

A Singular Tide in Insolvency Cooperation in Bermuda

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Introduction

In *Cambridge Gas*,¹ the Privy Council heralded a more open and expansive attitude to cooperation based on the principle of “active assistance”, which, in the instant case, would allow for the recognition of a specific category of insolvency judgment (as opposed to the traditional classification of judgments *in rem* and *in personam*) and which subsequently would allow for the recognition and enforcement of such judgments subject only to two caveats, the existence of a domestic statutory rule to the contrary and the need to ensure the protection of creditors. In appealing to the principles of unity and universality in promoting the efficient centralisation of decision-making in one set of proceedings, the court's views found favour in a number of other jurisdictions, including in Australia,² Bermuda,³ the Cayman Islands,⁴ Jersey⁵ and New Zealand.⁶ In 2012, however, two decisions, that of the Irish Supreme Court in *Re Flightlease*⁷ and that of the United Kingdom Supreme Court in *Rubin*,⁸ the latter also incidentally holding that *Cambridge Gas* was wrongly decided,⁹ marked a restoration in those jurisdictions of the more traditional common law approach to recognition and enforcement dependent on prior compliance with the rules developed for jurisdiction *in personam* and *in rem*. This has served to remind proponents of the modified universalism theory that some barriers may still exist to the recognition and enforcement of judgments given by courts that are exercising jurisdiction in insolvency over a debtor.

In the same year as *Rubin*, but prior to the decision of the Supreme Court, another English case, *Re Phoenix*,¹⁰ had adopted the *Cambridge Gas* principle of “active assistance” in a slightly different context. It was dealing

¹ *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26.

² *Bank of Western Australia v Henderson (No 3)* [2011] FMCA 840 (*obiter*).

³ *Re Founding Partners Global Fund Ltd (No 2)* [2011] SC (Bda) 19 Com.

⁴ *Re Lancelot Investors Fund Ltd* (2008) (unreported), cited in S. Dickson, “The Quick March of Modified Universalism: *Rubin v Eurofinance SA*” (Mourant Ozannes Briefing, June 2010).

⁵ *Re Montrow International Ltd* 2007 JLR Note 40.

⁶ *Williams v Simpson Civ 2010-419-1174* (12 October 2010) (High Court, Hamilton).

⁷ *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation)* [2012] IESC 12 (23 February 2012), noted by this author in An Irish Perspective on Insolvency Cooperation: The *Re Flightlease* Case (2013) 10 ICR 158.

⁸ *Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others* [2012] UKSC 46 (24 October 2012), noted by this author in The Limits of Co-Operation at Common Law: *Rubin v Eurofinance* in the Supreme Court (2013) 10 ICR 106.

⁹ *Ibid.*, at paragraph 132 (per Lord Collins).

¹⁰ *Re Phoenix Kapitaldienst GmbH, Schmitt v Deichmann & Ors* [2012] EWHC 62 (Ch) (23 January 2012), noted by this author in The Resurgence of Cross-Border Recognition and Enforcement of Insolvency Judgments: The *Re Phoenix* Case [2013] 9 ICCLR 329.

with the issue of whether the common law would allow assistance so as to permit the application of domestic provisions to come to the aid of an office-holder acting on the basis of an appointment made in a foreign proceeding, who wished to bring proceedings within the jurisdiction, but might otherwise lack the powers to do so, absent the opening of a local insolvency proceeding. The court in *Re Phoenix* held four things: (i) that the common law contains powers to recognise and assist foreign office-holders; (ii) that assistance means doing whatever the court could do in domestic proceedings; (iii) that insolvency proceedings are about collective enforcement for the benefit of all creditors and include, the issue in that case in particular, set aside proceedings directed at third parties; and (iv) that set aside proceedings are in fact central to the purpose of insolvency proceedings.¹¹ As such, the office-holder would be permitted to bring the set aside action within the jurisdiction by the common law extending the benefit of the domestic statutory provision, which might otherwise be unavailable to the office-holder.

Although decided later in time, the judgment in *Rubin* did not apparently disavow *Re Phoenix*, in fact omitting to mention it. As such, the persuasive precedent it set was subsequently followed in 2013 in the Cayman Islands in *Primeo*,¹² a case that arose out of the Madoff litigation and which also involved the issue of claw-back transactions. In this case, the judge extended the benefit of the domestic provisions that would allow for the bringing of proceedings and, incidentally, mentioned his preference for the approach in *Cambridge Gas* to that in *Rubin*. In doing so, the judge in *Primeo* also appeared to restrict *Rubin* to its facts in much the same way as a later case in Ireland has also attempted to limit the impact of *Re Flightlease*, trying to preserve greater discretion for the courts as far as assistance is concerned.¹³ It is also noteworthy that *Re Flightlease* itself did not rule out the particular change in rules contemplated by *Cambridge Gas*, but solely on the basis of consensus being achieved between the common law courts as to the desirability of such a move.

A little later in 2013, and relying on the judgements in *Re Phoenix* and *Primeo*, Chief Justice Kawaley in Bermuda acknowledges a judicial preference for the *Cambridge Gas* methodology by permitting the common law to come to the aid of a foreign liquidator seeking a discovery and examination order against a third party.¹⁴ The case involved two companies, Saad Investments Company Ltd (“Saad”) and Singularis Holdings Ltd (“Singularis”), incorporated in the Cayman Islands and which were later the subject of liquidation orders in that jurisdiction. A petition was brought for an

¹¹ *Ibid.*, at paragraph 62.

¹² *Picard and Anor v Primeo Fund (In Official Liquidation)* (unreported) (14 January 2013) (per Andrew Jones J), noted by this author in *Après Rubin: le Déluge? Thoughts on the Future of Common Law Insolvency Cooperation* (2013) 10 ICR 356.

¹³ *Mount Capital Fund Ltd (In Liquidation) & Ors v Companies Act* [2012] IEHC 97.

¹⁴ *Re Saad Investments Company Ltd (In Official Liquidation)* and *Re Singularis Holdings Ltd (In Official Liquidation)* (2013) SC (Bda) 28 Com (15 April 2013), noted by this author in *The “Empire” Strikes Back: Lessons for the Mother Country in Insolvency Cooperation* [2013] 11 ICCLR 411. Appreciation is due to His Honour Judge Ian Kawaley, Chief Justice of Bermuda, for drawing the author’s attention to his judgment at first instance and to that of the Court of Appeal, reported as [2013] CA (Bda) 7 Civ, that is the subject of comment in this article.

ancillary liquidation in Bermuda in the case of Saad, which was granted on 14 September 2012.¹⁵ The liquidators in Bermuda then applied for orders in respect of the companies on 13 February 2013 for the production of documents held by the former auditors, PriceWaterhouse Coopers, as well as the examination of certain members of the auditing practice under the terms of section 195 of the Bermuda Companies Act 1981 (“section 195”).¹⁶ The liquidators of Singularis applied on 12 February 2013 for recognition and assistance at common law as well as for similar relief to that applied for in the case of Saad. Both cases were heard together for convenience,¹⁷ given that challenges were being brought on similar terms to the orders that had been granted on 4 March 2013.¹⁸ In the case of Saad, given that there could be no challenge to the basis on which the ancillary liquidation had been ordered and to which section 195 would undoubtedly apply, the resistance on the part of the auditors was to the granting of the order for examination and production of documents and its scope.¹⁹ In the case of Singularis, challenges were brought in respect of the same issues as well as whether the Bermudian court was able to invoke its inherent jurisdiction to provide the assistance sought, whether at common law or by applying the statute.²⁰

In providing a summary of his findings,²¹ the judge stated there were four elements in his findings:

- (i) Recognition might be validly forthcoming for the appointment of the liquidators in their jurisdiction and whom the court will assist at common law by the application by analogy of the statutory power contained in section 195 on the same terms as could be ordered under that provision in the case of a local or ancillary liquidation;
- (ii) The principles in *Cambridge Gas* which militate for judicial assistance at common law have survived the repudiation of the case by *Rubin* insofar as the recognition of insolvency proceedings and the appointment of office-holders in another jurisdiction was concerned;
- (iii) At the very least, the scope of the assistance that might be forthcoming to such office-holders would be governed by the inherent jurisdiction of the court together with any common law or equitable powers under the general law of Bermuda, without needing to invoke any statutes of particular application, although what could be done in a local liquidation will inform a court requiring to determine the extent of the assistance that may be forthcoming (“conservative demarcation”);

¹⁵ *Re Saad and Re Singularis*, First Instance Judgment, at paragraph 1.

¹⁶ Section 195, Bermuda Companies Act 1981 reads (in part) as follows: “(1) The Court may... summon before it any officer of the company or persons known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company. (2) The Court may examine such person on oath... (3) The Court may require such person to produce any books and papers in his custody or power relating to the company...”

¹⁷ *Re Saad and Re Singularis*, First Instance Judgment, at paragraph 2.

¹⁸ *Ibid.*, at paragraph 3.

¹⁹ *Ibid.*, at paragraph 4.

²⁰ *Ibid.*, at paragraph 5.

²¹ *Ibid.*, at paragraph 8(a).

- (iv) Alternatively, applying *Cambridge Gas*, particularly where it approved *Re African Farms*,²² and the persuasive precedent in *Re Phoenix* and *Primeo*, the scope of assistance could be determined by the court's inherent jurisdiction and the general law, to which would be added the statutory insolvency regime that would apply in a local primary or ancillary liquidation ("radical demarcation").

The radical interpretation which suggested itself to the Bermudan judge in the last of these elements was to directly apply the local law which permitted discovery and examination, rather than a common law palimpsest of its contents, which would inevitably rely on the court's view of its own inherent powers and extent of judicial cooperation feasible. The judge termed this approach "more principled" than any other that would serve in this case.²³ Referring to *Re Phoenix*, in which the judge's own journey of discovery between *Re Kingate*²⁴ and *Re Founding Partners*²⁵ was the subject of mention, the judge noted the conclusion in that case to the effect that:

"...assistance includes doing whatever the English court could have done in the case of a domestic insolvency".²⁶

This conclusion rested on the statement in *Cambridge Gas*, in very similar language, which authorised the:

"...domestic court [to] at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency".²⁷

However, a crucial element in relation to the latter statement was that it was made in a context that presupposed the statutory provision referred to could be used. For the judge, it would be a "very generous reading indeed" to transplant that statement into a context where local insolvency provisions would not apply and where an ancillary winding up would be a legal impossibility.²⁸ However, some comfort was provided for precisely this step by the Cayman case of *Primeo*, to which reference was also made. In *Primeo*, the issue was whether the office-holder in foreign proceedings could bring a transactional avoidance claim in the Cayman Islands. Although his status had been recognised, it was accepted that the debtor he represented could not be wound up under Cayman Islands law. The issue was whether the avoidance provisions could be made available at common law by invoking the principles of assistance.

²² *Re African Farms Ltd* [1906] Transvaal Law Reports 373.

²³ *Re Saad and Re Singularis*, First Instance Judgment, at paragraph 49.

²⁴ *Re Kingate Global Fund Ltd (in liquidation) et al.* [2011] Bda LR 2.

²⁵ Above note 3.

²⁶ *Re Saad and Re Singularis*, First Instance Judgment, at paragraphs 50-53, citing *Re Phoenix*, above note 10, at paragraph 62.

²⁷ *Ibid.*, at paragraph 53, citing *Cambridge Gas*, above note 1, at paragraph 22.

²⁸ *Ibid.*, at paragraph 54.

The Cayman judge's findings, which were reproduced at some length,²⁹ were usefully summarised in the following way: that applying the local avoidance provisions was:

“...an incidence of recognition and... consistent with the statutory objective”.³⁰

The Bermudian judge agreed, holding that assistance was an integral part of recognition.³¹ Support for this position was found in *Re African Farms*, where an ancillary liquidation has also been unavailable. Yet, in that case, the court held that assistance could be given to allow the foreign office-holder to deal with local assets as if these were within the jurisdiction of the foreign court, subject to any conditions necessary to protect local creditors or where local law mandated some requirement, language also adopted as part of the reasoning in *Cambridge Gas*. The reason for this assistance was firmly based in comity, despite the fact that the foreign and local insolvency systems were not identical in all respects, and mandated recognition on the basis of principle and convenience.³²

Re African Farms also decided matters on the basis of an analogy with the recognition of foreign judgments. The court stated that it would not re-examine matters decided by a competent court, but would treat the subject matter of the judgment as a “new and independent obligation” which the court would, as a matter of justice and expediency, recognise and enforce.³³ This offered to the judge in the instant case the opportunity to consider the parallels that could be drawn with the enforcement of personal money judgments at common law. Referring to a summary of the position in Bermuda,³⁴ the judge noted the willingness of the courts in Bermuda to enforce a foreign judgment provided it were final and conclusive and not impeachable for want of compliance with any of the common law's requirements in relation to jurisdiction, procedural fairness, public policy or natural justice. For the judge, the fundamental aim of the common law proceedings to enforce a foreign money judgment was to achieve recognition on a summary basis without a full trial. This would result in a final local judgment which could be enforced using any and all of the available local procedural mechanisms. The aims of common law enforcement of a foreign insolvency order, which may include recognition of the status and/or capacity of a foreign office-holder, were “broadly similar”.³⁵

In this light, the judge asked a simple question: by declaring in an action that a foreign office-holder had been validly appointed in foreign proceedings, was the local court not “effectively domesticating” the foreign order? As such, would the result not be to declare that the recognition carried with it

²⁹ *Ibid.*, at paragraphs 55-56.

³⁰ *Ibid.*, at paragraph 57, citing *Primeo*, above note 12, at paragraph 41.

³¹ *Ibid.*, at paragraph 58.

³² *Ibid.*, at paragraphs 59-63, citing *Re African Farms*, above note 22, at 377 and 381-382.

³³ *Ibid.*, at paragraph 64, citing *Re African Farms*, above note 22, at 391-392.

³⁴ *Ibid.*, at paragraph 65, citing *Muhl v Ardra* [1997] Bda LR 36.

³⁵ *Ibid.*, at paragraph 66.

recognition of the same status as the foreign office-holder would have under the law of the principal insolvency? Furthermore, would this not enable the foreign office-holder to act as an office-holder within the jurisdiction of the recognising court?³⁶ Answering all these questions in the affirmative served as a “trigger” to bring into play the general law of Bermuda as well as, in addition, the statutory insolvency regime, provided this did not result in any distortion of the purposes of the statutory provisions nor any conflict with domestic public policy.³⁷ For the judge, it would be absurd that the recognition process would not result in making all relevant Bermudian law available to the foreign office-holder, including, as in the instant case, provisions facilitating examination and production of documents.³⁸ However, the “domestication” of the order might not go so far as to apply the local insolvency regime in “such a comprehensive way” as to create ancillary proceedings in substance.³⁹ This might be “a bridge too far”.⁴⁰ Short of this, though, it would accord with both “principle and pragmatism”, as well as the view in *Re African Farms*, that a recognition order should enable the foreign office-holder to take advantage of local general and insolvency law.⁴¹

Court of Appeal Judgment

It was undoubtedly the case that the matter would be appealed. Apart from the interests at stake, a critical issue for the local courts was whether the principles in *Cambridge Gas*, which, as a decision of the Privy Council, would ordinarily bind them, or those in *Rubin*, which represented a statement of the common law that would be authoritative for the courts in Bermuda where the common law has been received, should apply. Were the two cases utterly irreconcilable and, if so, which approach should be preferred?

Before the Court of Appeal,⁴² after a brief recitation of the facts,⁴³ the judge summarised the appellants’ case and the four grounds on which they relied.⁴⁴ The first was that the court at first instance had no jurisdiction to make a winding up order against Saad, which the appellants had not sought previously to challenge before that court, but now argued against.⁴⁵ The second was a similar contention aimed at the court’s jurisdiction to make the orders in the case of Singularis, whether at common law or on grounds analogous to section 195. This ground rested on the argument being made that the judge at first instance was wrong to hold that *Rubin* did not fully

³⁶ *Ibid.*, at paragraph 67.

³⁷ *Ibid.*, at paragraph 68.

³⁸ *Ibid.*, at paragraphs 69-70. The point is also made that application of the relevant conflict of laws rules would lead to the use of the *lex fori*, here Bermudian law, and the natural extension of the rules that are part of that legal order.

³⁹ *Ibid.*, at paragraph 74, where the judge also makes the observation that his judgment should not be interpreted as affording foreign office-holders automatic access to transaction avoidance provisions on the same terms as in *Re Phoenix and Primeo*.

⁴⁰ *Ibid.*, at paragraph 71.

⁴¹ *Ibid.*, at paragraphs 72-73.

⁴² *Coram* Zacca P, Auld JA and Bell AJA.

⁴³ Judgment of Bell AJA, at paragraphs 1-3 (Zacca P concurring with this judgment).

⁴⁴ *Ibid.*, at paragraph 4.

⁴⁵ *Ibid.*, at paragraph 5.

disavow *Cambridge Gas* and that the court should have, where the Privy Council decision had thus been disapproved, follow the earlier case of *Al-Sabah*,⁴⁶ with which *Cambridge Gas* conflicted. Further, the appeal on this ground also rested on arguments that the court was wrong in particular to rely on the decisions in *Re African Farms*, *Re Phoenix* and *Primeo*.⁴⁷ The third ground was an alternative contention that, even if the powers existed to enable the court to do as it did, the powers could not extend beyond those available to the liquidator in his home jurisdiction, the understanding here being that the Cayman Islands equivalent would not have permitted discovery in relation to certain documents, i.e. those “relating” to the company, as opposed to those that were the company’s property.⁴⁸ The final ground related to the absence of undertakings being fulfilled with respect to the provision of security for costs in relation to compliance with the court’s orders.⁴⁹

After providing the context of the appeal, in particular some of the history of the complex litigation surrounding the liquidation of the two companies concerned,⁵⁰ the judge turns to the grounds of appeal. The first argument can be dismissed easily, in the judge’s view, because of the decision in *PWC v Kingate*,⁵¹ where the court states in clear terms that a challenge against jurisdiction to wind the company up cannot be made in the course of an application made under the terms of that winding up.⁵² This relies on the dictum of Chadwick J in *Re Mid East Trading*,⁵³ to the effect that a decision to challenge must be made in the context of an application to resist the making of the winding up order, to rescind it or on appeal from it and not on an application incidental to it where not “all those affected have the opportunity to be heard”.⁵⁴ This is subject to whether, on the face of it, there has been a patent irregularity.⁵⁵ Holding that there has been no such irregularity and further rejecting an argument that the appellants were strangers to the liquidation, given their status as auditors, an argument which had also been rejected in the *PWC v Kingate* case itself, the judge finds that the clear rule in that case binds the court and that the appellants accordingly have no standing to be able to challenge the liquidation order.⁵⁶

On the second ground, whether the powers were available to the office-holder in the way the judge at first instance contemplated, the Court of Appeal states the essential question being whether it should consider itself to be bound by the Privy Council authority in *Cambridge Gas* or whether, in light of the decision in *Rubin*, the earlier decision in *Al-Sabah* should prevail. The court

⁴⁶ *Al-Sabah v Grupo Torras* [2005] 2 AC 333.

⁴⁷ Judgment of Bell AJA, at paragraph 6.

⁴⁸ *Ibid.*, at paragraph 7.

⁴⁹ *Ibid.*, at paragraph 8.

⁵⁰ *Ibid.*, at paragraphs 9-16.

⁵¹ *PWC Bermuda v Kingate Global Fund Ltd* (Ct of Appl) [2011] Bda LR 32.

⁵² Judgment of Bell AJA, at paragraphs 17-19.

⁵³ *Re Mid East Trading Ltd* [1998] BCC 726.

⁵⁴ *Ibid.*, at 746 (per Chadwick LJ).

⁵⁵ Judgment of Bell AJA, at paragraph 20.

⁵⁶ *Ibid.*, at paragraphs 21-27. The judgement given by Auld JA would have allowed the challenge by the appellants to also succeed under this head with a consequent impact on the legitimacy of the discovery and production orders.

does not think the decision in *Re HIH*⁵⁷ adds much to this debate apart from a general statement on cooperation, its subject matter being something wholly different to the present case.⁵⁸ Turning to *Al-Sabah*, a decision of the Privy Council which also included Lord Hoffmann, architect of the judgment in *Cambridge Gas*,⁵⁹ the court recites the essential facts involving an application under a Letter of Request from a Bahamian court for the setting aside of two trusts established under Cayman Islands law. The Cayman court accedes to the request, holding that it has the power under the relevant statute and also as a matter of the court's inherent jurisdiction to enable the trustee to enjoy powers to apply to set aside the trusts.⁶⁰ This position is confirmed at appeal and by the Privy Council. However, the judgment, in dealing with the position at common law, though accepting that an inherent jurisdiction might have been available to assist, considered it limited and, in any event, not to permit the exercise of powers under a domestic provision in circumstances not falling within its terms i.e. inherent powers cannot go beyond the boundaries of any domestic provision and are more limited in scope. This, the judge admits, is the appellants' argument "in a nutshell".⁶¹

Noting the facts of *Cambridge Gas*,⁶² the court highlighted the observations of Lord Hoffmann to the effect that the arguments put forward by Cambridge Gas about submission to jurisdiction did not appear to be in keeping with economic reality given the submission of other parts of the group.⁶³ It also referred to his statement on the purpose of bankruptcy proceedings, namely as a mechanism for collective execution, before going onto Lord Hoffmann's reliance on the statement in *Re African Farms* as to the meaning of active assistance,⁶⁴ which the court noted he adopted by means of the proposition that the domestic court must be able to do all it could otherwise have done in the case of a domestic insolvency, with the purpose of recognition being to avoid the office-holder or creditors from having to begin parallel proceedings by affording them the remedies they would have been entitled to had the proceedings in fact taken place before the domestic forum.⁶⁵ This statement, though objected to by the appellants, who contend that *Re African Farms* was simply a case of enforcement, is at the basis of the adoption by the judge at first instance of the view that there was little doubt as to the court's jurisdictional competence to grant the remedies sought.⁶⁶ Before dealing with these observations, the court reviews the decision in *Rubin*,⁶⁷ noting the leading judgement by Lord Collins which it says succeeds on conflict of laws grounds.⁶⁸ As to the relationship between *Rubin* and *Cambridge Gas*, the court notes Lord Mance's otherwise concurring judgment did not subscribe

⁵⁷ *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852.

⁵⁸ Judgment of Bell AJA, at paragraph 28.

⁵⁹ *Ibid.*, at paragraph 29.

⁶⁰ *Ibid.*, at paragraph 30.

⁶¹ *Ibid.*, at paragraph 31.

⁶² *Ibid.*, at paragraph 32.

⁶³ *Ibid.*, at paragraph 33.

⁶⁴ *Ibid.*, at paragraph 34.

⁶⁵ *Ibid.*, at paragraph 35.

⁶⁶ *Ibid.*, at paragraph 36.

⁶⁷ *Ibid.*, at paragraph 37.

⁶⁸ *Ibid.*, at paragraph 38.

necessarily to Lord Collins' "incidental observation" on the status of *Cambridge Gas* as a decision of the Privy Council.⁶⁹ The court also refers to Lord Mance's statement that, notwithstanding any views on the validity of *Cambridge Gas*, the decision does not "cover or control" the facts of the appeal in *Rubin*.⁷⁰ A similar view is expressed in Lord Clarke's dissenting judgment who holds that, at the very least, *Cambridge Gas* is distinguishable, though he does not agree that it is wrongly decided.⁷¹ Interestingly, the court analyses Lord Collins' own repudiation and is of the view that the rejection of *Cambridge Gas* appears to be uniquely from a conflict of laws' perspective,⁷² citing his other views in support of the position in *Re Impex*⁷³ and Lord Hoffmann's otherwise "brilliantly expressed opinion" in *Cambridge Gas*.⁷⁴

Reiterating the appellants' position that *Rubin* had disapproved of *Cambridge Gas*,⁷⁵ the court's essential query is whether Lord Hoffmann's statement on the purpose of recognition can be regarded as the ratio of *Cambridge Gas* and if, as such, it has now been disapproved of by *Rubin*. For the court, the arguments that *Rubin* disapproved of *Cambridge Gas* are not convincing, given the contents of the majority judgment and the indications, by reason of the statements in both the concurring and dissenting judgments, that the issue of whether *Cambridge Gas* was wrongly decided may not even have been argued before the Supreme Court. Interestingly, the court inclines to the view that Lord Hoffmann's statement is not in fact the true ratio of the case and thus cannot bind the court.⁷⁶ After a brief aside on the nature of judicial precedent, insofar as it affects the decisions of the Privy Council,⁷⁷ the court returns to the apparent conflict between *Rubin* and *Cambridge Gas*. It states, perhaps surprisingly, that consideration should be given to the context in which those statements are made, that in fact they are qualifications on the application of the principles in *Re African Farms* and are aimed at elucidating the limits on the assistance that can be offered at common law if statutory powers are not available. The reference to the purpose of recognition so as to avoid the commencement of parallel proceedings does not apply in the instant case because of the impossibility of opening those proceedings within the jurisdiction.⁷⁸ Similarly, the statement in *Al-Sabah* on the inherent jurisdiction of the court to set aside a trust is not really a statement on the assistance to be granted to an office-holder of the type present in the instant case.⁷⁹ Dismissing much of what had been relied on by both sides in the case, the court seeks to ascertain on what basis it might be said that section 195 can apply where its parent statute has no application. Further, in the absence of that application, the court doubts that its application by way of analogy, to use

⁶⁹ *Ibid.*, at paragraph 39, referring to *Rubin*, above note 8, at paragraph 178.

⁷⁰ *Ibid.*, at paragraph 40, referring to *Rubin*, above note 8, at paragraph 188.

⁷¹ *Ibid.*, at paragraph 41, referring to *Rubin*, above note 8, at paragraph 192.

⁷² *Ibid.*, at paragraph 42, referring to *Rubin*, above note 8, at paragraph 132.

⁷³ *Re Impex Services Worldwide Ltd* [2004] BPIR 564.

⁷⁴ Judgment of Bell AJA, at paragraph 43, referring to *Rubin*, above note 8, at paragraphs 33 and 92.

⁷⁵ *Ibid.*, at paragraph 44.

⁷⁶ *Ibid.*, at paragraph 45.

⁷⁷ *Ibid.*, at paragraphs 46-47.

⁷⁸ *Ibid.*, at paragraph 48.

⁷⁹ *Ibid.*, at paragraph 49.

the “principled approach” the Chief Justice suggests, has no basis at common law. As such, *Re Phoenix* and *Primeo* can have no bearing on determining what the position is at Bermudian common law,⁸⁰ nor is the statement in *Cambridge Gas* on which much reliance has been placed the true ratio of the case and thus is not binding on the court.⁸¹

For the court, the fact a winding up order has been made in the Caymans in respect of a Cayman company with its sole link to Bermuda being that it was audited by the Dubai office of a Bermuda exempted partnership would not found jurisdiction for proceedings in Bermuda against the company and, further, would not found an application using the pretext of cross-border insolvency assistance for a section 195 order in circumstances where the office-holders would be unable to obtain an equivalent order in their own jurisdiction. In the court’s view, this would be “unjustifiable forum shopping” that would be grounds for an appeal in the *Singularis* case.⁸² As far as Saad was concerned, as the order opening liquidation proceedings could not be challenged, the issue was whether the discovery and production were properly made. This was determined, after some lengthy analysis as to the proper extent of discretion, by the court in the affirmative.⁸³ Consequently, the issue of compliance costs and security fell to be determined in the appellants’ favour.⁸⁴

Analysis and Impact

Notwithstanding the existence of many initiatives aimed at providing cross-border support by way of assistance provisions in statutory or treaty form, developed in particular in the 20th century, on occasion such texts may not apply to the particular relationship between the jurisdictions concerned or to the subject matter of the case, on occasion also by reason of the nature of the debtor itself, as was the case in *Re Phoenix*. This necessitates recourse to the common law. In this context, assistance would depend on the willingness of courts to exercise their discretion to do so by appealing to principles they believed to apply to these cross-border situations, whether comity, convenience/expediency or benefit to creditors. Over the centuries that common law courts have been asked to assist, the jurisprudence has revealed many instances and types of cooperation offered, including recognition of proceedings and of the appointment of the office-holder,⁸⁵ recognition of the office-holder’s title to assets or to pursue debts,⁸⁶ ordering stays or discharge of domestic proceedings,⁸⁷ giving way to foreign proceedings in matters of determining parties’ entitlements,⁸⁸ restraining

⁸⁰ *Ibid.*, at paragraph 50.

⁸¹ *Ibid.*, at paragraph 51.

⁸² *Ibid.*, at paragraph 52.

⁸³ *Ibid.*, at paragraphs 53-61.

⁸⁴ *Ibid.*, at paragraph 62-63.

⁸⁵ There are some very early examples of this, including in *Solomons v Ross* (1764) 1 Hy. Bl. 131n; 126 ER 79; *Sill v Worswick* (1781) 1 H. Bl. 665.

⁸⁶ *Bergerem v Marsh* (1921) B&CR 195; *Schemmer and Ors v Property Resources Ltd and Ors* [1975] 1 Ch 273.

⁸⁷ *Re Queensland Mercantile Agency* (1888) 58 LT 878.

⁸⁸ *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112.

actions by creditors (including universal injunctions),⁸⁹ requiring the examination and production of documents,⁹⁰ mandating the remittance of funds to office-holders for the purpose of foreign proceedings⁹¹ as well as approving a reconstruction scheme voted on by the creditors.⁹² The doctrine of ancillary assistance, by which courts would initiate liquidations of the debtor's business within the jurisdiction to assist foreign proceedings, is also of some vintage, although now the authority tends to come from statute.⁹³

In this light, the decision in *Re Phoenix* does not at first seem surprising. All the court is seemingly doing is, following recognition of his appointment, capacity and status, authorising the foreign office-holder to bring proceedings in the United Kingdom to pursue a debt. The basis, though, for the action is not an acknowledged debt, nor is the action simply the enforcement of a foreign money judgment that would undoubtedly already comply with the common law canons referred to in *Rubin*, but the bringing of a claim for a debt alleged to be owed to the debtor's estate by reason of a transaction that infringes the canons of insolvency law, notably those on claw-back or vulnerable transactions. These types of claims are becoming increasingly the norm in insolvency, particularly in large-scale financial insolvencies, where disputes over the origins, use and destination of funds result in contending ownership/property claims that require to be resolved. The vehicle for the action is also a novelty: the foreign office-holder is being authorised to use a provision of domestic insolvency law that is normally accessible only if a domestic or ancillary liquidation is opened or if the assistance provision in domestic law so provides.⁹⁴ The offer of this vehicle is made by the court seemingly because of the injunction in favour of active assistance, lately uttered in *Cambridge Gas*, but going back to many cases before this, including *Re African Farms*. The effect is to offer a tool to the office-holder that might not otherwise be available in furtherance of the view that assistance includes doing what a domestic court could have done in the event of a domestic insolvency.⁹⁵ *Primeo* picks this principle up and runs with it, holding that domestic claw-back provisions are similarly available to a foreign office-holder. Moreover, the court will do so on the basis of treating the debtor as if it were in ancillary liquidation, although quite clearly it could not fall within the jurisdiction provisions of the statute.

In the Bermudian case, whose subject is an examination and production of documents order, the judge at first instance is able to accept the rationale for following the path illuminated by *Re Phoenix* and *Primeo*. He states that the powers being extended by way of assistance are, at the very least, common law creations guided by the scope and extent of the equivalent statutory

⁸⁹ *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.

⁹⁰ *Re Impex Services Worldwide Ltd* [2004] BPIR 564.

⁹¹ *Re BCCI (No 10)* [1997] Ch 213.

⁹² *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385.

⁹³ Sections 221 and 225, Insolvency Act 1986 (United Kingdom).

⁹⁴ Section 426, Insolvency Act 1986 (United Kingdom) which allows the court receiving a request from the court of a relevant country or territory, to apply the "insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction", subject to any considerations of private international law that might arise.

⁹⁵ *Re Phoenix*, above note 10, at paragraph 62, also echoing statements in *Cambridge Gas*.

provisions in insolvency, even if the latter would not apply. However, a wider and more radical view might be to see, as in *Re Phoenix* and *Primeo*, that the powers are in fact those in the statute, whose extension in aid of foreign proceedings is amply justified by the precept on active assistance, which may be usefully summarised as: if the court assists, it makes available all of its available law, meaning the common law and also any appropriate rules that are statute based, unless to do so would denature the purpose of the statute itself.⁹⁶ This is not so far from the view in *Cambridge Gas*, in which its expansive view on assistance is stated as being qualified by any domestic statutory rule militating to the contrary. Interestingly, this view is comforted by the question asked in the instant proceedings as to the effect of the recognition order. For the judge, the possibility is that simply recognising foreign proceedings and the appointment of an office-holder has the effect of “domesticating” the foreign order and making it enforceable by whatever means available, including through the extension of all available law. Unlike in *Primeo*, however, the judge is reluctant to state that this step is to be treated as equivalent to the opening of ancillary proceedings and would leave the precise extent of the provisions that could be invoked to be determined by the courts, albeit with the active assistance principle uppermost in their minds.

In the Court of Appeal, however, the statements made as to the extent of the common law assistance principle do not help clarify what should be the position at Bermudian common law. The statements at best represent desirable aims, but do not reflect concrete approaches to judicial assistance. Though the court is of the view that *Rubin* and *Cambridge Gas* can be read together and are not necessarily opposed in their impact, it does not read the impact as leading to the permissive granting of powers under a statute usually employed in a domestic liquidation to a foreign office-holder, even in aid of foreign proceedings. A more restrictive reading by the court of what powers exist within the court’s inherent jurisdiction is comforted here by what it regards as the tenuous link the Cayman entity and the order sought have to Bermuda, such as to qualify the attempt to seek discovery and production in Bermuda as a form of forum-shopping. This, the Court of Appeal will not countenance as being a legitimate use of the powers, even if they were available as the judge at first instance thought they might. As to what powers might be available and in what circumstances, the court does not say. What it does state, however, is that the expansive view in *Cambridge Gas* of what judicial assistance is, a view incidentally reflected in much jurisprudence around the world, cannot be read in the way that so many have sought in order to justify the extension of assistance in areas un contemplated by existing judicial practice.

Summary

The common law has had vocation in the past and in many jurisdictions to come to the aid of the foreign office-holder and of foreign proceedings. On an incremental basis, the view has been taken, whether in reliance on comity and general judicial practice or on principles appropriate to insolvency such as

⁹⁶ This is in fact how section 426, Insolvency Act 1986 (United Kingdom) is intended to work.

unity and universality, that assistance can be forthcoming in such and such a situation, carefully defined. This incremental practice had at least the advantage that the judges became accustomed over time to what would otherwise be regarded as at first mere novelties, while in each case, there appear to be careful attempts to anchor the decision by the weight of precedent and previous curial practice. In this light, *Cambridge Gas* represented a break with the past, for understandable reasons, not least the need to choose between the orthodoxy of private international law and the commercial reality of the modern management of bankruptcy/insolvency proceedings, particularly those exhibiting complex features, including cross-border components. It was also understandable because the web of legislative instruments (laws, treaties, European Regulations, model laws and other benchmarking texts) has not yet been successful in extending itself to the whole world, leaving countless jurisdictions without workable cross-border assistance mechanisms, except such as can be crafted at common law and at the hands of the judges.

In this process, much depends on judicial attitudes and, a feature of many of these cases, whether support exists in judicial practice. It seemingly matters little whether that practice is at home or elsewhere, given the propensity of common law judges to seek out persuasive precedents from other jurisdictions. What is clear from the case commented on here is that the view in Bermuda is, certainly at the Court of Appeal level, that the common law cannot be artificially extended by judicial artifice without there being either strong support or strong statements of judicial intent in the cases that would lead naturally to the type of incremental precedent-building that could develop the law. Here, there is too tenuous a case for cooperation. This is not to say that, in other instances, there could not be the fact situations that would lend themselves to judicial creativity and to the type of formative rule-making that could itself serve as precedent for other cases. It may also be the case that the legislatures could be persuaded to enact rules to fill the lacunae in cross-border insolvency frameworks revealed by these judgments, if indeed there is such an appetite in these jurisdictions and the case is suitably made.

While the judges in the common law canvass for principles that will help develop the law in this area, the debate between what *Rubin* and *Cambridge Gas* did or did not say will continue. Although the Bermudian court sees no conflict between the two, this is certainly not the universal view. It is likely that *Primeo* will be taken to appeal in the Cayman Islands, especially now in light of this decision. It may be that both cases will end up before the Privy Council, which will then have the opportunity to pronounce on the (in)compatibility of *Rubin* and *Cambridge Gas*. That is certainly an event to anticipate, given the possibility of resolution of what appears at present to be two contrasting and diametrically opposed views of the extent of judicial cooperation and assistance. In the interim, the situation in Bermuda and other similar jurisdictions exists in a state of flux, albeit one in which judicial creativity can still occur, although at a more modest pace than that attempted at first instance in the present case.

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