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CHINA IN TAX HAVENS

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ABSTRACT

We document the rise of China in offshore capital markets. Chinese firms use global tax havens to access foreign capital both in equity and bond markets. In the last twenty years, China's presence went from raising a negligible amount of capital in these markets to accounting for more than half of equity issuance and around a fifth of global corporate bonds outstanding in tax havens. Using rich micro data, we show that a range of Chinese firms, including both tech giants and SOEs, use these offshore centers. We conclude by discussing the macroeconomic and financial stability implications of these patterns.

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Tax havens and offshore financial centers have recently received considerable attention by policymakers and academics. While these jurisdictions are commonly associated with the financial operations of firms and wealthy individuals from high-income Western economies, these offshore financial centers also play an increasingly important role for financing emerging market firms. In particular, Chinese firms have been raising large sums of capital from foreign investors in global tax havens by establishing offshore affiliates to issue equities and bonds. Despite the large scale of these activities, they have received limited attention in academia and policy. One potential reason is that tracking these investment patterns is difficult because they generally rely on a series of financing subsidiaries and shell companies in these jurisdictions. Importantly, standard international financial statistics are compiled on a residency basis, wherein the country of the investment is ascribed to the location of the immediate issuing entity. If a Chinese firm issues debt via a Cayman Island subsidiary, such statistics classify the recipient of the investment as the Cayman Islands and not China. Coppola, Maggiori, Neiman and Schreger (2021) develop a methodology to estimate global capital allocations looking through the veil of offshore subsidiaries. In this paper, we leverage this previous work along with updated and expanded data to provide an entity-level assessment of how the Chinese government, state-owned enterprises, and corporates are attracting foreign portfolio investment, both onshore and offshore. This analysis also complements the recent work by Clayton, Dos Santos, Maggiori and Schreger (2022) on China's internationalization of its domestic bond market.

1 Mapping Capital Flows to China

1.1 Residency and Nationality

Balance of Payment statistics and International Investment Positions are recorded on a residency basis. This means that the location of an international investment is recorded according to where the immediate issuer of a security is based. The nationality principle, instead, assigns all securities to the location of the ultimate parent company. While there are certainly times when the the residency definition provides useful measures, in the case of tax haven issuance via shell companies, the issuing firm is likely to do little to no investment in the local jurisdiction, and so these flows offer a particularly distorted picture of global

capital allocation (Avdjiev et al. 2016).

1.2 Data and Methodology

In order to measure foreign investment in Chinese entities on a nationality basis, we need two types of information. First, we need a map linking every security issued around the world both to its immediate issuing entity and location, as well as this entity's ultimate parent and its corresponding location. Second, we need security-level data on which foreign investors own which securities around the world. For securities holdings, we use data on global mutual fund and exchange-traded fund (ETF) holdings from Morningstar, the portfolios of US insurance companies from S&P Global Market Intelligence, as well as the holdings of the Norwegian sovereign wealth fund that are publicly available. These data are described in detail in Maggiori et al. (2020) and Coppola et al. (2021). Our map between securities on a residency and nationality basis uses the algorithm and methodology developed in Coppola et al. (2021). This procedure combines subsidiary-parent information from seven different commercial datasets, along with prioritization rules. The information on the amount outstanding of each security is built by combining data from Factset, Dealogic, and Worldscope. Finally, data on country-level foreign investment on a residency basis is from the U.S. Treasury International Capital data and the IMF Coordinated Portfolio Investment Survey. Coppola et al. (2021) used data up to 2017 and here we update the estimates to end of year 2020. We show that the last three years have witnessed both a continuation of previous trends, with China expanding its corporate presence offshore, and new trends, with foreign investors entering the onshore bond market.[1]

2 Foreign Investment in China

2.1 The Rise of China in Offshore Markets

Panels (a) and (b) of Figure 1 document how quickly China has become one of the largest issuers of securities in offshore centers. We start by estimating the total value of securities outstanding issued by an entity resident in a tax haven whose nationality is not the tax

[1]The Global Capital Allocation Project website provides publicly available estimates as well as documentation and code at `globalcapitalallocation.com`.

haven itself.[2] We then compute the fraction of this total that is accounted for by entities that are Chinese by nationality. For equities, Panel (a) shows that Chinese firms went from being a trivial fraction of the total in the early 2000s to accounting for more than 60% of the total value outstanding by 2020. For corporate bonds, Chinese firms are also a fast-growing presence, but they account for a smaller share than for equities, constituting almost 20% of the total by 2019.[3] The Cayman Islands, Bermuda, and the British Virgin Islands are the tax haven of choice for these firms.

2.2 The Geography of Foreign Investment

We turn next to understanding the relative importance of these offshore jurisdictions compared to the domestic market in how Chinese entities attract foreign portfolio investment.[4] Panel (c) of Figure 1 focuses on equities and shows that, at the end of 2020, approximately 70% of foreign fund investment in China by nationality was via a tax haven affiliate of a Chinese firm, with the Cayman Islands domiciled entities accounting for the bulk of this phenomenon.

Panel (d) of Figure 1 focuses on bonds, both sovereign and corporate. This figure shows two interesting patterns. First, offshore entities account for the bulk of foreign bond investment in China by nationality. Second, investment in securities directly issued by Chinese entities increased rapidly during the years 2016-2020. Underlying these aggregate patterns, the micro data on security holdings reveals interesting heterogeneity.

Figure 2 documents the fast-changing currency composition of foreign investment fund bond holdings in China on a nationality basis, including holdings of sovereign and corporate bonds issued in either onshore or onshore markets. The vast majority of debt securities issued via tax haven subsidiaries are in foreign currency (mostly U.S. dollars, some in euros) and on behalf of corporate ultimate parents. As shown by Clayton et al. (2022), most of the debt securities issued in the Chinese domestic market and held by foreigners are

[2]The list of tax havens is the same as in Coppola et al. (2021). Here we exclude Hong Kong given the focus on China.

[3]The definition of corporate debt used here excludes asset backed securities. U.S. banks are substantial issuers of ABS via Cayman domiciled special purpose vehicles.

[4]These estimates follow the methodology and tax haven definition in Coppola et al. (2021) to restate TIC and CPIS data. We include the following eight countries as holders: USA, EMU, GBR, CAN, CHE, NOR, SWE, DNK. "Residency" are all securities issued by China resident entities. We allow for reallocations into China by nationality from all tax havens, including Hong Kong.

instead denominated in Renminbi and issued by either the central government or Chinese policy banks (hence effectively government-guaranteed). Therefore, the recent rise in onshore Chinese renminbi (CNY) in foreigners' portfolios reflects the increasing investment in Chinese government bonds issued onshore. The figure also make clear that the importance of the offshore Renminbi, the CNH currency, has diminished over the sample period.

2.3 How Chinese Firms Raise Capital From Foreigners

Figure 3 focuses on four large developed economies as investors and tracks their investments in bonds and equities of major Chinese firms. The middle column shows whether the investment occurs via a shell company in a tax haven or directly in China. Tech companies such as Alibaba, Tencent, and Baidu receive the vast majority of capital from these developed country investors through offshore subsidiaries. The Cayman Islands play a major role in matching these firms with foreign investors: they are a global supermarket for attracting all foreign investors, not just U.S. based ones.[5]

This investment into Cayman Islands based entities reflects the use of variable interest entity (VIE) structures by Chinese firms. Under Chinese law, foreign investors are restricted from owning equity in firms operating in strategic industries, including the tech industry. In order to abide by the letter of Chinese law and still attract foreign equity investment, some Chinese firms incorporate a shell company resident in the Cayman Islands that they list publicly on global stock exchanges such as the New York Stock Exchange. This Cayman Island resident shell, in turn, enters into a series of bilateral contracts, none of which are formally equity contracts, with the operating company and its Chinese owners. These contracts aim to replicate equity ownership by giving control and a claim to the residual profits of the operating company to shareholders of the offshore shell company. Under international accounting standards, these contracts are sufficient for the offshore shell company to claim them to be equivalent to equity and report on a consolidated worldwide group basis. At the same time, the operating firm in China takes the opposite view of these contracts and attests to local regulators that it is fully owned by Chinese residents.

Chinese tech companies are the largest but by no means the only Chinese issuers in tax havens. For example, State Grid Corporation of China, China National Overseas Offshore

[5] Beck et al. (2023) show that Euro Area domiciled mutual funds are more likely to invest in emerging markets, including China, via tax havens than are other types of European investors.

Oil (CNOOC), and Sinopec are all bond issuers via their British Virgin Islands subsidiaries. The motivation behind these state-owned firms' offshore presence is far less clear and might have to do with foreign investors, regulators, and rating agencies being less comfortable with bankruptcy procedures and bond holder rights in Chinese courts.

3 Implications For Policy and Research

The patterns documented above have implications for global markets that we group into four categories.

Financial Stability. There are major concerns about the legality and enforceability of VIE structures. At the time of writing, there is a bipartisan proposal in the U.S. Senate to require VIEs listed on U.S. exchanges to publicly identify as such because "variable interest entities based in foreign jurisdictions, including the People's Republic of China, pose a specific and significant risk to investors in the United States, including because investors that purchase shares of those entities (A) have no equity or direct ownership interest; and (B) lack legal recourse" and investors in these securities may be unaware of such risks.[6] In addition, China's securities regulator proposed to increase its oversight over Chinese firms utilizing a VIE structure to list abroad.[7] Indeed, when Jianzhi Education used a VIE structure to list on NASDAQ in October 2022, it warned that its corporate structure posed an investment risk "if the PRC government finds these contractual arrangements non-compliant with the restrictions on direct foreign investment in the relevant industries."[8]

In the corporate debt area, there are a number of questions raised by the prevalence of issuance in tax havens. In particular, there is uncertainty about how tax-haven issued corporate debt will be treated in bankruptcy. With Evergrande and other Chinese real estate firms declaring bankruptcy and intermediating much of their dollar borrowing from foreigners through tax havens, it remains an open question how the offshore and onshore creditors are treated.

[6] See Senate bill S.4757: `https://www.congress.gov/bill/117th-congress/senate-bill/4757/text?r=1&s=1`.

[7] At the end of 2021 China's National Development and Reform Commission and the Ministry of Commerce issued an update on Special Administrative Measures for Foreign Investment Access (commonly known as Negative List), essentially requiring VIE listing to be approved by Chinese regulators. However, much uncertainty remains in practice on what the rules and regulatory procedures are going to be.

[8] `https://law.asia/jianzhi-education-chinese-vie-debut-nasdaq/`

Global Efforts to Regulate Tax Havens. Recently, governments have stepped up their efforts to regulate the usage of offshore jurisdictions in many dimensions, from taxation to exchange of information and transparency. While there has been progress and some international cooperation on corporate taxation, for instance the OECD global minimum tax agreement, there has been less action on capital markets operating offshore. With the US and China operating as major players in raising capital and investing via global tax havens, policy efforts to reform offshore capital markets are likely to require the cooperation of these two global powers—which is difficult to achieve given geopolitical tensions.

Changing the Supply of Investable Assets. The rise of China's offshore presence as well as its opening up of the domestic bond market to foreign investors are a shock to the supply and composition of investable assets in global markets. Indeed, Chinese bonds and equities are now included in major investment indices and account for a substantial and increasing component. It is an open question what the effect of this supply of asset shock will be on global interest rates and asset prices.

China's Role in the International Financial System. Over the past decade, China has undertaken a number of important reforms, such as the introduction of the Stock Connect and Bond Connect programs, to encourage foreigners to invest onshore in Chinese securities. Given that these reforms to encourage investment onshore have occurred contemporaneously with the rise of China's firms in global tax havens, it remains to be seen whether China's current reliance on tax haven based intermediation is a defining feature of foreign investment in China or a passing phase during China's liberalization process.

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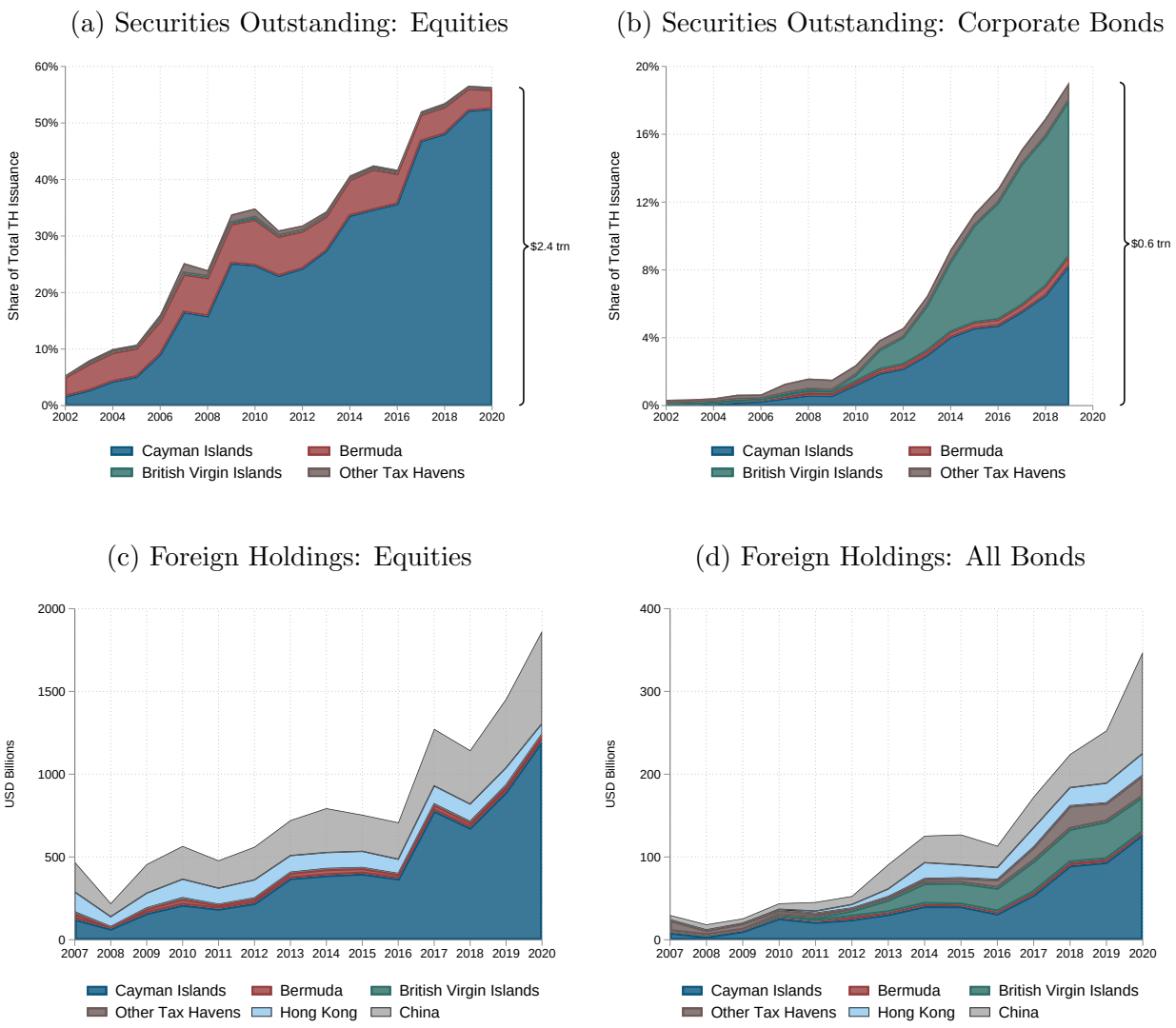
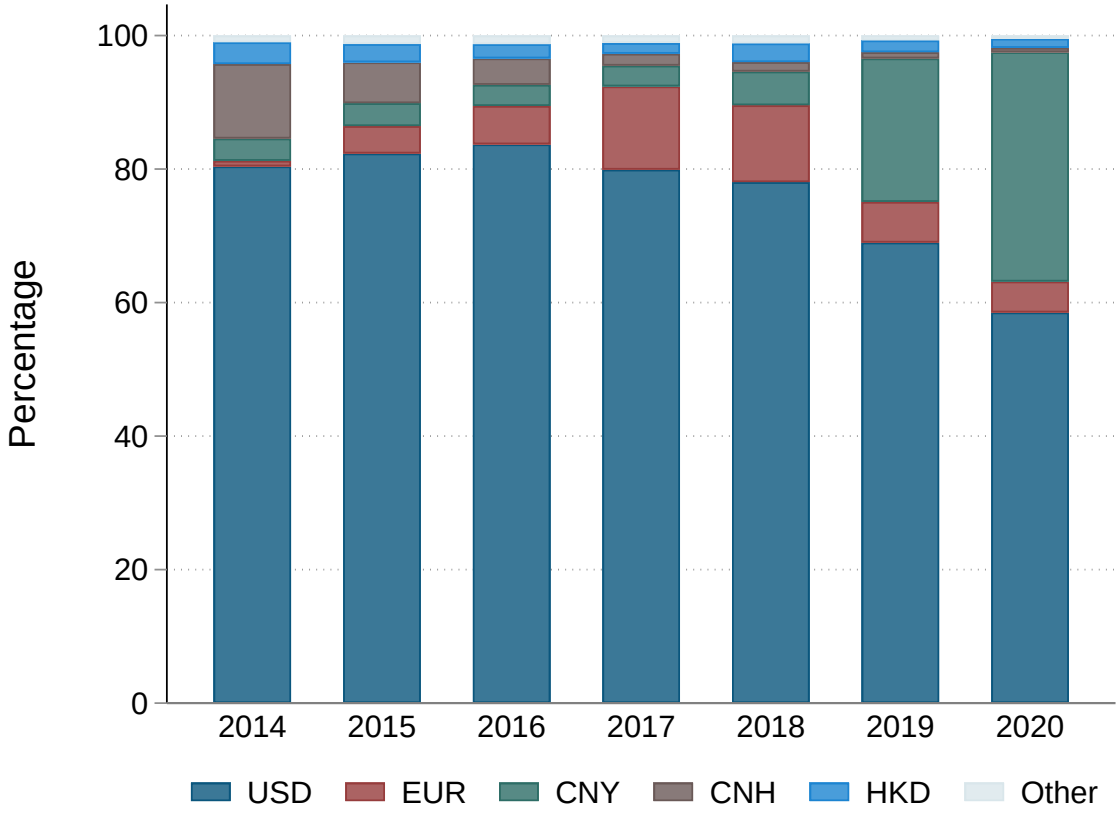
Maggiori, Matteo, Brent Neiman, and Jesse Schreger, "International currencies and capital allocation," *Journal of Political Economy*, 2020, *128* (6), 2019–2066.

Figure 1: The Rise of China in Offshore Asset Markets



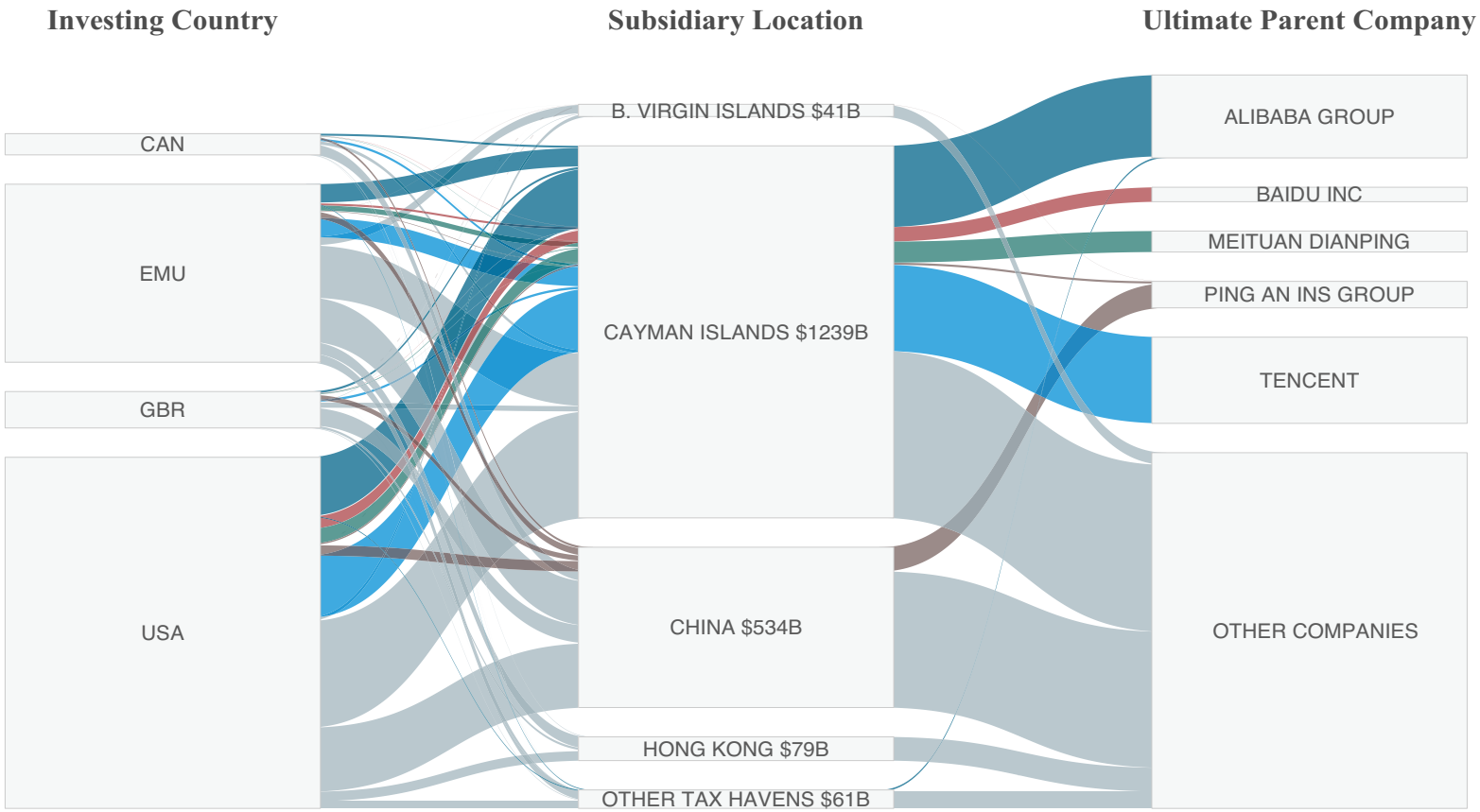
Notes: Panels (a) and (b) plot the share of total outstanding securities issued by entities resident in tax havens that are Chinese by nationality. Panels (c) and (d) plot foreign portfolio holdings of Chinese assets estimated by nationality and the breakdown by original residency. The label "China" indicates the asset is issued by an entity resident in China. Panels (a) and (c) are for equity securities, Panel (b) for corporate bonds, Panel (d) for all bonds. Market values are shown in Panels (a), (c), and (d). Notional amounts are shown in Panel (b).

Figure 2: Foreign Investment in Chinese Bonds by Currency



Notes: This figure plots the currency composition of foreign portfolio holdings in bonds issued by entities that are Chinese by nationality.

Figure 3: The Geography of Foreign Investment



Notes: This figure shows the patterns of reallocation of portfolio investment in tax havens for selected Chinese corporate entities. Estimates are for December 2020 and include both bonds and equities.

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.

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.