr Goldfarb. This is particularly so in circumstances where Mr Hunt's remuneration as liquidator of the Company is to be 50% of all recoveries. This means that, were he to succeed in his claim against FCIB, he would be paid approximately £90 million fees alone. This, contends Jones Day, creates a clear personal incentive for Mr Hunt to accept claims from the English claimants (which are companies almost exclusively under his control and that of his colleague).

20. Second, Jones Day asserts that the issue of Mr Hunt's conflict of interest is exacerbated by the fact that Mr Hunt has accepted claims that are plainly time-barred from companies entirely under his control and/or that of his partner at Griffins, Mr Goldfarb. Jones Day states that almost all of the English claimants' claims are out of time but Mr Hunt has confirmed that he has accepted those claims nevertheless.

21. In a letter dated 26 September 2017 Blake Morgan, acting for Mr Hunt, reconfirmed his desire to interview Mr Deuss in relation to the affairs of the Company. In a letter dated 9 October 2017 Jones Day contended that such an interview would be oppressive in the present circumstances. Jones Day pointed out that given the clear intention by Mr Hunt to issue proceedings against FCIB and Mr Deuss and that such threatened claims involve

allegations of fraud, the request to interview Mr Deuss is in reality an attempt to obtain pre-action disclosure. In the circumstances, Jones Day contended, that such a request for an interview and/or information is oppressive and would not be complied with.

The Recognition Application

22. The application for recognition of the appointment of Mr Hunt, as the liquidator of the Company, was supported by Mr Hunt's First Affidavit dated 18 June 2019. In that affidavit Mr Hunt explained that in order to progress the liquidation, he needs to be in a position where he has appropriate authority to continue the investigations involving the MTIC fraud into the Company's activities and dealings worldwide, both with third parties and within its own group of companies, including Bermuda.

23. In relation to Mr Deuss, Mr Hunt stated that while he was never a *de jure* officer of the Company, from his review of the Company's documents during the course of his investigation, it has become apparent that Mr Deuss was involved in the formation and management of the Company and exercised control over it and its *de jure* directors, who were accustomed to acting in accordance with his strategic and tactical direction. Mr Hunt stated that recognition in Bermuda may prove necessary to enforce compliance with any orders made in other proceedings and/or to give him the authority to request the relevant document from Mr Deuss in the absence of his cooperation in the liquidation.

24. Mr Hunt also referred to the statutory annual accounts of the Company for the years 2005 – 2009 and stated that as the liquidator he may need to investigate these transactions and recharges between the Company and other companies within the Group.

25. Mr Hunt concluded that recognition in Bermuda at this stage of the liquidation would provide the necessary authority to enable him at the appropriate time to continue his investigations and work in respect of persons, entities, documents, information, accounts and assets in Bermuda.

26. Counsel for Mr Hunt (Mr Potts QC) supported the application for recognition on the following factual grounds.

27. First, the claims brought by the liquidator of the entities involved in the MTIC fraud against the Company are for dishonest assistance in those frauds by the Company "onboarding" those entities as customers of FCIB without conducting effective due diligence and failing to apply adequate procedures to prevent the frauds during the lifetime of the accounts. Mr Hunt wishes to continue his investigations in Bermuda to determine the validity of claims made against the Company and to determine what consequential claims it may have against other entities and persons.

28. Second, Mr Hunt wishes to investigate the transactions the Company apparently entered into with other entities in the Group and to determine what is owed by and to those entities.

29. Third, Mr Hunt also wishes to investigate whether there are computer systems or data belonging to the Company and the source of funds for the payment of its employees.

30. Counsel submitted that these investigations may involve engaging with some or all of the Bermudian companies and residents and Mr Hunt seeks recognition by the Bermudian Court in order to pursue his investigations in Bermuda with the Court's authority.

Recognition is inappropriate and would serve no legitimate purpose

31. Mr Tom Smith QC for TWPS submits that the recognition of Mr Hunt's appointment in Bermuda is inappropriate and would serve no legitimate purpose because the principal purpose of the recognition is to facilitate the use of the powers of the Bermudian Court for information gathering, but the Bermudian Court would be bound to refuse such a relief since the information is sought in support of litigation which Mr Hunt has already determined to bring.

32. I accept, as submitted by Mr Smith QC, that the concepts of *recognition* and *assistance* are different. The concept of recognition simply involves recognising, in accordance with principles of private international law, the authority of the foreign officeholder, such as the liquidator or trustee in bankruptcy, to deal with the assets of the debtor located in the foreign jurisdiction. The general rule is that the court will recognise at common law only the authority of the liquidator appointed under the law of the place of incorporation of the company: *Dicey, Morris & Collins, The Conflict of Laws, 15th ed, para 30 R-100.* In this regard Lord Mance stated in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 at para 132 *: "the essence of the principle consists, as Lord Sumption JSC notes in his para 14(i), in the recognition by one court of the foreign liquidator's power of disposition over the company's assets in the domestic jurisdiction. That justified an order [in In re African Farms [1906] TS 373] restraining the disposition or seizure inconsistently with the foreign liquidation."*

33. In the present case, there could be no dispute over Mr Hunt's authority, as a matter of Bermudian private international law, as the liquidator appointed by the English court of the Company, a company incorporated under English law, to deal with any assets of the Company in Bermuda. Indeed, the Court made the Order recognising Mr Hunt's authority precisely on this basis in its Ruling made on 19 July 2019. However, Mr Smith QC submits, there is no evidence or suggestion that the Company has any assets and therefore there would be no basis for making an order recognising Mr Hunt for this reason. Mr Preston, appearing for Mr Hunt, confirmed to the Court that the Company has no assets within the jurisdiction. Accordingly, Mr Hunt cannot rely upon the existence of assets within the jurisdiction to support his application for recognition.

34. The other reason why recognition may be sought by a foreign officeholder is that it carries with it the active assistance of the court, within the limits explained by the Privy Council in *Singularis.* Mr Smith QC submits that it is clear that the real reason why an order for recognition was and is sought, is not in order to establish Mr Hunt's authority to deal with the assets of the Company in the face of some dispute, but rather to provide a platform by which Mr Hunt can then seek assistance from the Bermudian Court to obtain the

information which he wants, or simply to be able to support his request by being able to claim that he has the "*authority*" of the Bermudian Court. Mr Smith QC further submits that there is no proper basis for Mr Hunt obtaining any form of relevant assistance from this Court.

35. In *Singularis* Lord Sumption considered the limits of the common law power to assist a foreign officeholder at [25]:

> *"In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers.* ***It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed****. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation in In re African Farms Ltd and in HIH and Rubin, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in Norwich Pharmacal and R (Omar) v Secretary of State for Foreign and Commonwealth Affairs (at both levels) shows with all their,* ***common law powers of this kind are not a permissible mode of obtaining material for use***

in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept limitations*"* (emphasis added).

36. The last sentence in the above passage in Lord Sumption's judgment makes clear that there is a specific restriction on not using the common law powers to obtain material for use in actual or anticipated foreign litigation.

37. As noted above [33], the Company has no assets in Bermuda. Indeed, there is no suggestion that the Company has any assets in any jurisdiction. The sole aim of the liquidation of the Company is to pursue claims against FCIB and Mr Deuss arising out of the MTIC fraud. This has been confirmed in all the Annual Reports produced by Mr Hunt. In the latest Annual Progress Report for the year ending 16 November 2019 Mr Hunt confirms that:

    "The principal activity in the last year has continued to be of the undertaking investigations in relation to the Company's claim against First Curaçao International Bank ("FCIB") and defending the action brought by FCIB in Curaçao.

    My investigations have also been extended in relation to an additional claim…

    Overall I am able to report that investigations have continued to make progress with enquiries now spanning four jurisdictions. There remain a number of obstacles to recovery of further information but I am confident that, with the assistance of the courts, additional evidence will become available in support of claims.

    …

    The overarching strategy at the current time remains to investigate necessary issue claims against FCIB and Mr Deuss" (emphasis added).

38. The allegations made in the draft Points of Claim against Mr Deuss and FCIB are based on allegations that they participated in and assisted in the marketing and promotion by the Company of FCIB's banking services to customers who were involved in MTIC fraud. The basis of the claim is that these activities have exposed the Company to liability which it is

entitled to recover from FCIB and Mr Deuss. It seems reasonably clear from the terms of the information requests, which have been made by Kennedys on behalf of Mr Hunt since the ex parte Order, that those requests are in aid of the contemplated proceedings against FCIB and Mr Deuss. Thus, many of the questions appear to be directed at establishing that TWPS exercised control over the Company, so that it can be alleged that FCIB and/or Mr Deuss exercised control over the Company through TWPS.

39. The letter from Kennedys to TWPS dated 15 August 2019 states in the opening paragraph that Mr Hunt has "*been recognised in Bermuda by an ex parte Order of the Supreme Court of Bermuda, dated 19 July 2019."* The letter advises that the Mr Hunt's office requires him to investigate the MTIC fraud, and the general affairs of the Company including establishing *"who controls (or controlled) the Company at all relevant times".*

40. The letter advises that it appears from Mr Hunt's investigation that "*the Company, its directors and staff received instructions from time to time from Transworld Payment Solutions Limited ("TWPS Bermuda") and/or its directors, controllers or employees"*. The letter then proceeds to elicit the following detailed information:

> *"1.Explain the business activities of TWPS Bermuda and describe the commercial relationship between TWPS Bermuda and the Company.*
> *2. Provide a copy of any contract(s) and/or service level agreement(s) that has/have existed between TWPS Bermuda and the Company.*
> *3. Explain the basis on which control was exercised over the Company in respect of guidance issued by TWPS Bermuda in relating to "knowing your customer".*
> *5. Unless otherwise detailed on invoices, provide full details of service(s) provided between TWPS Bermuda and the Company.*
> *7. Provide details of any and all tax advice taken in respect of the transactions between the Company and TWPS Bermuda that was shared between the parties.*
> *9. Confirm whether, and who, of the staff employed by TWPS Bermuda were also employed by the Company or otherwise contracted by TWPS Bermuda to the Company.*

10. Confirm whether anyone, and who, was seconded from TWPS Bermuda to work within the structure of the Company.

11. Confirm how much money each member of staff working in furtherance of the Company's activities were paid by TWPS Bermuda between 2004 and 2010, with a breakdown of each such staff member's salary and bonus.

13. Provide full details of the information technology ("IT") support function provided by TWPS Bermuda to the Company, including website maintenance, with a copy of any contractual agreement.

15. Explain the role of TWPS Bermuda in reviewing and monitoring FCIB customer and applicant complaints, and the legal capacity in which TWPS Bermuda communicated guidance on those issues to the Company.

16. Explain the legal basis upon which TWPS Bermuda had access to FCIB data for transmission to the Company.

17. Confirm whether, and, if so, how, TWPS Bermuda was involved in establishing the parameters of a long-term bonus plan for those working, both directly and indirectly, for the Company.

21. Identify and confirm whether TWPS Bermuda, or anyone acting on its behalf, ever raised concerns about the legitimacy of the activities undertaken by the Company, its staff or directors? If so, when and what concerns were raised, and to whom?

22. Confirm what information concerning the relationship between TWPS Bermuda, the Company and FCIB has been provided (voluntarily or under compulsion) to the curator acting for the Central Bank of Curaçao and St Maarten and/or the Fiscale Inlichtingen-en OpsporingsDienst ("FIOD") in the Netherlands since October 2006.

23. Provide a copy of all email communications between TWPS Bermuda and the Company staff and/or directors or otherwise confirm the current exact location of computer and/or hardcopy records evidencing the relationship and transactions between them."

41. The letter ends with the statement: *"Please provide this information and these documents and records to us within 21 days, failing which Mr Hunt will consider making an application for assistance from the Bermuda Court"*.

42. Following the ex parte Order dated 19 July 2019 letters were written by Kennedys in similar terms and requesting similar information from Transworld Oil Inc, and Mr Victor N Farag, who Mr Hunt identified as having previously acted as a Managing Director for FCIB under ultimate authority of the Chairman of the Supervisory Board, Mr Deuss.

43. Having regard to all the circumstances outlined above, it is clear to me that the sole purpose of obtaining the recognition Order was to clothe the Mr Hunt with the authority of this Court so that he could obtain information and evidence for use in the contemplated proceedings in England against FCIB and Mr Deuss. This is clear from the requests for information and evidence made by Kennedys in their letters to TWPS, Transworld Oil Inc and Mr Farag.

44. The judgment of Lord Sumption in *Singularis* sets out that the common law power of providing assistance to a foreign officeholder cannot extend to or be utilised for the purposes of gathering evidence to be used in foreign proceedings. The obtaining of evidence to be used in foreign proceedings by an officeholder must comply with the mandatory requirements of sections 27P-27S of the Evidence Act 1905 and Order 70 of the Rules of the Supreme Court 1985. The officeholder, in this regard, does not stand in any privileged position.

45. The Court has a discretion to refuse recognition if satisfied that the applicant is abusing that process for an illegitimate purpose (*In re OGX Petroleo e Gas SA* [2016] Bus LR 121, Snowden J at [60]). The use of a recognition order to obtain evidence to be used in contemplated foreign proceedings is an illegitimate use of the procedure and if there is no other legitimate reason for granting recognition the court would refuse to make such an order. In my judgment there is no other legitimate reason for the recognition order and accordingly, I discharge the ex parte Order dated 19 July 2019.

46. In this regard I have not ignored the other grounds advanced in support of granting the recognition Order. In my judgment the other grounds are makeweights and on examination, lack any substance.

47. In the letter dated 15 August 2019 to TWPS, Kennedys raise certain questions in relation to historic intercompany transactions relating to recharges, debits or credits, between TWPS and the Company. In particular, Kennedys seek an explanation as to the basis for the Company paying expenses of £146,722 on behalf of TWPS between 2004 and 2008; explanation as to why in 2008 TWPS allowed the Company bad debt recharge of £44,458 to its own accounts; and explaining the basis for TWPS making payments of £468,132 between 2006 and 2008 for expenses on behalf of the Company which were recharged and requesting evidence that the Company repaid those recharges.

48. It is not clear what useful purpose this investigation in relation to historical transactions can achieve. These three transactions relate to the Company's accounts for the period 2004 to 2009 and on any basis any potential cause of action arising from these transactions would be statute barred. It seems reasonably clear that there can be no viable cause of action arising from an investigation of these historical transactions.

49. Second, the relevant inter-company charges have been audited by the Company's auditors, Ayers Bright Vickers based in Worthing, West Sussex, England. The Auditors Report dated 27 September 2007, for the year ended 31 December 2006, is attached as an exhibit to Mr Hunt's First Affidavit dated 18 June 2019. The firm of Ayers Bright Vickers is still in existence and if Mr Hunt has any questions arising out of the audited accounts, there is no reason why he should not approach the auditors in the first instance.

50. Mr Hunt says that he does not know whether some of the charges have been repaid to the Company. The Company's auditors based in Worthing should be able to provide that confirmation. Furthermore, the Company had a bank account in the United Kingdom and Mr Hunt, as the liquidator, should be able to confirm whether payments were indeed received by the Company by analysing its bank account statements.

51. In his Second Affidavit dated 7 November 2019, Mr Hunt advances another justification in support of obtaining a recognition order. He says that he was contacted by representatives of a former employee of the Company seeking confirmation about the employee's rights under the Company's pension scheme. He says this is just a single example of a myriad of general statutory duties that the liquidator has from taking office and which will be pursued until he is satisfied that no such records exist. It should be noted that there is no mention of any pension scheme in any of the letters written by Kennedys. Mr Smith QC advised the Court that there was no pension scheme.

52. In his First Affidavit dated 18 June 2019, Mr Hunt says that the global IT manager for the Transworld Group was based in Bermuda, and there is evidence of IT security advice being provided to the Company from TWPS. He then conjectures that "there may be computer equipment or data belonging to the Respondent in Bermuda". This is pure speculation on Mr Hunt's part and if he wishes to pursue this line of enquiry he should write to the relevant party dealing with this particular issue.

53. I have also not ignored the fact that Mr Hunt states in his Third Affidavit dated 5 December 2019, that he has sought detailed information concerning all accounts, facilities, agreements with and securities held by Butterfield Bank, Clarien Bank, HSBC Bank Bermuda, and the Bermuda Commercial Bank on behalf of the Company. Mr Preston confirmed to the Court that the Company has no such accounts in Bermuda.

54. Likewise I have not ignored the fact that Mr Hunt states in his Third Affidavit that he has sought information from the Land Title Registry in Bermuda concerning the land the Company might possess. It would be surprising if a company incorporated in the United Kingdom, without a permit to carry on business in Bermuda under section 134 of the Companies Act 1981, would be granted permission to own land in Bermuda under the provisions of the Bermuda Immigration and Protection Act 1956. Again Mr Preston confirmed that the Company owns no land in Bermuda.

55. In setting aside the ex parte Order dated 19 July 2019 the Court makes it clear that it will of course entertain an application for such an order if it can be shown that it will serve a useful purpose in aid of a legitimate object.

56. Mr Smith QC also argues that the use of the recognition Order to obtain evidence for the contemplated English proceedings also falls foul of the restriction in *Singularis,* that the common law power of assistance *"is not therefore available to enable them to do something which they could not do even under the law by which they were appointed."* In the present case, Mr Hunt is appointed under English law and Mr Smith contends that as a matter of English law, Mr Hunt would not be entitled to relief from the English court to compel the production of information which he now seeks. This is because, he says, such requests would be considered oppressive, as they are evidently in large part for the purpose of gathering information to support litigation which Mr Hunt has already decided to commence.

57. The relevant English statutory provision is section 236 of the Insolvency Act 1986, which is the equivalent to section 195 of the Bermudian Companies Act 1981. Mr Smith relies upon the leading authority in *British & Commonwealth Holdings plc v Spicer and Oppenheim* [1993] AC 426, in relation to the exercise of the Court's discretion for these purposes. In this case the House of Lords decided:

    (1) Although there is no requirement that the documents sought by the officeholder must be for the purposes of reconstituting the company's knowledge, this is one of the purposes which may most clearly justify the making of an order.
    (2) The power under section 236 it is an extraordinary power and the discretion must be exercised only after a careful balancing of the factors involved.
    (3) This involves balancing the reasonable requirements of the officeholder to carry out his task against the need to avoid making any order which is unreasonable, unnecessary or oppressive to the person concerned.
    (4) The applicant must satisfy the court that, after balancing all relevant factors, there is a proper case for such an order be made. The proper case is one where the

administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the officeholder's requirement.

58. Mr Smith QC argues that in the present case, the information requests which Mr Hunt apparently intends to make would be considered oppressive. First, Mr Hunt has clearly decided that he will sue Mr Deuss and FCIB. He has prepared the draft Points of Claim settled by Leading Counsel pleading claims against Mr Deuss and FCIB. Thus the effect of any information requests which go to the subject matter of the claim will be to allow Mr Hunt to gain advantages in the intended litigation which are not available to ordinary litigants.

59. Mr Preston, for Mr Hunt, submits that the Court is required to undertake a fact sensitive detailed analysis to weigh the various factors and consider all the circumstances in relation to each particular application for disclosure. In the circumstances he submits that the Court should not assume what type of disclosure, if any, the liquidators might ask the Court to grant in these proceedings and determine, pre-emptively, that all of those remedies would be oppressive in the circumstances of this case.

60. I have already ruled that the ex parte Order should be discharged on the ground that its use to obtain evidence for contemplated proceedings in England was an illegitimate purpose and that the Court will not exercise its common law power of assistance to aid the obtaining of evidence for use in contemplated foreign proceedings. In light of that ruling it is unnecessary to express a concluded view as to whether Mr Hunt would be entitled to relief from the English Court to compel the production of the information which he now seeks in the Kennedys letters. The Court can state that Mr Smith QC's submission that such an application would be considered oppressive by the English Court, is strongly arguable.

The scope of the ex parte stay

61. Mr Smith QC argues that there was no proper basis for Mr Hunt obtaining assistance from the Court by way of the stay order contained in paragraph 2 of the ex parte Order.

62. First, he submits that the evidence provided by Mr Hunt does not disclose any basis for granting such relief as there was no evidence of apprehended hostile creditor action or potential jeopardy to assets.

63. Second, he argues that at common law there is no basis for granting an order in terms of paragraph 2 of the ex parte Order which seeks to apply generally against unidentified persons. In this regard Mr Smith QC relies upon the decision of Barrett J in the New South Wales Supreme Court in *Independent Insurance Company Ltd* [2005] NSWSC 587, where Barrett J explained that such an order is "*express to be binding on the whole world in the manner of legislation*" and is therefore inappropriate for the court to make.

64. Third, he submits that at the ex parte hearing, the Court was misinformed by counsel into believing that the grant of such relief is a standard part of the recognition Order in England. Most recognition applications in England take place under the provisions of the Cross-Border Insolvency Regulations 2006, which implement the UNCITRAL Model Law on Cross-Border Insolvency into English law. When a foreign insolvency proceeding is recognised under the Regulations as a foreign main proceeding, then an automatic moratorium on creditor action arises. However, Mr Smith QC submits, this was nothing to do with recognition at common law, and therefore has nothing to do with the position in Bermuda.

65. In light of the fact that I have already discharged the entire ex parte Order, I can deal with these points shortly.

66. If necessary, I would have set aside paragraph 2 of the ex parte Order on the ground that it serves no legitimate purpose as there are no assets of the Company in the jurisdiction.

67. In light of my earlier ruling it is unnecessary to decide whether it is always inappropriate to order a stay of proceedings in respect of creditor claims by the general body of creditors of the insolvent company, as appears to be suggested by Barrett J in *Independent Insurance.* Such orders can serve a useful purpose when there are assets within the jurisdiction and there is justifiable apprehension that actions are likely to be commenced by some, as yet unidentified, creditors of the insolvent company. This would appear to be the reasoning of Kawaley CJ in *Funding Partners Global Fund Ltd* [2009] Bda LR 35, although the point was not in contention and not fully argued by counsel.

Settlement Agreements

68. TWPS argues that the Settlement Agreements were intended to draw a final line under the issues relating to alleged MTIC fraud. The intended effect of the Settlement Agreement, in particular, was to release FCIB, its former officers, directors and employees and any corporation or entity under common control with any of them from any new claims or demands, such as requests for information from insolvency practitioners, such as Mr Hunt.

69. Mr Smith QC contends that the Company is not itself referenced in the Settlement Agreements because Mr Hunt failed to tell FCIB that he had been appointed as liquidator of this Company and, as far as the Transworld Group was concerned, it had been dissolved in 2010.

70. The application of the Settlement Agreements gives rise to two issues of Curaçao law: whether TWPS is a releasee under Article 2(1) of the Settlement Agreements; and whether the Company is bound by the release. These issues of Curaçao law are presently pending before the Curaçao courts.

71. Mr Smith QC submits that if TWPS and FCIB are correct in their interpretation of the Settlement Agreements, then this would be a further reason why it would not be open to Mr Hunt to pursue information requests in Bermuda, and a further reason why any recognition of his appointment in Bermuda would be unnecessary and inappropriate. Mr

Smith submits that in the circumstances, the recognition Order should be discharged, or alternatively stayed pending the outcome of the Curaçao proceedings.

72. In light of my earlier ruling I can deal with this point briefly. The Court is not in a position to express any view in relation to the merits of the position taken by the parties under Curaçao law. The Court assumes that the respective positions of the parties are arguable. In the circumstances, assuming the application for the recognition Order would otherwise be justified for a legitimate purpose, the Court would not have refused recognition merely by reference to the existence of the Curaçao proceedings in relation to the Settlement Agreements.

Material Non-Disclosure

73. TWPS contends that there was very material non-disclosure by Mr Hunt at the ex parte hearing and that this is therefore a freestanding reason why the ex parte Order should be set aside. Reliance is placed upon the principles governing the requirement on an applicant to give full and frank at an ex parte hearing as summarised by Popplewell J in *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 at [50]-[52].

74. First, TWPS contends that there was a complete failure in both Mr Hunt's affidavit and counsel's skeleton argument to explain any of the very unusual background to the liquidation of the Company including (i) the very questionable circumstances in which it was placed into liquidation; (ii) the failure to disclose Mr Hunt's appointment as liquidator of the Company to FCIB at the time of entry into the Settlement Agreements; (iii) the extraordinarily generous remuneration payable to Mr Hunt and the fact that this appears to have been approved by a creditor under the control of an associate; (iv) the fact that the creditors of the Company whose claims are being relied on to support the claims against FCIB and Mr Deuss are controlled by Mr Hunt and/or his associates.

75. Second, Mr Hunt did not adequately explain the existence and relevance of the release clauses in the Settlement Agreements and the existence of the proceedings pending in Curaçao.

76. Third, there was a failure to give proper disclosure of the information requests which had been made by Mr Hunt in England and the repeated and detailed explanations given by FCIB's lawyers, Jones Day, that such a requests were oppressive given that Mr Hunt had already decided to commence proceedings against FCIB and Mr Deuss.

77. Again I can deal with this issue briefly. At the ex parte hearing the Court was aware, *inter alia*, from the Quinn Emanuel letter dated 9 July 2019 that (i) Gowlings had written a letter before action asserting claims against FCIB and Mr Deuss; (ii) there were proceedings pending in the Curaçao courts the outcome of which was materially likely to affect Mr Hunt's ability to prosecute claims against Mr Deuss; (iii) Mr Hunt had made an application to the English Court seeking public examination of Mr Deuss; and (iv) it was contended on behalf of Mr Deuss that the requested public examination was incompatible with the proceedings threatened in the letter before action.

78. I accept that the Court was not made fully aware of the circumstances of Mr Hunt's appointment as liquidator of the Company or the details of his compensation. In all the circumstances, I have come to the view that I would not have discharged the ex parte Order on the grounds of non-disclosure if I had otherwise taken the view that it was properly granted for a legitimate purpose.

Conclusion

79. Having regard to my conclusion expressed in paragraphs 43 to 45, I discharge the ex parte Order dated 19 July 2019 recognising the appointment of Mr Hunt as the liquidator of the Company and granting stay of proceedings.

80. I will hear the parties in relation to the issue of costs, if required.

Dated this 6 March 2020

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NARINDER K HARGUN

CHIEF JUSTICE

RE MAGYAR TELECOM BV

CHANCERY DIVISION (COMPANIES COURT)

David Richards J.: 3 December 2013

[2013] EWHC 3800 (Ch); [2014] B.C.C. 448

H1. *Schemes of arrangement—Jurisdiction—Sanction—Netherlands company—Group business mainly in Hungary—Loan notes issued—Notes subject to New York law and non-exclusive jurisdiction of New York courts—Company' s centre of main interests moved to England—Application to English court to sanction scheme of arrangement of notes debt—Scheme approved by requisite majority at single class meeting—Whether English court had jurisdiction to sanction scheme—Whether company could be wound up in England—Whether sufficient connection with the jurisdiction—Whether EC Judgments Regulation 44/2001 applied—Company insolvent—Whether court should sanction the scheme—Companies Act 2006 ss.895, 899—EC Insolvency Regulation 1346/2000—EC Judgments Regulation 44/2001 art.1(1), (2).*

H2. This was an application by a company incorporated and registered in the Netherlands, which was a member of a group whose principal business was the operation of telecommunication services in Hungary, for an order sanctioning a scheme of arrangement proposed by the company pursuant to Pt 26 of the Companies Act 2006 concerning a principal debt of notes governed by New York law.

H3. The company was incorporated and registered in the Netherlands as a member of a group whose principal business was the operation of telecommunication services in Hungary. The company owned all but a small proportion of the share capital of the main operating company in the group, a Hungarian company “Invitel”, and the company acted as the principal financing vehicle for the group. The ultimate parent of the group was a private investment firm incorporated in Guernsey and primarily managed by a company regulated by the Financial Conduct Authority in the United Kingdom and with its headquarters in London. The company's principal liabilities arose under an issue pursuant to an indenture dated 16 December 2009 of €345 million 9.5 per cent loan notes due 2016. The notes were governed by the law of the state of New York and subject to the non-exclusive jurisdiction of the courts of that state in favour of noteholders. The company's obligations under the notes were guaranteed by Invitel and other companies in the group. The notes were secured by a pledge over shares in the company and over the shares held by the company in Invitel and by other liens on substantially all the assets of the group. A scheme of arrangement was proposed to be made with “note creditors” with a beneficial interest in the notes with a principal value of €21.041 million, although the note creditors were not strictly speaking creditors of the company unless and until notes were registered in their names: they were contingent creditors of the company and thus “creditors” for the purposes of s.899 of the Companies Act 2006. Approval of a scheme was required under s.899 of the Companies Act 2006 by a majority in number representing 75 per cent in value of each class of creditors voting. About 70 per cent of the note creditors had previously signed a restructuring agreement, for which a consent fee was payable, but the English court had ordered a single class

meeting to consider approving the scheme. The scheme meeting approved the scheme by a majority of more than 97 per cent in number representing more than 99 per cent in value of those voting on the scheme on a very high turn-out where 326 note creditors entitled in aggregate to almost 90 per cent by value of the notes attended and voted. The company applied to the court for sanction of the scheme and the issue arose whether the English court had jurisdiction to do so.

H4. *Held,* sanctioning the scheme:

H5. 1. The company satisfied the jurisdictional requirement for a "company" under s.895(2) of the Companies Act 2006 that it should be liable to be wound up under the Insolvency Act 1986. A foreign-incorporated company was so liable even if its circumstances at the time of the application to the court were such that the English court would not at that time exercise its jurisdiction to wind up the company provided there was sufficient connection with this jurisdiction. (*Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch); [2004] 1 W.L.R. 1049; [2004] B.C.C. 334, *Re DAP Holding NV* [2005] EWHC 2092 (Ch); [2006] B.C.C. 48, and *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); [2012] B.C.C. 459 applied.)

H6. 2. As to the composition of the class of creditors, the rights conferred by the notes and the rights to be received in exchange for the notes under the scheme were identical as regards all note creditors. Although about 70 per cent of the note creditors agreed a consent fee no note creditor appeared on the sanction hearing to raise any contrary submissions against there being a single class of creditors and there was no basis for departing from the decision of the judge who convened the class meeting as a single class.

H7. 3. Normally the fact that the rights of the relevant creditors were governed by English law and that the English courts have an exclusive or non-exclusive jurisdiction in respect of disputes was a sufficient connection to the jurisdiction. (*Re Rodenstock GmbH* (above), *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746 (Ch) and [2012] EWHC 164 (Ch); [2013] B.C.C. 201, and *Re Vietnam Shipbuilding Industry Group* [2013] EWHC 2476 (Ch); [2014] B.C.C. 433 applied.) However the purpose of the scheme was to affect the rights enjoyed by the note creditors under New York law. The English court would not generally make any order which has no substantial effect and, before the court would sanction a scheme, it would need to be satisfied that the scheme would achieve its purpose: *Sompo Japan Insurance Inc v Transfercom Ltd* [2007] EWHC 146 (Ch), *Re Rodenstock GmbH* (above).

H8. 4. The only practical alternative to the restructuring proposed in the scheme or some other restructuring would be a formal insolvency process for the company, and as the company's centre of main interests under the EC Insolvency Regulation 1346/2000 had transferred to England, it followed that the insolvency would proceed under English law and in the English courts. Detailed expert evidence of US law established that it was likely that the US courts would, under Ch.15 of the US Bankruptcy Code 1978, which gave effect to the UNCITRAL Model Law on Cross-Border Insolvency, recognise and give effect to the scheme, notwithstanding that it altered and replaced rights governed by New York law. Similarly, there was expert evidence that the courts of the Netherlands would recognise and give effect to the scheme, as would the courts of Hungary where some of the guaranteeing companies and secured assets were located. On any footing, the circumstances of this case and the evidence filed in support of the application established that there existed a sufficient connection with England and that the scheme would substantially achieve its purpose so that the English court should sanction it.

H9. 5. There did not appear any issue arising under the Judgments Regulation 44/2001. An application to sanction a scheme of arrangement was a civil and commercial matter for the purposes of art.1(1) of the Regulation and in the absence of formal insolvency proceedings did not fall within

the exclusion contained in art.1(2)(b). As schemes of arrangement were not insolvency proceedings falling within the Insolvency Regulation and as it was generally accepted that the purpose of art.1(2)(b) of the Judgments Regulation was to enable that Regulation and the Insolvency Regulation to dovetail almost completely with each other, it logically followed that the exclusion in art.1(2)(b) did not extend to a scheme of arrangement involving an insolvent company, at least unless the company was the subject of an insolvency proceeding falling within the Insolvency Regulation. The order sanctioning the scheme would be entitled to recognition and enforcement under Ch.III of the Judgments Regulation. As a number of note creditors were domiciled in England, those domiciled in other Member States could be "sued" in the jurisdiction if Ch.II of the Judgments Regulation applied.

H10. Cases referred to:

Compania Merabello San Nicholas SA, Re [1973] Ch. 75
DAP Holding NV, Re [2005] EWHC 2092 (Ch); [2006] B.C.C. 48
Drax Holdings Ltd, Re [2003] EWHC 2743 (Ch); [2004] 1 W.L.R. 1049; [2004] B.C.C. 334
Eurofood IFSC Ltd (Case C-341/04) [2006] Ch. 508; [2006] B.C.C. 397
Interedil Srl v Fallimento Interedil Srl (Case C-396/09) [2012] B.C.C. 851
Lehman Brothers International (Europe), Re [2009] EWCA Civ 1161; [2010] B.C.C. 272
Primacom Holdings GmbH v Credit Agricole (No.1) and (No.2) [2011] EWHC 3746 (Ch) and [2012] EWHC 164 (Ch); [2013] B.C.C. 201
Rodenstock GmbH, Re [2011] EWHC 1104 (Ch); [2012] B.C.C. 459
Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch)
T&N Ltd (No.4), Re [2006] EWHC 1447 (Ch); [2007] Bus. L.R. 1411
Vietnam Shipbuilding Industry Group, Re [2013] EWHC 2476 (Ch); [2014] B.C.C. 433

H11. *Daniel Bayfield* (instructed by White & Case LLP) for the applicant company.

JUDGMENT

DAVID RICHARDS J.:

1. This is an application by Magyar Telecom BV ("the company") for an order sanctioning a scheme of arrangement proposed by it pursuant to Pt 26 of the Companies Act 2006. At a hearing on 29 November 2013, I sanctioned the scheme and I now set out in writing my reasons for doing so.

2. The company was incorporated and is registered in the Netherlands. The company is a member of a group, whose principal business is the operation of telecommunication services in Hungary. The main operating company is a Hungarian company called Invitel Távközlési Zrt ("Invitel"). All but a very small proportion of the share capital of Invitel is owned by the company, which also acts as the principal financing vehicle for the group. The ultimate parent of the group is Hungarian Telecom LP, a private investment firm incorporated in Guernsey and managed primarily by Mid Europa Partners Ltd, which has its headquarters in London and is authorised and regulated by the Financial Conduct Authority.

3. The principal liabilities of the company arise under an issue of €345 million 9.5 per cent notes due 2016 ("the notes") which were issued pursuant to an indenture dated 16 December 2009. The notes are governed by the law of the State of New York and are subject to the non-exclusive jurisdiction of the courts of that state in favour of noteholders. The company's obligations under the notes are guaranteed by Invitel and other companies in the group. The notes are secured by a pledge over shares in the company and over the shares held by the company in Invitel and by other liens on substantially all the assets of the group.

4. Interests in the notes are traded through Euroclear and Clearstream. The notes are held in global form through the Bank of New York Depository (Nominees) Ltd as common depository for Euroclear and Clearstream.

5. The scheme is proposed to be made with the persons described in the scheme as the note creditors. They are defined as the persons with a beneficial interest as principal in the notes, excluding the company itself as owner of notes with a principal value of €21.041 million. The note creditors are not strictly speaking creditors of the company unless and until notes are registered in their names. There are, however, under the indenture circumstances in which notes may be registered in their names, and they are accordingly contingent creditors of the company and thus "creditors" for the purposes of s.899 of the Companies Act 2006.

6. The scheme is proposed as part of a financial restructuring of the group. The company is presently unable to service its obligations under the notes, having defaulted in the payment of half-yearly interest of over €15.6 million due in June 2013, and the group is unable to provide the necessary funds from its revenues or otherwise. The directors of the company believe that if the restructuring is not implemented, and in the absence of some other restructuring, it is likely that the company and other companies in the group will be forced to enter formal insolvency proceedings. Such a step would be likely to result in a significant destruction of value in the group, and recoveries for holders of the notes would be likely to be significantly less than if the restructuring proceeds.

7. Under the proposed scheme, the note creditors will give up their rights under the notes, including their rights against the guarantors of the notes, in exchange for (i) new notes to be issued by the company with an aggregate nominal value of €155 million and (ii) a 100 per cent equity interest in a new company which will hold 49 per cent of the share capital of the company, thereby giving an indirect interest of almost 49 per cent in Invitel.

8. By an order made on 28 October 2013 by Arnold J., the company was directed to convene a meeting of the note creditors to be held on 27 November 2013 for the purpose of considering and, if thought fit, approving the scheme. The order contained detailed directions as to the steps to be taken to convene and hold the meeting. The evidence filed in support of the present application shows that those directions were followed.

9. The meeting was duly held and the scheme was approved by very substantial majorities. Section 899(1) of the Companies Act 2006 requires a scheme to be approved by a majority in number representing 75 per cent in value of the creditors present and voting in person or by proxy at the meeting. This scheme was approved by a majority of more than 97 per cent in number representing more than 99 per cent in value of those voting on the scheme. There was a very high turn-out at the meeting. 326 note creditors entitled in aggregate to almost 90 per cent by value of the notes attended and voted.

10. Before the court can exercise its power to sanction a scheme of arrangement, it must be satisfied that the company proposing the scheme is a "company" for the purposes of Pt 26 and that the class or classes of creditors were properly constituted for the purposes of the scheme. The practice of the court is to address these issues at the earlier stage of the application to convene the meeting or meetings. This was the course followed in this case and Arnold J. was satisfied on both counts.

11. The only jurisdictional requirement for a "company" is that it should be liable to be wound up under the Insolvency Act 1986: [CA 2006] s.895(2). A foreign-incorporated company is so liable, even if its circumstances at the time of the application to the court are such that the English court would not at that time exercise its jurisdiction to wind up the company: *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch); [2004] 1 W.L.R. 1049; [2004] B.C.C. 334, *Re DAP Holding NV* [2005] EWHC

2092 (Ch); [2006] B.C.C. 48, and *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); [2012] B.C.C. 459. The company in this case therefore satisfies that requirement.

12. As to the composition of the class of creditors, the rights conferred by the notes and the rights to be received in exchange for the notes under the scheme are identical as regards all note creditors. The only distinction between them is that some 70 per cent of note creditors signed a restructuring agreement, committing them to vote in favour of the scheme and not to take any action in the meantime to enforce rights under the notes. Under that agreement, a consent fee is payable to all creditors who signed it, in an amount which is small when compared to the claims of creditors. The opportunity to enter into the restructuring agreement and become entitled to payment of the fee was available to all note creditors. In these circumstances Arnold J. was satisfied that it was proper to convene a meeting of a single class of the note creditors. No note creditor has appeared on this hearing to raise any contrary submissions and there is no basis for departing from the decision of Arnold J. on that issue.

13. Because the company is registered in the Netherlands and because the notes are governed by New York law, serious issues arise as to whether this court would consider it appropriate to sanction the scheme. Although not going to jurisdiction, they are sufficiently fundamental to an exercise of the court's power under Pt 26 that the court might decline jurisdiction even if there were no opposition from any creditors to the scheme. Accordingly, they were properly raised before Arnold J. on the application to convene the scheme meeting and were the subject of detailed submissions to him by Mr Bayfield on behalf of the company, as they have been before me.

14. The fact that a foreign company would not be wound up by the English court in the circumstances prevailing at the time of the scheme is not a bar to the court sanctioning the scheme, provided that there is a sufficient connection with this jurisdiction. In *Re Drax Holdings Ltd* (above), Lawrence Collins J. said at [29]:

> "That the companies fall within the definition of companies for the purpose of s.425 [of the Companies Act 1985, now s.899 of the Companies Act 2006] does not, of course, mean that there are no limitations to the exercise of jurisdiction under s.425. The court should not, and will not, exercise its jurisdiction unless a sufficient connection with England is shown."

In that case, Lawrence Collins J. found that there were many factors which pointed to the exercise of the jurisdiction being both legitimate and appropriate. Foremost among them was that the claims of creditors falling within the relevant class were governed by English law and were subject to a non-exclusive submission to the jurisdiction of the English court, as were the associated security documents, and that the security included very substantial assets within England.

15. In a number of recent cases, a sufficient connection has been found solely or principally in the fact that the rights of the relevant creditors were governed by English law and that the English courts have an exclusive or non-exclusive jurisdiction in respect of disputes: see, among others, *Re Rodenstock GmbH* (above), *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746 (Ch) and [2012] EWHC 164 (Ch); [2013] B.C.C. 201, and *Re Vietnam Shipbuilding Industry Group* [2013] EWHC 2476 (Ch); [2014] B.C.C. 433. Under generally accepted principles of private international law, a variation or discharge of contractual rights in accordance with the governing law of the contract will usually be given effect in other countries. This is also the effect of the Rome Convention, and of Council Regulation (EC) 593/2008 (the Rome I Regulation) which applies to contracts concluded as from 17 December 2009, the day after the date of the indenture in this case.

16. In this case, however, not only is the company registered in the Netherlands but the notes are governed not by English law but by New York law. The purpose of this scheme is to affect the rights enjoyed by the note creditors under New York law by exchanging the existing notes for new notes

and equity. The court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose: *Sompo Japan Insurance Inc v Transfercom Ltd* [2007] EWHC 146 (Ch), *Re Rodenstock GmbH* (above) at [73]–[77].

17. The case made by the company on the present application is that the requirements for a sufficient connection with the jurisdiction and for the scheme achieving its purpose can be satisfied.

18. Steps were taken from mid-August 2013, some time before the application to convene the meeting of creditors was issued, but in anticipation of it, to move the centre of main interests ("COMI") of the company from the Netherlands to England. Detailed evidence has been provided to the court that as at the date of the application and for some time before then, the COMI was located in England for the purposes of Council Regulation (EC) No 1346/2000 ("the Insolvency Regulation"), as interpreted by decisions of the European Court of Justice in *Eurofood IFSC Ltd* (Case C-341/04) [2006] Ch. 508; [2006] B.C.C. 397 and *Interedil Srl v Fallimento Interedil Srl* (Case C-396/09) [2012] B.C.C. 851. On the application before him, Arnold J. was satisfied that the COMI of the company was indeed in England and it is clear that it remains so. As the only practical alternative to the restructuring proposed in the scheme or some other restructuring would be a formal insolvency process for the company, it follows that the insolvency would proceed under English law and in the English courts.

19. The detailed expert evidence of US law establishes that it is likely that the US courts would, under Ch.15 of the US Bankruptcy Code 1978 which gives effect to the UNCITRAL Model Law on Cross-Border Insolvency, recognise and give effect to the scheme, notwithstanding that it alters and replaces rights governed by New York law. This evidence deals at some length both with the approach of the US courts to questions of COMI under Ch.15 and to the recognition of non-US plans of reorganisation, and in particular schemes of arrangement under English law. It is not entirely clear to me from this evidence whether the move of the COMI of the company to England is relevant to the issue of recognition of the scheme under Ch.15. In circumstances where the practical alternative to the scheme is an insolvency process in, say, England, there is an obvious logic in treating a scheme approved under English law as effective to alter the rights of creditors, even though those rights are governed by the law of a different country. In the event of an insolvency process, the rights of the creditors to recover against the assets of the company would be governed by the insolvency law and recognition would be likely given to a scheme approved in the course of the insolvency process just as it would be given to the insolvency process itself. It may, however, be that in other appropriate circumstances the US courts would be prepared to recognise and give effect to schemes altering such rights. Either way, the expert evidence is clear that it is reasonably likely that the US court would recognise the present scheme and give effect to it.

20. Similarly, there is expert evidence that the courts of the Netherlands would recognise and give effect to the scheme, as would the courts of Hungary where some of the guaranteeing companies and secured assets are located.

21. I am inclined to the view that the requirement to show a connection with England and the need to show that the scheme, if approved, will have a substantial effect are not wholly separate questions but, if not aspects of the same question, at least closely related. In applying the requirement for a sufficient connection with England to the exercise of the court's jurisdiction to sanction a scheme, Lawrence Collins J. in *Re Drax Holdings Ltd* (above) was applying the requirement that, before the court would make a winding-up order, there must be a sufficient connection with England. This may, but does not necessarily have to, consist of assets within the jurisdiction. The reason for such connection in the context of winding up is not the product of abstract theory but the need for the winding-up

order to have a practical effect: see, for example, *Re Compania Merabello San Nicholas SA* [1973] Ch. 75 at 86G–H per Megarry J. Although in theory a winding-up order against a foreign company has as a matter of English law worldwide effect, the courts have always recognised that in practice its effect will be confined to the United Kingdom. (I leave aside here the effect of the Insolvency Regulation and the UNCITRAL Model Law.) The presence of assets within the jurisdiction is but the most obvious example of a connection which will give practical effect to a winding-up order.

22. Likewise, the presence in England of substantial assets belonging to a company proposing a scheme with its creditors could in an appropriate case provide the requisite connection, because the scheme if sanctioned would have the practical affect of preventing execution by the relevant creditors against those assets, save in accordance with the terms of the scheme. The presence of a sufficient number of creditors in England subject to the personal jurisdiction of the court might also supply the necessary connection, as those creditors would be bound to act in accordance with the scheme, both within and outside the jurisdiction. The importance of the connection provided in cases where the rights of creditors are governed by English law lies in the effect which foreign courts may be expected to give to an alteration of those rights in accordance with English law.

23. In the present case, the significance of moving the COMI of the company to England again lies not so much in the establishment in the abstract of a connection between the company and England but, on the basis that any insolvency process for the company would be undertaken under English law in England, providing a solid basis and background for a scheme under English law which altered contractual rights governed by a foreign law.

24. Of course, it may be that expert evidence of US law would show that the US courts would give effect to an English scheme which altered the rights of the note creditors governed by New York law even though the COMI of the company had not been moved to England and therefore there was no basis for contending that an English insolvency process was in fact the alternative to the scheme. I do not have to decide on this application whether, if that were the case, it would provide a sufficient basis for the court to exercise its jurisdiction to sanction a scheme under s.899.

25. On any footing, the circumstances of this case and the evidence filed in support of the application establish that there exists a sufficient connection with England and that the scheme will substantially achieve its purpose.

26. The scheme provides that it will not become effective unless the company obtains an order of the US Bankruptcy Court for the recognition of the scheme under Ch.15 of the US Bankruptcy Code. The scheme further provides that this condition may be waived by the company with the prior written consent of the trustee under the indenture. The company has filed a petition for recognition of the scheme which is due for hearing by the US Bankruptcy Court for the Southern District of New York on 3 December 2013. The company nonetheless wishes to preserve this right of waiver in the particular circumstances of this case. Even if an order for recognition is not obtained, the level of support for the scheme and the very high percentage of note creditors who have signed the securities confirmation form as a necessary precondition to receiving their entitlements under the scheme, including all of the nine note creditors who voted against the scheme, indicate that the scheme will very largely achieve its purpose. All note creditors who voted in favour of the scheme did so on the basis that it contained this right of waiver. In these circumstances, I do not consider it necessary to require the deletion of the right of waiver.

27. There is one point of practice in relation to the expert evidence of foreign law filed by the company in this case. The evidence of US law and Hungarian law was given by partners in White & Case in New York and Hungary respectively. White & Case, acting by their London office, are the solicitors acting for the company. While I am satisfied that the reports provided on US and Hungarian

law have been expertly and conscientiously prepared, I consider that the important feature of independence would be enhanced if such reports were provided by experts unconnected with law firms professionally engaged in the scheme. This consideration is all the more important in cases where there is no opposition to the application.

28. It did not appear to Arnold J., and it does not appear to me, that any issue arises under Council Regulation (EC) No 44/2001 ("the Judgments Regulation"). In my judgment an application to sanction a scheme of arrangement is a civil and commercial matter for the purposes of art.1(1) and, at least in the absence of formal insolvency proceedings, does not fall within the exclusion contained in art.1(2)(b). On the scope of art.1(1), I agree with the conclusion reached by Briggs J. in *Re Rodenstock GmbH* at [47]–[51].

29. As to the exclusion in art.1(2)(b), Briggs J. left open at [51] the question whether schemes in relation to insolvent companies are within the scope of the Judgments Regulation, even if they are not made as part of insolvency proceedings. As schemes of arrangements are not insolvency proceedings falling within the Insolvency Regulation and as it is generally accepted that the purpose of art.1(2)(b) is to enable the Judgments Regulation and the Insolvency Regulation to dovetail almost completely with each other (see the Schlosser Report cited by Briggs J. at [47]), it logically follows that the exclusion in art.1(2)(b) does not extend to a scheme of arrangement involving an insolvent company, at least unless the company is the subject of an insolvency proceeding falling within the Insolvency Regulation. In other words, an order sanctioning a scheme between an insolvent company and creditors is subject to the Judgments Regulation, at least if the company is not subject to insolvency proceedings to which the Insolvency Regulation applies. For these purposes, insolvency proceedings are those listed in Annex A to the Insolvency Regulation. Although it may well be that a scheme of arrangement proposed by a company which is subject to such insolvency proceedings falls within the exclusion in art.1(2)(b) of the Judgments Regulation, it does not necessarily follow, given that a scheme of arrangement under the Companies Act 2006 is not an insolvency proceeding to which the Insolvency Regulation applies. It could still be that an order sanctioning a scheme of arrangement in those circumstances is entitled to recognition under the Judgments Regulation. This is not an issue which arises for decision on this application.

30. The evidence on the financial position of the company in the present case demonstrates that it is insolvent and will only cease to be so if the scheme is sanctioned or another restructuring is agreed. For the reasons given above, the order sanctioning the scheme will nonetheless be entitled to recognition and enforcement under Ch.III of the Judgments Regulation.

31. There remains the issue whether Ch.II of the Judgments Regulation applies and, if so, whether the present application falls within one of the exceptions to the general rule stated in art.2(1). Whether Ch.II applies depends on whether an application to sanction a scheme involves persons domiciled in a Member State being "sued". That may fairly be described at present as an open question, but even if it does, the company relies on the exception contained in art.6, enabling a person domiciled in a Member State to be sued, where he is one of a number of defendants, in the courts for the place where any of the defendants is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. A number of the note creditors are domiciled in England and therefore, if Ch.II applies, note creditors domiciled in other Member States may be "sued" in this jurisdiction.

32. As far as the merits of the scheme are concerned, there is nothing in the proposals or in the material put to creditors and before the court which would suggest that the court should differ from the assessment of the commercial interests of the note creditors evidenced by the very high voting

figures in favour of the scheme. The high turn-out of creditors voting on the scheme assures the court that the class was well represented at the meeting.

33. As well as affecting the rights of the note creditors against the company itself, the scheme releases their rights against a number of guarantor companies. This is not an extraneous feature but is a commercially important part of the proposals and indeed is integral to them. There would be little point in proceeding with the proposed exchange of the existing notes for new notes and equity, while leaving the guarantees in place. The authorities establish that the variation or release of rights against third parties can properly form part of, or even in the right circumstances constitute, the proposals embodied in a scheme: see *Re T&N Ltd (No.4)* [2006] EWHC 1447 (Ch); [2007] Bus. L.R. 1411, *Re Lehman Brothers International (Europe)* [2009] EWCA Civ 1161; [2010] B.C.C. 272.

34. I am accordingly satisfied that the court should sanction this scheme and I therefore do so.

(Order accordingly)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 165 OF 2022 (NSJ)

IN THE MATTER OF SECTION 86 OF THE COMPANIES ACT (2022 REVISION)

AND

IN THE MATTER OF E-HOUSE (CHINA) ENTERPRISE HOLDINGS LIMITED

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Mr Nick Herrod, Mr Ryan Hallett and Ms Allegra Crawford of Maples and Calder (Cayman) LLP for the Company**
Convening hearing:	**15 September 2022**
Sanction hearing:	**9 November 2022**
Draft judgment distributed:	**10 November 2022**
Judgment Delivered:	**17 November 2022**

HEADNOTE

Creditors' scheme of arrangement pursuant to section 86 of the Companies Act (2022 Revision) – decision at convening hearing and sanction hearing – voting by creditors who are affected by sanctions on Russia – scheme discharging New York law governed debt – availability and effect of relief under chapter 15 of the US Bankruptcy Code and under New York private international law – effect of the scheme under Hong Kong and BVI law

JUDGMENT

Introduction

1. In July 2022 E-House (China) Enterprise Holdings Limited (the ***Company***) applied for an order (the ***Convening Order***) giving it permission to convene a single meeting (the ***Scheme Meeting)*** of certain of its creditors (all of whom are holders of notes issued by the Company) who were to be parties to a scheme of arrangement under section 86 of the Companies Act (2022 Revision) (the ***Companies Act***) for the purpose of considering and if thought fit approving the scheme.

2. On 28 July 2022, the Company filed a petition seeking the sanction of the proposed scheme and a summons (the ***Convening Order Summons***) pursuant to which it applied for the Convening Order. On 7 September 2022 the Company filed a further summons seeking permission to amend the petition in the manner set out in the amended petition attached to the further summons (the ***Amended Petition***).

3. The Convening Order Summons was heard on 15 September 2022. I was satisfied that it was appropriate to permit the Company to convene a meeting of the creditors to be parties to the scheme, although, as I explain below, I declined to permit the Company to exclude from voting certain creditors affected by sanctions against The Russian Federation (***Russia***). The Convening Order was made on 20 September 2022. The meeting was to be held on 12 October 2022. I explain below the issues that arose at the convening hearing and my reasons for making the Convening Order.

4. On 4 October 2022 the Company filed a summons (the ***Scheme Meeting Summons***) seeking an urgent order that the date of the meeting be changed to 2 November 2022. The Company, in its evidence in support of the Scheme Meeting Summons, explained that scheme documents had been sent to creditors but the Company had recently found that creditors were taking longer than expected to submit their voting instructions. As a result, the Company considered that creditors should be given more time to submit voting instructions so that as many creditors as

possible had the opportunity to vote and participate in the meeting. The Company also sought an order that the record date for the meeting be amended and that certain other consequential orders be made (including a direction that it give notice to creditors of the change to the date of the meeting and the other orders made). The Company also filed a Re-Amended Petition (the ***Re-Amended Petition***) which included various minor updating amendments to the Amended Petition. The Company requested that I deal with the Scheme Meeting Summons on the papers without the need for a further hearing. In view of the urgency and subject matter of the Scheme Meeting Summons, I was prepared to do so. On 5 October 2022, I ordered (the ***Further Convening Order***) that the Company had permission to amend and reschedule the date of the meeting to 2 November 2022 and made the necessary consequential orders. I also gave the Company permission to amend the scheme document in the form appended to the Fourth Affirmation of Zhou Liang (***Mr Zhou***).

5. On 6 October 2022 the Company sent to scheme creditors and published the notice of the date of the reschedule meeting and an update letter explaining the reasons for the change to the date of the meeting, explaining the further proposed amendments to the scheme and providing an update on progress in the restructuring and certain further information which I directed be provided to scheme creditors.

6. The meeting of scheme creditors was held in the Cayman Islands on 2 November 2022 at the offices of the Company's Cayman Islands attorneys (Maples and Calder). Creditors were able to attend in person or via a Zoom link. Over 93% in value of the notes subject to the scheme attended in person or by proxy and creditors representing 99.96% by value and 99.87% by number voted in favour of the scheme. The scheme therefore achieved the support of a very substantial proportion of affected scheme creditors.

7. On 9 November 2022, the Company's application for an order sanctioning the scheme was heard. At the end of the hearing I confirmed that I would grant the order sought and that I would subsequently set out in writing, in addition to my reasons for making the Convening Order, my reasons for making the order sanctioning the scheme. This judgment now sets out those reasons.

The evidence

8. The main evidence filed in support of the Convening Order Summons was as follows. The First Affirmation (***Zhou 1***) of Mr Zhou (who is the Company's CFO), the Second Affirmation of Mr Zhou (***Zhou 2***), the Third Affirmation of Mr Zhou (***Zhou 3***), the First Affidavit of Yeung King Shan Fanny (***Ms Yeung***) (who is an associate director of D.F. King Limited, the Company's information agent (the ***Information Agent***)), the Second Affidavit of Ms Yeung, the Affidavit of Edward Lam (***Mr Lam***) (who is a partner in Skadden, Arps, Slate, Meagher & Flom, the Company's onshore legal advisers) and the Affidavit of Allan Gropper (***Judge Gropper***) (who is a well-known and highly respected retired Bankruptcy Judge for the Southern District of New York). Zhou 1 exhibited a copy of the form of explanatory statement (the ***Explanatory Statement***) that the Company proposed to send to the creditors who were to be parties to the proposed scheme. The formal terms of the proposed scheme were set out at Appendix 4 of the Explanatory Statement (the ***Scheme***).

9. The following further evidence was filed in support of the Company's application for an order sanctioning the scheme. The Fifth Affirmation of Mr Zhou (***Zhou 5***); the Third Affidavit if Ms Yeung; the First Affidavit of Mr Alexander Lawson (the chairperson at the meeting of scheme creditors); the First Affirmation of Zhang Xing (***Zhang 1***) (Mr Zhang is an officer of China International Capital Corporation Hong Kong Securities Limited (***CICC***), the Company's financial adviser) and the Third Affidavit of Ms Rachel Catherine Baxendale of Maples and Calder. Shortly before the sanction hearing, the Company also filed the Sixth Affirmation of Mr Zhou (***Zhou 6***).

The Company, its financial position, and the notes which are to be subject to the scheme

10. The Company is a holding company. Its shares and notes have been listed on the Hong Kong Stock Exchange (***HKSE***). Its principal assets are the shares that it holds in its subsidiaries, in

particular Fangyou Information Technology Holdings Limited (***Fangyou***), a company incorporated in the BVI (through which it indirectly owns a number of operating entities including Hong Kong Fangyou Software Technology Company Limited (***Hong Kong Fangyou***) a company incorporated in Hong Kong), and TM Home Limited (of which the Company owns 70.23%, and which is incorporated in the Cayman Islands and ultimately controls a number of other operating entities). The Company is in the business of real estate agency services, real estate data and consulting services and real estate brokerage network services in the People's Republic of China (***PRC***), through its indirect operating subsidiaries there (I refer to the Company, its subsidiaries and its indirect subsidiaries as the ***Group***).

11. There are two note issues which are to be subject to the scheme (together the ***Old Notes***). The notes are all governed by New York law:

    (a). senior notes with an aggregate principal amount of US$298,200,000, a coupon of 7.625% per annum and a maturity date of 18 April 2022 (the ***2022 Notes***).

    (b). senior notes with an aggregate principal amount of US$300,000,000, a coupon of 7.60% per annum and a maturity date of 10 December 2023 (the ***2023 Notes***).

12. The 2022 Notes were listed on the HKSE but were delisted following maturity. The 2023 Notes remain listed on the HKSE but trading was suspended on 19 April 2022. I refer to the holders of the 2022 Notes and the 2023 Notes together as the ***Noteholders***.

13. The Old Notes are held in global form through the Hongkong and Shanghai Banking Corporation Limited (***HSBC***) acting through its nominee HSBC Nominees (Hong Kong) Limited as common depositary (the ***Depositary***) for the clearing systems (who are identified below). HSBC is the trustee of the Old Notes (the ***Old Notes Trustee***).

14. The Old Notes are guaranteed by certain direct and indirect subsidiaries of the Company (the ***Subsidiary Guarantors***), namely Fangyou , CRIC Holdings Limited (***CRIC***) (incorporated in the British Virgin Islands), Hong Kong Fangyou and CRIC Holdings (HK) Limited (***CRIC Hong Kong***) (incorporated in Hong Kong).

15. The Company has liabilities in addition to those arising under the Old Notes. These include sums owing under a convertible note (the ***Convertible Note***) issued on 4 November 2020 to Alibaba.com Hong Kong Limited (***Alibaba***) in the principal amount of HK$1,031,900,000 (US$135,000,000). In addition, there are liabilities owed to other members of the Group of RMB 1,423,300,000 (US$223,347,000) and other payables of RMB 12,200,000 (US$1,914,000).

16. The Company's financial position deteriorated in the second half of 2021 and the first half of 2022 as a result of various factors described in Zhou 1, including the downturn in the PRC property market. The Company was unable to repay the principal due on 18 April 2022 in respect of certain of the Old Notes. This default caused a cross-default under the Convertible Note but Alibaba agreed to waive this default subject to certain conditions which included a term that if the Company's proposed restructuring had not become effective by 31 October 2022 (which was later extended to 15 December 2022), then the waiver would be automatically and immediately revoked and Alibaba would become entitled to enforce the Convertible Note. Despite this waiver, sums remain due and owing under both the 2022 Notes and the 2023 Notes which the Company cannot pay. The Company's position is that it was therefore cashflow insolvent at the time of the filing of the petition and remains so and that absent the approval of the scheme by Noteholders and the sanction of the scheme by the Court, it was likely to go into insolvent liquidation.

17. According to Mr Zhou, the Company's financial position as at 31 March 2022 can be summarised as follows:

    (a). it had assets with a net book value of approximately RMB 8,967,000,000 (approximately US$1,407,118,000). It had total liabilities of approximately RMB 5,981,189,000 (approximately US$938,579,000).

    (b). the value of its assets (valued at book value) exceeded its liabilities. However, a majority of the Company's assets were not readily realisable and were unlikely to be recoverable in full or, in some instances, at all.

(c). the Company held cash and cash equivalents of approximately RMB13,380,000 (approximately US$2,100,000).

(d). the Company was, as noted above, unable to repay the principal sum of US$298,200,000 due on the maturity of the 2022 Notes on 18 April 2022. The failure to pay the amounts due under the 2022 Notes constituted an event of default under the relevant indenture, and as already noted, a cross-default (but without giving rise to an automatic acceleration) under the terms of the Convertible Note, which in turn constituted a cross-default under the 2023 Notes. The default under the Convertible Note has been, as I have also already noted, waived by Alibaba in exchange for the Company entering into various undertakings and agreements. However, the amounts due under the 2022 Notes and the 2023 Notes remain payable and outstanding.

18. As at the date of the Explanatory Statement, the Company's most recent audited accounts were those for the period ending 31 December 2020, as the audited accounts for 31 December 2021 were still in preparation (see the Explanatory Statement at [2.14(b)]). A copy of the unaudited consolidated financial statements of the Group for the year ended 31 December 2021 and the interim unaudited consolidated financial statements of the Group as at 30 June 2021 were attached in Appendix 8 to the Explanatory Statement and Mr Zhou provided further financial information in Zhou 1 based on and extracted from the Group's unaudited management accounts as at 31 December 2021. Mr Zhou stated that there had been some significant movements in relation to certain assets and liabilities during the period from 1 January 2022 to 31 March 2022 and confirmed that these had been taken into account in the information provided and statements made regarding the Company's financial position in Zhou 1 and that the updated information had been provided to Kroll (HK) Limited (***Kroll***) for the purpose of its liquidation analysis (which was attached as appendix 3 to the Explanatory Statement).

19. The Explanatory Statement (at [2.14(a)]) also noted that the figures for 31 March 2022 provided in it were based on the Group's unaudited management accounts as at 31 December 2021 with the necessary amendments to reflect the updated information provided to Kroll. Mr

Zhou further confirmed in Zhou 1 that there had been no significant changes to the Company's financial position since these updated figures. He also explained why the Company had been unable to finalise its 2021 and interim 2022 financial statements in time for inclusion in the Explanatory Statement. This, he said, had been primarily due to the fact that the progress in preparing the financial statements of the Group had been negatively affected by the strict COVID-19 prevention and control measures in the PRC, as well as staff turnover within the Group and a change in the Company's auditor. The Company had made announcements in July 2022 and August 2022 on the HKSE regarding the delays in finalising its financial statements and the reasons for the delays.

The restructuring negotiations and communications with Noteholders regarding the scheme process in advance of the hearing of the Convening Order Summons

20. The Company has been in discussions for some time regarding how to deal with its financial problems and the terms of a restructuring of the Old Notes.

21. In March 2022, the Company appointed a financial adviser (CICC) to evaluate the capital structure and liquidity position of the Company and its subsidiaries, and to explore options for the restructuring of the Old Notes.

22. On 31 March 2022, the Company announced on the HKSE website the commencement of an offer to exchange the outstanding principal amount of the Old Notes and a solicitation of consents from the Noteholders (the ***Exchange Offer***) which exchange was subject to certain conditions being met, including acceptance of the Exchange Offer by holders of at least 90 per cent of the outstanding principal amount of the Old Notes (the ***Minimum Acceptance Amount***).

23. Given the conditions attached to the Exchange Offer, concurrent with announcement of the Exchange Offer, the Company also invited the Noteholders (through an announcement on the HKSE website) to accede to a restructuring support agreement (the ***RSA***) by 4.00 p.m. London time on 11 April 2022 (the ***Exchange Expiration Deadline***). The Company's announcement also stated that the restructuring may be implemented through a scheme of arrangement if the Exchange Offer was not successfully completed, and provided a copy of the RSA, which

appended a term sheet setting out the terms of the proposed restructuring (the ***RSA Term Sheet***).

24. On 11 April 2022, the Exchange Expiration Deadline was extended to 4.00pm London time on 13 April 2022 and the Company announced this on the HKSE's website.

25. On 14 April 2022, the Company announced on that website that it had terminated the Exchange Offer due to the Minimum Acceptance Amount condition not having been satisfied and that it was preparing to implement the restructuring by way of a scheme of arrangement and that therefore it was extending the deadline for accession to the RSA, in accordance with the terms of the RSA, to 4.00 pm London time on 22 April 2022 (the ***Instruction Fee Deadline***).

26. On 5 August 2022, the Company sent a letter to Noteholders (as creditors who would be subject to the scheme). This letter is referred to as the ***PSL*** (an abbreviation of practice statement letter). The purpose of the PSL was (as contemplated by [3.1] of the Practice Direction No 2 of 2010 (the ***Practice Direction***)) to give notice to Noteholders of the terms of the proposed Scheme and of the restructuring, of the relevant background, that the Company intended to apply to the Court for an order permitting it to convene a meeting of Noteholders and to give notice of the issues that the Court would need to consider at the hearing of the Convening Order Summons. The PSL stated that the hearing of the Convening Order Summons had been listed for 5 September. It also explained that the commencement of the Scheme proceedings had been delayed for various reasons including (as discussed in more detail below) difficulties resulting from the effect of sanctions on Russia and the need for negotiations with Alibaba. The PSL noted that the terms of the scheme provided that the date on which the scheme became effective (the ***Restructuring Effective Date***) must occur by a certain date (the ***Longstop Date***) which had initially been 13 October 2022 but which the Company wished to amend to 31 October 2022. The PSL was notified to Noteholders via various different methods. These were posting the PSL on the website established by the Company to upload relevant information and documents relating to the scheme; circulating the PSL electronically through the clearing systems (Euroclear Bank S.A./N.V. and Clearstream Banking, S.A.) and sending the PSL via email

directly to each Noteholder who had registered with the Information Agent or had otherwise notified the Company or the Information Agent of its email address.

27. As noted above, the petition and the Convening Order Summons were then filed on 28 July 2022. The hearing of that summons was originally listed for 5 September 2022. However it subsequently became necessary to delay the hearing until 15 September 2022. Noteholders were notified of this change by letter dated 2 September 2022 (the ***2 September 2022 Letter***) which was distributed using the same methods of communication that had been used for giving notice of and circulating the PSL.

28. The Company had planned to circulate on 2 September 2022 or shortly thereafter an update to Noteholders to inform them of the changes that had been made since the PSL to the terms and structure of, and the process for voting on, the scheme. The 2 September 2022 Letter stated that "*Further details on the Scheme will follow early next week*." But unfortunately, because of further delays in finalising aspects of the restructuring, in particular delays in obtaining confirmation from the Old Notes Trustee that it would be prepared to act as a trustee of the new notes to be issued under the scheme (the ***New Notes***) and that it would assume other roles in connection with the New Notes, the update was further delayed. On 12 September 2022, three days before the hearing of the Convening Order Summons, the Company eventually sent out the update (the ***Additional PSL***) once again using the same methods of communication as had been used for the PSL. The Additional PSL explained the revisions to the scheme and the restructuring that had been made since the PSL and attached copies of the amendments to the scheme documents required to give effect to those changes.

The terms of the RSA and the high level of Noteholder support for the Scheme

29. A detailed overview of the RSA is set out at [5.10] of the Explanatory Statement. Its terms can be summarised as follows. Under the RSA, any Noteholder who accedes to the RSA by the Instruction Fee Deadline, votes in favour of the Scheme at the Scheme meeting and does not exercise its rights to terminate the RSA or breach any provision of it in any material respect, will be a ***Consenting Creditor***, and will receive a cash fee on the Restructuring Effective Date

in an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline (the ***Instruction Fee***). Mr Zhou confirmed in Zhou 1 (at [49]) that as at the date of his affirmation (9 September 2022) approximately 89.07% by value of Noteholders had signed or acceded to the RSA and therefore had undertaken to vote in favour of the Scheme at the Scheme meeting.

The terms of the Scheme

30. The terms of the Scheme were summarised in Zhou 1 at [61] to [87] and in further detail in section 7 of the Explanatory Statement and, as I have noted, set out in Appendix 4 to the Explanatory Statement. The Scheme will only affect the rights of the Company, the Subsidiary Guarantors and the "*Scheme Creditors*."

31. Scheme Creditors are defined as "*without double counting, the Noteholders, the Old Notes Trustee and the Depositary*." As regards voting, however, the Old Notes Trustee and the Depositary have agreed not to vote at the scheme meeting. The Noteholders are defined as "*those Persons with an economic or beneficial interest as principal in the Old Notes held in global form or global restricted form through the Clearing Systems at the Record Date, each of whom has a right upon the satisfaction of certain conditions, to be issued with definitive registered notes in accordance with the terms of the Old Notes*." A Released Claim is defined as "*any Scheme Claim, Ancillary Claim, or any past, present and/or future Claim arising out of, relating to or in respect of: (a) the Old Notes Documents; (b) the preparation, negotiation, sanction and implementation of [the] Scheme and/or the RSA; and/or (c) the execution of the Restructuring Documents and the carrying out of the steps and transactions contemplated in [the] Scheme …*" An Ancillary Claim is a claim against a Released Person. The following are defined as a Released person: the Company; the Subsidiary Guarantors, the Group, their Affiliates, Personnel and Advisers; the Old Notes Trustee and its connected parties and advisers; the New Notes Trustee and its connected parties and advisers; the Holding Period Trustee (whose role I discuss below); the Scheme Supervisor (who is Mr Lawson, who is appointed by the Board to act in such capacity); the Information Agent and the Cayman Islands Information Agent (which is Alvarez & Marsal Cayman Islands Limited).

32. Under the Scheme, on the Restructuring Effective Date:

(a). Scheme Creditors will release in full the Released Claims, in exchange for the New Notes and the Cash Consideration (which means 6% of the outstanding principal amount of the Old Notes held by the relevant Noteholder together with interest on the Old Notes accrued up to but excluding 18 April 2022).

(b). the Old Notes will be released, cancelled, fully compromised and forever discharged, and the respective rights and obligations of the Scheme Creditors, the Company, the Subsidiary Guarantors and the Old Notes Trustee towards one another under the Old Notes Documents will terminate and be of no further effect.

(c). Noteholders who are Consenting Creditors will be paid the Instruction Fee.

(d). the New Notes will be issued to Scheme Creditors in tranches which mature on the first anniversary and then in six-month increments from the date of the issue of the New Notes. The interest rate on the New Notes will be 8% per annum. The first principal payment of 10% of the aggregate principal amount of the New Notes will be due one year after the Restructuring Effective Date. The New Notes will mature on the third anniversary of the date that they are issued.

(e). the liability of the Subsidiary Guarantors will be released.

The Kroll liquidation analysis

33. An estimated outcome for Scheme Creditors of a liquidation of the Company was prepared by Kroll. They prepared a written liquidation analysis (dated 29 July 2022) which was discussed in Zhou 1 at [93] to [97] and set out, as I have said, at appendix 3 to the Explanatory Statement. In summary, the return to Scheme Creditors in an insolvent liquidation was estimated by Kroll to be in a range from 25.8% (low case) to 36.1% (high case). The liquidation analysis assumed

that all entities in the Group are put into liquidation. It assessed the likely realisable value of each of the companies in the Group on what is described as a segmented based approach. Kroll explained what this means in [3.2] of their analysis:

> *"E-House has over 300 major subsidiary entities within the Group. Given the significant number of subsidiaries and the complexity of the Group's corporate structure, we have sought to conduct our analysis on a consolidated basis for each Segment level. Based on the information provided by Management, we have aggregated the assets and liabilities of each Segment. For this Liquidation Analysis, we have assumed that upon the liquidation of each Segment, the proceeds from the aggregated realisation of assets for any specific Segment will be used to repay the aggregated debts recognised in the same Segment."*

34. The six segments identified by Kroll were as follows: the Company; 125 subsidiary entities that are principally engaged in real estate agency and consultancy; 17 subsidiary entities that are principally engaged in the provision of real estate related education services; 7 subsidiary entities that are engaged in offshore financing and marketing activities; 54 subsidiary entities that are principally engaged in digital marketing and brokerage; and 104 entities controlled by Leju Holdings Limited, a NYSE-listed entity that is principally engaged in the provision of online-to-offline real estate services. The liquidation analysis assumed that each company in the Group will cease operations upon liquidation and as a result that its assets will be sold at discounted prices rather than at prices that might be achieved if they were sold on a going concern basis.

The impact of Russian sanctions

35. The UK Government, the US Government and the European Union have imposed sanctions on Russia including sanctions in response to Russia's invasion of Ukraine. The UK's sanctions have been extended to and apply in the Cayman Islands. The Company was required to consider the effects, and to modify the terms of the scheme to deal with issues arising because, of these sanctions. The Company had to consider whether any Noteholders were subject to these sanctions regimes (in particular the asset freezes imposed thereby) in order to decide whether sanctions prohibited the discharge of the Old Notes, the issue of the New Notes and the payment of fees to Noteholders. Furthermore, as the Company discovered, it was also necessary

to consider whether any Russian banks or custodians through whom Noteholders hold their Old Notes (which banks and custodians are participants in and hold accounts with the clearing systems) were subject to sanctions and the impact of sanctions on the operation of the clearing systems. Sanctions may have an impact on the means by which the clearing systems communicate with and distribute documents to their participants and account holders. This could extend to the process by which the Explanatory Statement and related documents are to be distributed to Noteholders, the blocking by the clearing systems of transfers of and dealings in the Old Notes and the process for obtaining voting instructions from Noteholders.

36. Where notes are held through a clearing system the identity of the beneficial holders of the notes will generally not be known to the issuer of the notes and may be impossible to ascertain otherwise than with the assistance of the clearing system. The issuer relies on the clearing systems to facilitate communications with (both to and from) noteholders. The issuer sends a notice or other communication to the clearing system who transmits it to its account holders, who in turn submit it to those who hold accounts with them. The clearing system will also transmit voting instructions back from the ultimate beneficial owner to the issuer. The issuer also depends on the clearing system to ensure the integrity of the voting process by blocking trading in and transfers of the notes during the period in which noteholders are voting. The issuer also depends on account holders in the clearing system to provide confirmation and verification that a person claiming to be a scheme creditor is a holder of notes and the amount of notes they hold. The position role of the clearing systems and their involvement in communications with Noteholders and the voting process is explained in Ms Yeung's First Affidavit.

37. The sanctions regimes I have identified are relevant to the Company's scheme for the following reasons:

(a). the Cayman Islands sanctions regime is engaged because the Company is a Cayman Islands exempted company. As a British Overseas Territory the UK's sanction regulations (The Russia (Sanctions) (EU Exit) Regulations 2019) are applied to and

in the Cayman Islands by The Russia (Sanctions) (Overseas Territories) Order 2020 (as amended).

(b). the United States sanctions regime is potentially engaged because the Old Notes are governed by New York law and denominated in US$.

(c). the European Union sanctions regime is engaged because the clearing systems through which the Old Notes are held are subject to certain sanctions imposed by the European Union. This includes, since March 2022, the blocking and suspension of settlement services provided by the clearing systems in respect of accounts held by certain Russian banks and financial intermediaries, including the National Settlement Depository (***NSD***) which is the central securities depository for the Russian Federation.

38. Consequently, the Company considered and took advice on the impact on the scheme process and the nature and scope of these sanction regimes. Mr Zhou dealt with this in his evidence. He summarised the position in Zhou 2 as follows (see also Zhou 1 at [86]):

> *"6. Various financial sanctions have been imposed in response to Russia's invasion of Ukraine. As a result of such sanctions, the Clearing Systems (through which the Old Notes are settled) have blocked all transfers with accounts held by certain Russian banks and financial intermediaries. These restrictions have affected approximately 6.65% of the Noteholders (by value) who acceded to the RSA.*
>
> *7. The Company has been advised that the Scheme does not constitute a breach of the applicable financial sanctions regimes of the United States, the United Kingdom, the Cayman Islands and the European Union.*
>
> *8. Nevertheless, it is a matter for all stakeholders in the Scheme …to take their own commercial position on sanctions."*

39. A summary of the steps taken and advice received by the Company was set out by Mr Lam in his Affidavit. He noted that the Company had made various inquiries, with the assistance of the Information Agent, to ascertain whether any Noteholders were subject to or affected by the sanctions regimes. The Company deduced, based on information provided by the clearing

systems and obtained from the process for obtaining Noteholders' agreement to accede to the RSA, that approximately 6.65% of those Noteholders who acceded to the RSA hold their Old Notes through the NSD. The clearing systems have blocked transfers from the accounts of NSD's held by them. Mr Lam explained (at [22]) that:

> *"I have been informed by D.F. King, the information agent engaged by the Company, that Euroclear and Clearstream, through which the 2022 Notes and the 2023 Notes are settled, have blocked all transfers with accounts held by certain Russian banks and financial intermediaries, including Russia's National Settlement Depositary (the* ***"NSD")*** *from March 2022 (prior to the time the RSA was entered into in April 2022). I have also been informed by D. F. King that approximately 6.65 per cent of the holders of the 2022 Notes and the 2023 Notes who acceded to the RSA did not submit instructions through Euroclear or Clearstream. The Company was provided with a lock-up report containing the identity those holders that had acceded to the RSA, including those who did not submit instructions through Euroclear or Clearstream (the* ***"Lock-up Report").*** *So far as the Company can determine, the Lock-up Report contains the identity of all the holders of the 2022 Notes and 2023 Notes that did not submit instructions through Euroclear or Clearstream (the* ***"Blocked Noteholders")****. The Company has informed us that it believes, after due inquiry with D.F. King, that all of its Blocked Noteholders hold their 2022 Notes and/or 2023 Notes through the account of the NSD. As a result of the transfer block imposed by Euroclear and Clearstream, the Company believes there has been no change to the list of Blocked Noteholders since the time the RSA was entered into."*

40. Accordingly, some Noteholders are unable to receive documents or give instructions via the clearing systems (I refer to all such Noteholders as the ***Blocked Noteholders***). It appears that the Blocked Noteholders are Noteholders who hold their Old Notes through accounts with NSD or with other custodians who themselves have accounts with NSD. Some of the Blocked Noteholders have, despite these difficulties, been contacted by the Company and acceded to and agreed to be by bound the RSA. I refer to these Noteholders as the ***RSA Blocked Noteholders***. There may be other Blocked Noteholders but the Company currently does not know whether any exist or if they do exist who they are.

41. 89.07% by value of all Noteholders have acceded to the RSA and, as I have said, the RSA Blocked Noteholders constitute approximately 6.65% of all such acceding Noteholders. The alternative method for contacting the RSA Blocked Noteholders was discussed in Zhou 1 at [53]. The PSL and other documents and notices were posted on the scheme website so that any

Blocked Noteholder could access them and were sent by email to each Blocked Noteholder whose email address was known to the Company or the Information Agent (see Zhou 1 at [102]).

42. Therefore, so far as the Company was able to ascertain, all the RSA Blocked Noteholders held their Old Notes through NSD and none of the Noteholders were themselves subject to the asset freezes or other provisions of the sanctions regimes. The Company had also, as Mr Lam confirmed, verified that none of the RSA Blocked Noteholders were listed or treated as designated or blocked persons under the regulations governing the relevant sanctions.

43. As a further precaution to ensure that no Noteholder who is prevented by sanctions from voting on, from having the Old Notes discharged by or from receiving the scheme consideration under the scheme, from doing so, the Company will require Scheme Creditors to execute a distribution confirmation deed. This contains various sanctions related confirmations to be made by and on behalf of each Scheme Creditor to confirm that they are not subject to sanctions. If any Scheme Creditor fails to give the required affirmative confirmations then Company will check that Scheme Creditor's details against the lists of designated sanctioned persons in the Cayman Islands, the United Kingdom, the European Union and the United States to ensure that the Scheme Creditor is not on a sanctioned person.

44. In these circumstances, the Company is satisfied that, based on and following what it considers to be reasonable inquiries, the promotion and implementation of the scheme will not give rise to a breach of any applicable sanctions regime.

The Company's approach before the hearing of the Convening Order Summons to voting by Blocked Noteholders

45. Thus the clearing systems' decision to suspend settlement services and communications through accounts held by NSD has had an impact on the process for obtaining the approval of and implementing the scheme. As a result, the Company has been unable to give notices to or obtain voting instructions from the Blocked Noteholders via the clearing systems in the usual way (or make payments or transfer the scheme consideration to Blocked Noteholders). In

addition, the Company's bank has advised that it cannot make direct payments to the Blocked Noteholders (see Zhou 1 at [58]) and the Information Agent has indicated (in light of comments made by the clearing systems) that it is unable to collect information and voting instructions from the Blocked Noteholders outside the clearing systems.

46. The difficulties associated with sanctions were not addressed prior to the RSA being signed because the Company was not aware of them at the time. The need to investigate and resolve these difficulties and to prepare amendments to the scheme documents caused delays in finalising the terms and structure of the scheme and were mainly responsible for the need to delay the hearing of the Convening Order Summons. The amendments that the Company decided were needed to address the problems caused by sanctions were summarised in the Additional PSL as follows (underlining added):

> *"5. Since the [PSL], the Scheme Company has been working through the mechanics of the Restructuring and, following discussions with Euroclear and Clearstream, it has been agreed that the new notes to be issued pursuant to the Restructuring (the **"New Notes"**) can take a global form and will be on the same terms as the Term Sheet to the RSA, subject to the amendments shown in Appendix B to this PSL. The trustee of the New Notes will be an independent and professional provider of note trustee services that will be confirmed by the Scheme Company as soon as possible. The Scheme and Restructuring are also subject to the amendments set out below.*
>
> *6. First, the Scheme Consideration due to those persons or entities who hold the Old Notes through accounts held by certain Russian banks and financial intermediaries, including the [NSD], whose settlement services have been suspended and blocked by Euroclear and Clearstream, (the **"Blocked Scheme Creditors"**) will need to be first held by a trustee in accordance with the terms of the Holding Period Trust Deed (the **"Holding Period Trustee"**) on trust for the Blocked Scheme Creditors until the maturity date of the New Notes or the lifting of the applicable sanctions, whichever is earlier. If applicable sanctions are still in place upon the expiry of the Holding Period Trust, the Scheme Company will undertake in the Scheme to create a successor trust (the **"Successor Trust"**) for Blocked Scheme Creditors' Scheme Consideration to be held until the earlier of (i) the expiry of the perpetuity period of the Successor Trust or (ii) the lifting of applicable sanctions, with the Blocked Scheme Creditors being given a reasonable period thereafter to recover their entitlement to the Scheme Consideration in accordance with the terms of the Successor Trust. The same will apply to the Instruction Fee, which is to be paid to those Blocked Scheme Creditors who*

are also Consenting Creditors. The Holding Period Trustee will be Ultrex Holdings (HK) Limited, a Hong Kong incorporated subsidiary of the Scheme Company.

7. *Further and on account of the same sanctions regulations of the European Union, the Information Agent is not able to collect information, including voting instructions, from the Blocked Scheme Creditors. As a result, the Blocked Scheme Creditors will not be permitted to attend or vote at the Scheme Meeting. However, Blocked Scheme Creditors who are also Consenting Creditors will still be eligible to receive the Instruction Fee, on the terms set out in paragraph 6 above.*

8. *Finally, as anticipated in the [PSL], the Scheme Company proposes an amendment to the RSA to extend the Longstop Date until 31 October 2022. The Scheme Company now also proposes a further amendment to the RSA to provide the Scheme Company with the right (at its sole discretion) to extend the Longstop Date to 30 November 2022 (together with the initial extension until 31 October 2022, the* ***"Longstop Date Extension")*** *should additional time be required to complete the Restructuring. Consenting Creditors who vote in favour of the Scheme will be treated as having voted in favour of the Longstop Date Extension."*

47. As this extract makes clear, the Company decided, in order to deal with the impact of sanctions, that the New Notes could be issued in global form; that the New Notes could not be issued to Blocked Noteholders but would need to be held on their behalf by a trustee and Blocked Noteholders could not and would not be allowed to vote at the scheme meeting.

48. The arrangements for voting at the scheme meeting were set out in the Explanatory Statement and the documents attached to it, including the solicitation package. These explained what steps needed to be taken by a Scheme Creditor in order to be entitled to attend and vote at the scheme meeting. In the case of intermediated securities such as the Old Notes held through clearing systems, as I have noted, the clearing systems play a critical role since they pass on documents to their account holders (who then forward the documents to sub-custodians and thereby to Noteholders), block dealings in the Old Notes while voting is taking place and transmit back voting instructions executed by such account holders on behalf of Noteholders.

49. The Company prepared a form of document to be used by account holders for the purpose of recording and evidencing the Old Notes held and the voting instructions given by Noteholders.

This is the Account Holder Letter which must be signed by an Account Holder, who is defined in the Scheme as a person who has an account with the clearing systems and is recorded in the books of the clearing systems as holding in that account a book-entry interest in the Old Notes. The Account Holder in the Account Holder Letter identifies and provides the name of the person who is the to be treated as the Scheme Creditor in respect of a specified amount of the Old Notes and on whose behalf the Account Holder is acting. This ensures that the ultimate beneficial owner of the relevant Old Notes can attend and vote at the Scheme Meeting in accordance with the "Looking through the Register" approach set out in the Practice Direction (see [4]). The Account Holder in the Account Holder Letter gives various confirmations (representations) and voting instructions on behalf of the Scheme Creditor and provision is made in the Account Holder Letter for the appointment of a proxy by the Scheme Creditor. Appendix 2 to the Account Holder Letter attaches a distribution confirmation deed (to which I made reference above) which all Scheme Creditors must execute in order to be entitled to receive and before receiving their share of the New Notes. Annex B to the distribution confirmation deed sets out various securities law and sanctions confirmations and undertakings to be given by the relevant Scheme Creditor. The sanctions confirmations, in summary, confirm that the Scheme Creditor and its affiliates and associates are not subject to sanctions or acting for Russia and will not use the proceeds of the New Notes to fund or facilitate the business of any sanctioned person or of Russia.

50. The Explanatory Statement and the solicitation package confirmed and expanded on what was said in the Additional PSL regarding the position of the Blocked Noteholders. Blocked Noteholders (including the RSA Blocked Noteholders) would be excluded from voting. The Company considered that this was necessary because the Blocked Noteholders could not receive documents or give voting instructions via the clearing systems and because the Information Agent was also unable to send documents to or receive voting instructions from them. However, to ensure that the RSA Blocked Noteholders (who had acceded to the RSA and thereby agreed to submit an Account Holder Letter and vote in favour of the Scheme at the scheme meeting, and who were only entitled to the Instruction Fee if they did so) would be financially no worse off by being unable to vote, the Company agreed to waive the RSA Blocked Noteholders' obligation to submit an Account Holder Letter and agreed that the RSA

Blocked Noteholders should nonetheless still be paid their Instruction Fee if the Scheme was approved and sanctioned. This would be paid to the Holding Period Trustee.

Third Parties

51. The Scheme also provides that by no later than the date of the sanction hearing, various non-parties to the Scheme will give undertakings to the Company and the Court to be bound by the terms of the Scheme. These include the Subsidiary Guarantors, the subsidiaries who will guarantee the New Notes, the Old Notes Trustee, the Depositary, the Old Notes Paying and Transfer Agent, the New Notes Trustee,, the New Notes Paying and Transfer Agent, the Holding Period Trustee, the person appointed to act as the supervisor of the Scheme and the Information Agent.

The issues arising on the convening hearing

52. It is now well settled that the function of the Court at a scheme convening hearing is not to consider the merits or fairness of the proposed scheme. These issues arise for consideration at the sanction hearing if the scheme is approved by the requisite majority of creditors. At the convening hearing the Court is concerned with a narrower range of issues when determining whether to give directions for the convening of the scheme meeting and if so what those directions should be. The issues for consideration are referred to in the Practice Direction (at [3]). They are now frequently summarised as covering three main areas, namely first, any issues which may arise as to the constitution of the meeting or meetings of creditors; secondly, any issues as to the existence of the Court's jurisdiction to sanction the scheme and thirdly, any other issue (not going to the merits or fairness of the scheme) which might lead the Court to refuse to sanction it (which will usually include a review of the extent to which the scheme will be effective abroad in other relevant jurisdictions).

53. In addition, the Court will consider whether adequate notice has been given to creditors of the purpose and effect of the proposed scheme and of the convening hearing. The Practice Direction (at [3.1]), as noted above, states that:

> *"….practitioners should consider giving notice to persons affected by the scheme in cases where class or other issues referred to in paragraph 3.3 below arise and where it is practical to do so. Such notice should include a statement of the intention to promote the scheme and of its purpose, and also of the proposed composition of classes and of the intention to raise any issue as referred to in paragraph 3.3 below."*

54. Paragraph 3.3 of the Practice Direction states that:

> *"At the first hearing, the Court will also consider any other issue which is relevant to the jurisdiction of the Court to sanction the scheme, and any other issue which, although not strictly going to jurisdiction, is such that it would unquestionably lead the Court to refuse to sanction the scheme."*

55. In this case, there is no issue as to jurisdiction. The Company is a Cayman Islands incorporated company and is therefore liable to be wound up under the Companies Act. Accordingly, pursuant to section 86(5) of the Companies Act the Court clearly has jurisdiction to convene a scheme meeting (and sanction a scheme) in respect of the Company (I discuss below the relevance of the connections to the jurisdiction for the purpose of the Court's exercise of its discretion to sanction the Scheme). The Scheme is also clearly an arrangement within the meaning of section 86 of the Companies Act.

56. Issues do however arise in relation to the following matters: the notice of the convening hearing; class composition; the extent to which there are doubts as to the international effectiveness of the Scheme; the adequacy of the disclosure in the Explanatory Statement and the directions to be given for the convening and conduct of the Scheme meeting. I deal with each of these issues in turn.

Notice of the convening hearing and amendments to the Scheme

57. As I have noted above, Scheme Creditors were first given notice of the proposed scheme on 5 August 2022 in the PSL. The PSL said that the convening hearing was listed on 5 September 2022. They were notified on 2 September 2022 that the date of the convening hearing had been put back to 15 September 2022. They were then notified shortly before the convening hearing,

on 12 September 2022, that certain amendments to the Scheme were to be made with respect to the treatment of the Blocked Noteholders and that the Company would seek to be granted the power to extend the Longstop Date to 30 November 2022.

58. The question of the timing and adequacy of notice to Scheme Creditors has been considered by a number of authorities. As Mr Justice Zacaroli noted in *Re Lecta Paper UK Limited* [2019] EWHC 3615 (Ch) (***Lecta***) at [10] "*The essential question, as posed by Norris J in Re NN2 Newco Ltd [2019] EWHC 1917 (Ch), at [22]-[23] is whether in all the circumstances of the case (including the complexity of the scheme, the degree of prior consultation with creditors and the urgency of the scheme) creditors have been given sufficient notice of the basic terms of the scheme and an effective opportunity to raise any concerns*." As Mr Justice Meade said in *Re Nostrum Oil & Gas Plc* [2022] EWHC 1646 (Ch) (***Nostrum***) at [25] "*the appropriate period of notice is a fact-sensitive matter*."

59. In this case, leaving to one side the position of the Blocked Noteholders, I am satisfied that adequate notice has been given. The basic terms of the Scheme were notified on and have not materially changed since 5 August 2022. The PSL in early August gave notice that the convening hearing would be in early September and the subsequent notice dated 2 September gave just under two weeks' notice of the revised hearing date (of 15 September). Furthermore, a substantial proportion of the Noteholders have been involved in the restructuring negotiations and have become parties to the RSA. The precise dates on which Noteholders acceded to the RSA have not been disclosed but it is clear that they did so some time in advance of the PSL. In the PSL the Company confirmed (at [39]) that Noteholders holding approximately 90% of the Old Notes had already by 5 August 2022 entered into or acceded to the RSA.

60. But what about the position of the Blocked Noteholders? Some of the Blocked Noteholders acceded to the RSA. They will have been fully informed of the terms of the Scheme. But there may be others who have not come forward. They cannot receive notices through the clearing systems and so must rely on making their own searches of the Company's website and the HKSE website. This may result in some delays in their picking up and finding out about developments. However, the PSL was uploaded to the Company's and the HKSE's website in

early August 2022 and therefore it is reasonable to expect that even these other Blocked Noteholders will have been aware of the restructuring proposals, the terms of the Scheme and the timetable for implementing it, including there being a convening hearing in early September. I had a concern that they will only have found out that the Company was proposing that they would not have the right to vote at the Scheme meeting a matter of days before the convening hearing. It is possible that some of the Blocked Noteholders may have wished to object to the Company's proposal and to have made representations at the convening hearing but were unable to do so in view of the very short notice given of the amendments. However, in this case I do not consider that there is a need to find or justification finding that the Company failed to give adequate notice to the Blocked Noteholders of important amendments to the Scheme so that the convening hearing should be adjourned. First, as I shall explain shortly, I directed at, and the Company has agreed following the convening hearing that Blocked Noteholders be permitted to vote at the Scheme meeting and that arrangements be made that will give them an opportunity to do so outside the clearing systems. Therefore, the main cause of concern that the Blocked Noteholders would have had has been dealt with. Secondly, and most importantly, the Blocked Noteholders will have an opportunity to raise any concerns and objections to sanction of the Scheme at the sanction hearing. In view of the very short notice they were given of the amendments to the Scheme affecting them, they will be given greater leeway than creditors would usually have to raise at the sanction hearing issues that could and should have been brought forward at the convening hearing. Thirdly, the Company is clearly under serious time pressure in view of the Alibaba deadline and an adjournment of the convening hearing would potentially have serious and damaging consequences for the restructuring and the interests of Noteholders.

Class composition

61. The Court's approach to considering the question of class composition was neatly summed up recently by Meade J in *Nostrum* as follows:

> *"The basic principle is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (see Sovereign Life Assurance v Dodd [1892] 2 QB at [573] and many cases since, including e.g. Re Telewest Communications Plc [2004] BCC*

342). In answering the question of whether a separate class is required, the Court must consider the rights that creditors would have if the proposed scheme were not implemented. In carrying out that exercise, the Court is concerned with rights, not interests. Even where there are differences in rights, the differences must be sufficient to make consultation impossible. It is important that the Court should not be too picky, to guard against the risk that that will enable a small group to hold out unfairly against a majority."

62. In this jurisdiction the test to be applied is also summarised in the Practice Direction (at [3.2]).

63. When dividing creditors or members into classes, two considerations are relevant: the rights that the creditors or members would have if the scheme were not implemented, and the rights that the creditors or members have if the scheme is implemented. As Chadwick LJ said in *Re Hawk Insurance Co Ltd* [2002] BCC 300 at [30]:

> *"In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."*

64. The Company submitted that in the present case, the Scheme Creditors should vote in a single class:

(a). the Court needed to consider the rights of Scheme Creditors under the Scheme and under the alternative to the Scheme. The Company submitted that the Scheme Creditors have the same rights and are treated equally under the Scheme and would have the same rights under the alternative to the Scheme.

(b). the Scheme Creditors will, subject to the two differences discussed below, be given identical legal rights under the Scheme. Once the restructuring is implemented, each Scheme Creditor will be entitled to receive the same package of Scheme consideration pro rata to their existing claims. There is no relevant difference of treatment and therefore no difference in the rights acquired by Scheme Creditors under the Scheme.

(c). the Company also submitted that the evidence indicated that the alternative to the Scheme (the comparator) was an insolvent liquidation. If the Scheme is not approved the Company is very likely to enter into insolvent liquidation. In that situation, all Scheme Creditors would have the same legal rights against the Company. They would have unsecured claims ranking *pari passu*, and would receive (based on the Kroll liquidation analysis) the same estimated pro rata return of approximately 25.8% to 36.1%. The Company submitted that the Kroll liquidation analysis had been properly prepared and set out a realistic and reasonable estimate of the recoveries that Scheme Creditors would make if the Company and other members of the Group were forced in liquidation upon the failure of the Scheme.

65. The Company accepted that there were some differences of treatment between Scheme Creditors but that these differences were said to be immaterial and did not fracture the class:

(a). some, but not all, Scheme Creditors have signed the RSA and will receive the Instruction Fee although all Noteholders were offered the opportunity to accede to the RSA and receive the Instruction Fee.

(b). the Blocked Noteholders will not be able to receive the Scheme consideration on the Restructuring Effective Date, but instead the Scheme consideration to which the Blocked Noteholders would otherwise be entitled will be held on trust by the Holding Period Trustee, and subsequently the trustee of the Successor Trust until the applicable sanctions are lifted or for the duration of the two trusts. Furthermore, the Company's position at the convening hearing was that the Blocked Noteholders would not be entitled to attend or vote at the Scheme meeting.

66. As regards the fees, the Company argued that the fact that creditors had entered into a lock-up agreement did not give rise to a class issue. Rather, it was relevant to the exercise of the discretion of the Court when deciding whether to sanction a scheme (citing *Telewest Communications* [2004] BCC 342 at [53]). The Company argued that it was well-established that fees paid in connection with lock-up agreements of a type similar to the RSA (commonly

referred to as consent fees) did not fracture a class merely because some members of the class will not receive the fee (*In Re DX Holdings Ltd and other Companies* [2010] EWHC 1513 (Ch) at [7]). Two factors were important: first, whether or not the consent fee was offered to all scheme creditors and secondly, whether the consent fee was likely to exert any material influence on creditors' voting decisions (*Re Magyar Telecom* [2014] BCC 448 at [12]; *Re PrimaCom Holdings GmbH (No.1)* [2013] BCC 201 at [55]-[57] and *Re Privatbank* [2015] EWHC 3186 (Ch) at [30]). In this case, as already noted, the Instruction Fee had been offered to all Noteholders who acceded to the RSA by the Instruction Fee Deadline and all Noteholders were given the opportunity and sufficient time to accede to the RSA after the announcement of the RSA on 31 March 2022; the Instruction Fee was small, being only 1% of the outstanding principal amount of the Old Notes held by Noteholders who are Consenting Creditors; under the Scheme, the Noteholders were expected to receive 100% of the sums due under the Old Notes (albeit at a later date) but in a liquidation, the return was expected to be between 25.8% (low) and 36.1% (high) so that in these circumstances it was highly unlikely that a Noteholder who would otherwise have intended or planned to vote against the Scheme would have been persuaded and incentivised to vote in favour in order to obtain the Instruction Fee and a small additional 1% return.

67. As regards the treatment of the Blocked Noteholders:

(a). the Company noted that the Blocked Noteholders were receiving the same benefits under the Scheme as other Scheme Creditors (including, where they had acceded to the RSA, the Instruction Fee) but at a later date. The Company submitted that the delay in the Blocked Noteholders having access to their Scheme consideration was not unusual where parties to a scheme were subject to regulatory or other requirements that made it unlawful for them to receive the scheme consideration immediately. The Company relied on the following recent statement of the applicable principle by Mr Justice Marcus Smith in *Re Haya Holco 2 plc* [2022] EWHC 1079 (Ch) (***Haya***) at [72(3)]:

> "*Scheme Creditors will be required to make certain customary confirmations with respect to US securities legislation in order to certify their ability to*

> *receive their allocation of New SSNs and New Shares. If a Scheme Creditor is unable to make such customary confirmations, it may nominate a person to receive its allocation of New SSNs and New Shares on its behalf. If a Scheme Creditor fails to nominate such a person, then the New SSNs and New Shares for that Scheme Creditor will be transferred into a "holding trust" for up to 12 months. If the New SSNs and New Shares still have not been claimed at the end of that period, then they will be sold and the net proceeds will be distributed to the relevant creditor. This structure does not, in my judgment, fracture the class. It is a customary feature of schemes that involve the issuance of new debt or equity securities. The Scheme Creditors have the same rights in relation to the New SSNs and New Shares under the Scheme. An inability to give the customary confirmations required to be given to receive an allocation of New SSNs and New Shares goes merely to the enjoyment of those rights, creating a potential fairness, not class, issue: see Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [19] per Zacaroli J; Re Obrascon Huarte Lain SA [2021] EWHC 859 (Ch) at [28] per Adam Johnson J; Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [82]-[83] per Trower J.*"

(b). as regards the prohibition on the Blocked Noteholders from attending or voting at the Scheme Meeting, the Company noted that the issue had arisen in *Nostrum*, another sanctions case, but had not affected Meade J's decision that it was appropriate to convene a scheme meeting of a single class of scheme creditors. Meade J had noted at [42] of his judgment, the Company said, that the scheme creditors affected by sanctions had signed a lock-up agreement prior to their being sanctioned, and this strongly indicated that they did not object to the scheme. The Company submitted that the restrictions on the Blocked Noteholders' right to attend and vote at the Scheme meeting, if relevant at all, related only to the fairness of the Scheme, which was not a question to be decided at the convening hearing. If the Blocked Noteholders had any objections to the Scheme, related to the effect of sanctions or the mechanisms put in place to deal with them, then they would be able to raise these objections at the sanction hearing.

68. I accept that the entitlement of Consenting Creditors to be paid the Instruction Fee does not require that they be put in a separate class. But in my view the proper approach to be followed by the Court was that set out by Marcus Smith J in *Haya*. He said this (at [72(4)] (underlining added):

*"Consent payment. A consent fee is payable to Scheme Creditors who acceded to the Lock-Up Agreement by 5pm on 31 March 2022 (the **Consent Payment**). The Consent Payment is a sum equal to 0.5% of the principal amount of the New SSNs to be received by the relevant Scheme Creditor under the Scheme. The Consent Payment will be payable in cash upon the implementation of the Scheme. Consent fees of this type are common, and at this level do not – given the value at risk - fracture the proposed class. Of course, this is a matter that is fact dependent, and the fees incurred in bringing forward a scheme, and the basis on which they are to be paid, are always going to be matters the court ought to bear in mind. More specifically:*

(a) Some of the authorities suggest that, where a consent fee is made available to all creditors in advance of the scheme meeting, it cannot fracture the class. If each creditor had a right to obtain the fee, then there is no difference in rights that is capable of fracturing the class: see Re HEMA UK I Ltd [2020] EWHC 2219 (Ch) and Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [72] per Trower J, among many other cases. I am a little doubtful as to the weight of this point, since the critical question is how the class will vote at the meeting, and the factors that might impair that vote.

(b) Some of the authorities suggest that even if a consent fee was made available to all, it is necessary to consider whether the quantum of the consent fee is material. On this view, if a consent fee would be unlikely to exert a material influence on the relevant creditors' voting decisions (having regard to the amount that creditors would receive in the comparator to the scheme and the value of the rights conferred by the scheme), then the fee does not fracture the class: see Re Primacom Holding GmbH [2013] BCC 201 at [57] per Hildyard J, among other cases.

It is this, second, factor that is persuasive – at least in the present case, although I would be troubled if the potential for a consent fee were not available to all members of the class. To that extent, selectivity may be a negative factor, requiring of explanation. In the present case, all of the financial creditors were given an opportunity to sign the Lock-Up Agreement and receive the Consent Payment (if they acceded by 5pm on 31 March 2022). More importantly, the Consent Payment (which represents only 0.5% of the New SSNs to be received by the relevant Scheme Creditor) would not, in my judgment, exert a material influence on the Scheme Creditors' voting decisions. The difference between the "Scheme outcome" and the "comparator outcome" is far greater than 0.5% and it would be fanciful to suppose that anyone would vote for the Scheme in order to receive the Consent Payment."

69. The Court is required, when addressing the question of whether the class of Scheme Creditors has been fractured, to have regard to the rights given to Scheme Creditors pursuant to or in connection with the Scheme and consider whether there are material differences in those rights that prevent the Scheme Creditors from being able to consult together with a view to their common interest. It seems to me that rights have to be assessed at the date of the Scheme Meeting and include rights granted under documents that are entered into in connection with and for the purpose of obtaining creditor support for the Scheme. Accordingly, Consenting Creditors are to be treated as having different rights from other Scheme Creditors. But where all Scheme Creditors have been given an equal opportunity to obtain the consent fee (by acceding to a lockup agreement such as the RSA) and all Scheme Creditors are otherwise treated equally, the difference in rights is self-induced, in the sense that it arises from a choice made by those Scheme Creditors who have decided not to accede to the lockup agreement. Furthermore, the difference in rights is not of a kind that can reasonably be expected materially to affect Scheme Creditors' decision making at the Scheme Meeting, if the amount of the consent fee is so small that no reasonable and properly informed Scheme Creditor would be likely to change his/her vote (to vote in favour of the scheme) because of the entitlement to be paid the consent fee or be likely to regard that entitlement as having a substantial effect on his voting decision.

70. In the present case, all Scheme Creditors were invited to become parties to the RSA. This included the Blocked Noteholders, a significant number of whom acceded to the RSA. The Instruction Fee is an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline. The fee is not calculated by reference to the scheme consideration, as was the case in *Haya*, but that is not unusual or determinative. The amount of the Instruction Fee is not *de minimis* or trivial but it is not of such an amount that Scheme Creditors who are entitled to it can reasonably be expected to have a materially different view of the benefits of the Scheme over the alternative (an insolvent liquidation). There is no evidence to indicate, nor is the amount of the Instruction Fee inherently and of itself so large as to indicate, that a reasonable and properly informed Scheme Creditor would be likely to change his/her vote because of the entitlement to be paid the Instruction Fee or be likely to regard that entitlement as having a substantial effect on his voting decision. The Instruction Fee is being paid as an incentive for an early commitment to support the Scheme,

and represents reasonable compensation for a commitment to support the Scheme in advance of the Scheme meeting.

71. It is also worth noting that the payment of a consent fee may also be relevant to a different issue at the sanction stage. If fees are paid to secure the support of Scheme Creditors and have the effect of manipulating the vote at the Scheme Meeting, such fees can affect and undermine the integrity of the vote and be a ground for refusing to sanction the scheme. But no issue on this ground arises in this case.

72. I accept the Company's submissions with respect to the effect of the arrangements made in relation to the Blocked Noteholders' Scheme consideration. As pointed out by Marcus Smith J in *Haya* there is a fundamental distinction between a scheme conferring different rights on different groups of creditors and a scheme conferring the same rights on all creditors but with some creditors being unable to enjoy those rights (immediately) by virtue of some personal characteristic that they possess. The latter situation should not fracture the class, as it involves a difference in interests rather than rights.

Preventing Blocked Noteholders from attending or voting at the Scheme meeting

73. However, I do not accept that it would be permissible to deprive the Blocked Noteholders of the right to attend and vote at the Scheme meeting. While it might be said that by establishing arrangements and obtaining directions for the conduct of the Scheme meeting that prevented Blocked Noteholders (who were nonetheless Scheme Creditors whose rights were discharged and varied by the Scheme) from attending and voting, the Blocked Noteholders were being granted different rights from other Scheme Creditors under or in connection with the Scheme (so that they should be in a different class), it seems to me that this issue does not go to class composition. It goes to an even more fundamental point, namely the rights given by the Companies Act to parties to a scheme and to the fairness of the Scheme (leaving aside the

impact of the Bill of Rights). It therefore raises an issue which might lead the Court to refuse to sanction the Scheme at the sanction stage.

74. Blocked Noteholders are unable to receive documents and give voting instructions via the clearing systems. There is no evidence that attendance of any Blocked Noteholder or voting by a Blocked Noteholder at the Scheme meeting would be unlawful and a breach of relevant sanctions. If that were the case, the position would be different. It is just that the usual method of communicating with and obtaining instructions from the ultimate and unidentified holders of the Old Notes is not available because of the effect of sanctions and the action taken by the clearing systems in response to such sanctions.

75. Parties to a scheme of arrangement whose rights are to be varied or discharged thereby are entitled to attend and vote at the Scheme meeting. In my view, that is what is envisaged and required by the relevant provisions of the Companies Act.

76. Section 86 of the Companies Act states that:

> *"(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them ... the Court may ... order a meeting of the creditors or class of creditors .... to be summoned in such manner as the Court directs.*
>
> *(2) If a majority in number representing seventy-five per cent in value of the creditors or class of creditors as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company.*

77. The Court is to summon a meeting of all those creditors who are made parties to the scheme and such creditors are entitled to vote. The Blocked Noteholders are to be made parties to the Scheme. They must be summoned to the Scheme meeting and allowed to vote.

78. As I pointed out to the Company at the convening hearing, parties to a scheme must be given the right to vote on it and if there are practical problems which make it difficult for them or limit their ability to exercise that right and vote then the company must do (and must show that it has done) everything which it can reasonably be expected to do to give the scheme creditors concerned the opportunity to exercise the right to vote. In this case, it seemed to me that Blocked Noteholders could be given the opportunity to vote. They had already been notified of the Scheme and arrangements for the Scheme Meeting and could access the Scheme documents via the Company's scheme website and it seemed to me that it must also be possible for the Company to make arrangements, as had been done with the RSA, for Blocked Noteholders to submit voting instructions and evidence of their status as Noteholders outside the clearing systems to suitable persons identified and appointed by the Company for the purpose. After the convening hearing, and following consultations with its advisers and the clearing systems, the Company confirmed that indeed this was possible and the Scheme documents and the arrangements for attendance and voting at the Scheme meeting were amended to allow Blocked Noteholders to attend and vote at the meeting.

79. The Company relied on the judgment of Meade J in *Nostrum* and it is worth noting precisely what the learned judge had said on this topic in his judgment (underlining added):

> *"13. There are certain regulatory approvals that the Company must obtain in order to implement the Restructuring, which arise due to certain of the Scheme Creditors being direct or indirect targets of sanctions in the UK, EU or US. Such Scheme Creditors ("the Sanctions Disqualified Persons") are currently prohibited from dealing with the Existing Notes. Approximately 7.1% by value of the Notes are held by Sanctions Disqualified Persons.*
>
> *14. The Restructuring may require licences to be granted by the sanctions authorities in the UK, the Netherlands and the US. I understand from Mr Allison QC, who appeared for the Company, that there is a possibility that the relevant authorities will indicate that no such licence is required (although this is less likely with the US). There is uncertainty as to when such licences (or confirmation that licences are not required) will be provided, which is why the moratorium is necessary to provide the Company with breathing room to implement the Restructuring.*
>
> ….

> 42. *Sanctions Disqualified Persons will not, because of their status as such, be able to vote on the Scheme. I note however that the (current) Sanctions Disqualified Persons signed up to the Lock-Up Agreement prior to their being sanctioned and this strongly indicates that they did not object to the Scheme and would be unlikely to do so now.*
>
> 43. *In any event, in my opinion the issue of sanctions relates, if anything, to the fairness of the Scheme, which is not a question I need to decide at this stage. I therefore agree with Mr Allison that the fact that there are Sanctions Disqualified Persons, and the mechanisms put in place to deal with sanctions, do not fracture the class. For completeness, I record that I slightly misunderstood the voting position in relation to Sanctions Disqualified Persons at the hearing because I was at cross-purposes with Mr Allison. The paragraphs above have been corrected following a helpful communication from the Company's Counsel after seeing my judgment. I am confident that my misunderstanding did not affect the result and I would have announced the same decision at the hearing anyway."*

80. It therefore appears that in *Nostrum* the Sanctions Disqualified Persons were prohibited by sanctions from dealing with their notes. That appears to have meant that it would have been unlawful for them to vote at the scheme meeting. That is not the position in this case. In addition, it appears that all the Sanctions Disqualified Persons had agreed to support and be bound by the scheme, so that their assent did not need to be established or confirmed by a vote at the scheme meeting. I do not need in this case to decide whether the Court would be willing to sanction a scheme where creditors who are made parties to the scheme cannot vote. I would say however that I am not currently satisfied that this is an issue which only goes to fairness.

International effectiveness of the Scheme

81. At the convening hearing, the Court also needs to consider, at that stage on a preliminary basis, whether there is no point in convening a meeting of creditors because even if scheme creditors were to vote in favour and the Court were to sanction the scheme it would ultimately be ineffective since the scheme would not bind creditors and would be of no effect in other jurisdictions in which the company concerned had valuable assets or could be subject to insolvency proceedings (and there was a real risk that dissenting creditors might take action there). The Court will not act in vain and will not sanction a scheme which will not be substantially effective and achieve its core purpose.

82. In this case the Old Notes are governed by New York law. While as a matter of Cayman law, the Scheme will be effective to discharge the Old Notes and Noteholders will be bound by the Scheme if sanctioned, the question arises as to whether the Scheme will be effective as a matter of New York law and whether Noteholders will be bound so that they cannot bring proceedings to enforce the Old Notes or to wind up the Company in another jurisdiction in which the Company has valuable assets or could be wound up (and whether there is a real risk that dissenting creditors would take such action). As I have noted, the Company is a holding company and its principal assets are the shares it holds in its subsidiaries, in particular Fangyou (a BVI incorporated company) and TM Home Limited (a Cayman incorporated company).

83. In order to ensure that the Scheme is binding and given effect as a matter of New York law, the Company intends to apply, if the Scheme is sanctioned, for relief under chapter 15 of the US Bankruptcy Code. As regards the prospects of obtaining and the effect of chapter 15 relief the Company relied on Judge Gropper's evidence. Judge Gropper, as I have noted, is a hugely experienced and highly respected former US Bankruptcy Judge for the Southern District of New York. He summarised his evidence at [9] and [10] of his Affidavit as follows:

> *"9. I have been asked to state whether in my opinion (i) a United States Bankruptcy Court with appropriate jurisdiction, including the United States Bankruptcy Court for the Southern District of New York, would recognize the Cayman Islands' judicial process of obtaining approval of the Scheme (the "**Proceeding**") as a foreign main proceeding under chapter 15; (ii) relief could be obtained to ensure that the Scheme would be enforced in the United States, given the Indentures are governed by New York law, and in accordance with such principles, a creditor would or could be prevented from bringing legal proceedings in the United States against the Company in contravention of the terms of the Scheme; (iii) the grant of appropriate relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes affected by the Scheme for the purposes of U.S federal and state law; and (iv) the third-party waivers and releases and exculpation provisions set out in substantially the same form as the draft Scheme would be enforceable in the United States. I have also been asked to address whether the Cayman Islands would be recognized as the center of main interests ("**COMI**") of the Company such that the Proceeding would be*

recognized as a "foreign main" proceeding under chapter 15 of the Bankruptcy Code.

10. *Based on the facts provided in the documents identified below and the analysis set forth herein, and subject to the qualifications stated, it is my opinion that (i) the Cayman Proceeding would be recognized as a "foreign main proceeding" under chapter 15 of the Bankruptcy Code; (ii) the Scheme will be effective in the United States in practice to bind Scheme Creditors in relation to the variation of their rights; (iii) relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes and related guarantees for the purposes of U.S. Federal and State law; and (iv) the third-party waivers, releases and exculpation provisions set out in substantially the same form as the draft Scheme will be enforceable in the United States. I can also confirm that principles of international comity remain important considerations for courts in the United States when considering applications to give effect in the United States to foreign proceedings."*

84. Judge Gropper's Affidavit sets out a fully reasoned analysis with reference to relevant authorities to support his conclusions. He dealt in depth with the test under the chapter 15 jurisprudence for determining COMI and said this at [24]:

"Based on the statute as construed by the cases discussed above, it is my opinion that the Proceeding in the Cayman Islands would be recognized by a U.S. bankruptcy court as a foreign main proceeding. As stated above, section 1516(c) of chapter 15 provides that the place of registration is presumed to be the debtor's COMI, and in the instant case we must start with the presumption that the Cayman Islands is the COMI. This presumption may be rebutted, but here there would be insufficient grounds to do so. The Cayman Islands is undoubtedly the "center of the Company's interests", taking into account the words of the statute as written. Indeed, the Company's future as an entity depends on its efforts to restructure debt that is in default. These efforts are all centered in the Cayman Islands - in the petition to this Court to convene a Scheme Meeting, in that the Scheme Meeting will take place in the Cayman Islands, and in this Court sanctioning the Scheme. I am informed that noteholders who wish to contact the Company in relation to the restructuring and/or the Scheme will be informed through a practice statement letter that they may do so by contacting A&M, a service provider located in the Cayman Islands by: (i) writing to a Cayman Islands address; (ii) sending an email to a Cayman Islands email address; or (iii) by telephoning A&M on a Cayman Islands telephone number. In any event, by the date of the filing of the chapter 15 petition, which is the critical date for chapter 15 purposes, the Company's very existence will depend on activities centered in the Cayman Islands."

85. Judge Gropper relied in particular on the decision of the Second Circuit Court of Appeals in *Morning Mist Holdings Ltd v Kris* 714 F.3d 127 (2d Cir. 2013) (***Morning Mist***) and noted that his conclusions were strongly supported by the recent decision of Judge Glenn, the Chief Judge of the Bankruptcy Court for the Southern District of New York, in *In re Modern Land (China) Co., Ltd* 2022 WL 2794014 (Bankr. S.D.N.Y, July 22, 2022) ("***Modern Land***"). He said this about that decision:

> *"My conclusions as set forth above are strongly supported by the Modern Land decision of Judge Glenn discussed above. In a case involving a company with many relevant similarities to the Company here, the Court held that recognition as a foreign main proceeding would be consistent with the goals of chapter 15, with creditors' expectations and with choice of law principles, among other things. The Court also stressed that the judicial role in that proceeding, like the instant proceeding, was prevalent and that it would not imply the requirement that provisional liquidators or their equivalent would be required in order to meet the standards for recognition. 2022 WL 27940 at *13-14.*

86. In Judge Gropper's opinion, the third party releases in the Scheme would not preclude the US Bankruptcy Court from granting relief under chapter 15 and that the relief which would be granted would include both recognition and enforcement of the discharge effected by the Scheme. The US Bankruptcy Court would "*give full force and effect*" to the provisions of the Scheme.

87. Judge Gropper also referred to the judgment of Mr Justice Harris in Hong Kong in *In re Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 16896 (***Rare Earth***). *Rare Earth* was a case involving a Hong Kong scheme in respect of a company incorporated in Bermuda which sought to discharge debt governed by Hong Kong law. But the learned judge made some comments regarding the approach of the Hong Kong courts to the effect and recognition in Hong Kong of chapter 15 relief granted by US Bankruptcy Courts in respect of schemes sanctioned in "*offshore jurisdictions*" which discharged New York law debt. Mr Justice Harris said as follows:

> *"31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under Chapter 15 and granting by the relevant Bankruptcy Court of ancillary relief which prohibited*

enforcement in the United States. As the offshore jurisdictions apply the Rule in Gibbs, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of China Oil.

32. *A scheme sanctioned in an offshore jurisdiction and recognised under Chapter 15 in the United States will not be treated by a Hong Kong court as compromising US$ debt. The Rule in Gibbs requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law. In the insolvency context in the United States this is I understand is achieved under Chapter 11 of United States Bankruptcy Code. This is explained by Glenn J (who dealt with the Chapter 15 application in Winsway) in his judgment in In re Agrokor d.d. In pages 184 to 185 Glenn J explains the position as follows:*

"The Supreme Court concluded in Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an in rem proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an in rem proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan…"

33. *As a matter of United States law a confirmed Chapter 11 plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under Chapter 15 does not operate as a discharge and that Glenn J acknowledges this.*

34. *On page 185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement Glenn J was asked to*

recognise was governed by English law and the arrangement arose under Croatia's Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia.

"From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement: Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the Gibbs rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law. That would be unfortunate, indeed."

35. *The material distinction between Chapter 11 and Chapter 15 proceedings is explained on page 187:*

"Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property that is located within the territorial jurisdiction of the United States. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. See, e.g., Atlas Shipping, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located in the United States. Id." (emphasis added)

36. *It is clear from this passage that recognition under Chapter 15 operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States' law to discharge the debt. Consistent with this at page 196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under Chapter 11 which purports to have*

worldwide effect, recognition under Chapter 15 is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.

37. *There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which Gibbs is concerned) and a court within its jurisdiction recognising, pursuant to a process such as Chapter 15, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under Chapter 15 does not constitute a compromise of debt governed by United States law, which satisfies the Rule in Gibbs. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US$ denominated debt has recently been subject to schemes only in offshore jurisdictions and recognition under Chapter 15. It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and Chapter 15 recognition will not protect them.*

88. Judge Gropper noted that Judge Glenn in *Modern Land* had considered that Mr Justice Harris' summary of applicable US law had not been correct. Judge Gropper made the following comments in his Affidavit (at [19]) (underlining added):

"In regard to these issues, mention should be made of the recent decision of a Hong Kong Court in a case captioned In the Matter of Rare Earth Magnesium Technology Group Holdings Limited, [2022] HKCFI 1686. There, the Court, taking it upon itself to construe United States law and quoting from the decision in the Agrokor case cited above, stated in dictum that it did not believe that an order under chapter 15 recognizing and enforcing a foreign proceeding discharges the underlying debt. With respect, I believe the Court's discussion of chapter 15 and its effect erred, and Judge Glenn, the author of the decision in Agrokor, stated his disagreement with the Hong Kong decision in his recent decision in Modern Land. Judge Glenn said that the Hong Kong Court had misinterpreted his Agrokor decision and, in the plainest terms, said:

> *"To be clear in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes [in Modern land's Cayman scheme] is "binding and effective." 2022 WL 2794014 at *5 (footnote omitted)."*

> *Therefore, as stated above, it is my opinion that an order of a court in a foreign insolvency proceeding under chapter 15 that meets the requirements of chapter 15 will be enforced in the United States and the relief granted will have the effect of discharging the debt and releasing guarantee claims against the Old Notes Subsidiary Guarantors for U.S. purposes, regardless of whether the debt is governed by U.S. law. If a court in Hong Kong or elsewhere refuses, for whatever reason, to give similar effect to a foreign scheme or liquidation, it will do so for its own reasons, not because of any issue arising under chapter 15 or other provision of U.S. law."*

89. The Company also relied on an opinion on Hong Kong law provided by Mr Ian De Witt, a partner in Tanner De Witt and a solicitor qualified in Hong Kong. His opinion dated 19 August 2022 was exhibited to Zhou 1. Mr De Witt opined (as I understood it) that if the Old Notes were treated as discharged in accordance with New York law, they would be treated as discharged as a matter of Hong Kong law. He relied on Judge Gropper's evidence for the proposition that the relief to be granted on the Company's application under chapter 15 would discharge the debts under the Old Notes and the obligations of the Subsidiary Guarantors and that therefore that such discharge would also be given effect under the law of Hong Kong as a result of the well-known rule in *Anthony Gibbs and Sons v La Societe Industrielle et Commercial des Metaux* (1890) 25 QBD 399 (***Gibbs***). As regards *Rare Earth*, Mr De Witt noted that Mr Justice Harris' "*analysis [did] not accord with the opinion given by [Judge] Gropper*" and that:

> *"In any event, the potential impact of Harris J's decision in respect of the effect of a Chapter 15 recognition is minimal as his statements are obiter and non-binding. This is because:*
>
> *(a). The debts compromised by the scheme of arrangement in [Rare Earth] did not concern any United States governed law debts..... It is unclear [how the effect of chapter 15 relief in a case involving the discharge of New York law debts by a foreign scheme] arose in the written decision.*
>
> *(b). It is not apparent from the written decision that his Lordship considered any expert opinion on New York law.*

> (c). *The sanction of the scheme of arrangement in [Rare Earth] was unopposed, thus any expert opinion adduced by the scheme company would not have been challenged."*

90. At the convening hearing I asked where the restructuring negotiations had taken place and Mr Herrod confirmed that they had largely taken place in the PRC including Hong Kong. I then asked whether this was a fact that Judge Gropper had considered and whether this might be relevant to his assessment of the location of the Company's COMI. Mr Herrod said that this was a matter that the Company would raise with Judge Gropper in advance of the sanction hearing.

91. Further, the Company also relied on the advice it had received from Maples' BVI attorneys as to applicable BVI law. In an email dated 5 August 2022, Mr Matthew Freeman, a partner of Maples in the BVI, noted that two of the Subsidiary Guarantors were incorporated in the BVI and that their guarantees were governed by New York law. He confirmed that in his opinion if sums due under the Old Notes and liability under the guarantees were discharged in accordance with New York law, then such discharge would be given effect in the BVI.

92. In view of these opinions and advice, I was satisfied that there were good grounds for concluding (and that it was reasonably likely) that the discharge effected by the Scheme would be given effect and be binding on Scheme Creditors under and as matter of New York law. It appeared that the Company would be seeking, following and in the event of the sanction of the Scheme, an order from the Bankruptcy Court for the Southern District of New York under chapter 15 (or pursuant to New York private international law applying comity) to the effect that the Released Claims would be treated as discharged under and as a matter of New York law and that there were good grounds for concluding (and that it was reasonably likely), based on Judge Gropper's evidence and recent authority (*Modern Land*), that the New York court would grant such relief.

93. It also appeared that there were good grounds for concluding (and that it was reasonably likely) that, applying the chapter 15 jurisprudence to the facts of the present case, the Company's COMI is to be treated in the Cayman Islands at the date of the filing of its chapter 15 petition.

94. I was also satisfied that in these circumstances, and applying *Gibbs*, the discharge under and resulting from the Scheme should be given effect and recognised as a matter of Hong Kong and BVI law. However, I recognise and respect the fact that Mr Justice Harris has taken a different view of the effect of relief under chapter 15 and do not disregard the importance of the *dicta* in his judgment in *Rare Earth*. It seemed to me that Mr De Witt had rather too heavily discounted the significance of those *dicta*. Nonetheless, in view of the clear decision of Judge Glenn in *Modern Land* and the strong opinion of Judge Gropper in his evidence in this case, I concluded that there were good grounds for concluding that a properly drafted order (which confirmed that the relevant debt was treated as discharged by the Scheme) did mean that under and as a matter of the law of New York the Released Claims would for all purposes be regarded as discharged and extinguished by the Scheme so that for the purpose of the rule in *Gibbs* the Released Claims would treated as having been discharged and extinguished in accordance with, as a matter of and under their proper law. I also concluded that Mr Justice Harris may wish (of course recognising that this is a matter entirely for him and the Hong Kong court) at least to review and revisit his analysis of the effect of relief under chapter 15 (with the benefit of Judge Glenn's opinion and in light of the terms of the orders made by the US court) and that, while the issue was likely to come before and require further consideration by the Hong Kong courts, the evidence before me was that the discharge of the Old Notes and the liabilities of the Subsidiary Guarantors under the Scheme would be effective in and under New York law and therefore should be given effect in Hong Kong law (once again recognising that it is for the Hong Kong court to determine questions of Hong Kong law and not for this court to do so). I can see that it might be the case that the Hong Kong court would wish to form its own view and be entitled to make its own decision as to the location of the Company's COMI when deciding whether itself to give common law assistance to Cayman appointed provisional liquidators or liquidators but it was not argued nor does it seem to me to be right to say that when the *Gibbs* rule is being applied the Hong Kong court can or should go behind and mount a collateral attack on the New York court's finding with respect to COMI and its order granting chapter 15 relief.

95. The position is the same as a matter of BVI law, which is clearly of considerable practical significance in this case since the Company has assets (shares in a major subsidiary) and two of the Subsidiary Guarantors are incorporated there.

Adequacy of the Explanatory Statement

96. I was generally satisfied that the Explanatory Statement provided adequate disclosure to Scheme Creditors. However, there were three issues which arose.

97. First, I noted that the Explanatory Statement did not provide Scheme Creditors with any details of the costs of the restructuring and Scheme process. It seemed to me that Scheme Creditors should have this information and I directed that it be provided.

98. Second, there was an issue whether the financial information contained or referred to in the Explanatory Statement was sufficiently up to date or could be considered to be stale, and whether audited financial statements should have been included. I have explained above the financial information which the Company included and referred to and the Company's explanation as to why it had not been possible or practicable to include audited financial statements or more recent financial information. I was satisfied that in the circumstances the financial information was sufficiently up to date to allow Scheme Creditors to make a properly informed decision as to how to vote on the Scheme and that the Company's explanations as to why audited financial statements were not available was reasonable.

99. Thirdly, there was an issue as to whether Kroll's liquidation analysis had been properly prepared and was sufficiently reliable. As I have noted, Kroll's liquidation analysis was not based on a company by company analysis of the likely outcome of a liquidation of each company. Instead Kroll adopted what they described as a segmented based approach under which Kroll put the Group's over three hundred companies into six sub-groups (segments) and aggregated the assets and liabilities of each sub-group (segment) for the purpose of estimating their estimate of the return to creditors of each company in the sub-group in the event of a liquidation of all the companies concerned. Kroll assumed that it was sufficient to give Scheme Creditors an analysis that based estimated returns for creditors of each company in a sub-group

on the *pro rata* amount that all creditors of all companies in the sub-group would receive if the proceeds from realisation of all assets of all such companies were aggregated and distributed among all such creditors to discharge the aggregate of all liabilities of all such companies. It appears that membership of the sub-groups was based on the companies concerned being part of the same business sector. I did have some concerns about this methodology which did not appear to be based on the impact of intercompany indebtedness between particular companies (a company in one segment might owe or be owed large sums by a company in another segment so that value would flow from or to such companies otherwise than through the segment) but concluded that it was not wholly unreasonable to assess the impact of the liquidation of a company by reference to and with the effect of a liquidation of other companies operating in the same business sector and that Kroll's approach was reasonable having regard to the number of companies concerned and the need to establish a workable and cost-effective methodology for the liquidation analysis.

Directions for the convening and conduct of the Scheme meeting

100. I was satisfied that the arrangements for convening and conducting the Scheme meeting were satisfactory. The Scheme meeting was to take place in the Cayman Islands at a time and in a manner that would allow Scheme Creditors from across the world, in particular from Asia, the UK and the US east coast to participate. Scheme Creditors were able to attend and vote at the Scheme Meeting by video conference using dial-in details which could be obtained on request from the Information Agent. Scheme Creditors who attended via video conference would be able to see and hear and be seen and heard by other Scheme Creditors attending the Scheme meeting so as so ensure that there would be an adequate "*coming together*" of Scheme Creditors and an ability for them to consult among themselves (see Trower J's judgment in *Re Castle Trust Direct PLC* [2021] BCC 1 at [42]). At the convening hearing I indicated that it would be necessary for the chairperson at the Scheme meeting to confirm in his report to the Court on the outcome of the Scheme meeting for the purpose of the sanction hearing that the technology had worked properly and that Scheme Creditors were in fact able to see and hear each other and consult in this way.

101. As I have noted, following the convening hearing the Convening Order was amended to allow the Blocked Noteholders to attend and vote at the Scheme meeting. A form of voting form (the ***Blocked Scheme Creditor Voting Form***) was prepared for use by the Blocked Noteholders and the Convening Order provided that votes cast by Blocked Noteholders using the Blocked Scheme Creditor Voting Form were to be counted by the chairperson at the Scheme meeting.

The outcome of the Scheme meeting

102. The Scheme meeting was duly held on 2 November 2022 in accordance with the terms of the Convening Order and the Scheme Creditors in attendance at the Scheme Meeting overwhelmingly approved the Scheme. Of those Scheme Creditors present and voting at the Scheme Meeting, 99.96% by value and 99.87% by number voted in favour of the Scheme. In particular, of those Blocked Noteholders present and voting at the Scheme meeting, all Blocked Noteholders voted in favour of the Scheme and none voted against. All of the Blocked Noteholders who voted in favour of the Scheme were Consenting Creditors.

Further amendment to the Scheme

103. Shortly before the sanction hearing, the Company filed Zhou 6. In that affirmation, Mr Zhou explained that Deutsche Bank AG, Hong Kong, who has been engaged to act as the New Depository, had recently informed the Company that it would not sign the deed of undertaking on the basis that it had no direct contact with the Company. Its role and relationship was only with the clearing systems. Mr Zhou said that Deutsche Bank AG had no obligations under the Scheme and so did not need to be party to the deed of undertaking. Nonetheless, it had been necessary to amend the form of deed of undertaking to remove Deutsche Bank AG as a party and to make minor amendments to the Scheme to reflect the fact that Deutsche Bank AG would not be a party. The Company indicated that it would be seeking the sanction of the Scheme with this amendment and submitted, and I accept, that it had the power to make this minor change pursuant to clause 17 of the Scheme.

Longstop Date

104. At the sanction hearing, the Company confirmed that it would be exercising the power under clause 10.1(a) of the Scheme of extending the Longstop Date to 14 December 2022 and would, if the Scheme was sanctioned, give notice to this effect to Scheme Creditors in the Scheme Effective Notice.

The issues arising at the sanction hearing

105. In my judgment in *Re Freeman FinTech Corporation Ltd* (unreported, 4 February 2021) (***Freeman FinTech***) I set out and summarised the law regarding the function of, and the approach to be adopted by, the Court at the sanction hearing (see [16] – [17]). I also set out the approach to be taken where there were issues as to the international effectiveness of the scheme (see [31]). I also note that the approach to be adopted and issues to be considered by the Court at the sanction hearing were well summarised even more recently by Mellor J when sanctioning the scheme in *Re Nostrum* [2022] EWHC 2249 (Ch) at [15] – [18].

106. The issues to be considered can be summarised as follows:

(a). first, that the Company has complied with the terms of the Convening Order and the Further Convening Order in convening the Scheme meeting and that the requisite statutory majorities under section 86(2) of the Companies Act were achieved at the Scheme meeting (***Issue One***).

(b). secondly, that the class of Scheme Creditors was fairly and adequately represented by those who attended the Scheme meeting and that the statutory majorities were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purported to represent (***Issue Two***).

(c). thirdly, that the Scheme is a scheme of arrangement that is fair, in the sense that an intelligent and honest person, being a member of the class concerned and acting in

respect of his/her interest, might reasonably approve of it and that, as a matter of its residual discretion, the Court should sanction the Scheme (***Issue Three***).

(d). fourthly, that there is no other blot or defect in the Scheme which would warrant the Court refusing to sanction the Scheme (***Issue Four***).

(e). fifthly, in the case of a scheme with an international element, that the Court will not be acting in vain if it sanctions the Scheme. This requires consideration of whether the scheme will be recognised and given effect in other relevant jurisdictions. This was, as I have noted above, addressed in a preliminary way without the benefit of the results of the Scheme Meeting, at the convening hearing but needs to be reviewed again at the sanction stage (***Issue Five***).

Issue One

107. As regards Issue 1, I am satisfied that the additional evidence filed by the Company in advance of the sanction hearing demonstrates that the Scheme meeting was convened and conducted in accordance with the Convening Order and the Further Convening Order (and was quorate). I note in particular the evidence in Zhang 1 regarding the effectiveness of the video conference facilities. All Scheme Creditors who could not, or did not, wish to attend at the Scheme meeting venue including the Blocked Noteholders who were invited to vote by lodging duly completed Blocked Scheme Creditor Voting Forms and to attend the Scheme meeting, provided that they were able to have their identity/authority, status as Noteholder, and the size of their note holding verified by the Company prior to the Scheme Meeting. CICC provided and hosted the video conference facilities for the Scheme meeting using Zoom. One Scheme Creditor attended the Scheme meeting by video conference and no Blocked Noteholders indicated they would like to attend or attended the Scheme meeting. The person who joined via video conference could see and hear the proceedings at the Scheme Meeting venue, they could see each other and be seen by those at the Scheme Meeting venue and had the opportunity to ask questions or express opinions by using the chat function.

Issue Two

108. The Court is bound to assess whether the vote at the Scheme meeting was representative of the class of Scheme Creditors. In *Re BTR plc* [2000] 1 BCLC 740 at 747 Chadwick LJ stated that:

> *"The way in which Parliament's intention is to be given effect – as it seems to me and as it has seemed to judges over the century or so since Bowen LJ considered the matter in 1892 – is that the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court. That, as it seems to me, is the check or balance which Parliament has envisaged."*

109. Similarly, in *Re The Scottish Lion Insurance Co Ltd* [2010] SCLR 107 at [37] Lord Glennie stated that:

> *"[T]he grounds upon which an opposing creditor may seek to oppose the scheme are clearly wider than perversity, dishonesty and irrationality. The opposing creditor is entitled to seek to prove that the voting was unfair, unrepresentative or affected by special interests."*

110. I accept the Company's submission that in this case there is no reason to believe, and no evidence, that the views of those Scheme Creditors who voted at the Scheme meeting do not fairly represent the views of the Scheme Creditors as a whole. Neither is there any reason to believe or evidence that they were not acting *bona fide* or that they were being coerced.

Issue Three

111. The Court must also be satisfied that the proposed Scheme is fair such that as a matter of discretion it is appropriate to sanction the Scheme. Putting the same point another way, the

Court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme.

112. In *Re SPhinX Group of Companies*, [2014] (2) CILR 152 at [3] Chief Justice Smellie summarised the role of the Court at the sanction hearing as follows:

> *"At the third stage of the process, it is apparent that the role of the court is a limited one. Although it is often referred to as the stage at which the court will consider issues relating to the "fairness" of the proposed scheme, the task of the court at the sanction stage is not to pass its own subjective judgment on the merits of a scheme. The court takes the view that in commercial matters, members or creditors are much better judges of their own interests than the court."*

113. In applying this test, the Court is required to consider the relevant comparator to the Scheme. In the present case, the evidence shows that the Scheme is likely to produce or at least facilitate a considerably better recovery for Scheme Creditors than a liquidation.

114. It seems to me that the Scheme is obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. The commercial purpose of the Scheme was clearly explained in the Explanatory Statement and it appears that the Scheme offers material benefits to Scheme Creditors. Furthermore, Scheme Creditors have, both as regards the terms of and the procedure of voting on the Scheme, as a result of the directions given to permit Blocked Noteholders to attend and vote at the Scheme meeting, been treated fairly and I see nothing unfair in the Company agreeing to pay the Instruction Fee only to Consenting Creditors.

115. I also accept the Company's submission that the arrangements relating to the Holding Period Trust and, potentially, the Successor Trust for Blocked Noteholders are necessary, reasonable and fair in the circumstances. As the Company pointed out, the structure it adopted mirrors and responds to the block currently imposed by the clearing systems. The position of the Blocked Noteholders under the Scheme is no different from their position as holders of the Old Notes in that they are unable to receive consideration until that block is lifted. Furthermore, the Company has not arbitrarily imposed this structure on the Blocked Noteholders but explored,

under considerable time pressure, a number of alternatives. The Company will be able to review the status of sanctions and the position of Blocked Noteholders after three years at the end of the Holding Period Trust and before setting up and if required transferring the Blocked Noteholders' Scheme consideration to the Successor Trust. I also note that none of the Blocked Noteholders have objected to these arrangements.

Issue Four

116. The Court must also be satisfied that there is no blot on or defect in the Scheme that would warrant refusal to sanction the Scheme. I accept the Company's submission that no question of a blot or other defect arises in this case.

Issue Five

117. In *Freeman FinTech* I explained at [31] the Court's approach when considering the international effectiveness issue:

"31. *In my view, the following points summarise the approach which the Court should adopt in the present and similar cases:*

(a). the Court needs to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme.

(b). the Court needs to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the creditor not being bound by the scheme or the sanction order. This was why in this case I required further evidence to be provided as to whether the Company had considered whether the Macau Creditor could obtain a judgment in a jurisdiction in which the Cayman Scheme was not recognised and enforce that judgment or otherwise obtain execution in a jurisdiction in which the Company had assets and which would also not recognise the Cayman Scheme. I indicated that there should be evidence as to the nature and extent

of the risks associated with having a creditor, who is owed a not insubstantial sum, left outside and not bound by the Cayman Scheme. In this connection, I note the following comments of Snowden J in Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch) at [71], after referring to Sompo Japan (underlining added):

"In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the scheme companies in other countries on the basis of an assertion of their old rights. The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain."

(c). *the Court needs to consider whether on the evidence it is appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who are not bound and are likely to be able to take action in other jurisdictions. This assessment will be made in light of the location of the company's assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that may impact the recovery and rights of creditors and others under the scheme). The Court will consider, as Lloyd J put it in his judgment at first instance in Garuda (2001 and WL 1171948, which was upheld by the Court of Appeal) the "risk of disturbance." In appropriate cases, the fact that significant claims may not be bound by the scheme may not prevent the Court sanctioning the scheme where there are clear and real benefits that will be derived from the scheme and which are unlikely to be disturbed by hostile action following sanction. In Sompo Japan, a case involving an insurance business transfer scheme where what mattered most was the effectiveness of the transfer, the evidence established that only something over 27% of the policies in number and by reference to reserves were governed by English law. Nonetheless, since it was reasonable to suppose that the transfer would be effective in any relevant jurisdictions as regards those policies, the scheme would achieve a substantial purpose, irrespective of the fact that it also extended to a larger class of business not governed by English law. If the scheme is likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the Court will be likely to sanction the scheme despite some creditors not being bound and the risk of enforcement action by them. But the Court will wish carefully to consider the risks in each case. It will be relevant that the creditor or creditors in question had indicated support for the scheme and an intention not to take action, as was the case in China*

> *Lumena, or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme, as in Garuda.*
>
> *(d). it also seems to me that the Court needs to consider the issue of fairness in this context. If those who are bound by the scheme have accepted a haircut or other variation or discharge of their rights and claims, it may be unfair to sanction the scheme and hold them to the terms of the scheme if there is a serious risk that other creditors will be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by Scheme Creditors under the scheme). It may be relevant in this context to have regard to the extent to which creditors were made aware of the risks in the explanatory statement before voting, as in Garuda."*

118. I have already discussed at some length the approach I took to this issue at the convening hearing. But something further briefly needs to be said on the point since the Company filed further evidence from Judge Gropper after the convening hearing, the outcome of the Scheme meeting is now known and the issue falls to be reconsidered and assessed in the context of the exercise of the Court's discretion to sanction the Scheme.

119. On 28 September 2022 Judge Gropper wrote a letter to the Company, which was adduced into evidence by being exhibited to Zhou 5. In that letter Judge Gropper confirmed that he had been told that the restructuring negotiations leading to the proposed Scheme had taken place in the PRC including Hong Kong and that his opinions and conclusions set out in his Affidavit were unaffected. He noted, *inter alia*, that in *Morning Mist* the critical factor confirming that BVI was the COMI of the company was the fact that the scheme was considered and sanctioned there. Judge Gropper also noted the criticisms of the decision by Professor Jay Westbrook, a well–respected academic and bankruptcy law specialist from the University of Texas, but confirmed his view that *Modern Land* was correctly decided and that in his view Professor Westbrook's views were unpersuasive.

120. Accordingly, Judge Gropper has strongly reiterated his opinion and the analysis of the applicable law that I applied for the purpose of the convening hearing remains unaffected. Furthermore, the very substantial vote in favour of the Scheme by Noteholders and the

complete absence of any opposition to the Scheme means that, applying the test I set out in *Freeman FinTech*, it must be right to conclude that the risk of a successful challenge to the effectiveness is very low. There is a risk that the very small percentage of Noteholders who did not vote in favour of the Scheme could, even assuming that the New York Bankruptcy Judge grants the relief sought under chapter 15, seek to take action in Hong Kong but it is far from clear that they would be entitled to do so as a matter of law or that any action would prevent the Scheme being implemented. In any event, there is no evidence that any such Noteholders are considering or would wish to do so.

121. There is of course the risk that New York Bankruptcy Judge will decline to grant the relief sought by the Company. It is a condition to the effectiveness of the Scheme that such relief is granted. I was told at the sanction hearing that the Company's chapter 15 petition is due to be heard by The Honorable John P. Mastando III on Monday (14 November). It will, obviously, be a matter for Judge Mastando. The Company pointed out at the sanction hearing that this condition is one that it is permitted to waive and that should the relief it seeks not be granted it will need to consider its position and whether to waive the condition. This would be a possibility in this case in view of the very high level of support that the Scheme has obtained. Of course, in this event, the Company has the ability under the Scheme to apply for directions from this Court (see clause 19 of the Scheme). As I noted in *Re China Agrotech* [2019 2 CILR 356] at [35] the Court has the power to sanction a scheme subject to the satisfaction of conditions to implementation which are unsatisfied at the hearing date (following the reasoning of Henderson, J. in *Lombard Medical* [2014] EWHC 2457 (Ch)) and will do so where those conditions can reasonably be expected to be satisfied within a reasonably short time. I was satisfied in the present case that it was reasonably likely that the chapter 15 petition would be granted and in any event that since it was due to be heard very shortly after the sanction hearing any difficulties would emerge and could be dealt with promptly; that the conditions that needed to be satisfied in order to allow the Restructuring Effective Date to occur were administrative or otherwise likely to occur and that the amended Longstop Date was in the near future and reasonable in the circumstances.

122. I have also considered, in the context of the exercise of my discretion to sanction the Scheme, whether there are any grounds for concluding that the use of a Cayman scheme in the present case represents an abuse of process or improper forum shopping, having regard in particular to the fact that the debt subject to the Scheme is governed by New York law and the Company's strong connections with Hong Kong and the PRC. I note that no Scheme Creditor has raised any objection to a Scheme being promoted in this jurisdiction; in fact the position is the reverse. Virtually all the Noteholders have supported and voted in favour of the Scheme. In those circumstances, and generally in the circumstances of this case, it seems to me that the application for a scheme in this jurisdiction was proper and justifiable. I must say that I sometimes have a concern that when courts seek to be overly prescriptive as to when and whether it is legitimate for foreign courts to exercise jurisdiction in respect of cross-border restructuring or insolvency proceedings they do so without regard to whether creditors have objections. It seems to me that we need to adopt a flexible approach that gives companies the opportunity properly to make use of procedures in jurisdictions with which they have a sufficient and appropriate connection, where that is done in the interests of and with the support of creditors and adopt a case by case and fact sensitive basis that involves the rejection of attempts by companies to use foreign proceedings which harm or are objected to by creditors but not to intervene where they do not.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
17 November 2022

Neutral Citation Number: [2020] EWHC 2779 (Ch)

Claim No: CR-2020-003944

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 15/10/2020

Before:

MR. JUSTICE TROWER

- -

IN THE MATTER OF KCA DEUTAG UK FINANCE PLC

-and -

IN THE MATTER OF THE COMPANIES ACT 2006

- -
- -

MR. DAVID ALLISON QC and MR. ADAM AL-ATTAR (instructed by **Allen & Overy LLP**) for the **Company.**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE TROWER

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MR. JUSTICE TROWER :

1. This is an application by KCA Deutag UK Finance plc (the "company") for an order convening a single meeting to be held for the consideration and approval of a scheme of arrangement between the company and its scheme creditors pursuant to Part 26 of the Companies Act 2006.

2. The company is incorporated in England with its COMI in England. It is a finance company within the KCA Deutag group (the "group"), which is a global conglomerate carrying on business in the oil drilling sector. The group operates both onshore and offshore and is one of the world's largest international land drilling contractors. It operates in more than 15 countries with a strong presence in Europe, including the North Sea, Russia, Africa and the Middle East.

3. The scheme creditors are the holders of certain notes issued by the company and lenders under a credit agreement entered into with the company and its affiliates. Both the notes and the credit agreement were originally governed by New York law and subject to a New York jurisdiction clause, although I will return to this point shortly.

4. The amounts outstanding under the existing notes are some $375 million plus accrued plus interest payable under 7.25% senior secured notes ("SSNs") due in 2021, some $535 plus accrued interest payable on 9.875% SSNs due in 2022, and some $400 million plus accrued interest payable on 9.625% SSNs due in 2023.

5. The company was originally liable as a guarantor in respect of the debt incurred under the credit agreement. The debt comprises just over $400 million plus accrued interest payable under a term loan, borrowed by the German company in the KCA group, c.$95 million plus accrued interest payable under a revolving loan, originally borrowed by a company in the group called Abbot Group Limited, and the liabilities (c.$111 million plus accrued interest as at 30 September 2020) outstanding under a $115 million overdraft facility made available by HSBC as an ancillary facility under the credit agreement.

6. There are two further facilities under the credit agreement in respect of which approximately $60 million is outstanding which are not being compromised by the scheme, but which will be restructured by bilateral arrangements with the creditors concerned.

7. In circumstances which I will explain shortly, the company, although originally only a guarantor, has recently undertaken an obligation to contribute to amounts paid by the borrowers under the terms of the credit agreement. In practical terms, this means that, as against those other entities it has become a co-obligor.

8. The scheme creditors are all secured. The noteholders and lenders under the credit agreement all rank equally and share the same security package under the terms of an intercreditor agreement.

9. The restructuring arises out of a strategic review of the group's balance sheet and capital structure conducted between August 2019 and March 2020. The range of options available to the group was at that stage severely limited both by the Covid-19 pandemic and the subsequent collapse in the price of oil. These two factors have had a severe

impact upon the group with both revenue and EBITDA forecast to decline substantially. The position is now that the group is unable to meet its ongoing liquidity requirements and address its EBITDA decline without a material reduction in its indebtedness.

10. On 26th March, the group announced that it was planning to defer payment of interest under the 2022 and 2023 notes and that it would be formally engaging with its creditors, including an ad-hoc committee of existing noteholders and term loan lenders (the "Ad-Hoc Committee") and the RCF lenders under the credit agreement. Not long thereafter the company entered into a standstill agreement with the members of the Ad-Hoc Committee and the RCF lenders under the credit agreement. As its name suggests, there was agreement under the standstill agreement that the group would not make the April 2020 interest payments or any other interest payments under the indentures or the credit agreement during the period of the standstill. It was also provided that acceding creditors would not trade their notes or loans other than to creditors that were also party to the standstill agreement.

11. In consideration for this forbearance the group gave various undertakings and accepted certain restrictions on the conduct of its business. There was also an agreement entered into with other members of the group for the payment of a work fee to certain members of the AdHoc Committee and certain of the RCF lenders. This work fee amounted to an aggregate 1.75% of the credit exposure of the relevant creditors as at 30 April 2020. I will revert to the relevance of this arrangement a little later. However, the work fees agreed had been paid in full by 10th September and were not conditional on the scheme being sanctioned.

12. By the end of July, the company and certain other members of the group had also entered into a lock-up agreement with members of the Ad-Hoc Committee and certain of the RCF lenders by which they agreed to support and facilitate the formulation and implementation of the restructuring. In consideration for agreeing to the lock-up, the acceding creditors were entitled to a fee of 0.15% of their exposure to the company. The up-to-date position as at 8th October, and I do not have any figures since then, is that some 96.86% of the scheme creditors have acceded to the lock-up agreement.

13. Pursuant to the terms of the lock-up agreement, the indentures for the notes and the credit agreements were amended to provide for English jurisdiction to apply. The company has obtained expert evidence which confirms that the change in jurisdiction is effective as a matter of New York law.

14. The scheme that is now proposed by the company as a result of the engagement with its creditors is a restructuring, the essential elements of which are relatively straightforward to summarise. The indebtedness under the existing notes and the scheme claims under the credit agreement, which amount in aggregate to some $1.9 billion, will be released in exchange for $500 million of new 9.875% SSNs and ordinary shares to be issued by a Jersey incorporated newco ("Jersey Newco") to be allotted to scheme creditors pro rata to the financial indebtedness owed to them under the existing instruments. The new notes will be held in Euroclear and Clearstream. The new equity will not be listed.

15. The characteristics of the instruments which the term lenders will receive in exchange for their existing indebtedness are in some respects different from the characteristics of the instruments that they presently enjoy. This point has been raised by one creditor,

although there is at best a question mark over whether it has any relevance to the issues which I am asked to decide today.

16. The effect of the restructuring will be to reduce the company's total debt by approximately $1.4 billion and the annual debt servicing costs from $155 million to $49 million. The restructured group will have a strengthened balance sheet so that it will have a net leverage of 1.4 times its asset value as compared to its current leverage of 6.3.

17. The reduction in the face value of scheme creditors' debt is considerable, but the company considers that the scheme creditors will receive a significant upside return for their receipt of the new equity. Deloitte, who have been instructed by the group for this purpose, have estimated that the enterprise value of the group is between $1.2 billion and $1.5 billion, which as against the restructured debt implies a surplus of somewhere between $695 million and $995 million.

18. As is not unusual in restructurings of this sort, there is voluminous documentation to implement the steps necessary to achieve the rearrangement of creditor rights pursuant to the terms of the scheme. The legal structure of the scheme itself is the grant of authority to the company and others to execute the implementation documents. These steps include the release of scheme claims and existing security, the entry into of new debt documents, the issue of new notes, the issue of shares in the Jersey Newco and the execution of a Deed of Release covering, amongst other things, a discharge of claims against those involved in the negotiation, preparation or implementation of the restructuring.

19. It is well established that the function of the court at the convening stage is not to consider the merits or fairness of the proposed scheme. Those questions arise for consideration at the sanction hearing if the scheme is approved by the statutory majority: see David Richards J in *Re: Telewest Communications plc (No. 1)* [2004] BBC 342 at paragraph 14. At this stage, and as is confirmed by the Practice Statement issued by the Chancellor on 26th June 2020, the applicant should draw to the attention of the court for determination, if appropriate, any issues concerning the composition of classes, the jurisdiction to sanction the scheme or any other matters (save in relation to the merits of the scheme), which might lead the court not to sanction the scheme.

20. The Practice Statement also makes clear that, unless there are good reasons for not doing so, the applicant should take all steps reasonably open to it to notify any person affected by the scheme that it is being promoted, the purpose for which the scheme is promulgated, the meetings of creditors which the applicant considers will be appropriate and their composition, any matters affecting the jurisdiction to sanction the scheme or indeed any other matter, save in relation to the merits, which might lead the court not to do so.

21. Notice should be given in sufficient time to enable those affected by the scheme to consider what is proposed, to take appropriate advice and if so advised to attend the convening hearing. What is adequate notice will depend on all the circumstances. The evidence at the convening hearing should explain the steps that have been taken to give the notification and what response, if any, the applicant has had.

22. The evidence in this case shows that the way that notification was done was as follows. On 11th September 2020, a Practice Statement letter was uploaded on to the scheme website to which all creditors who were party to the standstill or lock-up agreements had access. It was also circulated to the agents for the term loan and the RCF lenders and sent to the corporate actions area for each clearing system and published by the Luxembourg Stock Exchange, on which, as I understand it, the existing SSNs are listed. I have read the Practice Statement letter. In my view the steps that were taken by the company to circulate the letter were sufficient to comply with paragraph 7 of the Practice Statement. Furthermore, I am satisfied that its contents complied with the requirements of the Practice Statement.

23. In deciding whether or not to order the meetings of creditors, the court will consider whether more than one meeting of creditors is required and, if so, the appropriate composition. Creditors are entitled to appear at the convening hearing and raise objections to class composition.

24. This brings me, therefore, to the class issues with which this convening hearing is primarily concerned. The fact that no class issues have been raised by creditors attending the hearing (although as I will come to shortly there is correspondence which I must consider), does not relieve me from considering whether the companies have approached the question of class constitution in the right way, bearing in mind that the court will not normally wish to revisit class issues at the sanction hearing. Of course, it may ultimately do so if creditors have a good reason for why they did not raise a challenge at this stage.

25. As to the constitution of classes, the relevant principles are well known. The overarching question is whether the pre and post scheme rights of those proposed to be included in a single class are so dissimilar as to make it impossible for them to consult with a view to their common interest. If that is the case, separate meetings must be summoned. As Lord Millett put it in *Re UDL Holdings Ltd* [2002] 1 HKC 172 at 184:

> "Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting."

26. In considering that question, the court is concerned with the rights of creditors, not their separate commercial or other interests. Divergence of rights, not differences in commercial interest, are the litmus test which determine whether they form a single class or separate classes. Conflicting interests will normally only ever arise at the sanction stage, when the court is concerned with more general issues of fairness, a point that was explained by Hildyard J in *Re Primacom Holding GmbH* [2013] BCC 201, at [4445], where he said this:

> "The golden thread of these authorities, as I see it, is to emphasise time and again...[that] in determining whether the constituent creditors' rights in relation to the company are so dissimilar as to make it impossible for them to consult together with a view to their common interest the court must focus, and focus exclusively, on rights as distinct from interests. The

> essential requirement is that the class should be comprised only of persons whose rights in terms of their existing and the rights offered in the replacement, in each case against the company, are sufficiently similar to enable them to properly consult and identify their true interests together."

27. It is also well established that the court should take a broad approach to the composition of classes so as to avoid giving unjustified veto rights to a minority group of creditors, such that the test for classes becomes an instrument of oppression by a minority, a point made very clearly by the Court of Appeal in *Re Hawk Insurance Company Limited* [2001] EWCA Civ 24, at [34]. If the court becomes too picky in relation to classes, as it was put by Neuberger J in *Re Anglo American Insurance Company Limited* [2001] 1 BCLC 755, at 764, that can lead to as many classes as there are members of a particular group and render the whole process completely impractical.

28. In assessing the extent and relevance of any difference in rights, it is important, although not determinative, to identify what has come to be called the comparator. The court has to compare, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If having carried out that exercise there is a material difference between the rights of the different groups, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest.

29. Applying these principles to the present case, the company submits that scheme creditors fall into a single class. In particular, it is said that they all have the same antecedent rights and all are being treated in materially the same way under the scheme. In making that submission, the company argued that the correct comparator was financial distress in which the security was enforceable, which is the present state and condition of the company subject to the terms of the lock-up agreement, and, secondly, the real possibility of a formal group insolvency in certain events, including the failure of the present restructuring proposals.

30. There is detailed evidence from Deloitte as to the returns in those circumstances, which is also referred to in the explanatory statement. I am satisfied that the submission as to the correct comparator in the present case is justified by the detailed evidence of Mr. Gilchrist, one of the company's directors, as to what is likely to happen if the scheme is not approved and sanctioned. Whatever the creditors' rights are in that context, i.e. the context of the two-headed comparator that I have identified, are the rights with which the varied rights under the scheme must be compared.

31. I agree with the company's submission that the reason that all creditors have materially the same antecedent rights is that all of them benefit from the same guarantee and security package. They all rank *pari passu* under the terms of the intercreditor agreement. The instruments that govern their indebtedness are all now capable of acceleration and the security granted in connection with the indebtedness is now enforceable, subject only to the terms of the lockup agreement.

32. Furthermore, because the correct comparator for the purposes of assessing the nature and extent of the bundle of rights which each creditor has is the real prospect of an

eventual formal insolvency, the differing economic terms and maturities of the debt instruments have a reduced relevance in the exercise of comparative consideration which they must be taken to be carrying out. If insolvency were to eventuate, which creditors must be taken to anticipate as a real possibility, all claims will be accelerated and no interest will continue to accrue. Even if insolvency were not to be the correct comparator, I doubt that the differences in maturity date and interest rates in the present case would be sufficiently material to mean that it is impossible for all scheme creditors to consult together with a view to their common interest.

33. The company has, however, drawn attention to a number of other matters which may be thought to fracture what would otherwise be a single class, although in the event, it submits that they do not do so.

34. The first is the existence of the lockup agreement itself. The present position is that in excess of 96% of scheme creditors have acceded to the agreement. I agree with the company's submission that the mere fact that a creditor has bound itself to facilitate the implementation of a scheme before the scheme meetings are held, and taken on the other obligations undertaken and rights granted under the terms of the lockup agreement, does not mean that a class issue arises: see the discussion of David Richards J in *Re Telewest Telecommunication plc (No. 1)* [2005] 1 BCLC 752, at [53].

35. In the present case, as is now commonplace, a fee was payable to creditors. It has been paid in consideration for the creditors' agreement to lock-up. The company's evidence is that the lock-up fee was considered to be appropriate in order to secure early support from the proposed restructuring from a diverse group of scheme creditors. I am satisfied that the evidence is consistent with this being the purpose for the payment of a lock-up fee in the present case. In particular, it appears not only that the fee was paid to facilitate implementation of the restructuring, but also that it was available to all scheme creditors, a factor of significance in all cases, and is of an amount, some 0.15% of each claim, which is unlikely to have made a material difference to the question of whether or not they should vote in favour of the scheme.

36. There are a number of decisions which have considered the circumstances in which a lockup fee might give rise to the fracturing of a class, and it is not necessary for me to add to the jurisprudence on the subject. They include most recently, I think, the decision of Falk J in *Re HEMA UK 1 Ltd* [2020] EWHC 2219 (Ch) at [36-37], in which she crisply summarises the position as follows:

> "In order to encourage a significant number of creditors to sign up to the lock-up agreement, a fee equivalent to 1% of the face value of the SSNs held by the relevant creditors is offered if they signed up by 15th July. The fee is not payable in cash, it is proposed to be paid in the form of additional amended SSNs, so it will be issued if and when the restructuring becomes effected. I am satisfied that this fee does not fracture the class. First, whilst it is not strictly available under the terms of the scheme, it has in reality been made available to all scheme creditors, and may in practice be regarded as a right conferred by the scheme in the sense that it will become effective and the notes will be issued if the restructuring is implemented.

> Certainly, there is a real question mark over whether in the circumstances the fee is material."

In my view, those kinds of consideration are equally applicable to the present case.

37. The company also drew attention to the fact that it has reimbursed adviser fees incurred by the Ad-Hoc Committee and RCF lenders. It suffices to say that I am satisfied that this does not give rise to a class issue either. As Zacaroli J said in *Re Lecta Paper UK Limited* [2019] EWHC 3615 (Ch) at [18]:

> "Since, however, this is limited to reimbursing the members of the committee for the disbursements actually incurred by them, and since they are payable in any event and not dependent upon sanction of the scheme, this does not fracture the class."

In my view, the same can be said about the payment of adviser fees in the present case.

38. The third category of fee is described in the papers as a work fee. This category of fee has given rise to a considerable amount of controversy in recent years. The reason for this is that a work fee is particularly susceptible to characterisation as disguised consideration for an agreement by the recipient to the rearrangement of its rights in accordance with the terms of the scheme. Where its receipt is limited to a small group of influential creditors involved in the design and formulation of the arrangement to the exclusion of other members of the same class, there are real grounds for concern.

39. Concern that this might be the reality in other cases has most recently been discussed in the judgment of Falk J in *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2441 (Ch) at [64]-[67], picking up on the earlier comments of Snowden J in *Re Noble Group Ltd* [2019] BCC 349, at [132]. The concerns which were expressed by Falk J are of real weight and substance in some cases, but it is important to give careful consideration to the structure of any work fee entitlement on the facts of each particular case. So long as the entitlement to a work fee reflects in broad terms the true value of the work provided by the creditors concerned, and does not depend on the scheme being sanctioned, there may well be no difficulty. All the more so in circumstances in which there is no indication that creditors who wish to assist in the formulation and implementation of the scheme, thereby (amongst other things) being able to earn the work fee, were excluded from the ability to do so.

40. On this issue, the only person who has expressed opposition to the scheme in writing is NCC CLO Manager LLC ("Nassau") in its capacity as the manager of three linked investment entities, each of which is an investor in the term loan. It has criticised in trenchant terms the fact that the Ad-Hoc Committee has secured the right to a work fee. In part, this criticism relates to the amount in aggregate of the fee the company committed to pay, i.e. some 1.75% of more than $1 billion of collective exposure. In part, it also challenged the work described as having been done by the Ad-Hoc Committee, characterising it as purported work and the amount paid as being outrageous.

41. The answer given by the company is that this is a case in which the work fee is less closely tied to the scheme than others because it precedes the lock-up agreement by some months. In any event, there are a number of other explanations said to justify the

fee, given in answer to what was said by Nassau. They are most crisply and clearly summarised in a letter from Allen & Overy which is supported by the evidence in the following terms:

> "Prior to agreeing the Work Fee Letters, the Group sought advice from its financial advisers on the level of work fees paid in comparable recent cross-border restructurings to ensure that the fees being negotiated with the Ad-Hoc Committee and the RCF lenders were in line with those precedents, bearing in mind the Group's situation in April 2020 and the work anticipated to be required from the key creditor stakeholders in order to agree and implement a restructuring transaction. The Group was and remains satisfied that the work fees proposed were appropriate and in line with recent market precedents, though it successfully negotiated down the work fees initially proposed by the Ad-Hoc Committee from 2% to 1.75% of the participating creditor exposure of the relevant members of the Ad-Hoc Committee as at 30 April 2020."

42. The objecting creditor has not appeared before me today to substantiate what amounted to an allegation that the court should infer that the work fee in the present case was not commercially negotiated and was no more than a disguised consideration for the recipients' agreement to vote in favour of the scheme. In the present case, I am not prepared to draw that inference, even though it seems to me that a work fee calculated in this manner may not, in every respect, reflect the level of work done. I accept the company's submission that it was entitled to consider the work fees it agreed in the present case to be of full value, being an appropriate payment for an important commercial service provided by the recipients in connection with the standstill agreement, the lockup agreement, the negotiation of the terms of the proposed restructuring and its implementation.

43. In any event, the relevance of the payment of a work fee for present purposes is whether it is class-creating. I do not think it is, because, whether or not it was objectively justified for the work actually done, the work fee was not dependent in any form on the sanction of the scheme. I also regard it as most unlikely that the entitlement to a work fee of this level will have had any material influence on the recipients' consideration of the merits of the scheme. The role which the members of the AdHoc Committee played in the formulation and facilitation of the restructuring has been described in detail and confirmed in correspondence from their solicitors Weil Gotshal, who concluded their letter with confirmation in the following terms, a confirmation on which the court is entitled to place some reliance:

> "The Ad-Hoc Group has provided the group with a stable platform to implement a restructuring of its liabilities and have negotiated a transaction that carries broad support from the wider body of lenders, as defined in the credit agreement, and the holders of the existing notes. In doing so, they have ensured the viability of the business for the benefit of all of its stakeholders. Each member of the Ad-Hoc Group has confirmed to us that its support for the scheme has not been influenced by the work fee. The recipients of the work fee are entitled to it, irrespective of

how they choose to vote ultimately. It is not therefore a relevant consideration in that decision."

44. In my judgment, there is no basis on the evidence for me to conclude, as I am effectively invited to do by Nassau, that this is not an accurate reflection of the position.

45. The letter from Nassau also raised two more issues on which the company made submissions relating to the question of whether or not they were class-creating. The first reflected the fact that the funds of which it is a manager are issuers of collateralised loan obligations ("CLOs") which are not permitted to hold, or may have a commercial disincentive from holding, senior secured notes or equity as collateral. The way it was put was that both of these instruments would be treated as having no value in computing what Nassau called the overcollateralization test. SSNs and equity, as I have already explained, are the categories of instrument which are to be issued as the scheme consideration.

46. This point had been anticipated by the company in the sense that the scheme makes provision for scheme consideration to be received by a nominee and, if necessary, held by a holding period trustee. The structure involves a scheme creditor exercising its entitlement to appoint a nominee to take up its allocation of new notes or new equity. If it does not do so and is also unable to take up its allocation of new notes and new equity, they will be allocated to the trustee to hold on trust for a period of 12 months, following the restructuring date. The creditor concerned will be entitled to require the new notes or new equity to be transferred at any time during the holding period.

47. This approach to dealing with concerns of the type expressed by Nassau is not uncommon in schemes of arrangement of this sort. On the face of it, the arrangements that have been made are appropriate, but if on a closer examination it is right to regard them as unfair, that is a matter to be raised at the sanction hearing. As to the reasonableness of the proposals which have been adopted, I should note at this stage that a number of other CLO holders have signed up to the lock-up agreement. At first blush, this indicates that the principled objection to the structure which has been advanced by Nassau is not shared by other entities in the same position.

48. For today's purposes, however, I am satisfied that this concern does not give rise to a class issue. The simple reason for this is that the court's concern when determining whether or not it is possible for creditors to consult together with a view to their common interest, is whether there are sufficient material differences in the rights against the company, not whether there are material differences in the individual interest they have extraneous to those rights. In my view, the question raised by Nassau arises out of a difference in interest that the Nassau entities have, as compared to other scheme creditors who are not CLOs. It does not arise out of a difference in rights. Put another way, the difference arises from Nassau's own internal structures and business arrangements.

49. In my judgment, there is a similar, albeit not identical, answer to the third question which is raised by Nassau. It contends that the terms of the new equity are structured to benefit large equity shareholders, being holders of more than 5% of the outstanding shares, because a holding of less than 5% will be non-voting. Furthermore, a holding of less than 1% will disable the holder from being eligible to receive non-public information. Allen & Overy have explained why from a commercial perspective, these

are appropriate restrictions to contain in the Jersey Newco's Articles of Association. On the face of it, those explanations appear to me to have substance.

50. In any event, and for the types of reason discussed by Warren J in *In Re Hibu Group Limited* [2016] EWHC 1921 (Ch) at [56] and a number of other cases, I am satisfied that the issue identified by Nassau does not give rise to a difference in rights against the company. The difference flows from the way in which individual creditors enjoy those rights, i.e. by reference to the amount of shares they choose to hold, not from any differences in the rights themselves, all of which are expressed in the same terms in the Jersey Newco's Articles of Association.

51. In those circumstances, I am satisfied that the concerns which have been expressed in Nassau's letter do not on proper analysis give rise to any class issues. Furthermore, I am satisfied that an order convening a single class meeting is the right order to make in this case.

52. The next issue relates to the creditors whom it is proposed to summon to the meeting. It arises as a point of jurisdiction in this sense; the bondholders do not themselves have the legal right to payment under the bond. That is held by Cede & Co and/or the DTC. They simply have a beneficial interest with no direct legal claim against the company. They do, however, have quite widely drawn rights for the exchange of a beneficial interest for legal title in the form of a definitive note under the terms and conditions of the notes.

53. It is well established that in these types of situation the noteholders as beneficial owners are to be treated as creditors, as that word is used in Part 26 of the Companies Act 2006, an approach that has been adopted in a number of cases in which noteholder schemes have been proposed. They are to be treated as contingent creditors, the contingency being the exercise of the right to the issue of a definitive note in the circumstances identified in the relevant indentures. I need do no more for present purposes than simply refer to *Re Castle Holdco 4 Ltd* [2009] EWHC 3919 (Ch) at [23], and *Re Cooperative Bank plc* [2013] EWHC 4072 (Ch) at [23].

54. As the company has made appropriate arrangements for the nominee and the depository not to vote in respect of their legal entitlement, I am satisfied that no issue on this question arises in the present case.

55. I now turn briefly to the questions of international jurisdiction and recognition. The company has made submissions as to whether the court must also be satisfied that it has jurisdiction over the scheme creditors pursuant to the Recast Judgments Regulation which applies in civil and commercial matters. This point arises because some of the scheme creditors are or may be incorporated in EU Member States outside the United Kingdom and may therefore be domiciled there.

56. It is now well established that an application to sanction a scheme is a civil or commercial matter, but it has never been conclusively determined whether the rule laid down by Article 4(1) of the Recast Judgments Regulation, that any person domiciled in an EU Member State must be sued in the courts of that Member State, also applies to schemes, although the matter has been referred to and debated in a number of cases, such as *Re Rodenstock GmbH* [2012] BCC 459 at [47ff], *Re Magyar Telecom BV* [2014] BCC 448 at [28ff] and *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 at [41ff].

57. In the present case, I shall adopt what has become the usual practice of assuming without deciding that Chapter II and therefore Article 4 of the Recast Judgments Regulation applies to these proceedings on the basis that the scheme creditors are sued by the company and they are defendants to the application to sanction the scheme. If on the basis of that assumption the court has jurisdiction because one of the exceptions to Article 4 applies, then there is no need to determine whether the assumption is correct, and I will not do so.

58. In the present case, the scheme companies rely on the exceptions provided for by both Article 25 and Article 8 of the Recast Judgments Regulation. So far as Article 25 is concerned, the governing law is now English law, as I have already identified, and in my judgment, it is clear that that gateway is available to the company. I should add that there is no objection in principle to the introduction of an English law jurisdiction clause for the purpose of facilitating the sanction of a scheme in England: see the discussion of Norris J in *Re NN2 Newco Ltd* [2019] EWHC 1917 (Ch).

59. So far as Article 8 is concerned, a defendant who is domiciled outside a Member State may be sued in that Member State, provided that another defendant in the same action is domiciled there and provided that it is expedient to hear the claims against both together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

60. The consequence of this is that if at least one scheme creditor is domiciled in England, then Article 8(1) confers the jurisdiction on the English court to sanction a scheme affecting the rights of creditors domiciled elsewhere in the EU so long as it is expedient to do so, which it normally will be. See for example, *Re DTEK Finance plc* [2017] BCC 165, in which all of the authorities are cited and considered at length. Even if a material number of creditors is required rather than a single creditor -- and there has in the past been a debate about that (a point to which I referred in *Re Lecta Paper UK Limited* [2020] EWHC 382 Ch at [48]) the evidence in this case is that a material number of creditors are based in the United Kingdom. It seems to me that, on any view, the requirement would be satisfied in the present case.

61. There are a number of other issues on which the company made submissions which I should very briefly deal with, because they touch on jurisdiction. The first relates to the fact that the company as guarantor undertook very recently an obligation to other members of the group to contribute to its liability as principal debtor to the lenders under the credit agreement. This type of structure, implemented for the purpose of facilitating the restructuring and minimising the number of schemes to be promulgated by different members of the same group has been considered recently in *Swissport Fuelling Ltd* [2020] EWHC 1499 (Ch) at [48ff], a decision of Miles J.

62. He was satisfied in similar circumstances that he could proceed on the basis that a similar arrangement enabled the scheme to bring about the variation or release of claims scheme creditors had against third parties, or rather that there was no roadblock at the convening stage to meetings of creditors being convened in circumstances in which a similar structure had been introduced. In my view, exactly the same position applies in the present case. There is no roadblock to the effectiveness of the scheme in due course caused by the company undertaking a direct contribution obligation to the other group companies which are principal debtors under the credit agreement: see also *Re Lecta Paper UK Limited* [2020] EWHC 382 Ch at [21].

63. Finally, I should mention three matters that go to the practicalities. The first is that I have read the Explanatory Statement. I am satisfied that it is in the form and style appropriate to the circumstances of the case. I am not approving it and it remains open to any creditor to raise issues as to its adequacy at the sanction hearing, but for present purposes, that aspect of the Practice Statement is satisfied.

64. The second practical matter is that the notice provisions which are put forward by the company in the draft order that I have been taken through provide for a 14 day notice period, with notice of the scheme meeting being sent out tomorrow. I simply note that this is at the shorter end of what the court will normally direct, but I am satisfied that, in the light of the detailed description of the scheme that was provided in the Practice Statement Letter, and the fact that creditors had five weeks to consider their position in relation to the scheme, together with the evidence as to the urgent need to conclude the restructuring during the course of November, a 14day notice period is appropriate.

65. The third practical matter is that the meeting in the present case will be held as a virtual meeting. The details of what is proposed have been described in Mr. Gilchrist's witness statement, reference to which has been made on the face of the order as descriptive of the directions which the court is giving in relation to the actual conduct of the meeting. I am satisfied, in accordance with the guidelines that I suggested in *In Re Castle Trust Direct plc* [2020] EWHC 969 (Ch), that these arrangements are appropriate.

66. In all those circumstances, I will make an order in the terms sought by the company convening a single scheme meeting and giving the directions in the draft order that I have considered.

[2021 (1) CILR 426]

IN THE MATTER OF FREEMAN FINTECH CORPORATION LIMITED

GRAND CT. (Segal, J.) February 4th, 2021

Companies — arrangements and reconstructions — confirmation by court — court sanctioned scheme of arrangement between company and unsecured creditors pursuant to Companies Act (2021 Revision), s.86(2) even though one unsecured creditor not bound by scheme because his claim governed by Macau law not Cayman law — scheme likely to be substantially effective — no indication Macau creditor intended to take action to enforce his claim and claim small

The court was asked to sanction a scheme of arrangement.

The company sought the court's sanction of a proposed scheme of arrangement between the company and its unsecured creditors, pursuant to s.86 of the Companies Act (2021 Revision). The company was an investment holding company incorporated in the Cayman Islands. It was part of a group of companies engaged in the provision of financial services to customers in Hong Kong and the People's Republic of China. The company was registered in Hong Kong as a non-Hong Kong company and its shares had been listed on the Hong Kong Stock Exchange. In 2019, a winding up petition was presented against the company in Hong Kong on the grounds *inter alia* that the company was insolvent. Joint provisional liquidators were appointed by the Hong Kong court in 2020. The company, acting though the JPLs, introduced a scheme of arrangement in Hong Kong and the Cayman Islands. The majority of the company's debts were governed by Hong Kong law. Under the proposed scheme of arrangement, unsecured creditors would likely receive a return of 8.7%–11.4%, whereas if the company were to go into insolvent liquidation the return would be 2.7%.

At the Cayman scheme meeting, five scheme creditors attended the meeting by proxy and voted unanimously in favour of the scheme. No scheme creditor abstained or voted against the scheme. The total value of the claims of the creditors voting at the meeting was some HK$3bn. It appeared that the amount owed to those creditors was approximately 96% of the company's total estimated unsecured debt.

The JPLs were aware of one creditor whose claim against the company of some HK$48m. (amounting to approximately 1%–2% of the company's total debt) was governed by Macau law. The Macau creditor had been

given notice of the Cayman scheme meeting and copies of the scheme documents but had not contacted the JPLs nor sought to participate in or attend the Cayman scheme meeting. The company accepted that although the Macau creditor was to be treated in this jurisdiction as bound by the Cayman scheme, as he had not submitted to the jurisdiction of this court and as the debt owed to him was not governed by Cayman law, there was a serious risk that the Cayman scheme and the sanction order could not be made effective and enforced against him in China or other jurisdictions. The same issue arose with respect to the Hong Kong scheme. The company submitted that although there was a risk that the Macau creditor could take action to obtain judgment in a third jurisdiction which did not recognize the Cayman and Hong Kong schemes, there was no evidence that the Macau creditor intended to do so and the company might be able to take steps to prevent execution of such a judgment. Given the possibility that no action might be taken by the Macau creditor, the relatively small amount owed to the Macau creditor compared to the amounts owed to scheme creditors, the overwhelming support of scheme creditors and the fact that any action taken by the Macau creditor would not adversely or materially affect the implementation of the Cayman scheme, the court should exercise its discretion and sanction the scheme.

The Hong Kong scheme was sanctioned by Harris, J.

Held, ordering as follows:

(1) The function of the court at a sanction hearing of a scheme of arrangement under the Companies Act was well known. The court must be satisfied that the provisions of the Act (and the order convening the scheme meeting of creditors) had been complied with. The court must be satisfied that the class of creditors the subject of the court meeting was fairly represented by those who attended the meeting, and that the statutory majority were acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they purported to represent. The court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme. There must be no "blot" on (*i.e.* defect in) the scheme. There must be no other reason which would preclude the court from exercising its discretion to sanction the scheme. One such reason was the principle that the court must be satisfied that the scheme would achieve a substantial effect and that it was not acting in vain (paras. 16–17).

(2) The Cayman scheme clearly fell within s.86 of the Companies Act. It was an arrangement between the company and a class of its creditors. The requirements of the convening order had been complied with and the scheme meeting appeared to have been properly conducted. The statutory majorities were also achieved. In relation to minority protection, it appeared that the class of scheme creditors who were the subject of the Cayman scheme meeting was fairly represented by those who attended the meeting and there was no evidence to suggest that the statutory majority

was acting other than *bona fide*, or to suggest that they were coercing the minority in order to promote interests adverse to those of the class. The scheme was obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. The evidence indicated that there were no defects which could constitute a blot on the scheme (paras. 18–21).

(3) With regard to the Macau creditor, the court adopted the following approach. (a) The court needed to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme. (b) The court needed to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the creditor not being bound by the scheme or the sanction order. There should be evidence as to the nature and extent of the risks associated with having a creditor, who was owed a not insubstantial sum, left outside and not bound by the Cayman scheme. The court required credible evidence to the effect that it would not be acting in vain. (c) The court needed to consider whether on the evidence it was appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who were not bound and were likely to be able to take action in other jurisdictions. This assessment would be made in light of the location of the company's assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that might impact the recovery and rights of creditors and others under the scheme). In appropriate cases, the fact that significant claims might not be bound by the scheme might not prevent the court sanctioning the scheme where there were clear and real benefits to be derived from the scheme and which were unlikely to be disturbed by hostile action following sanction. If the scheme was likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the court would be likely to sanction the scheme despite some creditors not being bound and the risk of enforcement action by them. But the court would wish carefully to consider the risks in each case. It would be relevant that the creditor(s) in question had indicated support for the scheme and an intention not to take action, or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme. (d) The court needed to consider the issue of fairness in this context. If those who were bound by the scheme had accepted a haircut or other variation or discharge of their rights and claims, it might be unfair to sanction the scheme and hold them to the terms of the scheme if there was a serious risk that other creditors would be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by scheme creditors under the scheme). It might be relevant to consider the extent to which creditors were made aware of the risks in the explanatory statement before voting (para. 31).

(4) In the present case, it was appropriate to sanction the Cayman scheme. The court accepted the company's submissions. This was not a case in which the creditor concerned had indicated a willingness to support the Cayman scheme or given an indication that he would take no action to enforce his claim, nor was there evidence as to the extent to which the company could prevent such enforcement or the likely impact of a successful enforcement action on the company. However, the court accepted that in view of the Macau creditor's silence and the absence of any indication that he intended to take any action, there was a real possibility that no action would be taken; that even if action was taken, the company might be able to take some steps with a view at least to delaying or avoiding enforcement action and that even if enforcement action were successful, the amounts involved were sufficiently small to avoid interfering with the implementation of and to undermine the benefits obtained by scheme creditors under the Cayman scheme. It was also right to give considerable weight to the judgment of Harris, J. and to follow the decision he had made in relation to the Hong Kong scheme (para. 32).

Cases cited:

(1) *Anthony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Metaux* (1890), 25 Q.B.D. 399, considered.
(2) *China Lumena New Materials Corp.*, *In re*, [2020] HKCFI 338, considered.
(3) *Lehman Brothers Intl. (Europe) (No. 10)*, *In re*, [2018] EWHC 1980 (Ch); [2019] BCC 115; [2019] Bus. L.R. 1012, considered.
(4) *New Zealand Loan & Mercantile Agency Co. Ltd.* v. *Morrison*, [1898] A.C. 349, referred to.
(5) *PT Garuda Indonesia*, *In re*, 2001 WL 1171948; on appeal, [2001] EWCA Civ 1969, considered.
(6) *Sompo Japan Ins. Inc.*, *Re*, [2007] EWHC 146 (Ch), considered.
(7) *TDG plc*, *In re*, [2008] EWHC 2334 (Ch); [2009] 1 BCLC 445, considered.
(8) *Van Gansewinkel Groep BV*, *Re*, [2015] EWHC 2151 (Ch); [2015] Bus. L.R. 1046, considered.
(9) *Winsway Enterprises Holdings Ltd.*, *Re*, [2017] 1 HKLRD 1, considered.

Legislation construed:

Companies Act (2021 Revision), s.86(2):

> "If a majority in number representing seventy-five per cent in value of the creditors or class of creditors … present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors … and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company."

G. Manning for the company.

1 **SEGAL, J.:**

Introduction

This is my judgment dealing with the petition presented by Freeman FinTech Corp. Ltd. ("the company") with respect to, and the company's application for sanction of, a scheme of arrangement ("the Cayman scheme") between the company and its unsecured creditors, pursuant to s.86 of the Companies Act (2021 Revision) ("the Act"). The sanction application was heard today (February 3rd, 2021).

2 The company is acting by and through its joint provisional liquidators (Ho Kwok Leung Glen ("Mr. Ho") and Lai Kar Yan) ("the JPLs") who were appointed by the Hong Kong court and whose powers to promote a scheme of arrangement in this jurisdiction on behalf of the company were recognized by this court in an order made by me and dated November 4th, 2020.

3 The company has also promoted a parallel scheme of arrangement under the laws of Hong Kong ("the Hong Kong scheme"). The Cayman scheme and the Hong Kong scheme are each conditional upon the other receiving sanction from the court in their respective jurisdictions. They each contain the same terms. The majority of the company's debts are governed by Hong Kong law. Prior to the hearing of the sanction application, I was told that the sanction hearing in respect of the Hong Kong scheme had taken place yesterday before Harris, J. and an order sanctioning the Hong Kong scheme had been made (and a copy of Harris, J.'s judgment in draft was very helpfully provided to me at the beginning of the sanction hearing, for which I am most grateful to Harris, J.).

The background

4 The background to the company is set out in the petition dated December 16th, 2020 and Mr. Ho's first affirmation affirmed on December 16th, 2020. In summary:

(a) The company is an exempted limited liability company, incorporated in the Cayman Islands on August 14th, 1992.

(b) The company has been registered in Hong Kong as a non-Hong Kong company since November 25th, 1992 and its shares have been listed on the Hong Kong Stock Exchange ("SEHK") since May 11th, 1998.

(c) The company is an investment holding company and is part of a group of companies ("the group") whose subsidiaries are principally engaged in the provision of financial services to customers in Hong Kong and the People's Republic of China ("the PRC").

(d) The group booked losses during calendar years 2018 and 2019 of over HK$2bn., causing significant cash flow problems.

(e) On May 10th, 2019, a winding-up petition was presented against the company in the Hong Kong court on the grounds that, *inter alia*, the company was insolvent.

(f) The JPLs were appointed on February 28th, 2020 and, pursuant to an order extending their powers on March 26th, 2020, are empowered to enter into discussions on behalf of the company for the purpose of a restructuring. Subsequently, following a concern I had raised, the Hong Kong court made a direction permitting the JPLs to commence proceedings to introduce a scheme of arrangement in both this jurisdiction and Hong Kong.

(g) Trading of the company's shares was suspended on February 28th, 2020. The SEHK has mandated certain requirements and conditions the company is required to meet prior to the trading of its shares being permitted to resume.

(h) Should the company fail to comply with these requirements and conditions by August 27th, 2021, the SEHK will cancel the company's listing.

(i) In addition to the suspension of trading in the company's shares, both the SEHK and Securities and Futures Commission of Hong Kong have imposed various trading restrictions and limitations on the company's key operating subsidiaries, which have had a significant impact on the ability of those subsidiaries to operate and, in turn, has significantly impacted the financial performance of their businesses.

(j) The JPLs are of the opinion that an immediate winding up of the company (and the group) would not be in the creditors' best interests as it would not maximize the value of the company's assets and would therefore diminish creditor returns and that the interests of creditors will be better served through the Cayman scheme and the proposed restructuring of which it is a part.

The Cayman scheme

5 The Cayman scheme proposes a compromise and arrangement between the company and scheme creditors. The scheme creditors comprise all of the company's creditors with unsecured claims (to include both the claims of its unsecured creditors and those of its secured creditors in respect of the portion of their claims which are not secured).

6 The purpose of the Cayman scheme (and the Hong Kong scheme) is to compromise the company's existing unsecured indebtedness and return it, and the group, to a position of solvency. The Cayman scheme will principally involve a cash injection from an investor (to reduce the company's secured

debt and provide cash consideration for the benefit of the scheme creditors) and a debt for equity swap (which will necessitate a restructuring of the share capital of the company). Following the Cayman scheme becoming effective, the company will continue as a going concern, trading of the company's shares on the SEHK can resume and all outstanding debts owed by the company will be discharged.

7 In essence, the Cayman scheme provides for the full and final release of creditor claims in exchange for:

(a) Dividends pursuant to the Cayman scheme, which will include a share in the cash consideration of HK$80m. and other retained assets to be realised.

(b) A share in 1,868,176,188 of the company's shares, representing approximately 10% of the enlarged issued share capital of the company.

8 No secured claim will be admitted into the Cayman scheme and therefore no secured creditor (in its capacity as such) will be entitled to any distribution under the terms of the Cayman scheme unless it has either (i) agreed the appraised value of its security with the scheme administrators and participated in the Cayman scheme as a scheme creditor for the unsecured portion of its admitted claim; or (ii) released its security and participated in the Cayman scheme as a scheme creditor for its entire admitted claim which will be treated as unsecured.

9 The JPLs have conducted a detailed analysis of the return that the creditors would likely receive pursuant to the Cayman scheme (8.7%–11.4%) compared with the return that they would likely receive in the alternative of an insolvent liquidation (2.7%). This enables, on an indicative basis, a comparison of the outcome for scheme creditors under the Cayman scheme with that in liquidation. If the Cayman scheme is not approved and implemented, the JPLs consider it to be inevitable that the company (and the group) will be placed into insolvent liquidation (presumably in Hong Kong and possibly in this jurisdiction).

The convening order

10 On December 16th, 2020, the company filed the petition and a summons seeking an order that the company be given leave to convene a meeting of scheme creditors for the purpose of considering and, if thought fit, approving the Cayman scheme.

11 On December 31st, 2020, I issued an order ("the convening order") granting leave on the following terms:

(a) That there be a single class of unsecured creditors, *i.e.* the scheme creditors.

(b) That there be a meeting of scheme creditors ("the Cayman scheme meeting") at 10 a.m. (Hong Kong time) on January 22nd, 2021 in Hong Kong with a connection via video link to the offices of the JPLs' attorneys in Cayman (to allow those in Cayman to hear and participate in the proceedings in Hong Kong). The convening order stated that it was permissible for the Cayman scheme meeting to take place at the same time and location as the meeting to consider the Hong Kong scheme. Creditors were permitted to attend in person, in proxy, by a Zoom remote link or telephone in the manner described and in accordance with the procedures set out in the explanatory statement (which were needed to comply with Hong Kong's COVID regulations). Documents filed were to be treated as filed for the purpose of both schemes and only one vote was required and was to be treated as a vote cast at both scheme meetings and for the purpose of both schemes.

(c) That scheme creditors were to be sent a notice of the Cayman scheme meeting and the documents listed in para. 5 of the convening order ("the scheme documents") by email or courier.

(d) Notice was also to be given by various methods of advertisement and publication.

(e) Within seven days of the Cayman scheme meeting, the chairman was to report the proceedings and result to the court.

The Cayman scheme meeting

12 As was confirmed in Mr. Ho's fourth affirmation, all creditors were sent the scheme documents by email and/or courier on December 30th, 2020. Notice was also given in accordance with the convening order by (i) an announcement to the SEHK; (ii) an advertisement in *The Standard*; (iii) an advertisement in *Sing Tao Daily*; and (iv) notice in the Cayman Islands *Gazette*.

13 The Cayman scheme meeting was held at the Hong Kong Management Association venue in accordance with the convening order with a connection via video-link to the offices of Campbells in the Cayman Islands at 9 p.m. (Cayman time) on January 21st, 2021 (which was 10 a.m. Hong Kong time on January 22nd, 2021). Mr. Ho acted as the chairman of both scheme meetings.

14 Prior to the Cayman scheme meeting, the JPLs received a total of eight notices of claim for voting purposes and seven proxies. Ultimately only five scheme creditors participated in the Cayman scheme meeting (Prosper Talent Ltd., Pure Virtue Enterprises Ltd., China Huarong Macau (HK) Investments Holdings Ltd., Robertsons and Crowe (HK) CPA Ltd.). The other three scheme creditors which had filed notices either chose not to attend the Cayman scheme meeting or their notice was rejected in full by

the chairman on the basis that their claim was secured and the estimated value of the security held exceeded the value of the claim. The notices filed by Prosper Talent Ltd. and Pure Virtue Enterprises Ltd., two secured creditors, were allowed in part by the chairman, to the extent that the estimated value of relevant security interests held by these secured creditors was insufficient to satisfy their claims. The notice filed by China Huarong Macau (HK) Investments Holdings Ltd. was allowed in full by the chairman because he accepted that the value of security interest held by this secured creditor will be nil.

15 Accordingly, five scheme creditors attended the Cayman scheme meeting by proxy (and gave their proxies to different individuals so that five persons were in attendance at the Cayman scheme meeting). They voted unanimously in favour of the Cayman scheme. No scheme creditor abstained or voted against the Cayman scheme. The total value of the claims of the five creditors voting at the Cayman scheme meeting was HK$2,992,628,293.18. The Cayman scheme was therefore approved by a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy at the meeting, as required by s.86(2) of the Act. It appears that the amount owed to the creditors voting at the Cayman scheme meeting represented approximately 96% of the total estimated unsecured debt of the company.

The law

16 The function of the court at the sanction hearing of a scheme of arrangement under the Act is well-known. It is set out in a frequently cited passage from *Buckley on the Companies Act*, and was neatly summarized by Morgan, J. in the Business and Property Courts in London in *In re TDG plc* (7) ([2009] 1 BCLC 445, at para. 29) as follows:

(a) The court must be satisfied that the provisions of the statute (and the order convening the scheme meeting of creditors) have been complied with.

(b) The court must be satisfied that the class of creditors the subject of the court meeting was fairly represented by those who attended the meeting, and that the statutory majority are acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they purport to represent.

(c) The court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme.

(d) There must be no "blot" on (*i.e.* a defect in) the scheme.

17 I would add a fifth matter for consideration at the sanction hearing, which may only be an amplification of the others mentioned above but

which I consider helpful to identify separately, namely that there must be no other reason which would preclude the court from exercising its discretion to sanction the scheme. One such reason which is frequently referred to in the authorities and which arises for consideration in this case is the principle that the court must be satisfied that the scheme will achieve a substantial effect and that it is not acting in vain.

The statutory requirements and the convening order

18 The Cayman scheme clearly falls within s.86 of the Act: it is an arrangement between the company and a class of its creditors. The requirements of the convening order were also clearly complied with. The Cayman scheme meeting appears to have been properly conducted. The statutory majorities were also achieved. 100% of those present by proxy voted in favour of the Cayman scheme.

Minority protection

19 On the evidence before me, it appears that the class of scheme creditors who were the subject of the Cayman scheme meeting was fairly represented by those who attended the meeting, and there is no evidence to suggest that the statutory majority was acting other than *bona fide*, or to suggest that they were coercing the minority in order to promote interests adverse to those of the class.

Rationality

20 The Cayman scheme is obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. In particular, the commercial purpose of the Cayman scheme was clearly explained in the explanatory statement and the scheme documents and it appears that the Cayman scheme offered material benefits to scheme creditors (the return which the scheme creditors would likely receive pursuant to the Cayman scheme of 8.7%–11.4%, while not representing a substantial recovery, was considerably greater than the return of only 2.7% which they were expected to receive in the event that the Cayman scheme was not approved or sanctioned and if an insolvent liquidation resulted). Furthermore, the Cayman scheme was unanimously supported by the scheme creditors at the Cayman scheme meeting and it appears that, as noted above, the value of the claims of the five creditors voting at the Cayman scheme meeting represents a very substantial proportion of the total unsecured liabilities of the company (as estimated by the JPLs, recognizing that there is some uncertainty as to the quantification of unsecured claims since this depended on the value and proceeds realised in respect of collateral held by the secured creditors). In

such a case the court will not readily differ from the commercial assessment of the creditors as to their own interests.

Blot on the scheme

21 The evidence indicates that there were no defects which could constitute a blot on the Cayman scheme.

Discretion—impact of a scheme creditor's claim being governed by a law other than Cayman or Hong Kong law

22 There is some debt which the Cayman scheme purports to compromise that is not governed by Cayman Islands law. It is also not governed by Hong Kong law. The issue was identified at the convening hearing when the company submitted, and I accepted, that the matter would fall to be considered at the sanction hearing in light of the action taken by the creditor concerned.

23 The JPLs are aware of one creditor, whose claim against the company in the sum of approximately HK$48m. (approximately US$6.2m.) is governed by Macau law ("the Macau creditor"). The Macau creditor's claim amounts to approximately 1%–2% of the total debt of the company.

24 The Macau creditor was given notice of the Cayman scheme meeting and copies of the scheme documents were sent to him by email and courier. However, he did not make contact with the JPLs, did not return the forms, and did not seek to participate in or attend the Cayman scheme meeting.

25 The company accepted that while the Macau creditor was to be treated in this jurisdiction as bound by the Cayman scheme (the discharge effected by the Cayman scheme and the order sanctioning it will be effective as a matter of Cayman Islands law irrespective of the governing law of the debt—see the judgment of the Privy Council, on appeal from the Supreme Court of Victoria, in *New Zealand Loan & Mercantile Agency Co. Ltd.* v. *Morrison* (4)), since the Macau creditor had not submitted to the jurisdiction of this court and since the debt owed to him was not governed by Cayman law, there was a serious risk that the Cayman scheme and the sanction order could not be made effective and enforced against him in the PRC or other jurisdictions. This was the case in jurisdictions which refused to recognize foreign schemes or restructuring proceedings and those common law jurisdictions which followed the English Court of Appeal's decision in *Anthony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Metaux* (1), to the effect that a discharge of a debt pursuant to a foreign bankruptcy or restructuring proceeding would only be recognized if the proceeding took place in the jurisdiction of the governing law of the debt or possibly in a place that would be recognized in the jurisdiction of the governing law of the debt. The same issue arose

with respect to the Hong Kong scheme, since the Macau creditor had not submitted to the jurisdiction of the Hong Kong court and the debt owed to him was not governed by Hong Kong law.

26 The company submitted that nonetheless the court could and should sanction the Cayman scheme provided that it was satisfied that the Cayman scheme would achieve a substantial effect and that the court would not be acting in vain or making an order which had no substantive effect or would not achieve its purpose. The court needed to determine, in the exercise of its discretion, whether to sanction the Cayman scheme on this basis.

27 As regards authorities dealing with the approach that the court should adopt in a case such as this, the company referred me to a decision of Harris, J. in Hong Kong in another case, *In re China Lumena New Materials Corp.* (2) ("*China Lumena*") (the company originally only provided me with a copy of the judgment in *China Lumena* but I directed that the authorities referred to by Harris, J. also be filed and provided to me). In that case, the Hong Kong scheme purported to compromise debt governed by PRC law. 42% of the debt covered by the scheme was owed to a PRC creditor and was governed by PRC law. The PRC creditor did not vote at the scheme meeting although a letter had been sent by its Zhejiang branch to say that it supported the scheme but that its representatives had encountered difficulties in obtaining approval to leave the PRC to attend the scheme meeting and its Hong Kong branch which was also a creditor had voted in favour of the scheme. Harris, J. noted that that there was no mechanism for enforcing or obtaining recognition of the scheme in the PRC. He considered that the key issue was whether in these circumstances the court should exercise its discretion to sanction the scheme having regard to the court's unwillingness to sanction a scheme which had no or only a limited utility, as he had explained in another decision of his, *Re Winsway Enterprises Holdings Ltd.* (9) ("*Winsway*"). There he had noted ([2020] HKCFI 338, at para. 12) that the utility of a scheme could be called into question—

> "if in a transnational context there is a serious question over the extent to which a scheme will be enforcible [*sic*] against foreign creditors. However, it is well-established that in assessing whether or not this is the case the court takes a robust and practical approach. For example, in *re Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [[2001] EWCA Civ 1696 at [27]], an English scheme in respect of an Indonesian company was sanctioned despite the existence of dissenting creditors and despite the fact that there was no parallel scheme in Indonesia or formal recognition of the English scheme in Indonesia."

He concluded (*ibid.* at paras. 13–14) that:

> "13. Ultimately, the guiding principle is that the court should not act in vain or make an order which has no substantive effect or will not achieve its purpose. The principle does not require either worldwide effectiveness or worldwide certainty. Thus it does not require that the court must be satisfied that the scheme will be effective in every jurisdiction worldwide: its focus is on jurisdictions in which, by reason of the presence there of substantial assets or in which creditors might make claims, it is especially important that the scheme be effective. The court will sanction the scheme provided it is satisfied that the scheme would achieve a substantial effect: *Re Lehman Brothers International (Europe) (No 10)* [[2018] EWHC 1980 (Ch)].
>
> 14. As there would appear to be no reason to think that there is a [PRC] creditor who is likely to try to enforce its claim in Hong Kong against the Company arguing that it is not bound by the Scheme because [PRC] law governs its debt, it seems to me that this is a proper case for the court to proceed on the basis that the scheme will probably serve its purpose, has utility and should be sanctioned."

28 In *In re Lehman Brothers Intl. (Europe) (No. 10)* (3), Hildyard, J. had said as follows ([2018] EWHC 1980 (Ch), at paras. 187–190):

> "187. Having regard to the general principle that the English court will not act in vain or make an order which has no substantive effect or will not achieve its purpose, and echoing Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch) at [18]–[20] and Rodenstock at paras. 73 to 77, in Re Magyar at [16], David Richards J said:
>
> > 'The court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose.'
>
> 188. However, the principle does not require either worldwide effectiveness, or certainty. Thus, it does not require that the Court must be satisfied that the scheme will be effective in every jurisdiction worldwide: its focus is on jurisdictions in which, by reason of the presence there of substantial assets to or because of which creditors might make claims, it is especially important that the scheme be effective. Further, and as Snowden J explained in Re Gansewinkel at [71],
>
> > 'The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain.'

189. Thus, in Sompo, when sanctioning an insurance transfer scheme under the Financial and Market Act 2000 (which is analogous in the context), David Richards J said this:

> '[17] My principal concern, when the application was first before me on 14th December 2006, was to understand the true impact, if any, of the proposed transfer on the business … What, if any, effect will the transfer have if proceedings against Sompo were brought in those jurisdictions where it did have substantial assets? Would the transfer be recognised in those jurisdictions? If not, what purpose would be served by the transfer?
>
> [18] It was relevant, therefore, to have some evidence as to the proportion of the transferred policies which were governed by English law or other UK law and, particularly if the proportion were small, to have some evidence as to the effect of the transfer in Japan and perhaps other jurisdictions where Sompo has substantial assets.
>
> [19] If it appeared that the transfer would have little or no significant effect, it raised an issue as to whether in its discretion the Court should sanction the transfer. It is established that, on comparable applications under the Companies Act 1985, the Court will not act in vain …
>
> [26] Overall this evidence leaves me less than convinced that the scheme once sanctioned will definitely be effective as regards proceedings in foreign jurisdictions to enforce claims under policies which are governed by foreign law, although I acknowledge that it provides a proper basis for concluding that it may well be so effective in Japan and the United States. More importantly, as I have mentioned, the evidence establishes that over 27% of the policies in number and by reference to reserves are governed by English law, and it is reasonable to suppose that the transfer will be effective in any relevant jurisdictions as regards those policies. The proposed scheme will therefore achieve a substantial purpose. The fact that the scheme also extends to a larger class of business not governed by English law is not, in my judgment, a good ground for refusing to sanction the scheme. Whether the scheme is recognised as effective in Japan or the United States or elsewhere will, if necessary, be tested in due course in proceedings in those jurisdictions.'

190. The Administrators submitted, and I agree, that the present case is stronger than Sompo: it is difficult to see how creditors could enforce their statutory interest entitlements in the English administration of an English company under English law in any

jurisdiction other than England, and only a small proportion of the Surplus is situated outside of England."

29 The company noted that the evidence demonstrated that the company's assets were located in the Cayman Islands or Hong Kong, save for one asset, namely an inter-company receivable owed to the company by a BVI subsidiary in the group. The assets in the Cayman Islands would be protected as a result of the Cayman scheme and the sanction order to be made by this court which in this jurisdiction would be regarded as being effective against and binding the Macau creditor. The assets in Hong Kong would similarly be protected by the Hong Kong scheme and sanction order. The company argued that while there was a risk that action could be taken by the Macau creditor to obtain a judgment in a third jurisdiction which did not recognize either of the schemes, for example Macau (and the company was unable to explain whether there was a choice of courts and submission to jurisdiction clause in the Macau creditor's contract with the company) and to enforce that judgment in the BVI against the receivable, there was no evidence or indication from the Macau creditor that he intended to do so (he had made no contact with or threats against the company) and the company might be able to take steps to prevent execution of such a judgment in view of the Cayman scheme and the Hong Kong scheme (although the company at this stage had not determined what action was available or would be taken). The company submitted that in view of the possibility that no action might be taken by the Macau creditor, the relatively small amount owed to the Macau creditor compared to the amounts owed to scheme creditors, the overwhelming support of scheme creditors and the fact that any action taken by the Macau creditor would not adversely or materially affect the implementation of the Cayman scheme, the court should exercise its discretion and sanction the Cayman scheme.

30 The company also relied on the decision and reasoning of Harris, J. in his draft judgment in this case. He concluded, after citing passages from his earlier judgments in *China Lumena* (2) and *Winsway* (9) that:

> "The Scheme if sanctioned in Hong Kong will prevent [the Macau creditor] taking enforcement proceedings in Hong Kong. Accordingly, [the Macau creditor's] debt does not impact adversely on the utility of the Scheme. I will, therefore, make the order which has been handed to me sanctioning the Scheme."

31 In my view, the following points summarize the approach which the court should adopt in the present and similar cases:

(a) The court needs to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme.

(b) The court needs to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the

creditor not being bound by the scheme or the sanction order. This was why in this case I required further evidence to be provided as to whether the company had considered whether the Macau creditor could obtain a judgment in a jurisdiction in which the Cayman scheme was not recognized and enforce that judgment or otherwise obtain execution in a jurisdiction in which the company had assets and which would also not recognize the Cayman scheme. I indicated that there should be evidence as to the nature and extent of the risks associated with having a creditor, who is owed a not insubstantial sum, left outside and not bound by the Cayman scheme. In this connection, I note the following comments of Snowden, J. in *Re Van Gansewinkel Groep BV* (8) ([2015] EWHC 2151 (Ch), at para. 71), after referring to *Re Sompo Japan Insurance Inc.* (6):

> "In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the scheme companies in other countries on the basis of an assertion of their old rights. *The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain.*" [Emphasis added.]

(c) The court needs to consider whether on the evidence it is appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who are not bound and are likely to be able to take action in other jurisdictions. This assessment will be made in light of the location of the company's assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that may impact the recovery and rights of creditors and others under the scheme). The court will consider, as Lloyd, J. put it in his judgment at first instance in *In re PT Garuda Indonesia* (5) (which was upheld by the Court of Appeal) the "risk of disturbance." In appropriate cases, the fact that significant claims may not be bound by the scheme may not prevent the court sanctioning the scheme where there are clear and real benefits that will be derived from the scheme and which are unlikely to be disturbed by hostile action following sanction. In *Sompo Japan* (6), a case involving an insurance business transfer scheme where what mattered most was the effectiveness of the transfer, the evidence established that only something over 27% of the policies in number and by reference to reserves were governed by English law. Nonetheless, since it was reasonable to suppose that the transfer would be effective in any relevant jurisdictions as regards those policies, the scheme would achieve a substantial purpose, irrespective of the fact that it also extended to a larger class of business not governed by English law. If the scheme is likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the court will be likely to sanction the scheme despite some

creditors not being bound and the risk of enforcement action by them. But the court will wish carefully to consider the risks in each case. It will be relevant that the creditor or creditors in question had indicated support for the scheme and an intention not to take action, as was the case in *China Lumena* (2), or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme, as in *Garuda*.

(d) It also seems to me that the court needs to consider the issue of fairness in this context. If those who are bound by the scheme have accepted a haircut or other variation or discharge of their rights and claims, it may be unfair to sanction the scheme and hold them to the terms of the scheme if there is a serious risk that other creditors will be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by scheme creditors under the scheme). It may be relevant in this context to have regard to the extent to which creditors were made aware of the risks in the explanatory statement before voting, as in *Garuda*.

32 I have concluded that in the present case, it is appropriate to exercise my discretion to sanction the Cayman scheme. I accept the company's submissions, as summarized in para. 29 above. This is not a case in which the creditor concerned has indicated a willingness to support the Cayman scheme or given an indication that he will take no action to enforce his claim, nor is there evidence as to the extent to which the company could prevent such enforcement or the likely impact of a successful enforcement action on the company. However, I accept that in view of the Macau creditor's complete radio silence and the absence of any indication from him that he intends to take any action, there is a real possibility that no action will be taken; that even if action is taken, the company may be able to take some steps with a view at least to delaying or avoiding enforcement action and that even if enforcement action were successful in the BVI, the amounts involved are sufficiently small to avoid interfering with the implementation of and to undermine the benefits obtained by scheme creditors under the Cayman scheme (I note that the risks were not mentioned in the explanatory statement but the issue was mentioned to me at the convening hearing and on the facts of this case I do not consider that this prevents me from or materially weakens the case for sanctioning the Cayman scheme). I also consider that in this case it is right to give considerable weight to the judgment of Harris, J. and to follow the decision he has reached in relation to the Hong Kong scheme.

Order accordingly.

Attorneys: *Campbells* for the company.

[2022] 3 HKLRD 252

Re Rare Earth Magnesium Technology Group Holdings Ltd
(稀鎂科技集團控股有限公司)

[2022] HKCFI 1686

(Court of First Instance)

(Miscellaneous Proceedings No 2227 of 2021 and Companies (Winding-up) Proceedings No 81 of 2021)

Harris J

27 May, 6 June 2022

Company law — scheme of arrangement — sanction by court — considerations — efficacy of scheme in other jurisdictions — recognition abroad of discharge of Hong Kong law-governed debt effected by Hong Kong scheme — rule in Gibbs

Conflict of laws — corporations and corporate insolvency — scheme of arrangement — transnational cases — approach — rule in Gibbs

公司法 — 債務償還安排 — 由法院認許 — 考慮因素 — 在其他司法管轄區的償還安排的效力 — 在海外認許香港償還安排下生效的香港法律規定的債務清償 — Gibbs 規則

法律衝突 — 法團和法團清盤 — 債務償還安排 — 跨國案例 — 做法 — Gibbs 規則

C was a company incorporated in Bermuda, listed in Hong Kong and part of a group of companies which carried on business in the Mainland. The ultimate holding company was incorporated in the Cayman Islands. C became financially distressed and as a result, soft-touch provisional liquidators (PLs) were appointed in Bermuda to assist in and facilitate C's restructuring. PLs were subsequently recognised by the Hong Kong Courts. Further, a winding-up petition in Hong Kong was presented by one of C's creditors. With PLs' assistance, C promoted a scheme of arrangement in Hong Kong (Scheme) which compromised the principal debt of interest-bearing bonds which were governed by Hong Kong law. The total indebtedness was around HK$852 million which was owed to 10 Scheme creditors. Under the terms of the Scheme, the creditors were given a choice between either or a combination of a term extension option and a convertible bond swap option. Convening orders for the Scheme were made and a first creditors meeting was held, which was adjourned. At the adjourned creditors meeting, the

majority of C's creditors voted in favour of the Scheme terms. Subsequently, C sought *inter alia* the Court's sanction of the Scheme under s.673 of the Companies Ordinance (Cap.622).

Held, allowing C's application, making an order sanctioning the Scheme, that:

(1) Applying the well-established principles, the Court would make an order sanctioning the Scheme. It was a legitimate debt restructuring scheme which had complied with all the statutory requirements and had received the requisite Scheme creditors' support after exercising their independent business judgment and would achieve its intended purpose (*Re China Singyes Solar Technologies Holdings Ltd* [2020] HKCFI 467 applied). (See paras.17(1)-(7), 41.)

(2) In transnational cases, the Court had to consider whether there was sufficient connection between the scheme and Hong Kong, and whether it would be effective in other relevant jurisdictions. Here, despite there being no parallel scheme or recognition application in any jurisdiction, the Scheme was expected to be internationally effective, in particular in Bermuda and the Cayman Islands, because all the debts were governed by Hong Kong law. The expectation that the discharge of Hong Kong law-governed debt effected by a Hong Kong scheme would be recognised abroad was justified because the discharge would occur as a matter of substantive Hong Kong law, consistent with the rule in *Gibbs*. The rule in *Gibbs*, which was followed in Bermuda and the Cayman Islands, provided that a debt was treated as discharged if compromised in accordance with the substantive law governing the debt (*Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, *Re China Singyes Solar Technologies Holdings Ltd* [2020] HKCFI 467, *Re PGS ASA* [2021] EWHC 222 (Ch), *Re China Oil Gangran Energy Group Holdings Ltd* [2021] 3 HKLRD 69 applied). (See paras.17(7), 26–29.)

(3) (*Obiter*) A scheme sanctioned in an offshore jurisdiction and recognised under Chapter 15 in the US would not be treated by a Hong Kong court as compromising USD debt which satisfied the rule in *Gibbs*. As a matter of US law, Chapter 15 did not operate as a compromise or discharge of US governed debt, but instead operated procedurally to recognise foreign insolvency processes and prevent action by a creditor against a debtor's property in the US. In the absence of a parallel scheme in Hong Kong to compromise the USD debt, a creditor who had not submitted to the jurisdiction of the offshore court would be able to present a petition in Hong

Kong to wind up the company (*Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1, *Re OJSC International Bank of Azerbaijan* [2018] Bus LR 1270, *Re Agrokor d.d.* 591 BR 163 (Bankr SDNY 2018), *Re China Oil Gangran Energy Group Holdings Ltd* [2021] 3 HKLRD 69 considered). (See paras.30–37.)

Application

This was an application by the subject company for *inter alia* the Court's sanction of a scheme of arrangement under s.673 of the Companies Ordinance (Cap.622).

Mr Look Chan Ho, instructed by Gall, for the company (in both actions).
Mr Justin Ho, instructed by DLA Piper Hong Kong, for AI Global Investment SPC (the creditor in HCMP 2227/2021 & the petitioner in HCCW 81/2021).
Attendance of the Official Receiver was excused (in HCCW 81/2021).

Legislation mentioned in the judgment

Bankruptcy Code [United States] Chs.11, 15
Companies Ordinance (Cap.622) ss.671(3), 673, 674(1)(b)

Cases cited in the judgment

Agrokor d.d., Re 591 BR 163 (Bankr SDNY 2018)
Allied Properties (HK) Ltd, Re [2020] 5 HKLRD 766, [2021] 2 HKC 446, [2020] HKCA 973, [2020] HKCLC 1549
Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399
CIL Holdings Ltd, Re (HCMP 2799/2002, [2003] HKEC 519)
Century Sun International Ltd, Re [2021] HKCFI 2928, [2021] HKEC 4522, [2021] HKCLC 1477
China Oil Gangran Energy Group Holdings Ltd, Re [2021] 3 HKLRD 69, [2021] HKCFI 1592, [2021] HKCLC 911
China Saite Group Co Ltd, Re [2022] HKCFI 1128, [2022] HKEC 1521
China Singyes Solar Technologies Holdings Ltd, Re [2020] HKCFI 467, [2020] HKEC 401, [2020] HKCLC 379
Enice Holding Co Ltd, Re [2018] 4 HKLRD 736, [2018] HKCFI 1736, [2018] HKCLC 305
Lamtex Holdings Ltd, Re [2021] 2 HKLRD 177, [2021] HKCFI 622, [2021] HKCLC 329
OJSC International Bank of Azerbaijan, Re [2018] EWHC 59 (Ch), [2018] 4 All ER 964, [2018] Bus LR 1270, [2018] BCC 267

PGS ASA, Re [2021] EWHC 222 (Ch)
Peninsula and Oriental Steam Navigation Co, Re [2006] EWHC 389 (Ch)
Peninsular and Oriental Steam Navigation Co v Eller and Co [2006] EWCA Civ 432
Rare Earth Magnesium Technology Group Holdings Ltd, Re [2021] 2 HKC 170, [2020] HKCFI 2260, [2020] HKCLC 1295
Winsway Enterprises Holdings Ltd, Re [2017] 1 HKLRD 1, [2016] HKEC 2495

Other material mentioned in the judgment
UNCITRAL Model Law on Cross-Border Insolvency, art.2 para.(f), art.16 para.3

REASONS FOR DECISION

Harris J

Introduction

1. I have before me:

(1) the Company's Petition seeking the Court's:

(a) sanction under *s.673* of the *Companies Ordinance* (Cap.622) (**Ordinance**) of a scheme of arrangement between the Company and its Scheme Creditors; and
(b) approval of certain amendments to the Scheme providing for improved recovery for the Scheme Creditors.

(2) The Petition issued by AI Global Investment SPC on 22 February 2021 to wind up the Company (**Winding-Up Petition**), which the Company asks me to dismiss and order that the costs are paid by the petitioner. I deal with this in [44].

2. On 12 January 2022 I made an order for the Company to convene a meeting of its creditors to consider a proposed scheme of arrangement restructuring its debt (**Convening Order**). After an adjournment, the Scheme Meeting was duly convened on 1 March 2022. At the Scheme Meeting the resolution was carried by a majority in number of the Scheme Creditors present and voting, in person or by proxy, holding 79.06% of the Claims voted. Specifically, 9 out of the 10 Scheme Creditors voted for the Scheme.
3. The Scheme seeks to restructure the Company's indebtedness in order to return the Company to a solvent going concern. A

successful restructuring would give the Scheme Creditors a much higher recovery (estimated to be 100% of the principal under the Scheme's Term Extension Option). Absent restructuring, the Company would be liquidated and the Scheme Creditors' estimated recovery would be approximately 8.5% to 23.1%.

4. The background to the Company and the need for the Scheme are in brief as follows. The Company is a Bermuda-incorporated entity and its shares have been listed on the Main Board of The Stock Exchange of Hong Kong Ltd (**SEHK**) since 28 January 1993. The Company is an investment holding company. The Company's subsidiaries are principally located in Hong Kong, Mainland China, and the British Virgin Islands. The Company is also part of a wider group (**Group**) ultimately held by Century Sunshine Group Holdings Ltd (**Century Sunshine**) which is an exempted company incorporated in the Cayman Islands and listed in Hong Kong (Stock Code: 509).

5. The Group's key businesses consist of the development and production of green fertilisers, including ecological fertilisers, functional fertilisers and general fertilisers; with the primary production bases in the Jiangsu Province and Jiangxi Province; and the production of magnesium in the Jilin Province and Xinjiang Uyghur Autonomous Region.

6. The Company is the key operator of the magnesium alloy production business segment of the Group and indirectly owns the relevant production bases in the Mainland. Despite enjoying strong growth and profitability in the past, the Group's financial position deteriorated in 2020 due to COVID-19. The Company is at least cashflow insolvent. The Company's management accounts as of 31 December 2021 stated that the Company had net assets of HK$1,138,523,000 and net current liabilities of HK$613,477,000.

7. The Company's principal indebtedness arises from unsecured interest-bearing bonds issued by the Company, which are governed by Hong Kong law. As of 31 December 2021, the Company's total indebtedness was approximately HK$852,533,000 owed to 10 Scheme Creditors. The Company is likely to go into liquidation unless its current indebtedness can be restructured. On 22 February 2021, a creditor (AI Global Investment SPC) presented a winding-up petition against the Company in Hong Kong (**Petition**). The Petition hearing has been adjourned to 27 May 2022 so that the Court may consider both the Scheme's progress and the Petition together.

8. Before the Petition was issued, the Company sought the appointment of soft-touch provisional liquidators (**PLs**) in Bermuda:

(1) On 3 July 2020, the Company filed a winding-up petition in Bermuda against itself.

(2) On 16 July 2020, the Bermuda court appointed the PLs to assist in and facilitate the Company's debt restructuring.

9. On 25 August 2020, I recognised the PLs in Hong Kong: ***Re Rare Earth Magnesium Technology Group Holdings Ltd.***[1]

10. To avoid liquidation and to return the Company to a solvent going concern, the Company (with the PLs' assistance) has been pursuing a debt restructuring leading to the Scheme. The Scheme seeks to discharge the Company's unsecured indebtedness, which would also entail releasing the Scheme Creditors' right to enforce guarantees granted by Century Sunshine (Cls.1 and 2 of the Scheme). In return, the Scheme Creditors will be given a choice to choose either the Term Extension Option, the Convertible Bonds Swap Option, or a combination of both (Cl.7 of the Scheme).

11. Under the Term Extension Option, the Scheme Creditors' Claim repayment deadline will be extended for five years, during which the Scheme Creditors will be entitled to receive the Term Extension Interest, Interim Payments, and the Final Payment; and where applicable the Early Repayment and Term Extension Potential Extra Payment (Cls.7.2 to 7.10 of the Scheme).

12. Under the Convertible Bonds Swap Option, the Scheme Creditors' Claim will be converted into Convertible Bonds which will mature in five years. The Convertible Bonds do not carry any interest and may be converted into the Conversion Shares during the conversion period. Unless previously redeemed or converted, the Company shall redeem the Convertible Bonds on the maturity date at the redemption amount which shall be equal to 100% of the outstanding principal amount (Cl.7.14 of the Scheme).

13. To give additional comfort to the Scheme Creditors who choose the Term Extension Option, the following are offered to those Scheme Creditors:

(1) Century Sunshine is pursuing its own debt restructuring via the Century Sunshine Proposed Scheme. If there are surplus assets resulting from the Century Sunshine Proposed Scheme, the surplus assets are intended to be transferred to the Scheme Company for distribution to the Option A Creditors (Cl.7.11 of the Scheme).

(2) Century Sunshine will provide a corporate guarantee to the Scheme Company to guarantee the punctual payment of the Interim Payment(s) (if payable) and the Final Payment (Cl.7.12 of the Scheme).

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1 [2020] HKCFI 2260; [2020] HKCLC 1295.

(3) The Company's various subsidiaries will provide security interests and corporate guarantees to the Scheme Company to secure the Final Payment (Cl.7.13 of the Scheme).

14. In addition, the Scheme Creditors who have executed the Consenting Agreement will be given a consent fee in cash amounting to 3% of the principal amount of the debt owed by the Company to the Scheme Creditors (Cl.9 of the Scheme).

15. The Scheme Creditors' recovery under the Term Extension Option is estimated to be 100% of the principal, whereas in a liquidation the Scheme Creditors' recovery is estimated to be approximately 8.5% to 23.1%.

16. The Company does not need any parallel scheme of arrangement in any jurisdiction.

Relevant principles

17. In considering whether to sanction a scheme, the Court applies some well-established principles which I recently restated in *Re China Singyes Solar Technologies Holdings Ltd.*[2] The Court considers in particular the following:

(1) whether the scheme is for a permissible purpose;
(2) whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting;
(3) whether the meeting was duly convened in accordance with the Court's directions;
(4) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision on whether or not to support it;
(5) whether the necessary statutory majorities have been obtained;
(6) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and
(7) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

18. As in *Singyes*, the Scheme is a genuine debt restructuring of a distressed company. It is also a permissible purpose to

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2 [2020] HKCFI 467; [2020] HKCLC 379 at [7].

compromise via the Scheme guarantees granted by Century Sunshine (see *Re Century Sun International Ltd*).[3]

19. In considering whether creditors are properly classified, the test is whether creditors who are called on to vote as a single class have sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting. The relevant principles may be summarised as follows:

(1) The overarching question is whether the pre and post-scheme rights of those proposed to be included in a single class are so dissimilar as to make it impossible for them to consult with a view to their common interest. If that is the case, separate meetings must be summoned.
(2) The second principle is that it is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests will normally only ever arise at the sanction stage as a question for consideration.
(3) The third principle is that the court should take a broad approach to the composition of classes, so as to avoid giving unjustified veto rights to a minority group of creditors, with the result that the test for classes becomes an instrument of oppression by a minority.
(4) The fourth principle is that the court has to consider, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If, having carried out that exercise, there is a material difference between the rights of the different groups of creditors, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest.
(5) In applying the above test, the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed.

See *Re China Oil Gangran Energy Group Holdings Ltd*.[4]

20. The Scheme Creditors correctly voted as a single class for these reasons:

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3 [2021] HKCFI 2928; [2021] HKCLC 1477 at [15]–[17].
4 [2021] 3 HKLRD 69; [2021] HKCFI 1592; [2021] HKCLC 911 at [15]–[16].

(1) The appropriate comparator here is an insolvent liquidation because, absent the Scheme, an insolvent liquidation of the Company would be an unavoidable outcome.
(2) The Scheme Claims are the Company's general unsecured debts.
(3) All Scheme Creditors are given the same options for distribution under the Scheme.

21. The Convening Order has been complied with. This is explained by Mr Chi in his 2nd affirmation which confirms the circulation of the notice of the Scheme Meeting, Explanatory Statement and Scheme. The advertisement of the Scheme Meeting was duly placed in *The Standard* and *Sing Tao Daily* on 18 January 2022.

22. During the Scheme Meeting held on 15 February 2022, the Chairman adjourned the Scheme Meeting to 1 March 2022 in view of the impending amendments to the Scheme resulting from negotiations with a major Scheme Creditor. This was permissible. The Chairperson could validly adjourn the Scheme Meeting to allow the Scheme Creditors sufficient opportunity to consider proposed amendments to the Scheme (see *Re Peninsula and Oriental Steam Navigation Co*;[5] *aff'd The Peninsular and Oriental Steam Navigation Co v Eller and Co*;[6] *Re CIL Holdings Ltd*).[7]

23. On 23 February 2022, the Company circulated the revised Scheme to all Scheme Creditors. The adjourned Scheme Meeting on 1 March 2022 duly voted in favour of the Scheme. The requirements under *s.674(1)(b)* of the *Ordinance* that the Scheme be approved by a majority in number representing at least 75% in value of the Scheme Creditors present and voting in person or by proxy have been satisfied.

24. To satisfy the requirements of *s.671(3)* of the *Ordinance*, an explanatory statement must be sufficiently informative:

> A company is under a duty to include in the explanatory statement all the information necessary to enable the creditors to form a reasonable judgement on whether the scheme is in their best interests or not, and hence how to vote. The extent of the information required to be provided will, of course, depend on the facts of the particular case. Necessarily, the duty extends to the company providing up to date information, or an adequate explanation of why it has not done so, that will allow a creditor to contrast what is to be anticipated if the scheme is approved, and the outcome if it is not. A company is required to provide specific

5 [2006] EWHC 389 (Ch) at [34], [49], [54]–[55] (Warren J).
6 [2006] EWCA Civ 432.
7 (HCMP 2799/2002, [2003] HKEC 519, 2 April 2003) at [8]–[12] and [18] (Kwan J).

> financial information to support its predicted outcomes, and I would normally expect it to have its views independently verified by an insolvency practitioner or other suitable professionals.[8]

The Explanatory Statement satisfies these requirements.

25. The Court is slow to differ from the majority views, as it normally acts on the principle that businessmen are much better judges of what is to their commercial advantage than the court could be: *Re Allied Properties (HK) Ltd.*[9] The primary object of the Scheme is that, upon the Scheme becoming effective, the Scheme Creditors' Claims will be discharged and in return they will be entitled to be given a cash distribution, convertible bonds or a combination of both under the terms of the Scheme. The Scheme consideration provides the Scheme Creditors with a much better return than in an insolvent liquidation of the Company. Therefore, in respect of the Scheme Creditors, the Scheme is one that an intelligent and honest person acting in accordance with his interests as a member of the class within which he voted might reasonably approve.

Transnational cases

26. The business group of which the Company is an intermediate subsidiary carries on business in Jiangsu, Jiangxi and Jilin Provinces and the Xinjiang Uyghur Autonomous Region. The ultimate holding company is incorporated in the Cayman Islands and listed on the SEHK. The Company is incorporated in Bermuda. The debt to be compromised by the Scheme is very largely governed by Hong Kong law.

27. In transnational cases, the Court considers whether a scheme is effective in other foreign jurisdictions of practical importance because it would not be a proper exercise of the discretion to sanction a scheme if it serves no purpose. In practice whether or not a jurisdiction is of practical importance to the efficacy of a scheme sanctioned in Hong Kong will commonly be determined by the following considerations:

(1) Is a material amount of debt to be compromised by a scheme governed by the law of a jurisdiction other than Hong Kong?

(2) Even if there is some doubt as to whether or not a scheme will compromise a proportion of the debt, is there any reason to think that the creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt?

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8 *Re Century Sun International Ltd, supra*, footnote 3 at [23].

9 [2020] 5 HKLRD 766; [2020] HKCA 973; [2020] HKCLC 1549 at [37].

(3) The amount of the debt involved. If, for example, the amount of debt that is not governed by Hong Kong law is less than the cost of introducing a parallel scheme it makes more sense to exclude that debt from the scheme and settle it separately if it is ever pursued: *China Oil*.[10]

28. Although there is no parallel scheme or recognition application in any jurisdiction, the Scheme is expected to be internationally effective, in particular in Bermuda and Cayman Islands, because all the Claims are governed by Hong Kong law. As Miles J recently observed in, *Re PGS ASA*,[11] in an English law context:

> There is no requirement for a scheme to be effective in every jurisdiction worldwide, provided that it is likely to be effective in the key jurisdictions in which the company operates or has assets. Where the governing law of the debt affected by the scheme is English law, it is inherently likely that the scheme will be recognised abroad.

29. The expectation that the discharge of Hong Kong law-governed debt effected by a Hong Kong scheme of arrangement will be recognised abroad is justified because the discharge occurs as a matter of substantive Hong Kong law. This is certainly to be expected of a jurisdiction, which applies, what is commonly known as, the Rule in *Gibbs*. The Rule in *Gibbs*[12] provides that a debt is treated as discharged if compromised in accordance with the law of the jurisdiction, which governed the instrument giving rise to the debt. As far as I am aware, at the time of this decision *Gibbs* is followed in Bermuda, Cayman Islands and the other offshore jurisdictions. If a creditor submits to the jurisdiction of a foreign insolvency process he is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency process.[13] Consequently, a scheme sanctioned by the court of an offshore jurisdiction compromising debt governed by Hong Kong law will be treated in Hong Kong as binding on a creditor, who submitted to the foreign jurisdiction. It will not bind a creditor, who did not participate in the scheme proceedings or any associated insolvency process in the foreign jurisdiction.

30. Although not material in the present case, it is common for Mainland business groups listed in Hong Kong to raise US$-denominated debt and for the relevant agreements to be

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10 *Supra*, footnote 4 at [21]–[23].

11 [2021] EWHC 222 (Ch) at [29] (Miles J).

12 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

13 *China Oil supra* [24] referring to *China Singyes supra* [18(2)].

governed by United States law. A technique was established in about 2016 to compromise such debt by introducing a scheme in Hong Kong that would be recognised in the United States.[14] This would not be inconsistent with the Rule in *Gibbs*. As I explain in *Winsway*:[15]

> The second issue is answered by the Privy Council's decision in *New Zealand Loan and Mercantile Agency Co v Morrison*.[16] The Privy Council held, applying *Gibbs*, that a scheme of arrangement sanctioned in England under the *Joint Stock Companies Arrangement Act 1870* did not prevent a claim being brought in Victoria in respect of a debt governed by the law of Victoria. It did, however, bind all creditors '*wherever the creditors may be found, whether in the United Kingdom or in the Colonies or in foreign countries; and within the jurisdiction of the English Courts, all, wherever domicile, will be bound by the result*.'[17] The Scheme will, therefore, prevent action being taken within the jurisdiction of the Hong Kong courts regardless of the governing law of the debt. This is one of the principal reasons for introducing a scheme such as the present one. It will prevent action being taken in Hong Kong by a dissident creditor, which interferes with the Company's listed status.

31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under *Chapter 15* and granting by the relevant Bankruptcy Court of ancillary relief which prohibited enforcement in the United States. As the offshore jurisdictions apply the Rule in *Gibbs*, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of *China Oil*.[18]

32. A scheme sanctioned in an offshore jurisdiction and recognised under *Chapter 15* in the United States will not be treated by a Hong Kong court as compromising US$ debt. The Rule in *Gibbs* requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law.[19] In the insolvency context in the United States this is I understand is achieved under *Chapter 11* of *United States Bankruptcy Code*. This is explained by Glenn J (who dealt with the *Chapter 15* application

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14 See in particular *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1.
15 *Ibid* [36].
16 [1898] AC 349.
17 Lord Davey pp.357–8.
18 *Supra*.
19 *In re OJSC International Bank of Azerbaijan Bakhshiyeva v Sberbank of Russia* [2018] Bus LR 1270, 1308, [158(2)] (Hildyard J).

in *Winsway*)[20] in his judgment in *Re Agrokor d.d.*[21] In pp.184 to 185 Glenn J explains the position as follows:

> The Supreme Court concluded in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an *in rem* proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an *in rem* proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its pre-petition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan …

33. As a matter of United States law, a confirmed *Chapter 11* plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under *Chapter 15* does not operate as a discharge and that Glenn J acknowledges this.

34. On p.185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement Glenn J was asked to recognise was governed by English law and the arrangement arose under Croatia's *Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia*.

> From the record before this Court — particularly since no objections have been filed — the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial

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20 *Supra*.

21 591 BR 163 (Bankr SDNY 2018).

jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the *Gibbs* rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of pre-petition debt governed by English law.[22] That would be unfortunate, indeed.

35. The material distinction between *Chapter 11* and *Chapter 15* proceedings is explained on p.187:

Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. *See, e.g., Atlas Shipping* , 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located **in the United States.*Id.*** (emphasis added)

36. It is clear from this passage that recognition under *Chapter 15* operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States law to discharge the debt. Consistent with this at p.196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under *Chapter 11* which purports to have worldwide effect, recognition under *Chapter 15* is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.

37. There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which *Gibbs* is concerned) and a court within its jurisdiction recognising, pursuant

22 As Chief Justice Waite said in *Gebhard*, 109 U.S. at 539, 3 S.Ct. 363, "[u]nless all parties in interest, wherever they reside, can be bound" by the arrangement which is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."

to a process such as *Chapter 15*, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under *Chapter 15* does not constitute a compromise of debt governed by United States law, which satisfies the Rule in *Gibbs*. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding-up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US$-denominated debt has recently been subject to schemes only in offshore jurisdictions and recognition under *Chapter 15*.[23] It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and *Chapter 15* recognition will not protect them.

Modification of the Scheme

38. The Company seeks to modify the Scheme terms slightly in order to accommodate SEHK's comments on the structure of the Term Extension Share Placement. The amendments are in summary as follows:

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23 By way of example: Hilong Holding Ltd (Stock Code: 1623), GCL New Energy Holdings (Stock Code: 451), MIE Holdings Corp (Stock Code: 1555), Golden Wheel Tiandi Holdings Co Ltd (Stock Code: 1232), Modern Land (China) Co Ltd (Stock Code: 1107) and E-House (China) Enterprise Holdings Ltd (Stock Code: 2048). In *Winsway* the scheme was recognised because the Hong Kong proceedings to introduce a scheme were found by Glenn J to constitute "*foreign non-main proceedings*" as defined in the **UNCITRAL Model Law** as incorporated in *Chapter 15*, on the basis that the Company was listed on the SEHK: *supra* [37]. My understanding is that it was thought by *Winsway*'s legal advisers that the Company's COMI might be in the Mainland and, therefore, the proceedings in Hong Kong would not constitute "*foreign main proceedings*" and the *Chapter 15* application was framed accordingly. For obvious reasons it is unlikely that any of the Mainland companies to which I have referred have their COMI in an offshore jurisdiction or an establishment as defined in para.(f) of art.2. Article 16 para.3 provides that "*In the absence of proof to the contrary, the debtor's registered office … is presumed to be the centre of the debtor's main interests*". I would have thought that it would be apparent from evidence filed in support of an application for recognition under *Chapter 15* explaining a scheme and its background that most, if not all, of these companies do not have their COMI in the place of incorporation. As I explain in [20] of my decision in *Li Yiqing v Lamtex Holdings Ltd* [2021] 2 HKLRD 177; [2021] HKCLC 329, referring to *Creative Finance Ltd* Case No. 14–10358 (REG) 13 January 2016, my understanding is that offshore jurisdictions are not normally eligible for recognition under *Chapter 11*.

(1) **Subject to complying with the public float requirement, the Company will issue in one lot all shares under the Term Extension Share Placement, instead of five instalments as originally proposed.**
(2) **The Term Extension Interest payable to the Scheme Creditors will no longer be subject to any cap; the original proposal was a 5% cap.**
(3) **The Company will have no liability for the Scheme Costs. All Scheme Costs will be settled solely from the Term Extension Share Placement Proceeds.**

39. The Company seeks the Court's permission to modify the Scheme terms to meet SEHK's requirements. In this connection, the Company relies on Cl.119 of the Scheme:

> The Scheme Administrators may jointly consent for and on behalf of all concerned to any modification of or addition to the Scheme or to any condition the Court may see fit to approve or impose at any hearing of the Court to sanction or give directions in respect of the Scheme, whether in accordance with Section 670 of the Companies Ordinance or otherwise… If the Court approves a modification or addition to the Scheme without the need to convene a meeting of the Scheme Creditors to vote on the modification, such modification or addition shall be binding on the Company and the Scheme Creditors provided that no further obligations or liabilities should be imposed on the Company and that the Company should not be adversely affected by reason of such modification or addition.

40. I permit the post-Scheme Meeting modifications. The proposed modifications seek only to improve the Scheme Creditors' recovery and thus by definition would not prejudice any Scheme Creditors. Had the proposed modifications been before the Scheme Meeting, they would not have made any difference to the outcome of the Scheme Meeting. There is no question of the Court, by approving these modifications, "foisting" on the Scheme Creditors anything other than what they voted on at the Scheme Meeting. In these circumstance, allowing the proposed modifications would be entirely consistent with authority: *Re China Saite Group Co Ltd.*[24]

Determination

41. The Scheme is a legitimate debt restructuring scheme which has complied with all the statutory requirements and has received the requisite Scheme Creditors' support after exercising their

24 [2022] HKCFI 1128 at [8].

independent business judgment and will achieve its intended purpose. I will, therefore, make an order sanctioning the Scheme in the form of the draft order submitted to Court, which is in conventional terms.

Listing of Schemes, recognition applications and applications to appoint Provisional Liquidators

42. Mr Look Chan Ho for the Company told me at the hearing that there appears some confusion among practitioners about the procedural and jurisdiction aspects of the current scheme practice. It will be helpful if I clarify this. As I thought had been brought to practitioners' attention, although Linda Chan J has taken over the role of Companies Judge, because of the amount of cases in the Companies List I will continue to deal with particular types of applications if my diary permits and in the first instance solicitors should approach my clerk for dates. If I am not able to deal with them I will liaise with Linda Chan J. The following matters should be referred to my Clerk in the first instance for dates and listing:

(1) Schemes of arrangement and capital reductions;
(2) applications to appoint provisional liquidators; and
(3) applications for recognition and assistance of foreign provisional liquidators and liquidators.

43. I would also remind practitioners of my guidance in *Re Enice Holding Co Ltd*:[25]

> I would emphasise that the Companies Court expects solicitors to proceed as follows when acting for parties introducing schemes or capital reductions. As soon as they are instructed to proceed with a scheme or capital reduction they should approach the Companies Judge's clerk to obtain dates, which it is reasonable to expect the company to meet. Counsel should be instructed who are available on the allocated dates and the Company should work towards those dates. The Companies Court should not be expected to fit in with the convenience of companies and solicitors should make this clear to those instructing them.

The Winding-Up Petition

44. The Company seeks an order dismissing the Winding-Up Petition. The petitioner, who appeared today through Justin Ho did not object, but the petitioner seeks its costs. Costs are controversial. As Recorder William Wong SC heard that substantive hearing of

25 [2018] 4 HKLRD 736; [2018] HKCFI 1736; [2018] HKCLC 305 at [49].

the Winding-Up Petition and will determine the costs of that hearing it seems to me that he should also deal with the other costs of the Petition, which I anticipate are small.

Reported by Martin Li

In re Modern Land (China) Co.

Decided Jul 18, 2022

22-10707 (MG)

07-18-2022

In re: MODERN LAND (CHINA) CO., LTD., Debtor in a Foreign Proceeding.

SIDLEY AUSTIN LLP Counsel to the Foreign Representative By: Anthony Grossi, Esq. MAPLES AND CALDER (CAYMAN) LLP Attorneys for Debtor in a Foreign Proceeding for the Cayman Islands By: Caroline Moran KIRKLAND ELLIS LLP Attorneys for the Ad Hoc Group By: Willa Wang, Esq. KIRKLAND ELLIS LLP Attorneys for the Ad Hoc Group By: Heidi Hockberger, Esq.

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

Chapter 15

SIDLEY AUSTIN LLP Counsel to the Foreign Representative By: Anthony Grossi, Esq.

MAPLES AND CALDER (CAYMAN) LLP Attorneys for Debtor in a Foreign Proceeding for the Cayman Islands By: Caroline Moran

KIRKLAND ELLIS LLP Attorneys for the Ad Hoc Group By: Willa Wang, Esq.

KIRKLAND ELLIS LLP Attorneys for the Ad Hoc Group By: Heidi Hockberger, Esq.

MEMORANDUM OPINION GRANTING MOTION FOR RECOGNITION AND RELATED RELIEF *2

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

This case raises the important questions of whether and when, under Chapter 15 of the Bankruptcy Code, a bankruptcy court may recognize and enforce a scheme of arrangement sanctioned by a court in the Cayman Islands, the debtor's place of incorporation, that modifies or discharges New York law governed debt. The Debtor here is a holding company for a large group of businesses, most of which are incorporated in the Cayman Islands or the British Virgin Islands ("BVI"), but that conduct most or all of their business in the People's Republic of China ("PRC"). Based on the UNCITRAL Model Law on Cross-Border Insolvency, Chapter 15 adopts the center of main interest ("COMI") concept, permitting recognition of a foreign proceeding in a debtor's center of main interest (a "foreign main proceeding") or, alternatively, recognition of a "foreign nonmain proceeding" in a place where the debtor maintains an "establishment." While the statute establishes a presumption that a debtor's COMI is its place of incorporation, the presumption can be overcome where other factors support finding the COMI to be elsewhere. Should this Debtor's Cayman sanctioned Scheme be recognized and enforced by this Court? On the facts of this case, the Court concludes the answer is yes. For the reasons explained below, this Court **GRANTS** the Motion recognizing the Cayman Proceeding as a foreign main proceeding and recognizing and enforcing the Scheme.

I. *BACKGROUND*

A. The Motion for Recognition and Enforcement

Pending before the Court is the *Motion for (I) Recognition of a Foreign Main Proceeding, (II) Recognition of a Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the "Motion," ECF Doc. # 4), filed by Mr. Zhang Peng, in his capacity as the authorized foreign representative (the "Foreign Representative") of Modern Land *3 (China) Co., Limited (the "Debtor"). A proposed recognition order is attached to the Motion as Exhibit A. ("Proposed Recognition Order," ECF Doc. # 4-1.) The Debtor is the subject of a foreign proceeding (the "Cayman Proceeding") concerning a scheme of arrangement (the "Scheme" or "Cayman Scheme") between the Debtor and certain holders of the existing notes (the "Scheme Creditors"), under section 86 of the Cayman Islands Companies Act 2022 (the "Companies Act") and currently pending before the Grand Court of the Cayman Islands (the "Cayman Court").

The following declarations were filed in support of the Motion: (i) a declaration of the Foreign Representative ("Peng Declaration," ECF Doc. # 5); (ii) a declaration of the Debtor's Cayman Islands counsel, Caroline Moran ("Ms. Moran") (ECF Doc. # 6); and (iii) the Foreign Representative's statements required by section 1515(c) of the Bankruptcy Code and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure (ECF Doc. # 3). The Foreign Representative also filed supplemental briefing addressing the *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 ("Rare Earth Briefing," ECF Doc. # 12) and *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 ("Global Brands Briefing," ECF Doc. # 19.)

The objection deadline was set for June 29, 2022, at 4:00 p.m. (*See* ECF Doc. # 9). There were no objections filed in response to the Motion. The hearing to sanction the Scheme by the Cayman Court was scheduled for July 5, 2022, at 11:00 a.m. (Motion ¶ 34.)

On July 5, 2022, the Debtor filed a supplemental declaration of Ms. Moran addressing the hearing to sanction the Scheme. ("Supplemental Moran Declaration," ECF Doc. # 20.) Annexed to the Supplemental Moran Declaration as Exhibit A is a report of the scheme meeting held on *4 June 30, 2022 (ECF Doc. # 20-1) and as Exhibit B a copy of the order sanctioning the Scheme issued by the Cayman Court ("Sanction Order," ECF Doc. # 20-2).

A hearing on the Motion was held on July 7, 2022. At the hearing, the Court directed the Foreign Representative's counsel to file further supplemental briefing by July 12, 2022. On July 12, 2022, the Foreign Representative filed (i) a supplemental brief ("Supplemental Brief," ECF Doc. # 23), (ii) a second declaration by the Foreign Representative ("Supplemental Peng Declaration," ECF Doc. # 24), and (iii) a third declaration by Ms. Moran ("Third Moran Declaration," ECF Doc. # 25).

B. The Debtor's Business Operations and Preexisting Capital Structure

On June 28, 2006, the Debtor was incorporated in the Cayman Islands under the Companies Act as an exempted company with limited liability. (Motion ¶ 6.) The Debtor is the ultimate holding company of a group of companies comprising the Debtor and its subsidiaries, including the following: Great Trade Technology Ltd., a holding company incorporated with limited liability in the BVI; the Modern Land HK Companies; and Jiu Yun Development Co., Ltd., a holding company incorporated with limited liability in Hong Kong (collectively with Great Trade Technology Ltd., the Modern Land HK Companies, and together with the Debtor, the "Company"), that carries out real estate investment and development in the PRC and the United States. (*Id.* ¶ 7.) The Company is a property developer focused on eco-

friendly residences in the PRC with four product lines: MOMA; Modern Eminence MOMA; Modern Horizon MOMA; and Modern City MOMA. (*Id.* ¶¶ 8, 10.)

As of June 30, 2021, the Company had a contracted sales gross floor area of 2.08 million square meters and aggregate unsold gross floor area of 16.77 million square meters in the PRC. *5 (*Id.* ¶ 11.) During the first half of 2021, the Company purchased a total of 20 new projects with an aggregate gross floor area of 3.56 million square feet. (*Id.*)

The Debtor's shares have been listed on the Stock Exchange of Hong Kong Limited since July 12, 2013. (*Id.* ¶ 9.) As of December 31, 2021, the authorized share capital of the Debtor was $80 million divided into eight billion ordinary shares of a par value of $0.01 each, of which 2.79 billion of the ordinary shares were issued and fully paid.[1] (*Id.*) As of June 30, 2021, the Company's total indebtedness was $4.32 billion, including: (i) short-term borrowings of $972.33 million; (ii) long-term borrowings of $1.92 billion; and (iii) bonds payable of $1.42 billion. (*Id.* ¶ 12.) Additionally, as of June 30, 2021, the Company's contingent liabilities amounted to $2.57 billion. (*Id.*)

[1] All dollar amounts are calculated in USD.

As part of the Company's $1.42 billion of bonds payable, the total principal amount outstanding under the existing notes ("Existing Notes") is $1.34 billion. (*Id.* ¶ 13.) The Existing Notes are the subject of the Scheme with each series of notes issued by the Debtor having different maturity dates and different interest rates. (*Id.* ¶¶ 13-14.) The remaining indebtedness is not being restructured and will be unaffected by the Scheme and this Chapter 15 case. (*Id.* ¶ 14.) As of June 30, 2021, the Debtor's current assets amounted to $12.49 billion on a consolidated basis[2] and these assets were located in the PRC and the United States. (*Id.* ¶ 15.) Some of the assets were pledged to secure certain banking and other facilities granted to the Company and mortgage loans granted to buyers of sold properties. (*Id.*) *6

[2] As of June 30, 2021, the Company's current assets consist of the following: a) inventory of $145.79 million; b) properties under development for sale of $6.92 billion; c) properties held for sale of $895 million; d) trade and other receivables of $1.78 billion; e) amount due from related parties of $129.27 million; f) restricted cash of $570.69 million; and g) bank balances and cash of $2.06 billion. (Motion ¶ 15.)

C. The Cayman Proceeding

Market concerns over the operations of Chinese property developers were intensified due to reduced lending for real estate development, the impact of COVID-19 on macroeconomic conditions, and certain negative credit events. (*Id.* ¶ 18.) These conditions led the Company to experience liquidity pressures due to limited access to external capital to refinance debt and reduced cash generated from sales. (*Id.*) The Company failed to meet two repayments arranged for October 2021 and February 2021 which constituted events of default. (*Id.*) These amounts remain unpaid. (*Id.*)

On October 26, 2021, the Debtor appointed Sidley Austin LLP as its legal advisor. (*Id.* ¶ 20.) On November 5, 2021, the Debtor appointed Houlihan Lokey (China) Limited as its financial advisor. (*Id.*) The Company commenced discussions with the ad hoc group of holders of the Existing Notes, who are advised by Kirkland & Ellis LLP. (*Id.* ¶ 19.)

On February 25, 2022, after negotiations with the ad hoc group, the Debtor entered into a restructuring support agreement (the "RSA") with the Scheme Creditors. (*Id.* ¶ 21; *see also* Peng Decl., Ex. A.) As of May 31, 2022, certain Scheme Creditors holding $1,083,272,000 of the Existing Notes-representing 80.75% of the

aggregate outstanding principal amount of all Existing Notes-had agreed to the RSA. (Motion ¶ 24.)

On April 14, 2022, the Debtor filed a petition (the "Scheme Petition," ECF Doc. # 6-1) with the Cayman Court commencing the Cayman Proceeding, seeking an order that (i) directed the Company to convene a meeting on the Scheme for a single class of creditors only (the "Scheme Meeting"), (ii) requested a convening hearing (the "Convening Hearing"), and (iii) sought the appointment of the Foreign Representative. (*Id.* ¶ 32.) Following the Convening Hearing on May 31, 2022, the Cayman Court entered the order (the "Convening Order") *7 scheduling the Scheme Meeting for June 29, 2022, scheduling the Sanction Hearing for July 5, 2022, and appointing the Foreign Representative. (*Id.* ¶ 34; Peng Decl., Ex. B.)

The Convening Order states that Scheme Creditors will be notified properly of the Scheme Meeting and will have the opportunity to raise questions and objections to the Scheme at the Scheme Meeting and/or at the Sanction Hearing. (Motion ¶ 37; Peng Decl., Ex. B.) At the Scheme Meeting, a vote will be held to determine whether the Scheme Creditors that are present and voting in person or by proxy will approve the Scheme. (Motion ¶ 38.) If a majority of creditors representing at least seventy-five percent in value of the Scheme Creditors present and voting at the Scheme Meeting votes in favor of the scheme, the Scheme is approved.[3] (*Id.*)

[3] As detailed in Section I.G., below, the Scheme Creditors voted overwhelmingly to approve the Scheme- 99% in number and 94.8% in amount. No objections to the Scheme were raised either in connection with the Cayman sanction hearing or this Court's recognition hearing.

D. Description of the Scheme and Issuance of New

The Scheme's effect will be to release the Scheme Creditors' claims related to the Existing Notes documents. (*Id.* ¶ 26.) In return, each Scheme Creditor will receive a pro rata share of the following consideration (the "Scheme Consideration"): cash consideration of $22.916 million; and the new notes ("New Notes"), in an aggregate principal amount equal to the sum of (i) 98.3% of the outstanding principal amount of the Existing Notes held by the Scheme Creditors; and (ii) accrued and unpaid interest up to but excluding the day the restructuring becomes effective (the "Restructuring Effective Date"). (*Id.*) This will enable the Company to restructure its existing indebtedness under the Existing Notes. (*Id.* ¶ 28.) The Debtor will also be issuing the New Notes on the Restructuring Effective Date. (*Id.*)

On the Restructuring Effective Date, following the distribution of the Scheme Consideration and the issuance of the New Notes, all outstanding Existing Notes will be *8 canceled and all guarantees in connection with the Existing Notes will be released. (*Id.* ¶ 29.) Additionally, the Scheme provides for releases by Scheme Creditors of any claim related to the restructuring against the Debtor and its affiliates. (*Id.* ¶ 30.) If the Scheme is approved by the requisite majorities of creditors and sanctioned by the Cayman Court with a sealed copy of the Sanction Order filed with the Cayman Islands Registrar of Companies, the Scheme will then bind all Scheme Creditors regardless of how, or if, they voted. (*Id.* ¶ 31.)

E. Rare Earth Briefing

On June 6, 2022, the High Court of the Hong Kong Special Administrative Region Court of First Instance (the "Hong Kong Court") ruled in *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 (the "*Rare Earth* Opinion"). In dicta, the *Rare Earth* Opinion speculated that "recognition under *Chapter 15* is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the

debt." *Rare Earth* Opinion ¶ 36. The *Rare Earth* Opinion relies heavily upon this Court's decision in *In re Agrokor d.d.*, 591 B.R. 163, 169 (Bankr. S.D.N.Y. 2018). Specifically, the Hong Kong Court points to this Court's explanation that "Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*." *Rare Earth* Opinion ¶ 35 (citing *In re Agrokor*, 591 B.R. at 187). From this statement, the Hong Kong Court concludes that " [r]ecognition does not appear as a matter of United States' law to discharge the debt." *Id.* ¶ 36.

On June 17, 2022, the Debtor filed the Rare Earth Briefing noting that the Hong Kong Court's statements principally rely on the application of United States law. (Rare Earth Briefing ¶ 8.) The Debtor notes that a federal court's Chapter 15 order that recognizes a discharge of New York law governed debt granted in a foreign proceeding is a complete and valid discharge of that debt as a matter of United States law. (*Id.* ¶ 9.) The Debtor asserts that because the *9 Proposed Recognition Order recognizes a discharge to the extent granted in the foreign Cayman Proceeding, it serves as a complete and valid discharge of the Existing Notes, which are governed by New York law, as a matter of New York state law. (*Id.*)

This is a critically important issue. The Scheme in this case, and in many other scheme or restructuring plan cases, modifies or discharges existing debt and related guarantees governed by New York law, and provides for the issuance of new debt and guarantees governed by New York law. An indenture trustee will only take the actions authorized by the scheme or plan if enforceable orders have been entered by the foreign court and a Chapter 15 court.

With great respect for the Hong Kong court in *Rare Earth*, that court misinterprets this Court's earlier decision in *Agrokor*, as well as many other decisions in the United States which have recognized and enforced foreign court sanctioned schemes or restructuring plans that have modified or discharged New York law governed debt. Provided that the foreign court properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable. Under U.S. law, that is an unremarkable proposition that has been firmly established in the U.S. at least since the Supreme Court decision in *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527 (1883), which granted international comity and enforced a Canadian scheme that discharged New York law governed debt and provided for the issuance of new debt governed by New York law. As Chief Justice Waite said in *Gebhard*, "the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries." *Id*. at 548. Chapter 15 limits a U.S. bankruptcy court's authority *10 to enjoin conduct outside the territorial jurisdiction of the United States, but it does not make a discharge of New York law governed debt any less controlling.

To be clear, in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes is binding and effective.[4]

[4] What *Agrokor* discussed at length (and will not be repeated here) is that English and some commonwealth courts continue to apply the *Gibbs* Rule, based on an 1890 decision of the Court of Appeal in *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, which refuses to recognize a discharge or modification of English law governed debt approved by a court outside of England. *See Agrokor,* 591 B.R. at 192-96.

F. The Global Brands Briefing

1. *The Debtor Does Not Intend or Expect to Seek Recognition of the Scheme or any Chapter 15 Order of this Court in Hong Kong*

The Court entered an order on June 27, 2022 (ECF Doc. # 18) requiring the Foreign Representative to file a supplemental brief addressing another recent Hong Kong court judgment, *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 ("*Global Brands*"). The court in *Global Brands* stated that, in the future, recognition and enforcement by the Hong Kong court of schemes sanctioned in the Cayman Islands and BVI depended upon common law principles developed by Hong Kong courts that would ordinarily apply a center of main interests test rather than the place of incorporation as had been done in the past. Because the Debtor and its affiliates conduct their business in the PRC, and the Debtor's common stock trades on the Stock Exchange of Hong Kong Limited, this Court wanted to know whether the Debtor intends to seek recognition and enforcement in Hong Kong of the Cayman Scheme and of any order of this Court recognizing and enforcing the Cayman Scheme. In short, the Foreign Representative's answer is that the Debtor does not intend or expect to seek *11 recognition and enforcement of the Scheme or this Court's order recognizing and enforcing the Scheme in Hong Kong.

Given that the Existing Notes are issued by a Cayman Islands entity and are governed by New York law, the Foreign Representative submits that the implementation and effectuation of a Cayman Islands scheme of arrangement and recognition and enforcement of the scheme under Chapter 15 of the Bankruptcy Code are all that is required to effectuate the Restructuring. (Global Brands Briefing ¶ 5.) Further, the Foreign Representative notes that the solely affected creditors, the holders of the Existing Notes, also agree with this position. (*Id.* ¶ 6.) The RSA and the Scheme documents, which were negotiated at arm's-length with sophisticated creditors represented by able counsel, do not require recognition of the Scheme in Hong Kong. (*Id.*)

2. *The Scheme Can Become Effective Without Recognition in Hong Kong*

According to the Foreign Representative, nothing in the RSA or in any of the Scheme documents necessitates or requires recognition and/or enforcement of the Scheme by the Hong Kong Court for the Scheme to be effective. (*Id.* ¶ 8.) Under the terms of the Scheme, once the Cayman Court sanctions the Scheme and the Sanction Order has been delivered to the Cayman Companies Registrar, the Scheme will become effective. (*Id.*) The Foreign Representative notes that the restructuring will ultimately become effective upon entry of the Sanction Order by the Cayman Court and the Proposed Recognition Order by this Court. (*Id.*) Further, the Foreign Representative argues that this Court does not need to consider whether the Scheme would be recognized and enforced in Hong Kong in making its determination whether to recognize and enforce the Scheme pursuant to section 1521 of the Bankruptcy Code. (*Id.* ¶ 9.) This argument relies on the *Agrokor* case, where this Court enforced the modification of both English law and New York law-governed debts pursuant to a Croatian insolvency proceeding, even though *12 jurisdictions following the *Gibbs* Rule may not have treated the modification of English law-governed debts as effective. (*Id.* ¶ 10.)

3. *Global Brands is Distinguishable*

The Foreign Representative believes it is unlikely that a court in Hong Kong will be asked to consider whether the Scheme is effective in Hong Kong. (*Id.* ¶ 15.) The Foreign Representative does not intend to seek relief in Hong Kong or to obtain any assets located in Hong Kong, and they argue the risk of a dissenting Scheme Creditor seeking enforcement of the Existing Notes in Hong Kong is de minimis. (Id.) It is, of course, for the Debtor to decide whether to seek recognition and

enforcement in Hong Kong, and for Hong Kong Court to decide whether to recognize and enforce the Scheme if the issue is presented by the Debtor or any other party that has standing to raise the issue in Hong Kong.

G. The Outcome of the Cayman Proceeding

Ms. Moran notes that the Scheme Creditors overwhelmingly approved the Scheme in the required majorities. (Supp. Moran Decl. ¶ 4.) Ms. Moran states that there were 372 creditors who voted (and one creditor that abstained), with over 99% (370) of those voting to support the Scheme. (*Id.*) Further, the supporting creditors represented *94.78%* ($1,271,425,000) of the total principal amount outstanding under the Existing Notes. (*Id.*) Only two creditors voted against the Scheme representing less than 1.23% ($16,319,000) of the total principal amount outstanding under the Existing Notes. (*Id.*)

On July 5, 2022, the Cayman Court presided over the Sanction Hearing and found that the Scheme satisfied the requisite elements to be sanctioned. *(Id.* ¶ 7.) Ms. Moran notes that no creditor raised any objection during the Sanction Hearing. (*Id.*) The Cayman Court entered the Sanction Order which sanctions and approves consummation of the Scheme and authorizes and effectuates the Scheme Restructuring. *(Id.* ¶ 8.) *13

H. Supplemental Briefs

A hearing on the Motion was held on July 6, 2022. ("Transcript," ECF Doc. # 21.) The Court expressed its concerns regarding the Debtor's COMI and, with respect to possible recognition as a foreign nonmain proceeding, whether the Debtor established that it was engaged in "non-transitory activity." (Transcript at 45:6-24.) Counsel to the Foreign Representative filed the Supplemental Brief on July 12, 2022.

The Debtor asserts that it's COMI is in the Cayman Islands because it is, and publicly identifies as, a Cayman-incorporated company. (Supp. Brief ¶ 1.) The Foreign Representative states that the Debtor's historical corporate counsel is a Cayman Islands law firm, Conyers Dill & Pearman, which provided general corporate advice on the issuance of the Existing Notes. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes make clear that the Debtor is a Cayman entity. (*Id.* ¶ 3.) The Debtor notes that when it first defaulted under the Existing Notes, BFAM Asian Opportunities Master Fund, LP ("BFAM,") issued a "statutory demand" (the "Statutory Demand") against the Debtor, threatening a winding up petition that would be filed under the laws of the Cayman Islands. (*Id.* ¶ 4.) The Statutory Demand prompted the restructuring negotiations and the RSA. (*Id.* ¶ 5.)

1. *Insolvency Procedures in the Cayman Islands*

The Debtor notes that liquidation of a Cayman Islands incorporated company is required to be implemented pursuant to Cayman law through insolvency practitioners appointed by the Cayman Court. (*Id.* ¶ 5 (citing Third Moran Decl. ¶¶ 16-18).) The Cayman courts generally do not recognize a non-Cayman Islands liquidation as being capable of liquidating and dissolving a Cayman Islands company. (*Id.* (citing Third Moran Decl. ¶¶ 18-23).)

The Foreign Representative notes that most of the Restructuring-related activities took place in the Cayman Islands. (Supp. Peng Decl ¶ 6.) Maples and Calder (Cayman) LLP *14 ("Maples"), the Debtor's Cayman counsel since November 2021, advised the Debtor with respect to practical elements of the Restructuring during negotiations of the RSA. (Third Moran Decl. ¶ 25.) The RSA put Scheme Creditors on notice that the proceeding to sanction the Scheme would occur in the Cayman Islands. (Supp. Brief ¶ 8.) The Debtor completed each of the steps needed to sanction the Scheme by the Cayman Court. (Supp. Peng Decl. ¶ 10.) These steps included holding the Scheme Meeting in the Cayman Islands that was chaired by an individual who resides in the Cayman Islands and was engaged directly by the Debtor for

the purposes of the Scheme Meeting. (Third Moran Decl. ¶ 25.) The chairman of the Scheme Meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*)

2. *Debtor's Arguments in Favor of Foreign Main*

The Debtor relies on the Scheme Creditor's expectations that the Debtor's COMI is the Cayman Islands. (Supp. Brief ¶ 11.) The Debtor notes that creditor expectations were formed via the publicly available descriptions of the Debtor in (i) the offering memoranda of the Existing Notes that stated that "an insolvency proceeding relating to us, even if brought in the United States, would likely involve Cayman Islands insolvency law" and (ii) the Debtor's press releases, pointing to the Debtor as a company "incorporated in the Cayman Islands." (*Id.*) The Debtor notes that creditor expectations were reinforced by certain actions including: (i) BFAM's negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplating an insolvency proceeding in the Cayman Islands. (*Id.*)

The Debtor notes that no Scheme Creditor-including the two Scheme Creditors that voted against the Scheme-objected to the Debtor's COMI being in the Cayman Islands. (*Id.* ¶ 12.) *15 The Debtor argues that the consensus of those affected by the Scheme points in favor of a Cayman COMI. (*Id.*)

The Debtor notes that Cayman Islands law requires that liquidation proceedings of Cayman Islands-incorporated companies take place in the Cayman Islands under the supervision of a Cayman Islands-appointed liquidator. (*Id.* ¶ 13.) This requirement was made clear in the documents related to the issuance of the Existing Notes.[5] (*Id.*)

5 The Debtor's argument is misleading. Neither the Debtor nor any of its creditors filed a winding up petition that would have resulted in the appointment by the Cayman court of one or more provisional liquidators, who are independent fiduciaries. *See* Cayman Companies Act §§ 94, 104. Rather, here, the Debtor filed the Scheme Petition under section 86 of the Cayman Companies Act, which does not by itself result in the appointment of JPLs. The benefit of a winding up order is that it enables the court in appropriate cases to issue a moratorium similar to our automatic stay preventing creditors from taking action to recover on their claims while the parties try to reach agreement on a scheme. The Cayman court in this case issued the Convening Order appointing the Debtor's president as the Foreign Representative and scheduling the Scheme Meeting. No JPLs were appointed, meaning that there was no independent fiduciary overseeing the process. The Debtor and its professionals had already negotiated the RSA and were proceeding rapidly to a consensual scheme of arrangement without the necessity of a winding up petition, JPLs and a moratorium. In many Cayman cases where the debtor hopes to negotiate a scheme of arrangement, a winding up order and appointment of JPLs precedes the negotiation of the scheme. Such matters are often referred to as a "light touch" restructuring. *See In the Matter of Midway Resources Int'l*, Grand Court of the Cayman Islands, Cause Number: FSD 51 of 2021 (NSD) (Nicholas Segal J.) (30 March 2021), at [68] ("I am satisfied that this is an appropriate case in which the PLs should be appointed on a soft touch basis (although I would reiterate my plea to substitute 'light-touch' for 'soft touch', since the latter expression has always seemed to me to bring with it associations of someone being duped and defrauded!").

The Debtor maintains its registered office in the Cayman Islands to which all communications may be addressed, and where matters such as the administration of annual filings and the payment of annual fees with the Cayman Registrar are dealt with. (*Id.* ¶ 14.) The Debtor is also required to maintain statutory registers of members (*i.e.*, shareholders), mortgages and charges, and directors in the Cayman Islands. (*Id.*)

The Debtor is also tied to the Cayman Islands by way of its asset holdings and the location of certain creditors. (*Id.* ¶ 15.) Nearly half of the Debtor's wholly owned direct subsidiaries are Cayman entities. (*Id.*) Additionally, the Debtor identified at least 35 entities- representing a minimum of over half a billion dollars of the outstanding principal of the Existing *16 Notes-that are domiciled in the Cayman Islands. (*Id.*) But it is undisputed that despite its domicile in the Cayman Islands, the Debtor and its affiliates are managed and conduct their business in the PRC.

Finally, the Debtor's restructuring activities have been centralized in the Cayman Islands and undertaken by Cayman Islands actors. (*Id.* ¶ 16.) These activities include: (i) Maples advising the Debtor on all aspects of the Restructuring, including the terms of the RSA, the Practice Statement Letter, the Explanatory Statement, and all Cayman Court documents; (ii) preparing for and appearing at hearings in front of the Cayman Court in the Cayman Islands; (iii) the convening of the Scheme Meeting by the Cayman Court; and (iv) the Scheme Meeting, which was chaired by an individual who resides in the Cayman Islands, was engaged directly by the Debtor for the purposes of the Scheme Meeting, and who held proxies for the majority of the Scheme Creditors and attended and voted at the Scheme Meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor notes that its board of directors did not host meetings that were physically located in the Cayman Islands during the restructuring due to international travel restrictions and changes in business practices resulting from the COVID-19 pandemic. (*Id.*)

The Debtor also argues that it was not necessary for its Cayman counsel or its Scheme Chairperson to wrest control of the Debtor from its previously existing management or take possession of its property like a joint provisional liquidator ("JPL"). (*Id.*) The Debtor asserts that such activities are not required or appropriate in a consensual scheme of arrangement. (*Id.*) A scheme of arrangement, by its nature, is driven by negotiation and compromises between a company and its creditors. (*Id.*) The Debtor argues that holding scheme chairpersons to the same standard as a JPL would create a perverse incentive for companies to enter into liquidations rather than a value maximizing, consensual resolution with their creditors via a scheme of *17 arrangement.[6] (*Id.*) The Debtor argues that this would dictate that the restructuring activities in liquidations, but not schemes, would merit recognition under Chapter 15. (*Id.*)

6 Ms. Moran notes that a company would seek the appointment of JPLs and avail of the stay afforded by section 97(1) of the Companies Act to facilitate a restructuring if: (a) there were issues with the propriety of actions taken by management, with a view to suspending the powers of the directors and/or (b) the scheme of arrangement was contentious including where there is a risk that minority creditor(s) might seek to frustrate the restructuring through the presentation of a winding up petition. (Third Moran Decl. ¶ 7.)

3. *Foreign Nonmain Arguments*

The Debtor asserts that it has substantial connections to the Caymans including issuing debt and holding assets in the Caymans, retaining counsel and employing professionals in the Caymans, and holding itself as an entity that could only be liquidated effectively in the Caymans. (*Id.* ¶ 19.) The Debtor argues that this is sufficient to find that the Debtor has non-transitory business connections with the Caymans. (*Id.*) The Debtor

notes that its maintenance of a registered office in the Cayman Islands, compliance with the corporate formalities required to maintain its status as a Cayman entity, and representations to creditors that it is a Cayman-incorporated entity also support finding non-transitory connections with the Caymans. (*Id.*)

The Debtor also argues that the alternative to recognition of the Cayman Proceeding is to potentially deny the Debtor the ability to implement a consensual restructuring and force the Debtor into a Cayman liquidation. (*Id.* ¶ 20.) The Debtor argues that it would leave all parties in a worse position. (*Id.*)

II. *LEGAL STANDARD*

A. Foreign Main Proceeding

To obtain recognition, the foreign proceeding must be either a foreign main or foreign nonmain proceeding. 11 U.S.C. § 1517(a)(1). Under section 1502(4) of the Bankruptcy Code, the term "foreign main proceeding" means "a foreign proceeding pending in the country where *18 the debtor has the center of its main interests ." 11 U.S.C. § 1502(4); *see, e.g., In re Ocean Rig UDW Inc.*, 570 B.R. 687, 702 (Bankr. S.DN.Y. 2017) (recognizing foreign main proceeding); *In re Suntech Power Holdings Co.*, 520 B.R. 399, 416-17 (Bankr. S.D.N.Y. 2014) (recognizing foreign main proceeding); *see also Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 138 (2d Cir. 2013) (hereinafter "*Fairfield Sentry*") (affirming recognition of foreign main proceeding). A Chapter 15 debtor's COMI is determined as of the filing date of the Chapter 15 petition, without regard to the debtor's historic operational activity. *See Fairfield Sentry*, 714 F.3d at 137 ("[A] debtor's COMI should be determined based on its activities at or around the time the chapter 15 petition is filed, as the statutory text suggests.").

The Bankruptcy Code establishes that "[i]n the absence of evidence to the contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c). However, this presumption can be overcome. *See, e.g. ABC Learning*, 445 B.R. 318, 328 (Bankr. D. Del. 2010); *aff'd*, 728 F.3d 301 (3d Cir. 2013) (stating that "the COMI presumption may be overcome particularly in the case of a 'letterbox' company not carrying out any business" in the country where its registered office is located); *In re Basis-Yield Alpha Fund (Master)*, 381 B.R. 37, 51-54 (Bankr. S.D.N.Y. 2008) (concluding that the absence of objections to COMI were not binding; the court must make an independent determination of COMI).

Courts consider several additional factors to determine whether the COMI presumption has been overcome, including: "the location of the debtor's headquarters; the location of those who actually manage the debtor . . . the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *In re SphinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006). In *SphinX*, this court explained that these factors *19 should not be applied "mechanically"; rather, "they should be viewed in light of Chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *Id.*; *see also Fairfield Sentry*, 714 F.3d at 137 (explaining that "consideration of these specific factors is neither required nor dispositive" and warning against mechanical application). The *SphinX* court also noted that "because their money is ultimately at stake, one generally should defer . . . to the creditors' acquiescence in or support of a proposed COMI." 351 B.R. at 117.

The Second Circuit and other courts often examine whether a Chapter 15 debtor's COMI would have been ascertainable to interested third

parties, finding "the relevant principle is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties. Among other factors that may be considered are the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes." *Fairfield Sentry*, 714 F.3d at 130. As the Second Circuit explained, by examining factors "in the public domain," courts are readily able to determine whether a debtor's COMI is in fact "regular and ascertainable [and] not easily subject to tactical removal." *Id.* at 136-37; *see also In re British Am. Ins. Co.*, 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010) ("The location of a debtor's COMI should be readily ascertainable by third parties."); *In re Betcorp Ltd.*, 400 B.R. 266, 289 (Bankr. D. Nev. 2009) (looking to ascertainability of COMI by creditors).

If a debtor's COMI has "shifted" prior to filing its Chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith. *See Fairfield Sentry*, 714 F.3d at 138 (concluding that "a court may look at the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith . . . The factors that a court may consider in *20 the analysis are not limited and may include the debtor's liquidation activities"). Courts ask whether there is evidence pointing to any "insider exploitation, untoward manipulation, [and] overt thwarting of third-party expectations" that would support denying recognition. *Id.*; *see also Ocean Rig*, 570 B.R. at 687 (granting recognition of foreign main proceeding where debtors shifted COMI from jurisdiction that only provided a liquidation option to jurisdiction that permitted reorganization, taking steps to shift COMI beginning one year before the foreign filing and where notice was given to creditors throughout the process of shifting COMI). The court in *Suntech* noted how "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." 520 B.R. at 416. Various factors could be relevant, such as "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *Id.*

In *Suntech,* the debtor's presumptive COMI was the Cayman Islands, where it was incorporated, however, the Cayman Islands was not its actual COMI when the Foreign Proceeding was commenced. *Id.* Notably, the *Suntech* debtor did not conduct any activities in the Cayman Islands, and maintained its principal executive offices in Wuxi, China from where it managed the Suntech Group. *Id.* So, the issue was whether the debtor's COMI should be measured at the time of the commencement of the Chapter 15 case or when the Foreign Proceeding was commenced. *Id.* But in *Suntech*, the Cayman Court appointed JPLs and *21 authorized them to exercise a host of additional powers (including acts on behalf of the debtor, possession of its property and collect all debts, dealing with all questions relating to or affecting the assets or the restructuring etc.) *Id.* at 417-18. The JPLs assumed control of the debtor's affairs, met with employees and creditors, opened a bank account in the Cayman Islands funded with transfers from one of the debtor's other accounts, and filed claims. *Id.* The *Suntech* court found the debtor's COMI on the date of the commencement of the chapter 15 case was the Cayman Islands and the JPLs did not manipulate the debtor's COMI in bad faith. *Id*. Therefore, the court overruled a creditor's objection to finding the debtor's COMI to be in the Cayman Islands.

The *Suntech* court's analysis and conclusion that COMI was in the Cayman Islands was consistent with the Second Circuit's analysis in *Fairfield Sentry*. In both cases, court-appointed fiduciaries assumed substantial control over the debtors' liquidation (in the case of *Fairfield Sentry*) and scheme proceeding (in the case of *Suntech*). So, the question is whether the absence of court-supervised fiduciaries, such as JPLs, requires a different result in finding COMI in the Cayman Islands in this case given that no JPLs were appointed. While this would be an easier case if JPLs had been appointed, the Court concludes that the Cayman court's supervision of the Debtor's Scheme Proceeding, in light of the other factors present here, is enough for the Court to conclude that the Debtor's COMI for the proceeding involving the single class of Existing Note holders was in the Cayman Islands.[7] *22

[7] It would be ironic if a scheme proceeding, following the appointment of JPLs in a contentious case where JPLs were needed to facilitate agreement between the debtor and its creditors, was recognized as a foreign main proceeding, but in a case such as this one where the Debtor and its professionals successfully negotiated the RSA with overwhelming creditor support without the need to file a winding up petition and the appointment of JPLs before obtaining sanction of the Scheme could not be recognized as a foreign main proceeding.

B. Foreign Nonmain Proceeding

The Foreign Representative's counsel argues, in the alternative, that the Scheme Proceeding satisfies the requirements to be a foreign nonmain proceeding. Recognition and enforcement can be granted as discretionary relief under sections 1507 and 1521 of the Bankruptcy Code even in a nonmain proceeding. The Court concludes that the Scheme Proceeding was not a foreign nonmain proceeding.

Courts recognize a foreign proceeding as a "foreign nonmain proceeding" if "the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending." 11 U.S.C. § 1517(b)(2). Section 1502(2) defines "[e]stablishment" as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2); *see also In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 70 (Bankr. S.D.N.Y. 2011), *aff'd* 474 B.R. 88 (S.D.N.Y. 2012) ("*Millennium Glob. I*"). Additionally, courts have required proof of more than a "mail-drop presence" to satisfy the establishment requirement. *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 277 (Bankr. S.D.N.Y. 2019) ("*Constellation I*") (citation omitted). Due to the "paucity of U.S. authority" on this question, the court in *Millennium Glob. I* cited a "persuasive" English law holding that the presence of an asset and minimal management or organization can create a debtor establishment. 458 B.R. at 84-85 (citing *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005)).

Whether the debtor has an "establishment" in a country is determined at the time of filing the Chapter 15 petition. *See Beveridge v. Vidunas (In re O'Reilly)*, 598 B.R. 784, 803 (Bankr. W.D. Pa. 2019). Several factors "contribute to identifying an establishment: the economic impact of the debtor's operations on the market, the maintenance of a 'minimum level of *23 organization' for a period of time, and the objective appearance to creditors whether the debtor has a local presence." *Millennium Glob. I*, 458 B.R. at 32. *See In re Creative Fin., Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016) (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007)) (finding that an "establishment" requires a "showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.")

This is evidenced by engagement of "local counsel and commitment of capital to local banks." *Millennium Glob. I*, 458 B.R. at 86-67. *See also Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1028 (5th Cir. 2010) (If a foreign "bankruptcy proceeding and associated debts [themselves] . . . demonstrate an establishment . . . [t]here would be no reason to define establishment as engaging in a nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding."); *Rozhkov v. Pirogova (In re Pirogova)*, 612 B.R. 475, 484 (S.D.N.Y. 2020) (finding that a foreign insolvency proceeding on its own cannot suffice to count as nontransitory economic activity in support of recognition as a foreign nonmain proceeding.)

III. *DISCUSSION*

For the reasons outlined below, the Court **GRANTS** the Motion for recognition of the Cayman Proceeding as a foreign main proceeding. The Court does not explicitly address the following aspects of the Motion because they are uncontroversial and satisfied by the uncontested facts: (i) whether the Debtor meets the eligibility requirements under section 109(a) of the Bankruptcy Code; (ii) whether the Cayman Proceeding is a foreign proceeding as defined in section 101(23) of the Bankruptcy Code; (iii) whether the Cayman Proceeding has been commenced by a duly authorized foreign representative; (iv) whether the Scheme Petition meets the requirements of section 1515 of the Bankruptcy Code; (v) whether the Debtor is entitled to *24 additional relief under section 1521 of the Bankruptcy Code; (vi) whether the Scheme is procedurally fair; (vii) whether the interests of creditors and other interested parties are sufficiently protected; (viii) whether the Foreign Representative is entitled to additional relief under section 1507 of the Bankruptcy Code; and (ix) whether recognition of the foreign proceeding is contrary to the public policy of the United States.

A. Recognition is Not Warranted as a Foreign Nonmain Proceeding.

The Court finds that recognition of the Cayman Proceeding as a foreign nonmain proceeding is not warranted because recognition would be inconsistent with the goals of foreign nonmain proceedings. Further, neither the bankruptcy proceeding itself nor the Debtor's bookkeeping activities constitute nontransitory economic activity, and the Debtor does not otherwise affect the local marketplace in the Cayman Islands.

1. *Recognition as a Nonmain Proceeding Would Be Inconsistent with the Goals of UNCITRAL Model Law*

The Court declines to recognize the Cayman Proceeding as a foreign nonmain proceeding because such a recognition would not comport with the stated goals of foreign nonmain proceedings. The UNCITRAL Model Law on Cross-Border Insolvency explains that in a foreign nonmain proceeding, "the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding." United Nations, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 12 (2014) (the "Guide"). The Guide further explains that "[u]nlike 'foreign main proceeding,' there is no presumption with respect to the determination of establishment . . . [t]he commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts, or of property would not in principle *25 satisfy the definition of establishment." *Id.* at 47. These provisions support the administration of a restructuring proceeding by a single foreign court.

In the present case, the Cayman Scheme pertains to the Existing Notes held by the Scheme Creditors. (Motion ¶ 13.) The language of the UNCITRAL Model Law on Cross-Border Insolvency therefore requires, for the purposes of recognition of the Cayman Proceeding as a foreign

nonmain proceeding, that the Existing Notes be assets in the Cayman Islands. However, this Court is not persuaded that the Existing Notes are assets within the meaning of Article 23, subsection 2 of the Model Law. As the Guide explains, "the existence of debts . . . would not in principle satisfy the definition of establishment." Guide at 47.

2. *There is Insufficient Evidence to Support a Finding of Nontransitory Economic Activity in the Caymans*

The Cayman restructuring cannot itself constitute nontransitory economic activity to support recognition as a foreign nonmain proceeding. In *Lavie v. Ran*, 406 B.R. 277, 286-87 (S.D. Tex. 2009), the bankruptcy court explained that if "the proceeding and associated debts alone could suffice to demonstrate an establishment, it would essentially rule out the possibility that any proceeding would fall into the . . . category of proceedings that are neither foreign main nor foreign nonmain. But, this third category was clearly envisioned by the drafters." Further, in *In re Pirogova*, 612 B.R. at 484, the court cited *Ran* and agreed that if "a foreign trustee could merely point to a foreign bankruptcy itself, which is subject to a recognition petition, as evidence of an establishment, the statutory requirements for recognition would be pointless." The court in *Pirogova* denied recognition of a foreign nonmain proceeding despite the Debtor's ownership of an apartment in Russia, her Russian utility bills, her vehicles in Russia, and her Russian yacht club membership, as well as the debtor's ongoing bankruptcy proceeding in Russia. *Id.* at 480. *26

In the present case, the Debtor's connections to the Cayman economy are far more tenuous than those discussed in *Pirogova*. The Debtor maintains a registered office in the Cayman Islands to which all communications may be addressed or served, and where the administration of annual filings and the payment of annual fees are registered. (Supp. Brief ¶ 1.) The Debtor also initiated the restructuring proceeding in its country of incorporation, the Cayman Islands. (*Id.*) However, the Debtor has been unable to point to any additional connections to the Cayman Islands that might constitute nontransitory economic activity, and therefore falls well short of the standards set in *Ran* and *Pirogova*.

3. *The Debtor's Business Activities Have No Local Effect on the Marketplace*

The court explained the standard for nontransitory economic activity in *In re Creative Fin., Ltd.*, 543 B.R. at 520-21. There, the court explained that recognition required "a showing of a *local effect on the marketplace*, more than mere incorporation and record-keeping and more than just the maintenance of property." *Id.* at 520 (emphasis added). In that case, the debtor, a foreign exchange trading business, was organized under the laws of the BVI, and admittedly engaged in bad-faith actions to pursue a restructuring proceeding there. *Id.* at 513. Nevertheless, the tenuous nature of the connection between the debtor's business activities and the BVI marketplace supported the court's denial of recognition as a foreign nonmain proceeding. *Id.* at 521.

In the present case, despite the absence of apparent bad faith, the Debtor similarly has a negligible effect on the local marketplace. The Debtor is a Cayman-incorporated investor and developer in real-estate that carries out its business in the PRC and maintains its books and records in the Cayman Islands. (*Id.* ¶¶ 6-7, 64.) However, the Debtor has not provided the Court evidence of "more than mere incorporation and record-keeping and more than just the *27 maintenance of property." *In re Creative Fin., Ltd.*, 543 B.R. at 520. The failure to engage the local economy excludes the Debtor from a foreign nonmain classification.

B. Recognition Is Warranted as a Foreign Main Proceeding

The Court recognizes the Debtor's COMI in the Cayman Islands. Section 1516(c) provides that "[i]n the absence of evidence to the contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interest." 11 U.S.C. § 1516(c). Given the evidence in this case, the Court considers the totality of the circumstances before it, including the goals of Chapter 15, the Scheme Creditors' expectations and intentions, the judicial role in the Cayman Scheme, the function of the Cayman Scheme Chairperson, the insolvency activities in the Caymans, Cayman choice of law principles and the Debtor's good-faith petition for recognition of the Cayman Proceeding. Each of these factors function together to support a finding of COMI in the Cayman Islands.

1. *Recognition as a Foreign Main Proceeding is Consistent with the Goals of Chapter 15*

Recognition of the Cayman proceeding as a foreign main proceeding would comport with the goals of Chapter 15. In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 126, *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008), the court explained that:

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> Unique to the Bankruptcy Code, Chapter 15 contains a statement of purpose: "[t]he purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency," with the express objectives of cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses. 11 U.S.C. § 1501(a)(1)-(5); *In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007).

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Chapter 15 contemplates cooperation between American and foreign bankruptcy courts, as well as facilitating protection for the Debtor in this case before the Court.

The Second Circuit has recognized that "[t]he absence of a statutory definition for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation." *Fairfield Sentry*, 714 F.2d at 138.

Here, the Debtor argues that denial of recognition of the Debtor's COMI in the Cayman Islands may leave the Debtor "with the alternative of converting a highly consensual Scheme into a Cayman liquidation in an effort to obtain such chapter 15 recognition at a later date." (Supp. Brief ¶ 23.) The Debtor also contends that this "would not maximize the value of the Debtor's assets, as it would divert additional funds towards

an entirely new insolvency process in an effort to potentially achieve the relief requested" in the Motion. (*Id.*) Such an outcome would clearly diverge from Chapter 15's stated goal of maximizing the value of the debtor's assets, as well as facilitating the rescue of a financially troubled business. Further, recognition of the Cayman Proceeding would promote cooperation between the American and Cayman courts, by helping facilitate the Cayman Proceeding and maximizing the chances of a successful reorganization.

2. *Recognition of this Proceeding is Consistent with Creditors' Expectations*

The Scheme Creditors' expectations that their loan agreements would be governed by Cayman law supports recognition of COMI in the Cayman Islands. (Supp. Brief ¶ 11.) When determining a Debtor's COMI, "creditor expectations can be evaluated through examination of the public documents and information available to guide creditor understanding of the nature and risks of their investments." *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 228 (Bankr. S.D.N.Y. 2017); *see also Constellation I*, 600 B.R. at 274 (listing cases in which offering *29 memoranda and indentures were evaluated for purposes of determining creditors' expectations). Here, this expectation was reasonable considering the publicly available descriptions of the Debtor as a Cayman company in (i) the offering memoranda of the Existing Notes that stated that "an insolvency proceeding relating to us, even if brought in the United States, would likely involve Cayman Islands insolvency law" and (ii) the Debtor's press releases, pointing to the Debtor as a company "incorporated in the Cayman Islands." (Supp. Brief ¶ 11.)

The Debtor's actions reinforced these expectations, particularly the fact that (i) BFAM initiated negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplated an insolvency proceeding in the Cayman Islands. (*Id.*) It is incontrovertible that the Scheme Creditors understood that the Debtor is a Cayman Islands company and expected that its debts would be restructured pursuant to the law of the Cayman Islands if a restructuring became necessary. (*Id.*) *See In re Ascot Fund Ltd.*, 603 B.R. 271, 283 (Bankr. S.D.N.Y. 2019) (finding COMI in the Caymans, in part, because "[f]rom the Ascot Fund investors' point of view, and as a matter of fact and law, they invested in a Cayman fund and their rights were to be determined under Cayman law.")

In *In re SPhinX, Ltd.*, 351 B.R. at 117, the Court explained that "[v]arious factors, singly or combined, could be relevant" to a COMI determination. The factors are not meant to be applied "mechanically," but rather, "viewed in light of chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *Id*. The *SPhinX* court reasoned that "because their money is ultimately at stake, one generally should defer, therefore, to the creditors' acquiescence in or support of a proposed COMI." *Id*. In *SPhinx*, ultimately, the Court found that COMI was outside of the Caymans, but *30 the concept remains, when a Court considers COMI factors, the protection of the creditors' interests is paramount. *Id*.

The decision in *In re Serviços de Petróleo Constellation S.A.* ("*Constellation II"*) also underscores how "Courts in the Second Circuit also look to the expectations of creditors with regard to the location of a debtor's COMI." 613 B.R. 497 (Bankr. S.D.N.Y. 2019) (finding COMI in Luxembourg, in part, because the creditors' expectations of the location of the insolvency proceeding); *see In re Chiang*, 437 B.R. 397 (Bankr. C.D. Cal. 2010) (noting how "the location of the COMI is an objective determination based on the viewpoint of third parties (usually creditors)"); *see also In re Codere Finance 2(UK) Ltd.*, Case No. 20-12151 (MG), (Bankr. S.D.N.Y.

Oct. 9, 2020) ("*Codere* Transcript," ECF Doc. # 13 at 21:17-23:6) (concluding that COMI in the UK was supported by lack of objections, overwhelming support of the scheme, no evidence of exploitation or untoward manipulation or thwarting of third-party expectations, and interests of creditors and other interested parties sufficiently protected).

In *In re Oi Brasil Holdings*, 578 B.R. at 226-229, the court considered whether, having initially recognized Brazil as the Debtor's COMI, subsequent events caused the COMI to shift to the Netherlands. To evaluate whether the COMI had shifted, the court considered creditor expectations, concluding "that purchasers of the notes understood that they were investing in Brazilian-based businesses, and [the debtor's] place of incorporation, or for that matter its very existence, was immaterial to their decision to purchase their notes." *Id.* at 229. It was notable in this case that "the [noteholders] had no legitimate expectation that the Austrian courts would play any role in the determination or payment." *Id*. at 226;*see also In re Olinda Star Ltd.*, 614 B.R. 28, 44 (Bankr. S.D.N.Y. 2020) (holding third party and creditors' expectations weigh in *31 favor of finding COMI); *Constellation II*, 613 B.R. at 508 (noting "[c]ourts in the Second Circuit also look to the expectations of creditors with regard to the location of a Debtor's COMI.")

In the present case, the Scheme Creditors made loans to Modern Land, a Cayman-incorporated holding company that carries out the business of real estate development in the PRC. (Motion ¶¶ 6-7.) Given the statutory presumption included in section 1516(c) of the Bankruptcy Code, the creditors could reasonably have concluded that the Debtor's registered office in the Cayman Islands was its COMI, subjecting it to the Cayman Companies Act, and in turn subjecting the creditors' agreements with the Debtor to Cayman law. Further, "nearly half of the Debtor's wholly owned subsidiaries are Cayman entities." (Supp. Brief ¶ 7.) Given the proclivity of Courts in the Second Circuit to consider creditor expectations when making a COMI determination, therefore, this factor supports a finding of the Cayman Islands being the Debtor's COMI.

The creditor expectations in this case are further evidenced by the overwhelming creditor support. Not one Scheme Creditor objected to the Debtor's COMI being located in the Cayman Islands, including the two dissenting Scheme Creditors that voted against the Scheme. (Supp. Brief ¶ 12.) Over 99% in number of the Scheme Creditors present and voting at the Scheme Meeting, representing approximately 95% in value of the outstanding principal of the Existing Notes, voted in favor of the Scheme. (*Id*., Supp. Moran Decl. ¶ 4.) In this case, definitive creditor expectations and overwhelming creditor support solidify a finding of COMI in the Cayman Islands.

3. *The Judicial Role in the Cayman Scheme is Prevalent in this Case*

Another factor supporting COMI being in the Cayman Islands is the ongoing restructuring proceeding itself. In *In re Suntech Power Holdings Co.*, 520 B.R. at 418, a *32 Cayman-incorporated holding company primarily conducting business in China filed for Chapter 15, seeking recognition. Over creditors' objections, this Court found COMI in the Cayman at the time of the filing, while acknowledging that COMI had been in China prior to the filing. *Id.* The *Suntech* court discussed at length the role of the JPLs, who conducted much of the Debtor's business from the Cayman Islands following the petition. *Id.*

In the present case, unlike in *Suntech*, there are no objections to recognition as a foreign main proceeding. The Scheme Creditors in this case overwhelmingly approved the Scheme. (Motion ¶ 65.) Modern Land is not subject to the control of JPLs, but there were no issues about the propriety if any actions by management, and the Debtor and its professionals successfully negotiated an RSA

with very broad creditor support. (Third Moran Decl. ¶ 7.) There was no need for the appointment of JPLs. (Supp. Brief ¶ 16.)

Furthermore, the Debtor in this case identifies itself as a Cayman-incorporated company in press releases and in official memoranda. (*Id.* ¶ 1.) The Debtor maintains its registered office in the Cayman Islands, and maintains a statutory register of members (i.e. shareholders), mortgages, charges, and directors in the Cayman Islands. (*Id.*) The Debtor's historical corporate counsel, who additionally advised the Debtor on the issuance of the Existing Notes, is a law firm located in the Cayman Islands. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes indicated in several places that, if needed, the Debtor would initiate an insolvency proceeding in the Cayman Islands. (*Id.* ¶ 3.) Lastly, the first demand upon the Debtor following its initial default under the Existing Notes threatened a winding up petition pursuant to the laws of the Cayman Islands. (*Id.* ¶ 4.)

The RSA expressly requires a Cayman Islands scheme of arrangement, and approximately 80.75% of the aggregate principal outstanding amount of all Existing Notes *33 acceded to the RSA. (*Id.* ¶ 5.) No Scheme Creditors objected to the Debtor's COMI being located in the Cayman Islands, and 99% in number of the Scheme Creditors present and voting at the Scheme Meeting representing approximately 95% in value of the outstanding principal of the Existing Notes, voted in favor of the Scheme. (*Id.* ¶ 12.)

Cayman law further provides that only the Cayman Court can conduct an effective liquidation of a Cayman Islands-incorporated company. (Third Moran Decl. ¶ 16.) The Debtors assert that, pursuant to Cayman law, a suit against a member of the Debtor's board of directors would require the application of Cayman law, even if such director did not live in the Cayman Islands. (*Id.* ¶ 24.) Next, nearly half of the Debtor's direct wholly owned subsidiaries are Cayman entities. (Supp. Brief ¶ 7.) The Debtor further identified at least 35 entities- representing a minimum of over half a billion dollars of the outstanding principal of the Existing Notes-that are domiciled in the Cayman Islands. (*Id.*)

The Debtor asserts, importantly, that as of the time of the filing of the Chapter 15 petition, the restructuring efforts were the Debtor's "primary business activity . . . to ensure the Debtor's survival." (*Id.* ¶ 8.) The "vast majority of Restructuring-related activities took place in the Caymans," and the Debtor's Cayman counsel advised the Debtor as a matter of Cayman Islands law. (*Id.*) For example, the Scheme Meeting took place in the Cayman Islands, the Scheme Meeting was presided over by a Cayman Islands resident, and the chairman of the meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor's Cayman counsel also appeared at both hearings before the Cayman Court to obtain permission to convene the Scheme Meeting and to sanction the Scheme. (Third Moran Decl. ¶ 25.) The Scheme received the support of Scheme Creditors representing approximately 95% of the value of the Existing Notes. *34 (Supp. Brief ¶ 9.) Given the strong support for the Scheme, the fact that the restructuring was the primary business activity of the Debtor at the time of the filing of the Chapter 15, the ongoing activities pertaining to the restructuring itself support recognition of the Cayman Islands as the Debtor's COMI in the present case.

Further, the fact that the Debtor is an exempted company does not jeopardize its ability to have a COMI in the Cayman Islands. The Debtor was incorporated in the Cayman Islands under the Companies Act as an exempted company with limited liability. (Motion ¶ 6.) While the Debtor's exempted company status places certain limitations upon its operations in the Cayman Islands, this Court has held that exempted companies can have a Cayman COMI. In *Ocean*

Rig, 570 B.R. at 705, this Court held that "[i]t also does not matter that [the debtor] is classified as 'exempted' under the Cayman Companies Law, even though 'exempted' company status appears to limit that company's activities in the Cayman Islands . . . [w]hile exempted companies are prohibited from *trading* in the Cayman Islands, except in furtherance of their business outside the Cayman Islands, they may still be *managed* from there." The *Ocean Rig* Court subsequently concluded that the Cayman Islands was indeed the debtor's COMI, and recognized the foreign main proceeding. *Id.* at 707. Therefore, in the present case, the Debtor's status as an exempted company does not jeopardize its COMI in the Cayman Islands.

4. *Choice of Law Principles Support a Finding of COMI in the Cayman Islands*

When conducting a COMI analysis, Courts in this Circuit additionally consider the jurisdiction whose law would apply to most disputes. *Olinda Star*, 614 B.R. at 43. "[T]his factor weighs in favor of a COMI in" the jurisdiction whose law applies. *Id.* at 44; *see also Constellation I*, 600 B.R. at 280 (stating that "because Parent/Constellation is a Luxembourg incorporated entity, that depends upon Luxembourg law for its existence and its corporate *35 operations, the Court found that Luxembourg law should be considered the law that applies to *most* of Parent/Constellation's disputes"). In the present case, the Foreign Representative explained that the Debtor, as a Cayman-incorporated company, "depends on Cayman Islands law for its existence and is subject to Cayman Islands laws and regulations." (Supp. Brief ¶ 13.) The Foreign Representative further explained that the requirements of Cayman law were "made clear in the documents related to the issuance of the Existing Notes." (*Id.*) While the Existing Notes as governed by New York law, the Cayman Islands is the jurisdiction whose law would apply to most disputes over corporate actions that may arise in the Cayman Proceeding, this factor supports finding a COMI in the Cayman Islands. And, to the extent that any New York law issues arose concerning the Existing Notes, the Second Circuit explained in *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005), that "[w]e have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding."

The Scheme Creditors here include only holders of Existing Notes. The Debtor's capital structure includes substantial debt governed by Hon Kong law. The Court has no reason to address the COMI of any insolvency or scheme proceeding involving creditors with claims other than holders of the Existing Notes. Creditor expectations in such a case could point to COMI somewhere other than the Cayman Islands.

5. *The Debtors Seek Recognition in Good Faith*

Many of the cases in which courts have denied recognition of a foreign main proceeding in a debtor's country of incorporation involved instances of bad faith, which are not present in the Debtor's petition for recognition. For example, in *Creative Finance*, the court found that the debtor's principal "and his associates-and hence the Debtors-were guilty of bad faith in *36 numerous respects." 543 B.R. at 513. Among other transgressions, the debtors in *Creative Finance* sought to manipulate a liquidator, ignored important inquiries, and sought to deny a disfavored creditor the opportunity to benefit from the proceeding. *Id.* In contrast, in *Fairfield Sentry Ltd.*, 440 B.R. at 64-65, the Court held that " [t]here being no showing of bad faith on the part of the BVI Liquidators, and given that the [d]ebtors are incorporated in and maintain their registered offices in the BVI, the Court finds it more compelling that the [d]ebtor's COMI lies in the BVI." *See also Codere* Transcript at 20:1-21:25 (reasoning that "the lack of objections and the overwhelming support for the scheme of arrangement in this case suggests that there has

not been insider exploitation, untoward manipulation, overt thwarting of third-party expectations. . . . Those sorts of things could evidence bad faith COMI manipulation.").

SPhinX was even more explicit in its consideration of the Debtor's bad faith as the basis for rejecting recognition. There, the Bankruptcy Court explained that "a primary basis for the Petition, and the investors' tacit consent to the Cayman Islands proceedings as foreign main proceedings, is improper . . . this litigation strategy [seeking to frustrate a settlement agreement by exploiting the automatic stay] appears to be the only reason for their request for recognition." *In re SPhinX*, 351 B.R. at 121. The *SPhinX* Court therefore rejected a finding of COMI supporting recognition of a foreign main proceeding, and instead proceeded to consider the existence of a foreign nonmain proceeding not subject to the debtor's bad faith. *Id.*

In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, the court denied recognition of a Cayman scheme proceeding seeking to restructure an open-end investment firm as either a foreign main or nonmain proceeding. 374 B.R. at 126. The *Bear Stearns* court emphasized the Debtor's operational history, considering the location of its employees, managers, books and records, and liquid assets. *Id*. at 130. The court therefore *37 denied recognition of COMI in the Cayman Islands because the United States, not the Cayman Islands, was "the place where the Funds conduct the administration of their interests on a regular basis." *Id.* However, *Fairfield Sentry* subsequently clarified that:

> A court may look at the period between the commencement of the foreign proceeding and the filing of the chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith, but there is no support for [the] contention that a debtor's entire operational history should be considered. The factors that a court may consider in this analysis are not limited and may include the debtor's liquidation activities.

714 F.3d at 138.

The *Fairfield Sentry* court also emphasized that "[t]here was no finding of bad-faith COMI manipulation." *Id.* at 139. In the present case, like in *Fairfield Sentry*, the Debtor is a holding company with subsidiaries that conduct business around the world. (Motion ¶ 7.) The Debtor is similarly engaged in a restructuring proceeding pursuant to the laws of its country of incorporation. (*Id.* ¶ 21.) The *Fairfield Sentry* court explained that "[it] matters that the inquiry under Section 1517 is whether a foreign proceeding '*is pending* in the country where the debtor *has* the center of its main interests.' 11 U.S.C. §1517(b)(1) (emphasis added)." 714 F.3d at 134. The same is true in this case too.

In *In re Ran*, 390 B.R. 257 (Bankr.S.D.Tex. 2008), the bankruptcy court denied recognition of an Israeli bankruptcy proceeding as either a foreign main or nonmain proceeding. On remand from the district court, the bankruptcy court "decline[d] to make findings on whether or not Lavie [a trustee overseeing the bankruptcy] acted in bad faith." *Id.* at 298. However, the court explained that "[b]y citing favorably to *In re SPhinX*, . . . in its order of remand, the district court suggests that a foreign representative's bad faith motive in seeking recognition of a foreign proceeding may appropriately be considered in determining the location of a debtor's center of *38 main interests." *Id.* at 297. Indeed, despite the court's distaste for making findings based upon the debtor's apparent

bad faith, the court nevertheless devoted an entire section of its analysis to the foreign representative's motive. *Id.* at 295. So, while the presence of bad faith did not play an explicit role in the court's decision in *Ran*, the questionable motivations of the foreign representative clearly informed the court's analysis.

In the present case, the Debtor has not engaged in COMI-shifting behavior, nor has it sought to deceive the Court or the Scheme Creditors in its pursuit of a Cayman restructuring. Instead, as discussed above, the Debtor seeks recognition of a proceeding under Cayman law, a fact which the Scheme Creditors likely factored into their decision to conduct business with the Debtor in the first place.[8] Given the absence of COMI-shifting and the Debtor's good-faith petition for recognition under chapter 15, this factor supports recognition of COMI in the Cayman Islands.

8 *See Suntech*, 520 B.R. at 418:

> Nor does the evidence support a finding that the Debtor's creditors would have expected it to restructure its businesses in China. The Debtor's largest creditor group was the Noteholders. The Indenture was governed by New York law and the parties to the Indenture submitted to the non-exclusive jurisdiction of the New York state and federal courts. In addition, when the representatives . . . who held approximately 50% of the debt, met with the Debtor's representatives, they urged the Cayman Islands as the most logical restructuring venue. The Debtor was incorporated in the Cayman Islands and the Cayman Islands employed a predictable, flexible and cost effective method for dealing with restructuring.

IV. CONCLUSION

For the reasons explained above, the Court **FINDS** that the Cayman Islands is the Debtor's COMI. All other requirements for recognition have been satisfied. *39

Therefore, the Court recognizes the Cayman Proceeding as a foreign main proceeding. Additionally, the Court, in the exercise of discretion, recognizes and enforces the Cayman Scheme.

A separate order will be entered granting the requested relief.

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HCMP 2196/2018 and
HCCW 325/2014
(Heard Together)
[2019] HKCFI 2531

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 2196 OF 2018

IN THE MATTER of DA YU FINANCIAL HOLDINGS LIMITED (formerly known as CHINA AGROTECH HOLDINGS LIMITED) (in liquidation)

and

IN THE MATTER of section 670 of the Companies Ordinance (Cap 622)

COMPANIES (WINDING UP) PROCEEDINGS NO 325 OF 2014

IN THE MATTER of an application under section 186 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

and

IN THE MATTER of DA YU FINANCIAL HOLDINGS LIMITED (formerly known as CHINA AGROTECH HOLDINGS LIMITED) (in liquidation)

Before: Deputy High Court Judge William Wong SC in Court

Date of Hearing: 22 July 2019

Date of Decision: 22 July 2019

Date of Reasons for Decision: 17 October 2019

REASONS FOR DECISION

1. On 22 July 2019, I sanctioned a scheme of arrangement (the "**Scheme**") to be entered into between Da Yu Financial Holdings Limited (formerly known as China Agrotech Holdings Limited) (in liquidation) (the "**Company**") and its general unsecured creditors (the "**Scheme Creditors**") with an undertaking from the Company that all its restructuring and liquidation costs and expenses are subject to taxation. I also granted a permanent stay of the winding-up of the Company. I now give my reasons.

Procedural history

2. On 11 June 2019, under section 670 of the Companies Ordinance, Cap 622 (the "**Ordinance**"), Mr Justice Harris gave leave for the Company to convene a meeting (the "**Scheme Meeting**") of the Scheme Creditors in order that they could consider and vote on the Scheme.

3. On 5 July 2019, the Scheme Meeting took place and an overwhelming majority of the Scheme Creditors present at the Scheme Meeting voted in favour of the Scheme.

4. On 8 July 2019, the Company issued a petition seeking the Court's sanction of the Scheme (the "**Petition**").

5. On 9 July 2019, Mr Justice Harris adjourned the Petition to be heard by me because the Petition was opposed and Mr Justice Harris decided to recuse himself. Mr Justice Harris' judgment dated 9 July 2019 explained the circumstances leading to his Lordship's decision to recuse.

Background to the Scheme

6. The Company is:

(a) a company incorporated in the Cayman Islands;

(b) registered in Hong Kong as an overseas company since 4 November 1999, with its principal place of business in Hong Kong;

(c) listed on the Hong Kong Stock Exchange since 14 January 2002, though its shares have been suspended from trading since 18 September 2014;

(d) an investment holding company with operating subsidiaries in the Mainland carrying on the business of, *inter alia*, trading in fertilizers, pesticides, and other agricultural and non-agricultural resources products;

(e) balance-sheet insolvent; and

(f) in liquidation in Hong Kong since 9 February 2015.

7. The Company's financial indebtedness includes:

(a) a bank loan of approximately HK$61.9 million;

(b) convertible bonds of approximately HK$540 million;

(c) corporate bonds of approximately HK$57.3 million;

(d) liabilities arising from a financial guarantee provided to some Mainland subsidiaries of approximately HK$198.2 million; and

(e) liabilities arising from a financial guarantee provided to a guarantor of Mainland subsidiaries of approximately HK$812.3 million.

8. It appears that the Company's only substantial asset is its listing status. As a matter of Hong Kong law, a company's listing status which carries with it a bundle of contractual rights and obligations under the listing rules and is analogous to a club membership, is a recognised form of asset: *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338 at §39 *per* Harris J.

9. With a view to realising the Company's listing status for the benefit of the creditors, the Company's liquidators have found an investor to pursue a restructuring and resumption of trading of the Company's shares. The key features of the proposed restructuring include the following:

(a) The Company will acquire the shares in Yu Ming Investment Management Limited ("**Yu Ming**") for HK$400,000,000 which the Company will settle in cash on completion of the acquisition.

(b) The Company's share capital will be reorganised involving a reduction of capital such that new shares will be issued to investors (the "**Capital Reorganisation**").

(c) The proceeds of the share subscription will be used to pay for the acquisition of Yu Ming, the Company's restructuring expenses, and the partial discharge of the Company's existing indebtedness. The amount of subscription proceeds available for distribution to creditors is HK$80,000,000, and thus the rate of recovery for creditors is about 4.28%.

(d) The partial discharge of the Company's existing indebtedness will be achieved through parallel schemes of arrangement in Hong Kong and the Cayman Islands.

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10. On 16 July 2019, the Cayman court sanctioned the Cayman scheme of arrangement and the reasons were released later: *Re China Agrotech Holdings Ltd* (Grand Court of the Cayman Islands, 22 July 2019) (the "**Cayman Scheme Judgment**").

Opposition to the Scheme

11. A shareholder of the Company, Perfect Gate Holdings Limited ("**Perfect Gate**"), initially objected to the Petition, but withdrew its objection in the course of the hearing before me. The background to Perfect Gate's objection is as follows:

(a) On 22 May 2019, in order to effect the Capital Reorganisation, the Company held an extraordinary general meeting (the "**EGM**").

(b) Perfect Gate voted against the relevant resolution at the EGM.

(c) However, the chairman of the EGM exercised his power to exclude and disallow Perfect Gate's votes. If Perfect Gate's votes were counted, the shareholders' resolution and Capital Reorganisation would have failed.

12. On 12 June 2019, the Company issued a summons in the Cayman Islands (the "**Cayman Application**") seeking a declaration that the shareholders' resolution passed at the EGM was validly passed.

13. On 26 June 2019, Perfect Gate issued a summons in Hong Kong seeking a declaration that the EGM chairman's decision to exclude its votes was unlawful and the purported special resolution was unlawful.

14. Although Perfect Gate did not appear by counsel in the Cayman court, it participated in the Cayman proceedings to oppose the Cayman Application by filing written submissions and evidence.

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15. On 9 July 2019, the Cayman court granted the Cayman Application and the reasons were released later: *Re China Agrotech Holdings Ltd* (Grand Court of the Cayman Islands, 16 July 2019) (the "**Cayman EGM Judgment**").

16. Nevertheless, Perfect Gate appeared by counsel in Hong Kong to oppose the Petition. The Company, however, argued that Perfect Gate had been estopped from arguing against the validity of the resolution passed at the EGM and that, being a shareholder of an insolvent company, Perfect Gate had no economic interest and thus could not object to the Petition.

17. During the hearing, I drew the parties' attention to a number of authorities and expressed my preliminary views on Perfect Gate's objection thus:

(a) Perfect Gate's status as a shareholder would not preclude its standing to oppose the Petition even if the Scheme did not compromise Perfect Gate's rights as a shareholder as such. Perfect Gate has sufficient interest to oppose the Petition because the Scheme is part and parcel of a wider restructuring exercise that would significantly dilute Perfect Gate's shareholding. An analogous authority is *Re Bluebrook Ltd* [2010] 1 BCLC 338 where Mann J at §26 said:

> "The schemes do not involve the mezzanine lenders in the sense of engaging them as parties. They will not bind them, and their legal rights are unaffected. The mezzanine lenders therefore cannot, and do not, complain as persons whose legal rights are being altered by the schemes in some unfair way. However, they are still entitled to object as creditors on grounds of unfairness if the schemes unfairly affect them in ways other than altering their strict rights. The court is exercising a discretion, and as a matter of principle can consider unfairness in that sense, if it is made out. That is the essence of the case of the mezzanine lenders."

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(b) However, the Hong Kong court would recognise and give effect to the Cayman EGM Judgment because Perfect Gate's participation in the Cayman proceedings to oppose the Cayman Application suggests that it had submitted to the Cayman court's jurisdiction. The position is neatly summarised in *Swiss Life v Kraus* [2015] EWHC 2133 (QB). Green J at §61 said:

> "Case law provides illustrations of the sorts of acts of participation in foreign proceedings which amount to submission. These include: pursuing acts as a plaintiff; *pleading to the merits of a claim qua defendant without contesting jurisdiction*; contesting jurisdiction but nonetheless proceeding further to plead to the merits; agreeing to a consent order dismissing the claims and cross claims; failing to appear in proceedings at first instance but appealing on the merits; taking no part in proceedings and allowing judgment to go against him in default of appearance but later applying to set aside the default judgment on non-jurisdictional grounds."
>
> (*emphasis added*)

18. Perfect Gate took time to reconsider its position and then rightly decided to withdraw its opposition to the Petition. In the circumstances, there is no need for this Court to rule on the objections raised by Perfect Gate including the issue that the EGM chairman's decision to exclude its votes was unlawful and the purported special resolution was thus null and void.

The legal principles governing the Court's discretion to sanction a scheme

19. The Court has an unfettered discretion as to whether or not to sanction a scheme. Case-law has developed principles which guide the Court in considering whether to sanction a scheme. What is clear is that the Court does not act as a rubber stamp and must reach its own independent view. But in doing so, if the scheme sanction principles are satisfied, the Court would be slow to differ from the views of the majority scheme creditors on matters such as what an intelligent, honest person

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might reasonably think. The Court regards the scheme creditors as the best judges of their own commercial interests.

20. The Court will take into account the following matters in considering whether to sanction a scheme of arrangement:

(a) whether the scheme is for a permissible purpose;

(b) whether creditors who were called on to vote as a single class had sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting:

> "the focus is upon 'rights'; upon existing 'rights' as they stand and the 'rights' as they will be under the proposed compromise or arrangement; upon identifying material dissimilarities in such 'rights' of the members to be called to the meeting; and in relation to those material dissimilarities asking the question whether they are so great as to make it *impossible* for the holders of those differing 'rights' to confer together because there is no community of interest."
>
> (See *Re Realm Therapeutics Plc* [2019] EWHC 2080 (Ch) at §32 *per* Norris J.)

(c) whether the meeting was duly convened in accordance with the Court's directions;

(d) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision whether or not to support it;

(e) whether the necessary statutory majorities have been obtained;

(f) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and

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(g) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions because it would not be a proper exercise of the discretion to sanction a scheme that serves no purpose.

(See: *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1 at §§15 – 16 *per* Harris J; *Re Mongolian Mining Corp* [2018] 5 HKLRD 48 at §§11 and 13 *per* Harris J; *Re Hong Kong Building and Loan Agency Ltd* [2019] HKCFI 2088 (HCMP 2268/2018, unreported, 20 August 2019), *per* Harris J; *Re Union Asia Enterprise Holdings Ltd* [2019] HKCFI 2349 (HCMP 1093/2018, unreported, 19 September 2019), *per* G Lam J.)

21. I also note that English case-law has summarised the scheme sanction principles by reference to the following five stages:

(a) The first stage — compliance with statute: The court must consider whether the provisions of the statute have been complied with. This will include questions of class composition, whether the statutory majorities were obtained, and whether an adequate explanatory statement was distributed to creditors.

(b) The second stage — proper class representation: The court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent.

(c) The third stage — fairness: The court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. The court is not concerned to decide whether the scheme is the only fair scheme or even the best scheme. The fairness requirement concerns whether the scheme is an arrangement that an intelligent and honest man,

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a member of the class concerned and acting in respect of his interest, might reasonably approve.

(d) The fourth stage — blot on the scheme: The court must consider whether there is any 'blot' or technical or legal defect in the scheme that would, for example, make it unlawful or in any other way inoperable according to its own terms.

(e) The fifth stage—international effectiveness: In an international case, the court must also be satisfied that it is appropriate, in its discretion, to exercise its scheme jurisdiction on the basis that there is a sufficient connection between the scheme and England, and there is a reasonable prospect of the scheme having real effectiveness, having regard, in particular, to its prospects for recognition in other relevant or key jurisdictions.

(See: *Re Noble Group Ltd* [2019] BCC 349 at §§17 and 18 *per* Snowden J; *Re Syncreon Group BV* [2019] EWHC 2412 (Ch) at §12 *per* Falk J; *Re NN2 Newco Ltd* [2019] EWHC 2532 (Ch) at §10 *per* Norris J.)

Analysis

22. Subject to the conditions relating to the Company's restructuring and other costs and expenses discussed in the next section, I am satisfied that it is appropriate, in my discretion, to sanction the Scheme.

23. First, it is well-established that debt restructuring is a permissible purpose of a scheme of arrangement.

24. Secondly, it is appropriate that the Scheme Creditors vote in a single class because:

(a) the Scheme Creditors are the Company's general unsecured creditors; and

(b) the Scheme Creditors are given the same Scheme consideration.

25. Thirdly, the requirements in the Order relating to the convening of the Scheme Meeting have been complied with.

26. Fourthly, subject to what I have to discuss below, the Scheme Creditors were given sufficient information in the explanatory statement to exercise their informed judgment on how to vote at the Scheme Meeting.

27. Fifthly, the resolution approving the Scheme was passed by 90.9% in number of the Scheme Creditors present and voting (representing 93.62% of the Scheme claims held by the Scheme Creditors present and voting). Thus the requisite statutory majorities of the Scheme Creditors have voted in favour of the Scheme at the Scheme Meeting.

28. Sixthly, I am satisfied that an intelligent and honest creditor of the Company could reasonably consider the Scheme to be in his best interests.

29. Seventhly, in relation to the international dimension:

(a) sufficient connection between the Scheme and Hong Kong exists for these non-exhaustive reasons:

(i) the Company is registered as an overseas company in Hong Kong;

(ii) the Company's principal place of business is in Hong Kong

(iii) the Company is listed in Hong Kong;

(iv) the Company's debts are governed by Hong Kong law; and

(v) the vast majority of the Scheme Creditors are in Hong Kong;

(b) as a result of the Cayman Scheme Judgment, the Scheme is practically effective in the Company's country of incorporation.

30. Finally, I am not aware of any 'blot' on the Scheme.

Permissible purpose, and restructuring and related expenses

31. There is one serious concern of the Court which I raised with Mr Hui (acting for the Company) at the beginning of the hearing which is the level or quantum of the liquidators' restructuring and liquidation costs as compared to the rate of return to the Scheme Creditors. I asked Mr Hui this question: Assuming the Company's listing status could realise $100 million, if the return to the Scheme Creditors were in the absolute sum of HK$1 million and the totality of the liquidators' restructuring and liquidation costs were HK$99 million, could be it sensibly submitted that the purpose of the Scheme was for the benefit of the Scheme Creditors and thus fell within the permissible purpose of propounding a scheme of arrangement under the Ordinance?

32. Mr Hui very fairly answered in the negative. The Court is very concerned that the statutory scheme should not be misused for any purpose other than advancing the interests of the Scheme Creditors and not for any other non-permissible purposes.

33. Mr Hui in reply raised a very good question, namely, where does the Court draw the line? For instance, is a 50:50 split of the value of the listing status between the Scheme Creditors' recovery and restructuring and liquidation expenses permissible? If not, what is the relevant percentage which will trigger the Court's intervention?

34. In my view, there can be no hard and fast rules and it will not be appropriate for the Court to lay down a specific percentage as a guideline. Every case must depend on its own facts. Depending on the complexity of the relevant schemes, there are cases where the amount of the restructuring and liquidation expenses is obviously reasonable albeit that they constitute a fairly large percentage *vis-à-vis* the rate of return to scheme creditors. Again, there will be cases where the amount of the restructuring and liquidation expenses will be unreasonably high irrespective of the rate of return to scheme creditors. In every case, the question to be asked by the Court is, taking into account all the circumstances of the case, including the rate of return to scheme creditors and the amount of the restructuring and liquidation expenses, whether the relevant scheme is propounded for a permissible purpose for the general benefit of the scheme creditors.

35. In the present case:

(1) HK$80 million is allocated for distribution to the Scheme Creditors — making a recovery rate of 4.28%;

(2) Restructuring expenses in the sum of approximately HK$49 million have been incurred and;

(3) Scheme costs in the sum of HK$5.87 million are expected to be incurred.

36. Given the fact that the Scheme is not hugely complicated, the Court and indeed the Scheme Creditors are not informed of the rationales which can legitimately justify such significant amount of professional expenses.

37. Mr Hui for the Company submitted that the amount of the restructuring expenses is a matter of contractual arrangement between the

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investor and the relevant professionals and normally such expenses are not subject to the supervision and taxation of the Court. I agree. However, it does not mean that the Court has no jurisdiction to impose conditions in exercising its function to sanction schemes of arrangement.

38. Indeed, as set out above, one of the key concerns in sanctioning a scheme of arrangement is whether sufficient information and explanations about the scheme have been given to scheme creditors such that they can properly make an informed decision on whether to support a certain scheme of arrangement or not.

Sufficient information about restructuring and related expenses

39. As a matter of law, an explanatory statement must contain all the information necessary to enable the creditors to form a reasonable judgment on whether the scheme is in their best interest or not, and hence how to vote. The extent of the information required to be provided will, of course, depend on the facts of the particular case. (See *Re Ophir Energy Plc* [2019] EWHC 1278 (Ch) at §22 *per* Snowden J.)

40. In the present case, the provision of sufficient and meaningful disclosure on the restructuring costs and other expenses is crucial. The adequacy of disclosure in the explanatory statement is a matter for the sanction hearing. (See *Re Noble Group Ltd* (*supra*) at §130 *per* Snowden J.)

41. I note from the Scheme's explanatory statement that there is only a one liner for the restructuring costs of the liquidators, namely, HK$13,526,000 with no breakdown at all. The same applies to costs of legal advisers to the Company in the sum of HK$4,809,000 and costs of legal advisers to the sponsor in the sum of HK$3,376,000. There is

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no further information for the Court and Scheme Creditors to assess the reasonableness of such costs.

42. I do not find the disclosure in the explanatory statement about the restructuring and other expenses to be entirely satisfactory. As I said, the so-called itemized list of expenses does not provide much information. In future, I expect that there will be a more detailed breakdown of such incurred costs so that both the Scheme Creditors and the Court can meaningfully assess the reasonableness of such costs. A statement of costs which will allow the Court to make a gross sum assessment is a useful guide for the purpose of disclosure of restructuring and other expenses.

43. The Court is being put in a difficult position in view of the lack of sufficient disclosure of restructuring and other expenses. It would not seem right and just to withhold sanction of the Scheme as the failure of the Scheme would leave the Scheme Creditors with nil recovery.

44. Accordingly, I am only prepared to sanction the Scheme on the condition that all of the restructuring and other expenses will be subject to taxation. Any cost savings resulting from the taxation process should be distributed to the Scheme Creditors. (See *Re Rhine Holdings Ltd* [2000] 3 HKC 543; *Re Yaohan Hong Kong Corp Ltd* [2001] 1 HKLRD 363; *nTan Corporate Advisory v TT International* [2018] 2 SLR 1237.)

Stay of winding-up

45. As a corollary of the sanction of the Scheme, it would be proper to grant a permanent stay of the winding-up of the Company in order to allow the Company's shares to resume trading. (See *Re Hong Kong Mercantile Exchange Ltd* [2018] HKCFI 1986 (HCCW 10/2014, unreported, 24 August 2018), *per* Harris J.)

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Cross-border coordination

46. Finally, I like to say a few words about cross-border coordination. In the Cayman Scheme Judgment, Mr Justice Segal made some apt and important remarks about the need for cross-border coordination (at §37):

> "Throughout this case I have reminded the liquidators (and Perfect Gate) of the need to consider the coordination of the applications made in this Court and the Hong Kong court (and the possible benefit of and need for common directions regarding the filing of evidence and submissions in both courts and even of court to court communication and simultaneous hearings). For reasons of which I am not aware this has not proved to be possible in this case. I do not intend to be critical. There may be good reasons why these steps were considered to be inappropriate or unavailable in this case (and I would note with gratitude that Mr. Justice Harris in the Hong Kong court very helpfully sent me a copy of his Decision of 9 July). But I would remind parties for the future to keep the need for such coordination firmly in mind."

47. I would respectfully echo Mr Justice Segal's remarks and would like to add the following observations on the current state of cross-border cooperation which seems to call for significant improvement.

48. It seems to have become an established practice that Hong Kong-listed companies incorporated offshore need to use parallel schemes of arrangement to restructure their debts. Although the company maintains no more than a letterbox presence in its country of incorporation, a scheme in the country of incorporation is nevertheless necessary, just like the present case. As Mr Justice Segal explains in the Cayman Scheme Judgment (at §33(d)(i)), "the main purpose of there being a scheme in Cayman was to ensure that scheme creditors cannot disrupt the smooth operation of the scheme by taking hostile action against the Company in its place of incorporation", even though "Hong Kong [is] where the preponderance of

the Company's debts are located (most of the Company's liabilities are governed by Hong Kong law)".

49. I am of the view that the idea that parallel schemes are needed in such circumstances appears to be an outmoded way of conducting cross-border restructuring. Requiring foreign office-holders to commence parallel proceedings is the very antithesis of cross-border insolvency cooperation. A crucial feature of cross-border insolvency cooperation is the recognition of foreign proceedings. In Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), the learned author at p 61 said:

> " Recognition of international bankruptcy orders and judgments is particularly needed because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding."

50. The *raison d'être* for recognising foreign proceedings is the avoidance of parallel proceedings. As pointed out by Lord Hoffmann in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 at §22, "[t]he 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".

51. Indeed, where Hong Kong and English schemes of arrangement need practical effectiveness in the United States, the standard procedure is to obtain recognition of the schemes in the United States (as opposed to commencing plenary US Chapter 11 proceedings to create a parallel Chapter 11 reorganisation plan).

52. Therefore, in my view, it would be beneficial, in the spirit of cross-border cooperation that all jurisdictions do take to heart this question (*mutatis mutandis*) posed by Lord Hoffmann in *Cambridge Gas* (at §25): "Why… should the [offshore] court not provide assistance by giving effect to the [Hong Kong scheme of arrangement] without requiring the [Hong Kong office-holders] to go to the trouble of parallel insolvency proceedings in the [offshore jurisdiction]?"

53. A substantive recognition in the offshore jurisdictions of foreign schemes of arrangement would seem to tie in well with the advanced procedural coordination that Mr Justice Segal was aptly advocating. Progress in cross-border procedural coordination should march in lockstep with progress in cross-border substantive recognition.

54. Finally, it remains for me to thank Mr Hui for Company and Mr Ko and Mr Tai for Perfect Gate for their helpful assistance to this Court.

(William Wong SC)
Deputy High Court Judge

Mr John Hui, instructed by Michael Li & Co, for the Petitioner (in HCMP 2196/2018) and the Joint and Several Liquidators (in HCCW 325/2014)

Mr Tony Ko and Mr Jonathan Tai, instructed by Hau, Lau, Li & Yeung, for Perfect Gate Holdings Limited (in HCMP 2196/2018)

Attendance of the Official Receiver (in HCCW 325/2014) was excused

Re China Oil Gangran Energy Group Holdings Ltd

[2021] HKCFI 1592

(Court of First Instance)

(Miscellaneous Proceedings No 503 of 2021 and Companies (Winding-up) Proceedings No 120 of 2019)

Harris J

26 May, 4 June 2021

Company law — scheme of arrangement — sanction by court — scheme creditors properly voted as single class — proper test — sufficient connection between scheme and Hong Kong — approach — scheme sanctioned

Company law — scheme of arrangement — parallel schemes — where non-Hong Kong company listed in Hong Kong and most of debt governed by Hong Kong law — parallel scheme in place of incorporation must be justified — observation that parallel scheme not justified in present circumstances

Company law — scheme of arrangement — post-scheme meeting modification of scheme — approach — modification granted

公司法 — 債務償還安排 — 由法院認許 — 償還安排債權人作為單一類別已適當地投票 — 適當的測驗 — 償還安排與香港之間的充分聯繫 — 做法 — 該項安排受認許

公司法 — 債務償還安排 — 並行償還安排 — 非香港公司在香港上市及大部分債務受香港法律所管轄的情況 — 取替註冊成立的並行償還安排必須有合理理由支持 — 並行償還安排在目前情況下沒有合理理由支持的相關觀察

公司法 — 債務償還安排 — 安排後的會議修改償還安排 — 做法 — 授予修改

C was incorporated in the Cayman Islands, was registered as a non-Hong Kong company and had been listed on the Growth Enterprise Market of the Hong Kong Stock Exchange since 2011. Trading in C's shares had been suspended since July 2019. Its operations were predominantly in Hong Kong and the Mainland. A petition was presented to wind up C in Hong Kong in April 2019 and was subsequently adjourned to afford C time to pursue its restructuring. The Cayman Court appointed soft-touch provisional liquidators (PLs) to facilitate C's restructuring efforts in November

2019 and the Hong Kong Court granted recognition to the PLs in May 2020. In May 2021, a scheme meeting was held in which a scheme of arrangement (the Scheme) was approved by C's unsecured creditors (the Scheme Creditors). Under the Scheme, new investors would acquire about 75% of C's shares; C's general unsecured debts (the Scheme Claims) would be discharged and the Scheme Creditors would be entitled to a *pro rata* distribution of the Scheme consideration. C sought the Court's sanction under s.673 of the Companies Ordinance (Cap.622) of the Scheme and the Court's approval of an amendment to the Scheme to correct a drafting error.

Held, allowing the application, that:

(1) The Court may permit post-meeting modifications of a scheme if the modification would not be likely to cause a hypothetical reasonable creditor to take a different view in relation to the scheme and would not be foisting on scheme creditors something substantially different to that which had been approved at the scheme meeting. Here, the reference to cl.67 in cl.69 of the Scheme was clearly erroneous because it would defeat the whole purpose of the Scheme, thus applying such approach, the Court could properly permit this post-scheme meeting deletion (*Re Aon Plc* [2020] EWHC 1003 (Ch), *Re PGS ASA* [2021] EWHC 222 (Ch) applied). (See paras.11–13.)

(2) In considering whether creditors were properly classified, the test was whether creditors who were called on to vote as a single class had sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting. In applying the test, the starting point was to identify the appropriate comparator, ie what would be the alternative if the scheme did not proceed. The Scheme Creditors properly voted as a single class. The appropriate comparator here was an insolvent liquidation because absent the Scheme, an insolvent liquidation of C would be an unavoidable outcome. The Scheme Claims were C's general unsecured debts and all general unsecured creditors would be given a *pro rata* amount out of the Scheme consideration. There were no separate class disputes or conflicts of interest (*Re China Singyes Solar Technologies Holdings Ltd* [2019] HKCLC 1035, *Re Lecta Paper UK Ltd* [2019] EWHC 3615 (Ch), *Re Castle Trust Direct Plc* [2021] BCC 1 applied). (See paras.14–17.)

(3) In a transnational restructuring, the Court considered whether there was sufficient connection between the scheme and Hong Kong to justify the Court sanctioning it and whether the scheme was effective in other relevant jurisdictions. In practice whether or not a jurisdiction was of practical importance to

the efficacy of a scheme sanctioned in Hong Kong would commonly be determined by: whether a material amount of debt to be compromised by the scheme was governed by the law of a jurisdiction other than Hong Kong; whether there was any reason to think that the creditors would take action in a jurisdiction which would not recognise a scheme as compromising the debt; and the amount of the debt involved (*Re LDK Solar Co Ltd* [2015] 1 HKLRD 458, *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1, *Re China Singyes Solar Technologies Holdings Ltd* [2019] HKCLC 1035, *Re Gategroup Guarantee Ltd* [2021] EWHC 775 (Ch) applied). (See paras.21–24.)

(4) The Scheme had strong and sufficient connection with Hong Kong, in particular, because C was listed in Hong Kong and a principal purpose of the Scheme was to protect that listing, it was a registered non-Hong Kong company, and managed from Hong Kong. Essentially all of the Scheme Claims were governed by Hong Kong law. The Scheme would be effective in other jurisdictions. (See paras.21, 25.)

(5) (*Obiter*) In the case of a company listed in Hong Kong, whose debt is very largely governed by Hong Kong law, the principle relevant jurisdiction is Hong Kong. It is only necessary to introduce a scheme in the place of incorporation if there is good reason to think that absent such scheme there is a genuine risk of the company being wound-up there. In the present case, a parallel scheme was introduced in the Cayman Islands and sanctioned in May 2021. It is difficult to see what justification there was for this given the minimal amount of debt not governed by Hong Kong law and apparently no indication that any of the creditors whose debt might not be compromised in accordance with the *Rule in Gibbs* were likely to seek a winding up of C in the Cayman Islands (*Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399 considered). (See paras.27–28.)

(6) (*Obiter*) Incurring costs in introducing a parallel scheme that is not necessary would reduce the amount available for scheme creditors. C's directors and the PLs should have been advised that they owed fiduciary duties to protect the interests of the unsecured creditors and that they should aim to ensure that the maximum amount of the gross proceeds of the subscription were available for distribution to Scheme Creditors. In future if it is proposed that parallel schemes are introduced, provisional liquidators or the company are expected to be able to justify doing so. (See paras.29, 34.)

Application

This was an application by the subject company for the court's sanction of a scheme of arrangement under s.673 of the Companies Ordinance (Cap.622) and approval of an amendment to the scheme.

Mr Look Chan Ho, instructed by Michael Li & Co, for the applicant (in HCMP 503/2021) and the company (in HCCW 120/2019).
Ms Tania Tse, instructed by Howse Williams, for the petitioner (in HCCW 120/2019).
Mr Harry Chan, instructed by YTL LLP, for a creditor (in HCCW 120/2019).
Mr W Wu of Hastings & Co, for a creditor (in HCCW 120/2019).
The attendance of the Official Receiver was excused.

Legislation mentioned in the judgment

Bankruptcy Code [United States] Chapter 15
Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) s.193
Companies Ordinance (Cap.622) ss.671(3), 673, 674(1)(b)

Cases cited in the judgment

Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399
Aon Plc, Re [2020] EWHC 1003 (Ch)
Castle Trust Direct Plc, Re [2020] EWHC 969 (Ch), [2021] BCC 1
China Bozza Development Holdings Ltd, Re [2021] 2 HKLRD 977, [2021] HKCFI 1235
China Huiyuan Juice Group Ltd, Re [2021] 1 HKLRD 255, [2020] HKCFI 2940
China Singyes Solar Technologies Holdings Ltd, Re [2019] HKCFI 2559, [2019] HKCLC 1035
China Singyes Solar Technologies Holdings Ltd, Re [2020] HKCFI 467, [2020] HKCLC 379
China Solar Energy Holdings Ltd (No 2), Re [2018] 2 HKLRD 338, [2018] HKCFI 555
Eurofood IFSC Ltd (C-341/04), Re EU:C:2006:281, [2006] Ch 508, [2006] 3 WLR 309, [2006] BCC 397
Gategroup Guarantee Ltd, Re [2021] EWHC 775 (Ch)
Kaisa Group Holdings Ltd [2017] 1 HKLRD 18
LDK Solar Co Ltd, Re [2015] 1 HKLRD 458
Lecta Paper UK Ltd, Re [2019] EWHC 3615 (Ch)
Legend International Resorts Ltd, Re [2006] 2 HKLRD 192, [2006] 3 HKC 565
Mongolian Mining Corp, Re [2018] 5 HKLRD 48, [2018] HKCFI 2035

PGS ASA, Re [2021] EWHC 222 (Ch)
Rhine Holdings Ltd, Re [2000] 3 HKC 543
Winsway Enterprises Holdings Ltd, Re [2017] 1 HKLRD 1
Yao Weitang v China Creative Global Holdings Ltd [2021] HKCFI 1565, [2021] HKEC 2363
Yaohan Hong Kong Corp Ltd, Re [2001] 1 HKLRD 363, [2000] 4 HKC 488

REASONS FOR DECISION

Harris J

The Application

1. The Company seeks (a) the Court's sanction under *s.673* of the *Companies Ordinance* (Cap.622) (**Ordinance**) of a scheme of arrangement between the Company and its Scheme Creditors, and (b) the Court's approval of an amendment to the Scheme to correct a drafting error.

2. The Scheme Meeting was duly convened on 18 May 2021. The resolution of the Scheme Meeting was carried by a majority in number of the Scheme Creditors present and voting, in person or by proxy, holding 91.58% of the Claims voted.

3. The Scheme forms part of a wider restructuring which involves new investors acquiring a controlling stake in the Company with a view to saving the Company's Hong Kong listing status. A successful restructuring will give the Scheme Creditors a higher recovery (estimated to be 12.9%) than a liquidation. Absent restructuring, the Company would be liquidated and the Scheme Creditors' estimated recovery would be 0.5%–0.9%.

Corporate background

4. The Company was incorporated in the Cayman Islands, is registered as a non-Hong Kong company, and has been listed on the Growth Enterprise Market of the Hong Kong Stock Exchange (**SEHK**) since 18 May 2011. Trading in the Company's shares has been suspended since 2 July 2019.

5. The Company is an investment holding company with subsidiaries in Hong Kong, the British Virgin Islands, and the Mainland (together, **Group**). The Group's business focuses on the following three areas:

(1) power and data cords;
(2) trading of refined oil and chemicals; and
(3) trading of commodities.

6. The Group's operations are predominantly in Hong Kong and the Mainland.

The Company's insolvency proceedings and restructuring efforts

7. On 24 April 2019, a petition was presented to wind up the Company in Hong Kong (HCCW 120/2019) (**Petition**). The Petition has been adjourned to 19 July 2021 to afford the Company time to pursue its restructuring. On 5 November 2019, the Cayman Court appointed soft-touch provisional liquidators (**PLs**) to facilitate the Company's restructuring efforts. On 5 May 2020, this Court granted recognition to the PLs.

8. As one of the Company's key assets is its Hong Kong listing status, the Company and PLs have sought to rescue the Company's listing status so that the Company could resume trading its shares. The Scheme is necessary in order to meet SEHK's resumption conditions by the deadline of 31 May 2021. Upon the completion of the Scheme:

(1) the Subscribers will control about 75% of the Company's shares;
(2) the Company's debts owed to the Scheme Creditors amounting to approximately HK$136 million will be discharged.

Principal features of the Scheme

9. The Scheme seeks to discharge the Company's general unsecured debts and in return the Scheme Creditors will be entitled to a *pro rata* distribution of the Scheme Consideration which includes the Cash Amount (approximately HK$17.6 million) and the Creditors' shares. In case there are creditors holding secured debts and preferential debts, these creditors will participate in the Scheme only to the extent of the unsecured, non-preferential portion of their claims.

Drafting error in the Scheme

10. Clause 69 of the Scheme contains a drafting error which was discovered shortly before the Scheme Meeting. Clause 69 provides:

> In the event the Schemes are terminated pursuant to Clauses 67 or 68 above, the Claims which are discharged and extinguished against the Company under Clause 1 of this Scheme will be deemed to have revived and the Scheme Creditors will be entitled to pursue such Claims against the Company in such ways as if the Schemes had never been effective and binding upon them.

11. The reference to cl.67 was a drafting error. Clause 67 provides that the Scheme will terminate when the terms of the Scheme have been carried out. It would not make sense for the Claims to revive after the Scheme Creditors receive all their entitlement under the Scheme.

12. The Court may permit post-meeting modifications of a scheme if the modifications would not be likely to cause a hypothetical reasonable creditor to take a different view in relation to the scheme, and would not be foisting on scheme creditors something substantially different to that which has been approved at the scheme meeting.[1]

13. The reference in cl.69 of the Scheme to cl.67 was clearly erroneous and makes no sense because it would defeat the whole purpose of the Scheme. Deleting the reference to cl.67 would therefore not cause a hypothetical reasonable Scheme Creditor to take a different view in relation to the Scheme. In my view, the Court can properly permit this post-Scheme Meeting deletion of the reference in cl.69 of the Scheme to cl.67. I shall so order.

The legal principles governing the sanction of a scheme

14. In considering whether to sanction a scheme, the Court applies some well-established principles which I recently restated in *Re China Singyes Solar Technologies Holdings Ltd*.[2] The Court will consider in particular the following:

(1) whether the scheme is for a permissible purpose;
(2) whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting;
(3) whether the meeting was duly convened in accordance with the Court's directions;
(4) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision whether or not to support it;
(5) whether the necessary statutory majorities have been obtained;
(6) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and
(7) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

1 *Re Aon Plc* [2020] EWHC 1003 (Ch), [16]–[18] (Trower J); *Re PGS ASA* [2021] EWHC 222 (Ch), [37] (Miles J).
2 [2019] HKCFI 2559, [2019] HKCLC 1035, [7].

Class composition

15. In considering whether creditors are properly classified, the test is whether creditors who are called on to vote as a single class have sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting. The relevant principles may be summarised thus:

> The overarching question is whether the pre and post-scheme rights of those proposed to be included in a single class are so dissimilar as to make it impossible for them to consult with a view to their common interest. If that is the case, separate meetings must be summoned …
>
> The second principle is that it is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests will normally only ever arise at the sanction stage as a question for consideration …
>
> The third principle … is that the court should take a broad approach to the composition of classes, so as to avoid giving unjustified veto rights to a minority group of creditors, such that the test for classes becomes an instrument of oppression by a minority …
>
> The fourth principle is that the court has to consider, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If, having carried out that exercised [*sic*], there is a material difference between the rights of the different groups of creditors, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest.[3]

16. In applying the above test, the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed.[4]

17. I am satisfied that the Scheme Creditors properly voted as a single class for these reasons:

(1) **The appropriate comparator here is an insolvent liquidation because, absent the Scheme, an insolvent liquidation of the Company would be an unavoidable outcome.**

3 *Re Castle Trust Direct Plc* [2020] EWHC 969 (Ch), [2021] BCC 1, [12]–[16].
4 *Re Lecta Paper UK Ltd* [2019] EWHC 3615 (Ch), [13] (Zacaroli J).

(2) The Scheme Claims are the Company's general unsecured debts.
(3) All general unsecured creditors will be given a pro-rated amount out of the Scheme Consideration (see cl.19 of the Scheme).
(4) There are no separate class disputes or conflicts of interest.

Statutory majorities

18. The Scheme Meeting was uneventful and Scheme Creditors proceeded to vote overwhelmingly in favour of the Scheme. The requirements under *s.674(1)(b)* of the *Ordinance* that the Scheme be approved by a majority in number representing at least 75% in value of the Scheme Creditors present and voting in person or by proxy are therefore satisfied.

Information provided to Scheme Creditors

19. The Explanatory Statement is detailed and informative. It satisfies the requirements of *s.671(3)* of the *Ordinance*.

Discretionary element: the "intelligent and honest man" test

20. The primary object of the Scheme is that, upon the Scheme becoming effective, the Scheme Creditors' claims will be discharged and in return they will be entitled to be given the Scheme Consideration in accordance with the terms of the Scheme. The Scheme Consideration gives the Scheme Creditors a better return than would a liquidation of the Company. The Scheme is one that an intelligent and honest person acting in accordance with his interests as a member of the class within which he voted might reasonably approve.

International effectiveness

21. In a transnational restructuring, the Court considers whether there is sufficient connection between the scheme and Hong Kong[5] to justify the Court sanctioning it, and whether the scheme is effective in other relevant jurisdictions. It would not be a proper exercise of the discretion to sanction a scheme that serves no purpose. The Scheme clearly has strong and sufficient connection with Hong Kong, in particular, because the Company is listed in Hong Kong and a principal purpose of the Scheme is to protect that listing, it is a registered non-Hong Kong company, and managed from Hong Kong. Further, essentially all of the Scheme Claims are

5 *Re LDK Solar Co Ltd* [2015] 1 HKLRD 458; *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1.

governed by Hong Kong law. However, as with most Hong Kong listed companies more than one jurisdiction is involved in the affairs of the Company.

22. The Company is listed and has its centre of main interest in Hong Kong; its business operations are located in the Mainland; and it is incorporated in the Cayman Islands. In these circumstances, thought needs to be given as to whether or not, in order to achieve the purpose of the Scheme, it will be effective to compromise all or enough of the Company's debt in a jurisdiction in which action could be taken, which might undermine the efficacy of the Scheme. For example, would the Cayman court treat the Scheme as compromising all unsecured debt thus inhibiting the presentation of a winding-up petition in the Cayman Islands. Mr Justice Zacaroli has recently framed the efficacy issue as follows in [6] of his judgment in *Re Gategroup Guarantee Ltd*:[6]

> In addition, the court needs to be satisfied that the Plan will achieve its purpose. Where there is a significant international element, that includes being satisfied that the Plan will be effective in those foreign jurisdictions where its recognition is of practical importance: see *re Magyar Telecom BV* [2014] BCC 488, at [16]; *Re Sompo Japan Insurance Inc v Transfercom Ltd* [2007] EWHC 146 (Ch), at [17]–[26]. Of particular relevance, in light of the co-obligor structure adopted by the Company in this case, is the effectiveness of the Plan under Swiss law (which governs the Bonds) to vary the terms of the Bonds as between the Bondholders and the Issuer.

23. In practice whether or not a jurisdiction is of practical importance to the efficacy of a scheme sanctioned in Hong Kong will commonly be determined by the following considerations:

(1) Is a material amount of debt to be compromised by the scheme governed by the law of a jurisdiction other than Hong Kong? Different jurisdictions having differing approaches to recognition of the effect of a scheme. Some like Hong Kong, apply what is commonly known as the *Rule in Gibbs*,[7] which provides that a debt is treated as discharged if compromised in accordance with the law of the jurisdiction, which governed the agreement giving rise to the debt. Other jurisdictions focus on the features of the process said to have led to the discharge of the debt. For example, under *Chapter 15* of the *United States Bankruptcy Code* it is possible for a debtor to seek recognition of a scheme on the basis that the proceeding in Hong Kong is a foreign non-main proceeding and ancillary

6 [2021] EWHC 775 (Ch).

7 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

relief, which give effect to the terms of a scheme.[8] I note in passing that as a consequence of Hong Kong and the Mainland entering into an arrangement on 14 May 2021 for recognition by certain Intermediate People's Courts of a Hong Kong scheme of arrangement, it is now possible for a Hong Kong scheme to compromise debt governed by Mainland law.

(2) Even if there is some doubt as to whether or not a scheme will compromise a proportion of the debt, is there any reason to think that the creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt? Clearly if a creditor, whose debt is governed by Hong Kong law, agrees to the terms of a scheme, there is no need to be concerned about enforcement in another jurisdiction and, if the *Rule in Gibbs* is applied in that other jurisdiction, participation in the scheme process provides an exception to the *Rule*.[9]

(3) The amount of the debt involved. If, for example, the amount of debt that is not governed by Hong Kong law is less than the cost of introducing a parallel scheme, it makes more sense to exclude that debt from the scheme and settle it separately if it is ever pursued.

24. An illustration of how these considerations operate in practice is illustrated by my decision in *Re China Singyes Solar Technologies Holdings Ltd*.[10] I explain the following in [18]:

> [18](2) Although the Convertible Bonds are governed by English law, there is no need to seek recognition of the Scheme in England. This is because 100% of the holders of the Convertible Bonds voted in favour of the Scheme. Accordingly, there is no issue about the '*Gibbs* rule' because 'there is an exception to the rule if the relevant creditor submits to the foreign insolvency preceding. In that situation, the creditor is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency proceeding' (*Re OJSC International Bank of Azerbaijan*).[11] Therefore, the Scheme will be effective in England.
>
> [18](3) The 2018 Notes and the 2019 Notes are governed by New York law. I accept that there is no need to seek recognition of the Scheme under Chapter 15 of the US Bankruptcy Code for these reasons:

8 *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1, [34]–[37].
9 *Re China Singyes Solar Technologies Holdings Ltd*[2020] HKCFI 467, [2020] HKCLC 379, [18(2)]
10 At [18](2) and (3).
11 [2018] EWCA Civ 2802, [2019] Bus LR 1130, [28] (Henderson LJ).

(i) More than 99% of the holders of the 2018 Notes and the 2019 Notes voted in favour of the Scheme.

(ii) There are examples of Chapter 15 recognition despite a very high percentage of voting in favour of a scheme (eg *Re NN2 Newco Ltd*).[12] However, there is no invariable rule that a Chapter 15 recognition is necessary whenever New York law-governed debts are compromised.

(iii) Where the circumstances so warrant, the Court may take a robust approach to the notion of international effectiveness: *Re Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia*.[13] In *Garuda*, an English scheme in respect of an Indonesian company was sanctioned despite the existence of dissenting creditors and despite the fact that there was no parallel scheme in Indonesia or formal recognition of the English scheme in Indonesia.

(iv) Ultimately, the guiding principle is that the Court should not act in vain or make an order which has no substantive effect or will not achieve its purpose. The principle does not require either worldwide effectiveness or worldwide certainty. Thus it does not require that the Court must be satisfied that the scheme will be effective in every jurisdiction worldwide: its focus is on jurisdictions in which, by reason of the presence there of substantial assets because of which creditors might make claims, it is especially important that the scheme be effective. The Court will sanction the scheme provided it is satisfied that the scheme would achieve a substantial effect: *Re Lehman Brothers International (Europe) (No 10)*.[14]

(v) In the present case, the Scheme will achieve a substantial effect even without Chapter 15 recognition. The Company does not know the identity of the remaining Scheme creditors who did not vote and has no reason to believe that any of them would try to enforce their pre-Scheme claims in the United States. Especially in view of the overwhelming Scheme

12 [2019] EWHC 2532 (Ch), [7] and [21] (Norris J).
13 [2001] EWCA Civ 1696, [27] (Peter Gibson LJ).
14 [2018] EWHC 1980 (Ch), [2019] Bus LR 1012, [187]–[191] (Hildyard J).

> creditors' support of the Scheme, I accept that the risk of adverse enforcement by a dissenting Scheme creditor in the United States is *de minimis*.

25. As I have already mentioned in the present case a parallel scheme was also introduced in the Cayman Islands. This is a subject which I address in the next section. To conclude this issue, the Scheme will be effective.

The need for a parallel scheme

26. The facts of this case justify further comment on the decision that was made to introduce a parallel scheme in the place of incorporation.

27. The gross proceeds of the subscription are HK$36.9 million (US$4.73 million) of which HK$17.6 million (US$2.25 million) will be available for distribution to Scheme Creditors. As these figures illustrate, because of the deteriorating value of the listed status of companies in Hong Kong, the realisation of which drives the type of scheme introduced in the present case, the amount of cash available to Scheme Creditors is small. This fall in value is a consequence of the large number of listed companies that have become insolvent in recent years. It follows that it is imperative that the cost of the restructuring of these kinds of companies is carefully controlled. In the present case a parallel scheme was introduced in the Cayman Islands and sanctioned on 14 May 2021. It is difficult to see what justification there was for this given the minimal amount of debt not governed by Hong Kong law and apparently no indication that any of the creditors whose debt might not be compromised in accordance with the *Rule in Gibbs* were likely to seek a winding up of the Company in the Cayman Islands.

28. In the case of a company listed in Hong Kong, whose debt is very largely governed by Hong Kong law, the principle relevant jurisdiction is Hong Kong. It is Hong Kong in which a scheme is necessary and any restructuring should proceed on this basis. It is only necessary to introduce a scheme in the place of incorporation if there is good reason to think that absent a scheme sanctioned in the place of incorporation there is a genuine risk of the company being wound up there. It would not, for example, make any sense to incur more costs in introducing a scheme in the place of incorporation than the amount of the debt that it is thought might not be compromised by a scheme sanctioned in Hong Kong.

29. If costs are reduced there will be more available for unsecured creditors. The directors of the Company and the PLs

should have been advised that they owe fiduciary duties to protect the interests of the unsecured creditors and that they should aim to ensure that the maximum amount of the gross proceeds of the subscription were available for distribution to Scheme Creditors.[15] Unless a genuine need to introduce a scheme in the Cayman Islands could be identified it was only necessary to introduce a scheme in Hong Kong.

30. I asked Mr Ho if he was able to explain why it was thought necessary to introduce a scheme in the Cayman Islands. I understand he was not involved in that decision. The PLs instructed Mr Ho to hand up to me a copy of the advice that they had received from Mr Chai Ridgers at Harneys on which they waived privilege. On 16 March 2021 Mr Frederic Leung of the PLs sent an email to Mr Ridgers in which he asked two questions: "*— could you advise on the risk of a creditor with Hong Kong governing debt (which compromised by a Hong Kong scheme) who filing a winding up petition against the Company in the Cayman Islands (ie the place of incorporation). In addition, please also advise the use/rationale of parallel Scheme in both Hong Kong and Cayman if in the case that the Company have 40'70% creditors– support.*" I note that there is nothing to suggest either in Mr Leung's email or Mr Ridgers's subsequent reply that the Company had any debt other than Hong Kong law governed debt.

31. The final sentence of Mr Leung's email is, as I would have expected Mr Ridgers to have appreciated, a *non sequitur*. The material question that was being asked is clearly whether or not a Hong Kong scheme will as a matter of Cayman Islands law compromise the debt thus defeating a winding up petition presented in the Cayman Islands. Mr Ridgers states in his email in reply to Mr Leung, that the *Rule in Gibbs* "*remains good law in the Cayman Islands*". It follows that as a matter of Caymans Islands law only a scheme introduced in Hong Kong would be recognised as compromising the Hong Kong law debt. Consequently a scheme introduced in the Cayman Islands would have no utility. However, Harneys advised the opposite.

32. Mr Ridgers says this:

> Pursuing parallel schemes of arrangement in both Hong Kong and the Cayman Islands, sometimes together with recognition proceedings in other jurisdictions (if appropriate) remains favourable to achieving a properly risk mitigated cross-border restructuring. This is because undertaking parallel restructurings in the place of incorporation and in the country of the law of the debt gives maximum effectiveness and recognition to the restructuring. To do otherwise risks having no robust protection in the place of incorporation. By way of explanation:

15 *Re China Bozza Development Holdings Ltd* [2021] 2 HKLRD 977.

…

- The proper approach should be for the implementation of a scheme in the home jurisdiction, together with a parallel proceeding in (in this case) Hong Kong where there is foreign debt that requires a parallel proceeding to effectively compromise it, by reason of the recently reaffirmed *Gibbs* rule, which remains good law in the Cayman Islands.
- Once a Hong Kong scheme comes into effect, the restructuring provisional liquidation would need to be brought to an end (as that is a necessary requirement), at which point the moratorium will fall away—opening the door for dissenting creditors or creditors who do not take any part in the restructuring, to come to the Cayman Islands for relief.

…

- The final issue relates to whether it is a creditors' or members' scheme. Issues relating to share capital are, by virtue of private international law, governed by the laws of the place of incorporation. In this instance we understand, whilst it is a creditors scheme that is contemplated, there is an intention to issue shares, which will be governed by Cayman Law, as well as Hong Kong regulations. It seems to us therefore that there should properly be a Cayman scheme. Not to do so would be a significant departure from decided case law.

33. Mr Ridgers then goes onto to refer to some general statements in a number of decisions. These do not address the issue to hand, which is whether it is necessary to introduce a scheme in the Cayman Islands to compromise debt governed by Hong Kong law. Mr Ridgers continues in penultimate paragraph of the email:

Turning now to your first point, creditors of Hong Kong law governed debt, who have participated in and are compromised by the Hong Kong scheme, would have difficulty in thereafter pursuing the same debt by way of a winding up petition, simply because the debt has already been compromised under the jurisdiction of the governing law clause and would undoubtedly face injunctive proceedings. However the risk is with dissentient creditors as we have highlighted above. Currently with only 40–70% of creditors supporting, who would additionally have a blocking vote to any scheme, it appears to us that there is a not insignificant risk of action in the place of incorporation and this may impact on the international effectiveness of a scheme in Hong Kong.

34. This paragraph makes little sense. It certainly does not reconcile the inconsistency in Harneys' advice, namely, that (1) only a scheme sanctioned in Hong Kong would as a matter of Cayman Islands law compromise the Hong Kong law debt and yet (2) it is desirable to introduce a scheme in the Cayman Islands. It is difficult not to conclude that in framing his advice Mr Ridgers's aim was to persuade the PLs that it was necessary to instruct his firm to cause a scheme to be introduced in the Cayman Islands. It was not to provide an accurate answer to the question on, which Harneys' advice had been sought. In my view a scheme in the Cayman Islands was plainly not necessary in the present case and served only to generate fees for Harneys and reduce the amount available for Scheme Creditors. In future if it is proposed that parallel schemes are introduced I will expect provisional liquidators or the Company to be able to justify doing so.

35. There is a specific matter suggested in Mr Ridgers's email, which requires comment. Mr Ridgers suggests that generally the "*proper approach should be for the implementation of a scheme in the home jurisdiction, together with a parallel proceeding — in Hong Kong ...*". In cases such as the present in my view this is plainly wrong.

36. The Company operates a business primarily in the Mainland. Its creditors are almost exclusively in Hong Kong. It is listed in Hong Kong. Its COMI is in Hong Kong. The Company's connection with the Cayman Islands is limited to it being the place in which it is registered. It has no other connection. One might ask why a business of this sort came to be listed on the SEHK using a Cayman Island company at all? This I anticipate is a question that will be asked increasingly frequently as it becomes apparent to a widening circle of observers that the indiscriminate use of "letter box jurisdictions" as they are described by the European Court of Justice in [35] of the Court's decision in *Re Eurofood IFSC Ltd*,[16] is prejudicing the interests of creditors in Hong Kong and the Mainland when such companies encounter financial difficulties.[17]

37. What is quite clear is that the problems that have to be solved and the economic interests that have to be protected are firmly located in Hong Kong and the Mainland. They are not located in offshore jurisdictions. Schemes should be introduced in the jurisdiction, almost invariably Hong Kong, which is central to the protection of the interests of unsecured creditors. Regard has to be had to the principles and policies, which guide Hong Kong's courts

16 [2006] Ch 508.

17 See the discussion in [34]–[44] *Re China Huiyuan Juice Group Ltd* [2021] 1 HKLRD 255 concerning accessing assets in the Mainland. It may now be possible to circumvent these problems in cases in which the COMI of the holding company and any intermediate subsidiary is located in Hong Kong and recognition of Hong Kong provisional liquidators and liquidators in possible pursuant to the new mutual recognition arrangement between Hong Kong and the Mainland.

in dealing with the introduction of schemes. This includes the Hong Kong Court's approach to the use of soft-touch provisional liquidation. In [31] of my decision in *Re China Huiyuan Juice Group Ltd* [18] and [17]–[18] of my recent decision in *Re China Bozza Development Holdings Ltd* [19] I explain the development of the use of provisional liquidation in Hong Kong to restructure debt. As I demonstrate in Hong Kong creditors have had a central role in the process. I would add two further comments to what I said in my earlier decisions, which may help those less familiar with Hong Kong's approach in this area to understand it better.

38. The first is that the current absence of legislation that provides for some form of debtor-in-possession mechanism to address a company's financial difficulties does not arise from inadvertence on the part of the Financial Services and the Treasury Bureau; although I anticipate some changes, in particular to *s.193* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap.32), may be forthcoming. The Hong Kong business community and employees organisations have historically been sceptical about debtor in possession processes. This is part of the explanation for the method that had been available until the Court of Appeal's decision in *Re Legend International Resorts Ltd* [20] being largely creditor driven. It follows that recognition of soft-touch provisional liquidation commenced in the place of incorporation is dependent in part on this Court being satisfied that it will not result in a process, which is materially inconsistent with Hong Kong's policy in this area. In practice this means that the process must be conducted by independent professionals appointed by the court actively to manage the process with a high level of creditor involvement and primacy being given to the latter's best interests.

39. The other matter concerns the character of what is taking place when a listed company is put into soft-touch provisional liquidation; a process commonly referred to as "*debt restructuring*"; a convenient short hand expression, which I have used in many decisions. It is, however, potentially misleading when used to describe a scheme of the sort that I have sanctioned in this case. It implies that the terms of a company's debt have been changed as part of some process to resolve a company's immediate financial problems and allow it to continue business; for example, a change in tenor or interest rates. The term is apposite in cases such as *Re Kaisa Group Holdings Ltd*,[21] *Re Winsway Enterprises Holding Ltd*,[22] and *Re Mongolian Mining Corp*[23] in which the schemes allowed

18 [2021] 1 HKLRD 255.
19 *Ibid*, footnote 15.
20 [2006] 2 HKLRD 192.
21 [2017] 1 HKLRD 18.
22 [2017] 1 HKLRD 1.
23 [2018] 5 HKLRD 48.

the companies to continue their existing operations. It is less so when used in a case such as the present. In the present case the Company has been sold to an investor, which wishes to acquire a listed company. The transaction necessitates a compromise and a release of the unsecured debt. The Scheme achieves that result. The Scheme does not restructure the debt in the conventional sense. This distinction is not merely a matter of semantics or pedantry. The distinction reminds us that in cases such as the present the economic interests of the owners of the original business are not so much peripheral, as largely irrelevant, except to the extent that they need to be involved in changes in capital structures and may need to be given some financial incentive to cooperate.[24] As an aside I note, that in the present case I have some reservations that the existing shareholders maintain a 15% interest in the Company, although not sufficient reservations to dissuade me from sanctioning the Scheme. Once a listed company of the type, which is appearing in the Companies list in large numbers[25] is insolvent and the continuation of the existing business ceases to be viable, the interests of unsecured creditors become paramount. If the board is not capable of taking the steps necessary to protect their interests either by realising assets, which are commonly in the Mainland or realising the value of the listed status, provisional liquidators need to be appointed capable of so doing. As I have recently explained in *Yao Weitang v China Creative Global Holdings Ltd* [26] if a company's management are incapable of protecting the interests of unsecured creditors by taking steps to maximise the value of such assets the better course may be for the Company to be put into provisional liquidation in Hong Kong and, if needs be, restructuring powers can subsequently be granted if the provisional liquidators consider it advisable,[27] which will avoid some of the issues that arise and the expense that will be incurred if soft-touch provisional liquidators are appointed in the place of incorporation.

Reported by Ken TC Lee

24 See, for example, *Re Rhine Holdings Ltd* [2000] 3 HKC 543; *Re Yaohan Hong Kong Corp Ltd* [2001] 1 HKLRD 363.

25 I understand that there are currently somewhere in the order of 30 listed companies in Hong Kong with winding up petitions issued against them. In addition, there have since May 2020 been 26 applications for recognition and assistance by provisional liquidators of companies, many listed in Hong Kong, incorporated in an offshore jurisdiction and some subject to petitions issued in Hong Kong.

26 [2021] HKCFI 1565.

27 *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338.

Re Samson Paper Co Ltd (In Liq)

[2021] HKCFI 2151

(Court of First Instance)

(Miscellaneous Proceedings No 963 of 2021)

Harris J in Chambers

20 July 2021

Company law — insolvency — foreign insolvency proceedings — recognition and assistance — application for letter of request to Mainland court seeking recognition of and assistance to Hong Kong liquidators — cooperation mechanism for mutual recognition of insolvency processes and office holders by courts of Hong Kong and Mainland — proper case for letter of request to be issued

Conflict of laws — cross-border insolvency — recognition and assistance — application for letter of request to Mainland court seeking recognition of and assistance to Hong Kong liquidators — granted

公司法 — 無力償債 — 外國清盤法律程序 — 認可和協助 — 申請向內地法院發出請求書尋求對香港清盤人作出認可和協助 — 香港和內地法院對清盤程序及公職人員的相互承認合作機制 — 發出請求書的適當案件

法律衝突 — 跨境清盤 — 認可和協助 — 申請向內地法院發出請求書尋求對香港清盤人作出認可和協助 — 授予

C, a company incorporated in Hong Kong, was wound up by its shareholders in Hong Kong on the grounds of insolvency. In order to deal with C's assets located in Shenzhen, its liquidators (Ls) applied to the Court for the issuance of a letter of request to the Bankruptcy Court of the Shenzhen Intermediate People's Court requesting that an order be made recognising Ls and providing assistance to them. The application was made pursuant to a new procedure for the mutual recognition of insolvency processes and office holders between the High Court of Hong Kong and the Intermediate People's Courts in Shenzhen, Shanghai and Xiamen (the Cooperation Mechanism). The Cooperation Mechanism consisted of two documents: the "Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region and Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Court of the Mainland and the Hong Kong Special Administrative Region"; and the Supreme People's Court's "Opinion on taking forward a pilot

measure in relation to Recognition and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong Special Administrative Region" (the SPC Opinion). According to art.6 of the SPC Opinion, in order for an application by Hong Kong liquidators for recognition and assistance to be granted under the Cooperation Mechanism, it was necessary for the Hong Kong Court to provide a letter of request and a judgment determining that a letter of request should be issued.

Held, ordering a letter of request to be issued to the Shenzhen Intermediate People's Court (in the form appended to this decision), that:

Jurisdiction

(1) According to art.4 of the SPC Opinion, a Hong Kong liquidator could only apply for recognition and assistance where the centre of main interests of the debtor company had been in Hong Kong continuously for at least six months. C was incorporated in Hong Kong, so it followed that the SPC Opinion applied and this was a proper case in which to seek recognition and assistance, unless there were matters which demonstrated its centre of main interests was located elsewhere. On the evidence, C's centre of main interests had remained in Hong Kong since its incorporation as it had always been run out of Hong Kong (*Re Melars Group Ltd* [2021] EWHC 1523 (Ch) considered). (See paras.5–6.)

Principles for granting a letter of request

(2) The Court had the inherent jurisdiction to grant a letter of request in order to permit Hong Kong liquidators to seek recognition and assistance in another jurisdiction. The Court had to consider which jurisdiction was the most appropriate or convenient forum for determining the issue in question, applying generally applicable jurisdictional principles. Here, it was appropriate to grant a letter of request. The assistance Ls needed related to conventional asset collection action; they had an express statutory power under Hong Kong law to commence legal proceedings to recover assets; and this power extended to commencing proceedings outside Hong Kong (*Akira Sugiyama v Kosei Securities Co (Asia) Ltd* [1992] 1 HKC 261, *Re Southern Pacific Personal Loans Ltd* [2014] Ch 426, *Re China Agrotech Holdings Ltd* [2017] HKCLC 365 applied). (See paras.7–9.)

Appropriate entity to which letter of request to be directed

(3) As the Bankruptcy Court was an administrative section of the Shenzhen Court rather than a separate entity, it was more appropriate to direct the letter of request simply to the Shenzhen Intermediate People's Court. (See para.15.)

Application
This was an application by the liquidators of a company incorporated in Hong Kong for the issuance of a letter of request to the Bankruptcy Court of the Shenzhen Intermediate People's Court seeking recognition and assistance.

[*Editor's note*: This is the first time that the Hong Kong Court has issued a letter of request to a Mainland Court requesting an order for recognition of and assistance to Hong Kong liquidators pursuant to the new "Cooperation Mechanism" referred to in the decision (see paras.1, 12).]

Mr Look Chan Ho, instructed by Jones Day, for the applicants.

Legislation mentioned in the judgment
Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) s.251, 251(1), Pt.2, Sch.25

Cases cited in the judgment
Akira Sugiyama v Kosei Securities Co (Asia) Ltd [1992] 1 HKC 261
CEFC Shanghai International Group Ltd (Mainland liquidation), Re [2020] 1 HKLRD 676, [2020] 4 HKC 62, [2020] HKCFI 167
China Agrotech Holdings Ltd, Re [2017] HKCLC 365
Liquidator of Shenzhen Everrich Supply Chain Co Ltd, Re [2020] HKCLC 891
Melars Group Ltd, Re [2021] EWHC 1523 (Ch)
Sea Containers Ltd, Re [2012] SC (Bda) 26 Com
Southern Pacific Personal Loans Ltd, Re [2013] EWHC 2485 (Ch), [2014] Ch 426, [2014] 2 WLR 1067, [2014] 1 All ER 98, [2014] BCC 56

DECISION

Harris J

IN THE MATTER OF Samson Paper Co Ltd

The application

1. On 14 May 2021 the Supreme People's Court and the Secretary for Justice signed what I shall refer to as the "Cooperation Mechanism", which provides a procedure for mutual recognition of insolvency processes and office holders by the High Court of Hong Kong and the Intermediate People's Courts in three jurisdictions: Shenzhen, Shanghai and Xiamen. The Cooperation Mechanism consists of two documents, which in English are called the "***Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region and***

Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Court of the Mainland and the Hong Kong Special Administrative Region " and the Supreme People's Court's "***Opinion on taking forward a pilot measure in relation to Recognition and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong Special Administrative Region*** " (**SPC Opinion**). Prior to May 2021 there had been two cases[1] in which I had made orders for recognition and assistance on the application of administrators (管理人)[2] in the Mainland with the support of letters of request from the relevant Intermediate People's Courts. On 8 July 2021, Derek Lai Kar Yan and Glen Ho Kwok Leung of Deloitte issued an *ex parte* originating summons requesting an order that "***A simplified Chinese version of the letter of request in the form annexed hereto to be issued to the Bankruptcy Court of the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's liquidation and the Liquidators*** ". This is the first application made in accordance with the Cooperation Mechanism in either Hong Kong or the Mainland. Formal recognition by the Shenzhen Intermediate People's Court (**Shenzhen Court**) would be the first occasion on which a court in the Mainland has formally recognised and assisted a liquidator appointed under Hong Kong law. As I explain in [27]–[32] of my decision in *Re CEFC Shanghai International Group Ltd*, [3] a liquidator appointed by the High Court of Hong Kong, or a Court outside the People's Republic of China, has never been formally recognised by a Mainland Court. This application is, therefore, of some significance in the development of cooperation between Hong Kong and the Mainland in the sphere of corporate insolvency.

The reasons for the application

2. Samson Paper Co Ltd (**Company**) is incorporated in Hong Kong. It is part of a corporate Group headed by Samson Paper Holdings Ltd (**Holdings**), which is incorporated in Bermuda and listed on the Stock Exchange of Hong Kong. Mr Lai and Mr Ho were appointed as provisional liquidators of Holdings by the Supreme Court of Bermuda on 24 July 2020 on a soft-touch basis. This appointment I recognised on 13 August 2020. On 14 August 2020 the intermediate group subsidiary, which held the voting shares in the Company resolved to wind up the Company on the grounds of insolvency and appointed Mr Lai and Mr Ho as liquidators

1 *Re CEFC Shanghai International Group Ltd* [2020] 1 HKLRD 676; *Re the Liquidator of Shenzhen Everrich Supply Chain Co Ltd* [2020] HKCLC 891.

2 The equivalent office holder in the Mainland to that called liquidator (清盤人) in Hong Kong.

3 *Ibid*.

(**Liquidators**). Their appointment was confirmed at a meeting of creditors on 25 August 2020.

3. The Liquidators have formed the view that they need to obtain recognition and assistance in order to deal with the Company's substantial assets in the Mainland, which are principally located in Shenzhen. The assets fall into three categories:

(1) Wholly-owned subsidiaries (**Subsidiaries**) including a wholly-owned subsidiary in Shenzhen, namely Samson Paper (Shenzhen) Co Ltd (**Samson Shenzhen**) (森信纸业(深圳)有限公司), which in turns holds two wholly-owned branches in Nanning and Xiamen; and a wholly-owned subsidiary in Shanghai, namely NJ Trading (Shanghai) Co Ltd (**Samson Shanghai**) (能京商贸(上海)有限公司);

(2) receivables (as of 14 August 2020) in the aggregate sum of approximately HK$422 million due from affiliated companies incorporated in the Mainland, which I summarise in the following table:

Name of company	**HKD**
Universal Pulp & Paper (Shangdong) Co. Ltd (远通纸业(山东)有限公司)	208,567,255
Samson Shenzhen	93,015,577
Samson Shanghai	60,689,874
Sino Development (Tianjin) International Trading Co. Ltd (建成(天津)国际贸易有限公司)	32,544,776
SJ (China) Co Ltd (Formerly known as Universal Pulp & Paper (Jiangsu) Co. Ltd) (诚仁(中国)有限公司(前称「远通纸业(江苏)有限公司」))	19,219,773
Shanghai Samson (Culture) Co Ltd (上海森信文化用品有限公司)	7,799,018

(3) an apartment in Beijing.

4. I am satisfied that it is desirable that the Liquidators' appointment is recognised and assistance provided in Shenzhen by the Shenzhen Court in order that the Liquidators can collect in the assets within the jurisdiction of the Shenzhen Court.

Jurisdiction

5. Article 4 of the SPC Opinion states:

四、本意見適用於香港特別行政區系債務人主要利益中心所在地的香港破產程序。

本意見所稱「主要利益中心」，一般是指債務人的註冊地。同時，人民法院應當綜合考慮債務人主要辦事機構所在地、主要營業地、主要財產所在地等因素認定。

在香港管理人申請認可和協助時，債務人主要利益中心應當已經在香港特別行政區連續存在6個月以上。

4. This Opinion applies to Hong Kong Insolvency Proceedings where the Hong Kong Special Administrative Region is the centre of main interests of the debtor.

'Centre of main interests' referred to in this Opinion generally means the place of incorporation of the debtor. At the same time, the people's court shall take into account other factors including the place of principal office, the principal place of business, the place of principal assets etc. of the debtor.

When a Hong Kong Administrator applies for recognition and assistance, the centre of main interests of the debtor shall have been in the Hong Kong Special Administrative Region continuously for at least 6 months.

6. As the Company is incorporated in Hong Kong it follows that unless there are matters, which demonstrate that its centre of main interests are located elsewhere the SPC Opinion applies to the Company and its Liquidators and this is a proper case in which to seek recognition and assistance. On the basis of the evidence before me, in my view it would appear that the Company's centre of main interests has been in Hong Kong since its incorporation as it has always been run out of Hong Kong.[4]

The principles governing the grant of a letter of request

7. The technique of issuing letters of request to foreign courts to facilitate the task of the liquidator who seeks assistance from a foreign court appears to be a creature of the common law. Letters of request are a private international law response to ancient public international law notions of territorial sovereignty, according to which the jurisdiction of the courts of one sovereign state does not run beyond that sovereign state's own territorial limits.[5]

4 See for a recent explanation of the criteria for determining the location of the centre of main interests, *Re Melars Group Ltd* [2021] EWHC 1523 (Ch), [56]–[62].

5 *Re Sea Containers Ltd* [2012] SC (Bda) 26 Com, [13].

8. The law is well-settled that the Court has an inherent jurisdiction to grant a letter of request in order to permit Hong Kong liquidators to seek recognition and assistance in another jurisdiction.[6] In considering whether to grant a letter of request, the Court has to consider which jurisdiction is the most appropriate or convenient forum for the determination of the issue in question applying generally applicable jurisdictional principles.[7]

9. The granting of a letter of request in the present case would be consistent with these principles. The Liquidators have a duty to collect in the Company's assets. The assistance that the Liquidators need in the Mainland relate to conventional asset collection action.[8] In order to carry out this function, the Liquidators have an express statutory power in Hong Kong to commence legal proceedings to recover assets and this includes commencing proceedings outside Hong Kong.[9]

Procedure for recognition specified in SPC Opinion

10. Article 6 of the SPC Opinion sets out the procedure for an application by a Hong Kong liquidator (清盤人):

> 六、申請認可和協助香港破產程序的，香港管理人應當提交下列材料：
>
> (一) 申請書；
> (二) 香港特別行政區高等法院請求認可和協助的函；
> (三) 啟動香港破產程序以及委任香港管理人的有關文件；
> (四) 債務人主要利益中心位於香港特別行政區的證明材料，證明材料在內地以外形成的，還應當依據內地法律規定辦理證明手續；
> (五) 申請予以認可和協助的裁判文書副本；
> (六) 香港管理人身份證件的複印件，身份證件在內地以外形成的，還應當依據內地法律規定辦理證明手續；
> (七) 債務人在內地的主要財產位於試點地區、在試點地區存在營業地或者在試點地區設有代表機構的相關證據。向人民法院提交的文件沒有中文文本的，應當提交中文譯本。

6 *Re China Agrotech Holdings Ltd* [2017] HKCLC 365.
7 *Ibid*, footnote 5 at [17].
8 *Re Southern Pacific Personal Loans Ltd* [2014] Ch 426, [31], [36]–[37].
9 *Section 251(1) and Sch.25 Pt.2* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap.32); *Akira Sugiyama v Kosei Securities Co (Asia) Ltd* [1992] 1 HKC 261, 263.

6. The Hong Kong Administrator applying for recognition of and assistance to Hong Kong Insolvency Proceedings shall submit the following materials:

(1) an application;
(2) a letter of request for recognition and assistance issued by the High Court of the Hong Kong Special Administrative Region;
(3) the relevant documents on the commencement of the Hong Kong Insolvency Proceedings and in relation to the appointment of the Hong Kong Administrator;
(4) materials showing that the debtor's centre of main interests is in the Hong Kong Special Administrative Region, and if any of such materials was issued outside the Mainland, it shall be certified in accordance with the law of the Mainland;
(5) a copy of the judgment in respect of which the application for recognition and assistance is made;
(6) a copy of the identity document of the Hong Kong Administrator, and if such identity document was issued outside the Mainland, it shall be certified in accordance with the law of the Mainland;
(7) evidence showing that the debtor's principal assets in the Mainland are in a pilot area, or that it has a place of business or a representative office in a pilot area.

Where a document to be submitted to a people's court of the Mainland is not in the Chinese language, a Chinese translation shall be submitted.

11. As can be seen from [6(2)] and [6(5)], in order for an application for recognition to be granted it is necessary for the Hong Kong Court to provide two documents. The first is a letter of request. The second is a judgment determining that a letter of request should be issued.

12. I have found in [4] above that it is desirable that the Liquidators' appointment should be recognised and assisted in Shenzhen and in [9] that the criteria for issuing a letter of request are satisfied in the present case, it follows that in my opinion this is a proper case for a letter of request to be issued by the Hong Kong Court to the Shenzhen Court requesting that the Shenzhen Court make an order recognising the Liquidators and providing assistance to them.

Liquidators' function and powers

13. For the benefit of the Judge of the Shenzhen Court who will deal with the Liquidators' application for recognition and assistance it will be helpful if I summarise the Liquidators' powers and function under Hong Kong law. Under Hong Kong law and, in particular *s.251* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap.32), the Liquidators are authorised jointly and severally to exercise the following functions and powers:

(1) take into their custody, or under their control, all the property and things in action to which the Company is or appears to be entitled;
(2) sell the real and personal property and things in action of the Company by public auction or private contract, with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;
(3) do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal; and
(4) do all other things as may be necessary for winding up the affairs of the Company and distributing its assets.

14. It is desirable that the Liquidators are able to exercise the same functions and powers in Shenzhen as in Hong Kong to the extent that the laws of the Mainland provide that an administrator in the Mainland has the same or substantially similar functions and powers. The Hong Kong Court would, as the decisions in *CEFC Shanghai*[10] and *Shenzhen Everrich*[11] demonstrate, in similar circumstances recognise a letter of request from the Shenzhen Court and provide such recognition and assistance as may be requested subject to compliance with the procedure stipulated in the SPC Opinion and any applicable limitations under Hong Kong law.

15. As I have explained in [1] the Liquidators seek an order for issue of a letter of request in simplified Chinese to the Bankruptcy Court of the Shenzhen Court. As I understand the position the Bankruptcy Court although physically separate to the rest of the Shenzhen Court, is an administrative section of the Shenzhen Court rather than a separate entity and I, therefore, think it more appropriate to direct the letter of request simply to the Shenzhen Intermediate People's Court. As the letter of request is directed to a court in the Mainland, I agree that it is appropriate that the letter of request is issued in simplified Chinese, although I think it will be helpful if an English version is appended to this

10 *Ibid*, footnote 1.
11 *Ibid*.

decision along with the Chinese version for readers who are not conversant with Chinese.

16. I will make the following order:

(1) A letter of request in the form appended hereto in simplified Chinese be issued to the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's liquidation and its liquidators.

(2) The Liquidators' costs of this application be paid out of the assets of the Company as an expense of the Company's liquidation.

Reported by Martin Li

Appendix

Order

根据认可和协助香港特别行政区破产程序试点方案发出的司法协助请求函

致: **深圳市中级人民法院破产法庭（“深圳市破产法庭”）**

鉴于：

1. 本法庭是对香港特别行政区（“**香港**”）的公司法和破产法行使管辖权的法庭。
2. 森信洋纸有限公司(**公司**)是一家于1981年3月24日根据香港法律注册成立的公司。
3. 公司在香港从事纸制品贸易已有40多年。
4. 于2020年8月14日，公司A类股股东通过书面决议，自愿将公司清盘，并委任位于香港金钟道88号太古广场一座35楼德勤.关黄陈方会计师行的黎嘉恩先生和何国梁先生共同和各别担任公司的清盘人（“**清盘人**”）。因此，公司自2020年8月14日起已在香港进行债权人自愿清盘（“**清盘程序**”）。
5. 于2020年8月25日，公司债权人通过决议，确认清盘人的委任。
6. 根据香港法律（包括《公司（清盘及杂项条文）条例》（香港法例第32章）第251条），授权清盘人共同及各别采取（其中包括）以下行动：

    (a) 将公司有权享有或看似有权享有的所有财产及据法权产，收归该清盘人保管或控制；
    (b) 借公开拍卖或私人合约，出售公司的不动产、动产及据法权产，并有权将该等财产及权产全盘转让予任何人或任何公司，或将它们分拆出售;
    (c) 以公司名义和代表公司作出所有作为及签立所有契据、收据及其他文件，并可为该目的而在有需要时，使用公司印章；及
    (d) 作出为公司事务清盘及公司资产分配而需要作出的所有其他事情。

7. 清盘人认为，鉴于（其中包括）以下事实，若要根据香港法律有效行使他们的权力，需要深圳破产法庭认可他们的委任：

(a) 公司在内地的资产包括：

(i) 一家位于深圳的全资附属公司，即森信纸业（深圳）有限公司*，该公司又在南宁和厦门持有两家分公司;

(ii) 一家位于上海的全资附属公司，即能京商贸(上海)有限公司*;

*仅供识别

(iii) 应收下列在内地注册成立的集团公司的款项（截至2020年 8月14日）合共约4.22亿港元：

Name of company	HKD
Universal Pulp & Paper (Shangdong) Co Ltd⋆（远通纸业（山东）有限公司）	208,567,255
Samson Paper (Shenzhen) Co Ltd⋆（森信纸业（深圳）有限公司）	93,015,577
NJ Trading (Shanghai) Company Limited⋆（能京商贸（上海）有限公司）	60,689,874
Sino Development (Tianjin) International Trading Co. Ltd⋆（建成（天津）国际贸易有限公司）	32,544,776
SJ (China) Company Limited (Formerly known as Universal Pulp & Paper (Jiangsu) Co. Ltd) ⋆（诚仁（中国）有限公司（前称「远通纸业（江苏）有限公司」））	19,219,773
Shanghai Samson (Culture) Company Ltd⋆（上海森信文化用品有限公司）	7,799,018

*仅供识别

(iv) 位于北京的一套公寓。

8. 因此，清盘人认为，根据香港法律，向深圳破产法庭寻求济助属适当行为，以便（特别及最重要的是）该法庭能认可清盘人及其权力。

9. 本案所提供的证据证明并令本法庭信纳，在其认为适当的范围内，向深圳破产法庭提出协助请求符合正义。为使清盘人能够履行其职责，谨请深圳破产法庭协助本法庭，授权清盘人根据适用的内地法律在内地行使香港法律赋予他们的所有权力、职责和酌情权。

10. 本法庭谨请深圳破产法庭为清盘程序及清盘人提供协助，签发命令并指示：

    (a) 清盘程序和清盘人的委任均得深圳破产法庭的认可；及

    (b) 清盘人拥有并可行使香港法律赋予他们的权力（如上文所载），并可在内地法律允许的最大范围内行使。

11. 本法庭确认，已根据香港的程序和法律发出本请求函及作出相关申请。

12. 为免产生疑问，寻求该协助旨在获得与本法庭因公司资产专属于本法庭的管辖范围内所授予的济助大致相符的济助。

13. 本法庭进一步确认，香港法院将在类似情况下，并在行使其固有管辖权时，认可深圳破产法庭的请求函，并就该请求函提供可能需要的协助（受香港法律的适用限制约束）。

LETTER OF REQUEST FOR JUDICIAL ASSISTANCE UNDER THE PILOT MEASURE IN RELATION TO THE RECOGNITION OF AND ASSISTANCE TO INSOLVENCY PROCEEDINGS IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION

To: **Bankruptcy Court of the Shenzhen Intermediate People's Court ("Shenzhen Bankruptcy Court")**

WHEREAS:

1. This Court is a court exercising jurisdiction in relation to company and insolvency law in the Hong Kong Special Administrative Region ("**Hong Kong**").
2. Samson Paper Company Limited ("**Company**") is a company incorporated under the laws of Hong Kong on 24 March 1981.
3. The Company engaged in the trading of paper products in Hong Kong for more than 40 years.
4. On 14 August 2020, the shareholder of class A shares of the Company passed a written resolution to wind up the Company voluntarily and appointed Mr Lai Kar Yan (Derek) and Mr Ho Kwok Leung Glen of Deloitte Touche Tohmatsu, 35/F, One Pacific Place, 88 Queensway, Hong Kong, as liquidators of the Company jointly and severally ("**Liquidators**"). Accordingly, the Company has been in creditors' voluntary liquidation in Hong Kong since 14 August 2020 ("**Liquidation Proceedings**").
5. On 25 August 2020, the creditors of the Company passed a resolution confirming the appointment of the Liquidators.
6. Under Hong Kong law (including section 251 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)), the Liquidators are authorised jointly and severally to, among others:

    (a) take into their custody, or under their control, all the property and things in action to which the Company is or appears to be entitled;

(b) sell the real and personal property and things in action of the Company by public auction or private contract, with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

(c) do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal; and

(d) do all other things as may be necessary for winding up the affairs of the Company and distributing its assets.

7. The Liquidators consider that the effective exercise of their powers under Hong Kong law requires that their appointment be recognised by the Shenzhen Bankruptcy Court because of, *inter alia,* the following facts:

(a) The Company's assets in the Mainland include:

(i) a wholly-owned subsidiary in Shenzhen, namely Samson Paper (Shenzhen) Company Limited* (森信纸业（深圳）有限公司), which in turns holds two wholly-owned branches in Nanning and Xiamen;

(ii) a wholly-owned subsidiary in Shanghai, namely NJ Trading (Shanghai) Company Limited* (能京商贸（上海）有限公司);

* for identification purpose only

(iii) receivables (as of 14 August 2020) in the aggregate sum of approximately HKD422 million due from the following group companies incorporated in the Mainland:

Name of company	**HKD**
Universal Pulp & Paper (Shangdong) Co. Ltd*（远通纸业（山东）有限公司）	208,567,255
Samson Paper (Shenzhen) Company Limited*（森信纸业（深圳）有限公司）	93,015,577
NJ Trading (Shanghai) Company Limited*（能京商贸（上海）有限公司）	60,689,874

Name of company	HKD
Sino Development (Tianjin) International Trading Co. Ltd* （建成（天津）国际贸易有限公司）	32,544,776
SJ (China) Company Limited (Formerly known as Universal Pulp & Paper (Jiangsu) Co. Ltd) * （诚仁（中国）有限公司（前称「远通纸业（江苏）有限公司」））	19,219,773
Shanghai Samson (Culture) Company Ltd* （上海森信文化用品有限公司）	7,799,018

* for identification purpose only

(iv) an apartment in Beijing.

8. Accordingly, the Liquidators consider it appropriate, as a matter of Hong Kong law, to seek relief from the Shenzhen Bankruptcy Court, most specifically and importantly for the recognition of the Liquidators and their powers.
9. The evidence filed in these proceedings has demonstrated to the satisfaction of this Court that, in order for the Liquidators to discharge their duties, it is in the interests of justice to respectfully request the Shenzhen Bankruptcy Court, to the extent it deems it appropriate to do so, to assist this Court by empowering the Liquidators to exercise all the powers, duties and discretions afforded to them under Hong Kong law within the Mainland in accordance with applicable Mainland law.
10. This Court hereby respectfully requests the Shenzhen Bankruptcy Court to act in aid of the Liquidation Proceedings and in aid of the Liquidators by ordering and directing that:

(a) the Liquidation Proceedings and the appointment of the Liquidators be recognised by the Shenzhen Bankruptcy Court; and
(b) the Liquidators have and may exercise such powers as are available to them under Hong Kong law (as set out above), and to the fullest extent permitted by Mainland law.

11. This Court confirms that this Letter of Request has been issued, and the associated application has been made, in accordance with the procedures and laws of Hong Kong.
12. For the avoidance of doubt, this assistance is sought to obtain relief broadly corresponding to the relief which would be granted by this Court if the Company's assets were located exclusively within the jurisdiction of this Court.
13. This Court further confirms that the Hong Kong Court would in similar circumstances, and in the exercise of its inherent jurisdiction, recognise a letter of request from the Shenzhen Bankruptcy Court and provide such assistance as may be requested in respect of that letter of request (subject to applicable limitations under Hong Kong law).

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HCMP 9/2022
[2022] HKCFI 363

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 9 OF 2022

IN THE MATTER of Ozner Water International Holding Limited （浩澤淨水國際控股有限公司） (In Liquidation)

and

IN THE MATTER of the inherent jurisdiction of the Court

JOINT AND SEVERAL LIQUIDATORS OF OZNER WATER INTERNATIONAL HOLDING LIMITED （浩澤淨水國際控股有限公司） (IN LIQUIDATION) (“**COMPANY**”) — Applicants

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Before: Hon Harris J in Chambers (Not Open to the Public)

Date of Hearing: 27 January 2022

Date of Decision: 27 January 2022

D E C I S I O N

Introduction

1. I have before me the third application for issue by this court of a letter of request directed to the Shenzhen Intermediate People’s Court seeking its assistance in aid of the Company’s

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liquidation and liquidators. The application is made pursuant to what is now commonly referred to as the "Cooperation Mechanism" that was entered into on 14 May 2021 by the Supreme People's Court and Hong Kong's Secretary for Justice. The first application was made on 20 July 2021. It concerned *Samson Paper Co Ltd*[1]. It is not necessary for me to repeat the explanation contained in that decision of the genesis and purpose of the Cooperation Mechanism and its terms. For present purposes what is relevant are **(1)** that the Cooperation Mechanism applies as between the Hong Kong High Court and the Shenzhen Intermediate People's Court and **(2)** the criteria that need to be satisfied before the Shenzhen Intermediate People's Court will recognise the Liquidators and grant them assistance.

2. This application is, however, different from the two previous applications in one material respect. The Company is not incorporated in Hong Kong. It is incorporated in the Cayman Islands.

Background

3. The Company was incorporated in the Cayman Islands on 15 November 2013, and has been registered in Hong Kong under *Part 16* of the *Companies Ordinance* (Cap. 622) as a registered non-Hong Kong company since 6 January 2014, with its principal place of business in Hong Kong. The Company's shares have been listed on the Main Board of the Stock Exchange of Hong Kong since June 2014, with stock code 2014. Trading in the Company's shares has been suspended since 18 March 2021. The Company is an investment holding company, with its principal operating subsidiaries in the Mainland (together, "**Group**"). The Group's business is in three principal areas, namely:

1 [2021] 3 HKLRD 727.

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(1) water purification services;

(2) air sanitisation services; and

(3) supply chain services.

4. The background to the Company's insolvency proceedings may be summarised as follows:

(1) In 2020, the Group encountered financial difficulties.

(2) The Company is balance-sheet insolvent.

(3) On 14 December 2020, DBS Bank Ltd, Hong Kong branch ("**Petitioner**") issued a winding-up petition against the Company because the Company owed the Petitioner some US$25 million.

(4) On 17 March 2021, Master Lai made a winding-up order on the Petitioner's petition.

(5) On 16 April 2021, upon the Official Receiver's application, I granted a regulating order appointing the Liquidators.

5. Since their appointment, the Liquidators have been investigating the Company's affairs and preserving the Company's assets.

6. The Liquidators need to obtain recognition and assistance in the Mainland in order to take possession of and deal with the Company's substantial assets in the Mainland which are located in Shenzhen, consisting of:

(1) a judgment debt in the sum of HK$20 million plus interest ("**Judgment Debt**") owed by a financial services company incorporated in Shenzhen, namely 深圳市威廉金融控股有限公司 ("**Shenzhen William**"), arising from a judgment

granted by the People's Court of Qianhai Cooperation Zone, Shenzhen on 8 September 2020; and

(2) debt claims exceeding HK$142 million due from Shenzhen William ("**Receivables**").

Need for Recognition and Assistance

7. In *Re Samson Paper Co Ltd*[2], I explained the principles governing the issue of a letter of request by the Hong Kong court to a Mainland court in connection with the Cooperation Mechanism. Granting the Letter of Request would be consistent with the established principles for these reasons. First, the assets the Liquidators seek to control via the Mainland recognition are assets in the Mainland. Thus the Mainland court is the most appropriate forum for the determination of the Liquidators' powers over the Mainland assets.

8. Second, the Letter of Request would be consistent with the Cooperation Mechanism because the following features of the present case fall squarely within the Cooperation Mechanism:

(1) The Company is in insolvent compulsory liquidation, with its principal Mainland assets being in Shenzhen.

(2) The Company's centre of main interests has been in Hong Kong because the Company has always been run out of Hong Kong.

(3) The Liquidators have a duty to get in the Company's assets. The assistance the Liquidators need in the Mainland concerns classic asset collection efforts.

[2] *Ibid*, at [7]–[9].

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9. Third, the Liquidators have under Hong Kong law statutory power to commence proceedings outside Hong Kong to perform their functions.

10. Granting the letter of request here would be a fruitful exercise of the Court's discretion because the evidence demonstrates that without recognition and assistance in the Mainland, the Liquidators would not be able to collect on the Judgment Debt and Receivables. This is in my opinion a proper case to issue a Letter of Request to take advantage of the Cooperation Mechanism in order to assist in the Liquidators' asset collection efforts. Indeed, recently the Shenzhen court granted the relevant recognition and assistance to the liquidators in *Samson Paper*[3] to achieve a similar purpose.

Jurisdiction

11. Article 4 of the SPC Opinion states:

> "　四、　本意見適用於香港特別行政區系債務人主要利益中心所在地的香港破產程序。
>
> 本意見所稱‘主要利益中心’，一般是指債務人的註冊地。同時，人民法院應當綜合考慮債務人主要辦事機構所在地、主要營業地、主要財產所在地等因素認定。
>
> 在香港管理人申請認可和協助時，債務人主要利益中心應當已經在香港特別行政區連續存在 6 個月以上。
>
> 4.　This Opinion applies to Hong Kong Insolvency Proceedings where the Hong Kong Special Administrative Region is the centre of main interests of the debtor.
>
> 'Centre of main interests' referred to in this Opinion generally means the place of incorporation of the debtor. At the same time, the people's court shall take into account other factors including the place of principal office, the principal place of business, the place of principal assets etc. of the debtor.

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[3] *Re Samson Paper Company Limited* (2021) 粤 03 认港破 1 号 (15 December 2021).

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> When a Hong Kong Administrator applies for recognition and assistance, the centre of main interests of the debtor shall have been in the Hong Kong Special Administrative Region continuously for at least 6 months."

12. As the Company is not incorporated in Hong Kong it is necessary for the court in Hong Kong and the Mainland to be satisfied that its centre of main interests is located in Hong Kong and this is a proper case in which to seek recognition and assistance. On the basis of the evidence before me in my view it would appear that the Company's centre of main interests has been in Hong Kong since its incorporation as it has always been run out of Hong Kong [4].

Determination

13. I have found in [10] above that it is desirable that the Liquidators' appointment should be recognised and assisted in Shenzhen and in [12] that the Company's centre of main interests is in Hong Kong. It follows that in my opinion this is a proper case for a letter of request to be issued by the Hong Kong Court to the Shenzhen Intermediate People's Court requesting that the Shenzhen Intermediate People's Court make an order recognising the Liquidators and providing assistance to them.

14. I will make the following order:

(1) A letter of request in the form appended hereto in simplified Chinese be issued to the Shenzhen Intermediate People's Court seeking its assistance in aid of the Company's liquidation and its liquidators.

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[4] See for a recent explanation of the criteria for determining the location of the centre of main interests, *Re Melars Group Ltd* [2021] EWHC 1523 (Ch) [56]–[62].

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(2) The Liquidators' costs of this application be paid out of the assets of the Company as an expense of the Company's liquidation.

(3) Liberty to apply.

(Jonathan Harris/夏利士)
Judge of the Court of First Instance
High Court

Mr Look Chan Ho, instructed by King & Wood Mallesons, for the applicants

HCMP 300/2022

[2022] HKCFI 924

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 300 OF 2022

IN THE MATTER of Hong Kong Fresh Water International Group Limited （香港浩澤國際集團有限公司）(In Liquidation)

and

IN THE MATTER of the inherent jurisdiction of the Court

BY

THE JOINT AND SEVERAL LIQUIDATORS OF HONG KONG FRESH WATER INTERNATIONAL GROUP LIMITED （香港浩澤國際集團有限公司）(IN LIQUIDATION) (“**COMPANY**”) Applicants

---

Before: Hon Harris J in Chambers

Date of Written Submission: 18 March 2022

Date of Decision: 6 April 2022

D E C I S I O N

The Application

1. The Liquidators of Hong Kong Fresh Water International Group Limited (“**Company**”) have issued an application for a letter of

request to be issued to the Shanghai No.3 Intermediate People's Court ("**Shanghai Court**") pursuant to what I shall refer to as the "Cooperation Mechanism", which provides a procedure for mutual recognition of insolvency processes and office holders by the High Court of Hong Kong and the Intermediate People's Courts in three jurisdictions: Shenzhen, Shanghai and Xiamen. The Cooperation Mechanism consists of two documents, which in English are called the "*Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region and Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Court of the Mainland and the Hong Kong Special Administrative Region*" and the Supreme People's Court's "*Opinion on taking forward a pilot measure in relation to Recognition and Assistance to Bankruptcy (Insolvency) Proceedings in the Hong Kong Special Administrative Region*" ("**SPC Opinion**").

2. This is the first application pursuant to the Cooperation Mechanism for a letter of request to be issued to the Shanghai Court. There have been three letters of request issued to the Shenzhen Intermediate People's Court[1] pursuant to the Cooperation Mechanism and in *Re CEFC Shanghai International Group Ltd*[2] I granted recognition of liquidators appointed in Shanghai at the request of the Shanghai Court (that application being made before the Cooperation Mechanism was introduced).

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1 *Re Samson Paper Co. Ltd* [2021] HKCFI 2151; [2021] HKCLC 1053; *Re Zhaoheng Hydropower (Hong Kong) Ltd* [2022] HKCFI 248; *Re Ozner Water International Holding Limited* [2022] HKCFI 363; [2022] HKEC 784.

2 [2020] HKCLC 1; [2020] HKCFI 167.

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The Company, its financial problems and the need for recognition and assistance in Shanghai

3. The Company was incorporated in Hong Kong on 31 August 2010. The Company is part of a corporate group ("**Group**") headed by Ozner Water International Holding Limited ("**Parent**") which is a Cayman-incorporated entity listed in Hong Kong. The Group's business is or was in three principal areas, namely:

(1) water purification services;

(2) air sanitisation services; and

(3) supply chain services.

4. The Company serves as an intermediate holding company within the Group. The Company's main assets in the Mainland are its shareholding in wholly-owned subsidiaries incorporated in Shanghai ("**Shanghai Subsidiaries**"), namely:

(1) Shanghai Haoze Environmental Technology Co., Ltd（上海浩泽环保科技有限公司）;

(2) Shanghai Haoze Water Purification Technology Development Co., Ltd（上海浩泽净水科技发展有限公司）;

(3) Haoze (Shanghai) Environment and Science Co., Ltd（浩泽（上海）环境科技有限公司）and

(4) Small Dragon (Shanghai) Lease & Finance Co., Ltd（小龙虾（上海）融资租赁有限公司）.

5. The Company also has a key subsidiary in the Shaanxi province, namely, Shaanxi Haoze Environmental Technology Group Co., Ltd)（陕西浩泽环保科技集团有限公司）.

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6. The Shanghai Subsidiaries' principal businesses are or were:

(1) water purification services;

(2) air sanitisation services;

(3) environmental science and technology; and

(4) finance leasing, factoring and lending business.

7. Because of lack of cooperation from the Company's former management and the Shanghai Subsidiaries' management, the Liquidators have only limited information about the financial health of the Shanghai Subsidiaries. However, based on the Group's interim report for the six months ended 30 June 2020, the Shanghai Subsidiaries were, as at 30 June 2020, balance sheet solvent.

8. Both the Parent and the Company are in liquidation in Hong Kong. In 2020, the Group encountered financial difficulties.

(1) In respect of the Parent:

(a) On 17 March 2021, upon the petition of DBS Bank Ltd, Hong Kong branch ("**DBS**"), Master Lai made a winding-up order against the Parent on grounds of the Parent's insolvency.

(b) On 16 April 2021, I granted a regulating order appointing the Liquidators as liquidators of the Parent.

(2) In respect of the Company:

(a) The Company was at least as at 30 June 2020 balance-sheet solvent, and is cashflow insolvent.

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(b) On 14 December 2020, DBS issued a winding-up petition against the Company because the Company owed DBS some US$25 million.

(c) On 17 March 2021, Master Lai made a winding-up order against the Company.

(d) On 27 July 2021, Master Lai appointed the Liquidators.

9. Since their appointment, the Liquidators have been investigating the Company's affairs and preserving the Company's assets. The Liquidators need to obtain recognition and assistance in the Mainland in order to take possession of and deal with the Company's substantial assets in the Mainland, in particular the Shanghai Subsidiaries.

10. The Liquidators' need to control the Shanghai Subsidiaries has become pressing because the Liquidators' investigations show that the management of the Shanghai Subsidiaries have apparently diverted the Shanghai Subsidiaries' business and continued to use the association with the Parent as a listed entity, while they have ignored the Liquidators' request for information.

11. I recently granted a letter of request to the Liquidators in respect of their capacity as the liquidators of the Parent in order to facilitate their efforts to take control of the Parent's assets in Shenzhen: *Re Ozner Water International Holding Ltd*[3].

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[3] *Supra*.

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The principles governing the grant of a letter of request

12. These I explain in [7]–[9] of my decision in *Re Samson Paper Co Ltd*[4].

> "7. The technique of issuing letters of request to foreign courts to facilitate the task of the liquidator who seeks assistance from a foreign court appears to be a creature of the common law. Letters of request are a private international law response to ancient public international law notions of territorial sovereignty, according to which the jurisdiction of the courts of one sovereign state does not run beyond that sovereign state's own territorial limits [5].
>
> 8. The law is well-settled that the Court has an inherent jurisdiction to grant a letter of request in order to permit Hong Kong liquidators to seek recognition and assistance in another jurisdiction [6]. In considering whether to grant a letter of request, the Court has to consider which jurisdiction is the most appropriate or convenient forum for the determination of the issue in question applying generally applicable jurisdictional principles [7].
>
> 9. The granting of a letter of request in the present case would be consistent with these principles. The Liquidators have a duty to collect in the Company's assets. The assistance that the Liquidators need in the Mainland relate to conventional asset collection action [8]. In order to carry out this function the Liquidators have an express statutory power in Hong Kong to commence legal proceedings to recover assets and this includes commencing proceedings outside Hong Kong [9]."

Procedure for recognition specified in the SPC Opinion

13. These I explain in [10] of my decision in *Re Samson Paper Co Ltd*[10].

> "10. Article 6 of the SPC Opinion sets out the procedure for an application by a Hong Kong liquidator (清盤人):

4 *Supra*.
5 *Re Sea Containers Ltd* [2012] SC (Bda) 26 Com at [13].
6 *Re China Agrotech Holdings Ltd* [2017] HKCLC 365.
7 *Re Melars Group Limited* [2021] EWHC 1523 (Ch) at [17].
8 *Re Southern Pacific Personal Loans Ltd* [2014] Ch 426 at [31], [36]–[37].
9 *Section 251(1) and Schedule 25 Part 2* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32; *Akira Sugiyama v Kosei Securities Co (Asia) Ltd* [1992] 1 HKC 261, 263.
10 *Ibid*.

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‘ 六、申請認可和協助香港破產程序的，香港管理人應當提交下列材料：

（一） 申請書；

（二） 香港特別行政區高等法院請求認可和協助的函；

（三） 啟動香港破產程序以及委任香港管理人的有關文件；

（四） 債務人主要利益中心位於香港特別行政區的證明材料，證明材料在內地以外形成的，還應當依據內地法律規定辦理證明手續；

（五） 申請予以認可和協助的裁判文書副本；

（六） 香港管理人身份證件的複印件，身份證件在內地以外形成的，還應當依據內地法律規定辦理證明手續；

（七） 債務人在內地的主要財產位於試點地區、在試點地區存在營業地或者在試點地區設有代表機構的相關證據。向人民法院提交的文件沒有中文文本的，應當提交中文譯本。

6. The Hong Kong Administrator applying for recognition of and assistance to Hong Kong Insolvency Proceedings shall submit the following materials:

(1) an application;

(2) a letter of request for recognition and assistance issued by the High Court of the Hong Kong Special Administrative Region;

(3) the relevant documents on the commencement of the Hong Kong Insolvency Proceedings and in relation to the appointment of the Hong Kong Administrator;

(4) materials showing that the debtor’s centre of main interests is in the Hong Kong Special Administrative Region, and if any of such materials was issued outside the Mainland, it

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> shall be certified in accordance with the law of the Mainland;
>
> (5) a copy of the judgment in respect of which the application for recognition and assistance is made;
>
> (6) a copy of the identity document of the Hong Kong Administrator, and if such identity document was issued outside the Mainland, it shall be certified in accordance with the law of the Mainland;
>
> (7) evidence showing that the debtor's principal assets in the Mainland are in a pilot area, or that it has a place of business or a representative office in a pilot area.
>
> Where a document to be submitted to a people's court of the Mainland is not in the Chinese language, a Chinese translation shall be submitted."'

Liquidators' function and powers

14. For the benefit of the Judges of the Shanghai Court who will deal with the Liquidators' application for recognition and assistance it will be helpful if I summarise the Liquidators' powers and function under Hong Kong law. Under Hong Kong law and, in particular *section 251* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32, the Liquidators are authorised jointly and severally to exercise the following functions and powers:

(1) take into their custody, or under their control, all the property and things in action to which the Company is or appears to be entitled;

(2) sell the real and personal property and things in action of the Company by public auction or private contract, with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

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(3) do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal; and

(4) do all other things as may be necessary for winding up the affairs of the Company and distributing its assets.

Determination

15. I am satisfied for the reasons explained in [3]–[10] above that it is desirable that the Liquidators' appointment is recognised and assisted in Shanghai. I am also satisfied, as I was in the case of the Parent, that although not incorporated in Hong Kong, the Company's centre of main interests ("**COMI**") was in Hong Kong where the Parent was listed. In the case of the Company its affairs have been managed since at least March 2021 in Hong Kong by the Liquidators and this alone is enough to satisfy the COMI test as the Cooperation Mechanism requires the COMI to have been in Hong Kong for six months prior to the application being made.

16. I will, therefore, make an order in the terms of the application and issue the letter of request.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Written submissions by Look Chan Ho, instructed by King & Wood Mallesons, for the applicants

Re Guangdong Overseas Construction Corp (In Liq) (廣東海外建設總公司)

[2023] HKCFI 1340
(Court of First Instance)
(Miscellaneous Proceedings No 453 of 2023)

Linda Chan J in Chambers

2, 17 May 2023

Company law — insolvency — foreign insolvency proceedings — recognition and assistance — PRC company in insolvent liquidation in Mainland China — application for recognition and assistance order by Mainland administrators — principles and criteria — where request initiated by Mainland court outside pilot areas of cooperation mechanism between courts of Hong Kong and Mainland — order granted — approach to future applications

Conflict of laws — cross-border insolvency — order for recognition and assistance — request initiated by Mainland court outside pilot areas of cooperation mechanism between courts of Hong Kong and Mainland — approach

公司法 — 破產 — 外地清盤法律程序 — 認可和協助 — 中國公司在中國大陸進行破產清盤 — 內地管理人申請認可和協助令 — 法律原則及標準 — 內地法院在香港與內地法院之間的合作機制的試點領域以外提出請求的情況 — 授予命令 — 針對未來申請的做法

法律衝突 — 跨境清盤 — 認可和協助令 — 內地法院在香港與內地法院之間的合作機制的試點領域以外提出請求 — 做法

C, a company established in Mainland China in insolvent liquidation, held shares in a company registered in Hong Kong. The administrator appointed by the Guangzhou Court sought recognition and assistance of the insolvency proceedings from the Hong Kong court in order to take control of such shares. The Court considered whether, in light of the terms of the consensus reached in 2021 in relation to mutual recognition of and assistance to insolvency proceedings between the courts of the Mainland and Hong Kong (the Cooperation Mechanism), the Guangzhou Court, which was a court outside the Pilot Areas, might initiate a request for assistance to the Hong Kong court.

Held, allowing the application, that:

(1) The "Procedures for a Mainland Administrator's Application to the Hong Kong SAR Court for Recognition and Assistance — Practical Guide" (the Practical Guide) and the "Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region" prescribe the framework of mutual recognition and assistance of insolvency proceedings between the courts of the Mainland and of Hong Kong and the manner in which an application was to be made to the relevant court. They did not purport to confer jurisdiction on the relevant court to seek recognition and assistance. The power of the court to recognise and assist office-holders appointed by a court of another jurisdiction derived from common law (*Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, *Re CEFC Shanghai International Group Ltd (Mainland liquidation)* [2020] 1 HKLRD 676, *Re Global Brands Group Holding Ltd (In Liq)* [2022] 3 HKLRD 316 considered). (See paras.16(3), 21.)

(2) Where an application was brought outside the scope of the Cooperation Mechanism, this was not a consideration the Hong Kong court should take into account in granting recognition and assistance as: (i) reciprocity was not a requirement for recognition and assistance under common law; and (ii) the issue whether it was appropriate for a court outside the Pilot Areas to apply for recognition and assistance was a matter for the Supreme People's Court (*Re HNA Group Co Ltd* [2021] HKCFI 2897 applied). (See para.19.)

(3) The court must be satisfied that: (i) the foreign insolvency proceedings were collective insolvency proceedings which included proceedings opened in a civil law jurisdiction; (ii) the foreign insolvency proceedings were conducted in the jurisdiction where the company's centre of main interest was located; and (iii) the assistance was necessary for the administration of a foreign winding up or the performance of the office-holder's functions, and the order was consistent with the substantive law and public policy of the assisting court so it was not available for purposes which were properly the subject of other schemes (*Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, *Re CEFC Shanghai International Group Ltd (Mainland liquidation)* [2020] 1 HKLRD 676, *Re Global Brands Group Holding Ltd (In Liq)* [2022] 3 HKLRD 316 applied). (See para.17(2).)

(4) On the facts, the Court was satisfied that those requirements were met and it was appropriate to make an order for recognition and assistance in the present case. (See para.23.)

(5) The terms of the order had to be formulated to suit the company in question. In the instant case, details of the asset identified should be set out in the order to ensure that the order was sufficiently certain and effective in assisting the office-holder in carrying out its functions in Hong Kong. (See paras.2, 24.)
(6) (*Obiter*) As a matter of practice and to ensure consistency, it would be desirable for future applications to follow the Practical Guide even though the letter of request was issued by a court outside the Pilot Area. (See para.22.)

Application
This was an application by the Mainland administrator of a PRC company in insolvent liquidation, after the implementation of the "Cooperation Mechanism", seeking recognition and assistance of the insolvency proceedings pursuant to a letter of request issued by a Mainland court outside the Pilot Areas.

Mr Stephen Siu (written submissions only) and Ms Christy Chak, instructed by Ling & Lawyers, for the Administrator.

Cases cited in the judgment
CEFC Shanghai International Group Ltd (Mainland liquidation), Re [2020] 1 HKLRD 676, [2020] 4 HKC 62, [2020] HKCFI 167
Global Brands Group Holding Ltd (In Liq), Re [2022] 3 HKLRD 316, [2022] 5 HKC 485, [2022] HKCFI 1789
Jiang Wenyu, Re; sub nom HNA Group Co Ltd, Re [2021] HKCFI 2897, [2021] HKEC 4405
Liquidator of Shenzhen Everich Supply Chain Co Ltd, Re [2020] HKCFI 965, [2020] HKEC 1188
Nuoxi Capital Ltd v Peking University Founder Group Co Ltd; sub nom Peking University Founder Group Co Ltd, Re [2022] 2 HKC 1, [2021] HKCFI 3817
Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36, [2015] AC 1675, [2015] 2 WLR 971, [2015] BCC 66

Other materials mentioned in the judgment
"Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region", paras.1, 2, 3
"The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to

Insolvency Proceedings in the Hong Kong Special Administrative Region", para.1

JUDGMENT

Linda Chan J

1. There is before the court an application filed on 21 March 2023 by 廣州金股企業清算有限公司, the administrator (管理人) (**Administrator**) appointed by the Guangzhou Intermediate People's Court of Guangdong Province (廣東省廣州市中級人民法院) (**Guangzhou Court**) over Guangdong Overseas Construction Corp (廣東海外建設總公司) (**Company**), for recognition and assistance from the Hong Kong court. The application is made under the inherent jurisdiction of the court, as the Company is not a company wound up under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) such that the provisions under Cap.32 have no application.

2. In their written submissions, counsel for the Administrator describe the terms of the order sought as the "standard form recognition order". While this may be the terms of the orders granted by the court in the earlier cases, it should not be taken as the basis for seeking an order in the same terms regardless of the circumstances faced by the Administrator. In my view, it is incumbent upon the office-holder and those advising it to formulate the terms of order which suit the company in question. In particular, where as here the office-holder has already identified the asset which it seeks to take control, it should set out the details of such asset in the order. This is necessary to ensure that the order is sufficiently certain and effective in assisting the office-holder in carrying out its functions in Hong Kong.

Background

3. The Company is a private company established in the Mainland on 30 November 1992. Its registered capital is RMB 29.5 million. Until its bankruptcy, the Company carried on business in selling construction materials and hardware in the Mainland.

4. 廣東海外建設發展有限公司 (香港) (Guangdong Overseas Construction Development Ltd) (**GOCD**) is a company incorporated in Hong Kong. It has 4,000,000 issued shares of which 1,199,997 shares are registered in the name of the Company.

5. By a judgment dated 20 April 2016 granted by the Tianhe District Court in Guangzhou, the Company was adjudged liable to pay RMB2,746,320 together with interest to a creditor.

6. Following the Company's default in payment, the creditor applied for a bankruptcy order against the Company. On 24 April 2020, the Guangzhou Court accepted the creditor's application for a bankruptcy order against the Company pursuant to the Enterprise Bankruptcy Law (EBL), and appointed the Administrator over the Company.

7. On 23 July 2020, the Guangzhou Court appointed Mr Gao Peng (高鹏) as the authorised representative of the Administrator.

8. On 17 May 2022, the Guangzhou Court made a bankruptcy order against the Company on the ground that it was insolvent and unable to pay its debts.

9. On 15 November 2022, Guangzhou Court issued a letter of request to the Hong Kong court (Letter of Request) requesting for recognition and assistance in the terms set forth below:

為便於管理人處分廣東海外建設總公司在香港特別行政區的破產財產，特請求香港特別行政區高等法院認可本法院依法決定的破產清算程序及破產管理人身份。

本法院茲請求香港特別行政區高等法院作出以下命令及指示，以協助破產程序及管理人：

1. 認可廣東海外建設總公司破產清算程序;
2. 認可廣州金股企業清算有限公司為廣東海外建設總公司管理人身份;
3. 為廣東海外建設總公司管理人提供履職協助。

現謹確認並保證，上述請求並未受到《中華人民共和國企業破產法》及相關司法解釋的限制。

(English translation:

To facilitate the deposition of the bankruptcy property of [the Company] in the Hong Kong Special Administrative Region by the Administrator, it is hereby requested that the High Court of the Hong Kong Special Administrative Region recognises the bankruptcy liquidation procedures and the status of the Administrator as decided by the Court according to the law.

This Court hereby requests the High Court of the Hong Kong Special Administrative Region to make the following orders and directions to provide assistance in the bankruptcy liquidation procedures and to the Administrator:

1. To recognise the bankruptcy liquidation procedures of [the Company];
2. To recognise the status of 廣州金股企業清算有限公司 being the Administrator of [the Company];
3. To provide assistance to the Administrator of [the Company] in performing its duties.

This Court hereby confirms and guarantees that the requests above have not been restricted by the [EBL] and the relevant judicial interpretations.)

10. In the Letter of Request, the Guangzhou Court described (1) the background leading to the appointment of the Administrator; (2) the duties of the Administrator under the EBL; (3) the 1,199,997 shares in GOCD registered in the Company's name; and (4) the bankruptcy order made against the Company.

11. So far as the duties of the Administrator are concerned, it was stated in the Letter of Request in this way:

根據《中華人民共和國企業破產法》的規定，管理人依法履行職務，向本法院報告工作，並接受債權人會議和債權人委員會的監督。管理人的法定職責如下：

(一) 接管債務人的財產、印章和帳簿、文書等資料；
(二) 調查債務人財產狀況，製作財產狀況報告；
(三) 決定債務人的內部管理事務;
(四) 決定債務人的日常開支和其他必要開支；
(五) 在第一次債權人會議召開之前，決定繼續或者停止債務人的營業；
(六) 管理和處分債務人的財產；
(七) 代表債務人參加訴訟、仲裁或者其他法律程序；
(八) 提議召開債權人會議；
(九) 本院認為管理人應當履行的其他職責。

(English translation:

According to the provisions of the [EBL], an administrator shall perform his duties in accordance with the law, report on his work to this Court and be subject to supervision by the creditors' meeting and the creditors' committee. The statutory duties of an administrator are as follows:

(1) taking over the property, seals, account books, documents and other data of the debtor;
(2) investigating into the financial position of the debtor and preparing a report on such position;
(3) deciding on matters of internal management of the debtor;
(4) deciding on the day-to-day expenses and other necessary expenditures of the debtor;
(5) deciding, before the first creditors' meeting is held, to continue or suspend the debtor's business;
(6) managing and disposing of the debtor's property;
(7) participating in legal actions, arbitrations or any other legal procedure on behalf of the debtor;
(8) proposing to hold creditors' meetings; and
(9) performing other duties that this Court deems that he should.)

12. It is not clear why the Administrator did not make the application shortly after the Letter of Request was issued by the Guangzhou Court, but waited until March 2023 to make the application.

13. In their submissions, counsel rely on the principles set out in *Re CEFC Shanghai International Group Ltd (in liq)* [2020] 1 HKLRD 676 (Harris J) and *Re Shenzhen Everich Supply Chain Co Ltd (in liq)* [2020] HKCFI 965 (Harris J). In their supplemental submissions, counsel submit that the "Cooperation Mechanism" (as defined in [14] below) has no application to the Company as the Guangzhou Court is not a court of the 3 pilot areas designated by the Supreme People's Court (**SPC**) under the Cooperation Mechanism.

Applicable principles

14. On 14 May 2021, the SPC and the Government of Hong Kong reached a consensus in relation to mutual recognition of and assistance to insolvency proceedings between the courts of the Mainland and of Hong Kong (**Cooperation Mechanism**) and published the following documents:

(1) The "Record of Meeting of the Supreme People's Court and the Government of the Hong Kong Special Administrative Region on Mutual Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and of the Hong Kong Special Administrative Region" signed by the Secretary for Justice and the SPC on 14 May 2021 (**Record of Meeting**).

(2) The "Procedures for a Mainland Administrator's Application to the Hong Kong SAR Court for Recognition and Assistance — Practical Guide" issued by the Department of Justice (**Practical Guide**).

(3) "The Supreme People's Court's Opinion on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region" (**SPC's Opinion**).

15. The Record of Meeting describes the types of application for recognition and assistance which may be made as follows:

> 1. Intermediate People's Court in the pilot areas designated by the Supreme People's Court may initiate cooperation with the courts of the Hong Kong Special Administrative Region on mutual recognition of and assistance to bankruptcy proceedings.
> 2. A liquidator or provisional liquidator in insolvency proceedings in the Hong Kong Special Administrative Region may apply to the relevant Intermediate People's Court at a pilot area in the Mainland for recognition of compulsory winding up, creditors' voluntary winding up and corporate debt restructuring proceedings brought by a liquidator or provisional liquidator as sanctioned by a court of the Hong Kong Special Administrative Region in accordance with the laws of the Hong Kong Special Administrative Region, recognition of his office as a liquidator or a provisional liquidator, and grant of assistance for discharge of his duties as a liquidator or a provisional liquidator.
> 3. An administrator in Mainland bankruptcy proceedings may apply to the High Court of the Hong Kong Special Administrative Region for recognition of bankruptcy liquidation, reorganisation and compromise proceedings under the [EBL], recognition of his office as an administrator, and grant of assistance for discharge of his duties as an administrator.

16. The following points should be noted:

(1) In respect of an application for recognition and assistance made by a Mainland court, the request has to be initiated by a court

in the pilot areas designated by the SPC[1] (**Pilot Areas**) (para.1). Although para.3 of the Record of Meeting refers to an application made by a Mainland administrator to the Hong Kong court for recognition and assistance, it has to be read in the context that the Cooperation Mechanism is for mutual recognition and assistance between the *courts* of the Mainland and Hong Kong as stated in the first paragraph of the Record of Meeting.

(2) Similarly, an application made by a liquidator[2] appointed by the Hong Kong court for recognition and assistance has to be made to a court in the Pilot Areas (para.2).

(3) The Practical Guide and the SPC's Opinion prescribe the framework of mutual recognition and assistance of insolvency proceedings between the courts of the Mainland and of Hong Kong and inform the practitioners on the *manner* in which an application is to be made to the relevant court. They do not purport to confer jurisdiction on the relevant court to seek recognition and assistance. The jurisdiction is to be found in existing laws. As far as Hong Kong court is concerned, the jurisdiction to recognise and assist office-holder appointed by a court of another jurisdiction is to be found in common law (*CEFC*, [8]–[12]; *Re Global Brands Group Holding Ltd (in liq)* [2022] 3 HKLRD 316, [15]–[21], *per* Harris J; *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, [10]–[13] & [19], *per* Lord Sumption).

17. The approach of the court in dealing with an application for recognition of foreign insolvency proceedings and assistance to the foreign office-holder may be summarised as follows:

(1) The power at common law to recognise and assist foreign office-holder does not depend on winding up proceedings having been commenced against the company in the assisting court, as the court is asked to recognise the office-holder appointed in the place of incorporation as the lawful agent in accordance with principle of private international law (*Singularis*, [12], [19]; *Global Brands*, [45]).

(2) The applicant has to satisfy the court that:

   (a) the foreign insolvency proceedings are collective insolvency proceedings which include proceedings opened in a civil law jurisdiction (*CEFC*, [8]–[9]);

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1 Being the People's Courts in Shanghai Municipality, Xiamen Municipality in Fujian Province and Shenzhen Municipality in Guangdong Province (see para.1 of SPC's Opinion)

2 Which includes provisional liquidator for this purpose

(b) the foreign insolvency proceedings are conducted in the jurisdiction in which the company's centre of main interest is located (*CEFC*, [8]; *Global Brands*, [17], [31]–[42]); and

(c) the assistance is necessary for the administration of a foreign winding up or the performance of the office-holder's functions, and the order is consistent with the substantive law and public policy of the assisting court so it is not available for purposes which are properly the subject of other schemes (*Singularis*, [25]).

(3) As to the extent and terms of assistance to be provided to the office-holder, the authorities show that the court has granted assistance to a foreign office-holder (a) to take control of the assets of the company; (b) to stay the local proceedings against the assets of the company; and (c) to obtain and gather information and documents relating to the company from third parties (*Singularis*, [10], [19], [25]; *Global Brands*, [45]).

Discussion

18. In the present case, the request for assistance is made by the Guangzhou Court, which is not a court in the Pilot Areas. The first question is whether, in light of the terms of the Cooperation Mechanism, a court outside the Pilot Areas may initiate a request for assistance to the Hong Kong court.

19. In *Re HNA Group Co Ltd* [2021] HKCFI 2897, the 3 individuals representing the administrator appointed by the Hainan Province Higher People's Court applied for recognition and assistance from the Hong Kong court in respect of the reorganisation process of the company as approved by the Hainan Court. The administrator applied for and obtained a letter of request addressed to the Hong Kong court seeking recognition of the reorganisation and providing powers of assistance to the 3 individuals. Harris J considered that although the Cooperation Mechanism does not extend to the Hainan Court, this is not a consideration which should be taken into account as (1) reciprocity is not a requirement for recognition and assistance under common law; and (2) the issue whether it is appropriate for a court outside the Pilot Areas to apply for recognition and assistance is a matter for the SPC ([9]).

20. I respectfully agree with the view of Harris J. Although the Letter of Request did not refer to the involvement of the SPC, given the relatively few applications which have been made to the Hong Kong court,[3] it is reasonable to assume that the SPC would

3 Since the Cooperation Mechanism came into place, the Hong Kong court has granted 2 orders recognising and assisting the administrators appointed by the courts in the

have been informed about the Letter of Request before it was issued to the Hong Kong court.

21. More importantly, as stated in [16(3)] above, the Cooperation Mechanism and the Practical Guide merely prescribe the procedure and the manner in which an application is to be made. The power of the court to recognise and assist office-holder appointed by a court of another jurisdiction derives from common law, and the approach of the court is to ask whether the criteria for recognition and assistance are satisfied by the applicant.

22. Having said that, as a matter of practice and to ensure consistency in which the application is made, in future, it would be desirable for an applicant seeking recognition and assistance of the insolvency proceedings to follow the Practical Guide when making the application to the Hong Kong court even though the letter of request is issued by a court outside the Pilot Areas.

23. I turn to the fact of the present case. I am satisfied that this is an appropriate case for the court to make the Order set out in [24] below for the following reasons:

(1) The insolvency proceeding of the Company is a collective insolvency proceeding under the supervision of the Guangzhou Court (*CEFC*, [23]). This is reinforced by p.2 of the Letter of Request which describes the duties of the Administrator under the EBL (see [11] above).
(2) The insolvency proceeding of the Company is conducted in the Mainland, which is both the place of incorporation of the Company and its centre of main interest.
(3) The assistance sought in the Letter of Request is necessary for the administration of the Company and the performance of the Administrator's functions given that the Company has valuable asset in Hong Kong (ie the shares in GOCD) and the Administrator is under a duty to take control of such asset and apply it in accordance with the insolvency scheme under the EBL.
(4) The Order is consistent with the substantive law and public policy of the court.

24. The Order is in the following terms:

(1) The liquidation of Guangdong Overseas Construction Corp (廣東海外建設總公司) in the Mainland of the People's Republic of China (**Company**) and the appointment of 廣州

Mainland namely, *Re HNA Group Co Ltd* [2021] HKCFI 2897 (Hainan Higher People's Court) and *Re Peking University Founder Group Co Ltd* [2021] HKCFI 3817 (Beijing Intermediate People's Court)

金股企業清算有限公司 of Room 803–805, West Tower, Time Square, 28 Tianhe North Road, Guangzhou, the People's Republic of China (中國廣州市天河北路28號時代廣場西座803–805), the administrator (管理人) (**Administrator**) appointed by the Guangzhou Intermediate People's Court of Guangdong Province (廣東省廣州市中級人民法院) be recognised by this Court;

(2) The Administrator has and may exercise in the Hong Kong Special Administrative Region the following powers for the purpose of carrying out its functions as administrator of the Company:

(a) to request and receive from third parties documents and information concerning the Company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency;

(b) to locate, protect, secure and take into its possession and control all assets and property within the jurisdiction of this Court to which the Company is or appears to be entitled including the 1,199,997 shares in 廣東海外建設發展有限公司(香港) (Guangdong Overseas Construction Development Ltd), a company incorporated in Hong Kong (company number 457692) (**Shares**);

(c) to locate, protect, secure and take into their possession and control the books, papers, and records of the Company including the accountancy and statutory records within the jurisdiction of this Court and to investigate the assets and affairs of the Company and the circumstances which gave rise to its insolvency. The books, records and documents of the Company include:

(i) emails exchanged and other correspondence between the Company and its auditors, and the Company and other third parties; and

(ii) documents and information provided by the Company to its auditors and provided by the auditors to the Company in relation to the audit work;

(d) to take all necessary steps to prevent any disposal of the Company's assets including the Shares and to secure any credit balances in any bank accounts in the name or under the control of the Company within this jurisdiction;

(e) to operate and open or close any bank accounts in the name and on behalf of the Company for the purpose of collecting the assets and paying the costs and expenses of the Administrator;

(f) so far as may be necessary to supplement and to effect the powers set out herein, to bring legal proceedings and make all such applications to this Court, whether in its own name or in the name of the Company, on behalf of and for the benefit of the Company;

(3) Anything that is authorised or required to be done by the Administrator may be done by all or any one or more of the persons appointed;

(4) If the Administrator wishes to apply for a stay or other directions in respect of any proceedings commenced against the Company or the Shares in the High Court or otherwise as a consequence of the recognition of their appointment by this Order, such application shall be listed before the Companies Judge;

(5) The Administrator do have liberty to apply; and

(6) The costs of this application be paid out of the assets of the Company as an expense of the liquidation.

Reported by Christy Chak

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

Claim No: BVIHC (COM) 0032 of 2018

BETWEEN:

INDUSTRIAL BANK FINANCIAL LEASING CO LTD

Claimant

and

XING LIBIN

Defendant

Appearances:

Mr. Iain Tucker of Walkers for the claimant
Ms. Laure-Astrid Wigglesworth of Appleby for the defendant

2020 January 15; 22;
January 28.

JUDGMENT

[1] **JACK, J [Ag.]**: This matter concerns a BVI company called Firstwealth Holdings Ltd ("Firstwealth"). By an application made on 22nd November 2019, the claimant ("the bank") sought the appointment of equitable receivers "over all issued shares in [Firstwealth], its business and undertaking and any and all rights the company may have whatsoever and howsoever found." Firstwealth is owned 100 per cent by the defendant ("Mr. Xing"). Directions for expert evidence of Hong Kong law were also sought.

[2] The bank is incorporated in the People's Republic of China ("PRC"). By three judgments of Supreme People's Court of the PRC (two delivered on 13th December 2015, one on 27th December 2016), the bank recovered a total of 325,374,626.58 renminbi, the equivalent of about US$48.45 million, against Mr. Xing. To that interest at 44,571.87 renminbi (or about US$6,600) per day and costs need to be added. By orders of the High Court of Hong Kong dated 29th October 2016 and 10th April 2018, the PRC judgments were registered there with full force and effect. The Hong Kong court also issued pre- and post-judgment freezing orders against Mr. Xing. These effectively prevent Firstwealth dissipating its assets.

[3] On 26th February 2019, on the bank's application Green J ordered that the three judgments be recognized in this Territory. On 11th July 2019 by order of Adderley J the bank was granted a provisional charging order over the shares in Firstwealth. The charging order was made final by order of Farrara J on 18th September 2019.

[4] The assets of Firstwealth fall into three categories. The first are 93,693,306 shares in Shougang Fushan Resources Group Ltd (formerly known as Fushan International Energy Group Ltd) ("Fushan"). Fushan is listed on the Hong Kong Stock Exchange, where in October 2019 it was trading at HK$1.61 per share. Firstwealth's holding of Fushan shares is on this basis worth about US$19.2 million. The second comprises two bank accounts, one with HSBC Hong Kong, the other with BNP Paribas Hong Kong. The amounts in the accounts are not known, but may be very small.

[5] The third relates to a house ("the Peak property") at 3 Gough Hill Road on the Peak in Hong Kong. The registered owner of the Peak property is Xing Jian, Mr. Xing's son, however, there is evidence to suggest that Firstwealth made a number of payments to Xing Jian for the purpose of repaying part of the mortgage on the Peak property. There may thus be a claim by Firstwealth for ownership of, or at least a beneficial share in, the Peak property. This is a more speculative asset than the first two.

[6] Before considering the bank's application, I should say a little about Mr. Xing. He was arrested in the PRC in March 2014 and was subject to what are, perhaps euphemistically, called "compulsory measures". He was held incommunicado, including from his wife and his lawyer, for an extended period. He was finally released from custody on 26th July 2019. His case in the PRC is that, due to his incarceration, he was unable to defend himself in the PRC proceedings which lead to the three civil judgments. There is currently no application in this Territory to set aside Green J's order for the recognition in this jurisdiction of the PRC judgments.

[7] On 11th September 2019 Mr. Xing filed a "situation reflection" with the Supreme People's Court requesting the court of its own motion to initiate a retrial in relation the three PRC judgments. The statutory time limit for an ordinary application for a retrial had expired, hence his resort to the Chinese equivalent of what in Scotland might be called the *nobile officium*. The following day, he applied to the Tianjin Intermediary People's Court (No 2) for a stay of execution of the PRC judgments. To date, the Supreme People's Court has not initiated a retrial and the Intermediary People's Court has not granted a stay. On 17th September 2019 Mr. Xing applied to this Court for a stay of execution pending the outcome of the applications in the PRC, however, this application was not listed at the hearing of 18th September 2019 at which the final charging order was sought. At that hearing, Farara J rejected Mr. Xing's request for an adjournment and granted the final charging order. Mr. Xing has not since then sought to move the application for a stay of execution.

[8] In the absence of such an application being before the Court, the bank is in my judgment entitled to proceed to enforce its judgment. An application for a stay would require detailed evidence from Mr. Xing as regards the prospects of his applications to the PRC courts succeeding. It would need to balance the prejudice to the bank and to Mr. Xing from respectively granting or refusing a stay of execution. Again such consideration would need detailed evidence.

[9] There are two forms of order which the Court makes for the appointment of an equitable receiver. As I discussed in **VTB Bank (Public Joint Stock Company) v Miccros Group Ltd and another**[1] ("**Miccros**"):

> "[24] There is an important difference between an interim order for the appointment of a receiver and a final order for such an appointment. The former is made in order to preserve assets for execution. It is similar to a freezing order. The latter is a form of execution in itself. To obtain the final order, a judgment creditor must prove on balance of probabilities that the asset in respect of which the receiver is appointed is owned legally or beneficially by the judgment debtor.
>
> [25] By contrast, the Court is willing on an interim application to appoint a receiver over assets which fall within the much wider definition of assets in the standard English freezing order. This form of order applies to:
>
>> 'all the Respondent's assets whether or not they are in its, her or his own name, whether they are solely or jointly owned and whether the Respondent is interested in them legally, beneficially or otherwise. For the purpose of this order the Respondent's assets include any asset which it, she or he has the power, directly or indirectly, to dispose of or deal with as if it were its, her or his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with its, her or his direct or indirect instructions.'
>
> This makes an interim order potentially more onerous than a final order."

[10] Applying that difference to the current case, the position is that the assets of Firstwealth are under the *de facto* control of Mr. Xing, so that the appointment on an interim basis of an equitable receiver over those assets would be (at least potentially) legally permissible. (In practice, this will be rare, because a freezing order will generally be sufficient: see the result in **Miccros** itself, which was a case of an interim order.) The assets of Firstwealth are, however, not within the *de jure* ownership of Mr. Xing. It is trite law that the assets of a company are not the assets of even a 100 per cent shareholder. (There is an exception if the corporate

[1] BVIHC (COM) 2018/0067 (delivered 23rd January 2020). This judgment had not been handed down when argument was first made to me on 15th January 2020, so I adjourned the application and made a copy of the approved version of the judgment available to the parties for further argument on 22nd January 2002. This again pre-dated the hand-down of the Miccros judgment by a day.

veil stands to be pierced, but this will now-a-days be vanishingly rare in the light of **Prest v Petrodel Resources Ltd**.[2] No question of piercing the corporate veil arises in the current case.) Insofar as the bank seeks a final order for the appointment of a receiver over "any and all rights the company may have whatsoever and howsoever found", this is misconceived in my judgment. The rights of the company are not the assets of the sole shareholder, so there is no jurisdiction to make a final order appointing a receiver over those assets.

[11] Where a final order is made, what is legally permissible is in my judgment this. An equitable receiver can be appointed over the shares. He can then use his powers as receiver to replace the existing director with a new director, usually himself. He can then use his power as a director to convert the assets of the company into money. Alternatively, he can put the company into voluntary liquidation. In either case he has to have regard to the interests of third party creditors of the company.

[12] An equitable receiver can be appointed over legal rights which the judgment debtor has. This is especially so, if these are rights against which other means of execution are not available. The Privy Council (on appeal from Cayman) in **Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd**[3] approved the appointment of receivers over the judgment debtor's power to revoke a Cayman trust. The exercise of the power of revocation would release assets against which the judgment creditor could execute.

[13] The principles for making an interim order are wider than those for making a final order, in that an interim order can cover more assets than a final order (*de facto* control versus *de jure* control), but narrower in that the grant of an interim order is subject to a more restrictive exercise of the Court's discretion. An interim appointment is a super-turbo-charged *Mareva*. It will only be granted where an ordinary freezing order will not do. By contrast, a final order will be made — always subject of course to the Court's discretion — whenever ordinary means of

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[2] [2013] UKSC 34, [2013] 2 AC 415.
[3] [2011] UKPC 17, [2012] 1 WLR 1721.

execution fail or there is some "hindrance or difficulty" in such execution (see below). This is wider than the narrow discretion applicable to making an interim order.

[14] The ordinary method of enforcement against shares held by a judgment debtor is by way of charging order, first interim, then final. If the charging order fails to force the debtor voluntarily to pay, then the shares stand to be sold. The difficulty in the current case is that very much less than the full value of Firstwealth is likely to obtained by way of a sale of the shares in the open market. A third party purchaser is unlikely to put any substantial value on the claim in respect of the Peak property. The purchaser would be buying a claim to litigation against Mr. Xing's son of a speculative nature. Likewise, it is impossible to value the bank accounts without knowing what is in them. Further it is likely that a purchaser would discount the value of the Fushan shares. Why buy through Firstwealth, where litigation is, to use the German expression, *vorprogrammiert*, when one can simply buy the Fushan shares on the stock market? Any open market sale of the shares in Firstwealth is likely to be at a discount, and probably a large discount, to the true value of Firstwealth's assets.

[15] Now, it would be possible to give directions for sale of the Firstwealth shares on the open market (either by auction or tender), with a provision allowing the bank to bid or tender for the shares. This would, however, potentially give the bank a windfall. It could offset part of its judgment debt against the discounted open-market price of Firstwealth shares (so it did not need to part with any cash at all) and then realise the full value of Firstwealth's assets. By this means it would make a substantial turn on the initial purchase price with no duty to account to Mr. Xing for the profit on the subsequent liquidation of Firstwealth's assets. In fact, the bank says that there are regulatory problems with its owning a BVI company, so it does not want to pursue this possibility. I therefore do not need to consider it further.

[16] It should be noted that appointing a receiver to take control of Firstwealth and then realise the full value of the company in fact aids Mr. Xing. The more his assets realise, the greater the reduction in his judgment debt. Moreover, in the event that he sets aside the PRC judgments, the bank will be obliged to repay him the monies the bank has recovered. The more the bank recovers, the more it has to disgorge if Mr. Xing has a viable defence to the PRC claims. If (as Ms. Wigglesworth submits) the Firstwealth shares should be sold by auction or tender, and if the PRC judgments are subsequently set aside, then all the bank would be obliged to repay to Mr. Xing would be the discounted price that the shares in Firstwealth had obtained on the open market, not any turn made by the purchaser on the sale of the underlying assets.

[17] The test for the appointment of equitable receivers by way of execution was set out by Males J (as he then was) in **Cruz City I Mauritius Holdings v Unitech Ltd**[4]:

> "The jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution, but there are no rigid rules as to the nature of the hindrance or difficulty required, which may be practical or legal, and it is necessary to take account of all the circumstances of the case. That is all that is meant by *dicta* which speak of the need for 'special circumstances': see… **Masri (No 2)**[5] and also the decision of Arnold J in **UCB Home Loans Corporation Limited v Grace**[6], holding that there were sufficient 'special circumstances' rendering it just and convenient to appoint a receiver by way of equitable execution when it would be 'difficult for the claimant to enforce its judgment by other means' and that the appointment of a receiver was the only realistic prospect available to the judgment creditor to enforce its judgment in the short term."

[18] In the current case, a sale of the shares by auction or tender would prejudice both the bank and Mr. Xing because only a discounted recovery would be made. This

[4] [2014] EWHC 3131 (Comm), [2015] 1 All ER (Comm) 336 at para [47(c)], permission to appeal refused [2015] EWCA Civ 33.
[5] Masri v Consolidated Contractors International (UK) Ltd (No 2) [2008] EWCA Civ 303, [2009] QB 450.
[6] [2011] EWHC 851 (Ch).

is in my judgment a "hindrance or difficulty", which makes it expedient to appoint receivers by way of a final order.

[19] I am reinforced in my conclusion on this, by the decision of Bannister J in **Dalemont Ltd v Senatorov et al**.[7] The shares of three companies were held on bare trusts established under Cypriot law for the judgment debtor. The judge appointed receivers on the basis that they would "replace the current directors of the companies with their own nominees… cause the new directors to replace the current nominees of [a foundation which held assets which could be appointed to the judgment debtor]" and take various other actions which would assist asset recovery. Although there is little discussion in the judgment of the legal principles, the **Tasarref** case was cited to him and he applied the considerations which I have outlined above.

[20] Part of the application before me is to give directions for expert evidence of Hong Kong law. The proposed issue is: would the Hong Kong court recognize the powers of an equitable receiver appointed by this Court? It seems to me that this question arises only if this Court were to appoint a receiver over "any and all rights the company may have whatsoever and howsoever found". I can well see that the Hong Kong court might raise its eye-brows at an order of a foreign court giving powers to a person who was not an officer of the company to deal with the company's assets situate in Hong Kong. That would indeed be an exorbitant exercise of a foreign court's long-arm jurisdiction. However, I have refused to make such an order.

[21] Under the order which I do make for the appointment of receiver, the receiver will appoint a new director. The new director will take steps to administer Firstwealth so as to maximalise value. It is very unlikely that an English-law based jurisdiction such as Hong Kong would refuse to recognize the appointment of a director which has the approval of the Court of the place of incorporation of the company. Accordingly, I do not consider there is any need for expert evidence of Hong Kong

[7] BVIHC (COM) 149 of 2011 (delivered 4th July 2013).

law at present. The Court being sadly deficient in powers of vaticination (or at any rate accurate vaticination), I cannot rule out the need for such evidence in the future, but at present there is in my judgment no need for expert evidence.

Conclusion

[22] Accordingly, I conclude:

(a) It is appropriate to appoint equitable receivers over the shares in Firstwealth, but not over any and all rights Firstwealth may have whatsoever and howsoever found; but

(b) there is no need for expert evidence of Hong Kong law.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2021/0103

BETWEEN

GE WU

Claimant

-and-

XUN LIU

Defendant

Determined *ex parte* on paper:
Ms. Xia Li of Carey Olsen submitted a skeleton

2022 March 3

JUDGMENT

[1] JACK, J [Ag.]: The claimant applies for an interim charging order over some shares in a BVI company in order to enforce a judgment of the People's Court of Xicheng District in Beijing. This judgment is put in writing, because there seems to be a widespread belief that it is difficult to enforce judgments issued in the People's Republic of China in this jurisdiction. It appears that the only published judgment of this Court dealing with the matter is the judgment in Industrial Bank Financial Leasing Co Ltd v Xing Libin.[1]

[2] It is not the case that foreign judgments are difficult to enforce in this Territory. It is true that there are no treaties between the United Kingdom and the People's

[1] [2020] ECSCJ No 420 (Jack J), BVIHC (COM) 0032 of 2018 (28th January 2020).

Republic of China ("PRC") governing enforcement of judgments. However, bringing an action on a PRC judgment at common law is not difficult. In the current case, Xun Liu was resident in China when the proceedings were brought against him. He appointed lawyers and defended himself in the PRC action. On 27th September 2020, the People's Court of Xicheng District gave judgment against Xun Liu in (2019) Beijing 0102 Civil Case – First No 16361. The courts of the PRC clearly had jurisdiction and due process was observed. Enforcement in China was unsuccessful and Xun Liu is no longer to be found in China.

[3] On 10th June 2021 Ge Wu commenced proceedings to enforce the judgment in this Territory. Service of these proceedings was affected on Xun Liu in Canada. Judgment by default was given on 20th January 2022 for RMB22,855,777.78 with interest thereon to run at 5 per cent per annum. It is this judgment in respect of which the charging order is sought. None of this sum has been satisfied.

[4] Xun Liu holds 2,100 shares in N Century Holding Co Ltd, a BVI company. The conditions of the Charging Orders Act 2020 are satisfied and I granted the provisional charging order on 2nd March 2022. These are the reasons for that determination.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar