

# The Universe of Insolvency Cooperation and the Primeo Directive

by  
Paul J. Omar  
of Gray's Inn, Barrister

## **Introduction**

This is an interesting time in cross-border insolvency, certainly insofar as judicial cooperation at common law is concerned. There has been a patient, incremental and continuous development over the centuries since cases featuring foreign connexions first started appearing before the courts in England and Wales, mostly in the context of business insolvencies (of trading partnerships and, later, of commercial companies).<sup>1</sup> As a result, the common law has made it possible to achieve a number of things to render assistance in cross-border matters and to make the task of administering a debtor's estate easier across frontiers. Although the common law sourced much of its power to assist in the inherent jurisdiction of the courts, the developments in the case law have also been underpinned by principled approaches to comity, including reliance on theories of unity and universality as espoused by the judges.

The first step in such cases was usually to recognise the existence of foreign proceedings and the office-holder's capacity as representative of the estate and/or acting in the shoes of the debtor.<sup>2</sup> In that light, recognition also followed naturally in relation to the office-holder's title to assets and/or entitlement to pursue debts/claims owed to the estate.<sup>3</sup> Where they deemed it desirable, the courts have also assisted in the procedural management of foreign proceedings by issuing orders requiring the examination of debtors or third parties as well as the production of any relevant documents within the jurisdiction.<sup>4</sup> Taking the view, usually on grounds of unity and/or universality, that management of the debtor's estate may be more appropriate in foreign proceedings, the courts have also assisted by restraining actions by creditors within the local jurisdiction where such actions would conflict with the proper administration of the estate elsewhere.<sup>5</sup> Giving support to the idea of a single efficient insolvency procedure, the courts have also authorised stays or discharges of local proceedings.<sup>6</sup> This is especially so where the courts view foreign proceedings as the natural home for the administration of the debtor's estate.<sup>7</sup> In this light, the courts have also mandated the remittance of funds for

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<sup>1</sup> *Solomons v Ross* (1764) 1 Hy. Bl. 131n; 126 ER 79; *Sill v Worswick* (1781) 1 H. Bl. 665.

<sup>2</sup> *Idem*; *Macaulay v Guaranty Trust Company of New York* (1927) 40 TLR 99.

<sup>3</sup> *Bergerem v Marsh* (1921) B&CR 195.

<sup>4</sup> *In re Impex Services Worldwide Ltd* [2004] BPIR 564.

<sup>5</sup> *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.

<sup>6</sup> *Re Queensland Mercantile Agency* (1888) 58 LT 878.

<sup>7</sup> *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112.

the purposes of overseas proceedings<sup>8</sup> and given effect to a reconstruction scheme voted on by the creditors in another jurisdiction.<sup>9</sup>

Furthering the types of assistance developed at common law, the courts also developed at an early stage the doctrine of ancillary assistance. In the case of personal insolvencies, assistance was predicated on the basis of the principle of *mobilia sequuntur personam*,<sup>10</sup> which largely meant that one set of bankruptcy proceedings would be organised, wherever the debtor was viewed to have taken up domicile. These would then be recognised elsewhere, with all other courts assisting by the making of any necessary orders. In the case of corporate entities, however, adherence to the principle that the law of the state of incorporation also governed the dissolution of the company meant that only one court would usually have jurisdiction. This could be inconvenient, given that the debtor company might have business and activities elsewhere which needed careful management, ideally by means of a formal procedure. Courts thus evolved a principle, by which they enabled the opening of liquidations, termed “ancillary” or assisting, so as to deal with issues that could not simply be solved by the making of orders subsequent to recognition applications.<sup>11</sup> Such ancillary liquidations were deemed to exist so as to assist foreign procedures and allowed for the full panoply of domestic law to come to the aid of the foreign office-holder. Care would be taken to ensure that domestic procedures would not come into conflict between the courts involved, while keeping costs down and ensuring that the interests of creditors were protected.<sup>12</sup>

Ancillary liquidation has subsequently become regulated by statute, governing situations including where a dissolution has already taken place under the law of the home jurisdiction.<sup>13</sup> These provisions were preceded in time, though, by specific assistance provisions enabling the communication of Letters of Request between British courts within the Empire for the granting of aid to one another.<sup>14</sup> Together, the statutory framework they have made has allowed for the continued making of orders such as those mentioned above as well as the development of novelties. Thus, foreign office-holders have been permitted to bring vulnerable transaction actions under domestic law<sup>15</sup> as well as to take proceedings against directors to recover a deficiency in the insolvent debtor’s assets.<sup>16</sup> Furthermore, the judges have also been able to be creative under the umbrella of the statute, including by interpreting the assistance provisions to allow for the application of rescue proceedings to overseas companies, usually where their home jurisdiction did not have such proceedings at the

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<sup>8</sup> *Re BCCI (No 10)* [1997] Ch 213; *Re HIH Casualty and General Insurance Limited and Others* [2008] UKHL 21.

<sup>9</sup> *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385.

<sup>10</sup> Lit. “Moveables follow the person”.

<sup>11</sup> *Re Matheson Brothers Ltd* (1884) 27 Ch D 225.

<sup>12</sup> *Re: Commercial Bank of South Australia* (1886) 33 Ch D 174.

<sup>13</sup> Sections 221 and 225, Insolvency Act 1986 (United Kingdom).

<sup>14</sup> *Ibid.*, section 426 (“section 426”). This provision is descended from one first adopted as section 220, Bankruptcy Act 1849 (England and Wales). In the form it took in the 1986 enactment, the provision extends to both personal and corporate insolvencies.

<sup>15</sup> *Re BCCI International (Overseas) Ltd* [1988] 1 WLR 708.

<sup>16</sup> *Re BCCI* [1993] BCC 787.

time or where there would be a clear benefit in having United Kingdom rescue proceedings applied to the insolvent company.<sup>17</sup>

In the modern age though, the emphasis has shifted to the creation of international frameworks for regulating insolvency matters. This is a process which has already led to the adoption of major texts, such as the UNCITRAL Model Law on Cross-Border Insolvency 1997 (“Model Law”) and the European Insolvency Regulation 2000 (“EIR”), although this does not by any means ensure global coverage in matters of cross-border insolvency. This is because the EIR is applicable only to member states of the European Union, while the Model Law has only been adopted by about twenty states around the world. As the texts were adopted in/made applicable to some common law states, they appear to have side-lined the common law as a source of developments in judicial cooperation, albeit section 426 (and its counterparts in other jurisdictions)<sup>18</sup> has continued to generate a modest amount of decisions. The advent of the Privy Council case of *Cambridge Gas*<sup>19</sup> ~~appears~~appeared, nevertheless, to have given fresh impetus to judicial creativity. In the way it sought to reinvigorate the precept of “active assistance”, a methodology it traced back to early case-law from South Africa,<sup>20</sup> the decision stated simply that a presumption of assistance should exist in furtherance of the principle of universality. This was subject only to two caveats: there not being any domestic statutory rule to the contrary and the requirement to positively avoid any harm to the creditors’ interests.

*Cambridge Gas* was rapidly taken up as precedent in a number of cases across the common law world, including in Australia,<sup>21</sup> Bermuda,<sup>22</sup> the Cayman Islands,<sup>23</sup> Ireland,<sup>24</sup> Jersey<sup>25</sup> and New Zealand.<sup>26</sup> Unsurprisingly, given the overlap in membership between the Privy Council and the House of Lords,<sup>27</sup> the lower courts in England and Wales also accepted the persuasive precedent in *Cambridge Gas*.<sup>28</sup> Here too, one case went so far as to suggest it was desirable that the common law, whether in furtherance of judge-made cooperation or in decisions interpreting the extent of domestic cross-border

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<sup>17</sup> The earliest examples are: *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394 (administration for an Australian company and its subsidiary); *Re Television Trade Rentals Ltd* [2002] EWHC 211 (corporate voluntary arrangements for an Isle of Man company).

<sup>18</sup> Section 29, Bankruptcy Act 1966 and section 582, Corporations Act 2001 (Australia); Article 49, Bankruptcy (*Désastre*) (Jersey) Law 1990 etc.

<sup>19</sup> *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26 (“*Cambridge Gas*”).

<sup>20</sup> *Re African Farms Ltd* [1906] TLR 373.

<sup>21</sup> *Bank of Western Australia v Henderson (No 3)* [2011] FMCA 840 (*obiter*).

<sup>22</sup> *Re Founding Partners Global Fund Ltd (No 2)* [2011] SC (Bda) 19 Com.

<sup>23</sup> *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).

<sup>24</sup> *Fairfield Sentry Ltd (In Liquidation) & Anor v Citco Bank Nederland NV & Ors* [2012] IEHC 81.

<sup>25</sup> *Re Montrow International Ltd* 2007 JLR Note 40.

<sup>26</sup> *Williams v Simpson Civ 2010-419-1174* (12 October 2010) (High Court, Hamilton).

<sup>27</sup> The Constitutional Reform Act 2005 transferred the House of Lords’ appellate judicial capacity to the newly formed United Kingdom Supreme Court.

<sup>28</sup> *Rubin & Anor v Eurofinance SA & Ors* [2010] EWCA Civ 895; *New Cap Reinsurance Corp Ltd & Anor v Grant & Ors* [2011] EWCA Civ 971.

statutory provisions, should ensure that the same types of assistance were available in both systems.<sup>29</sup> It seemed as if the common law had found, with *Cambridge Gas*, a new sense of purpose, particularly timely and useful, given the limitations on the applicability of the statutory frameworks that existed.

As a result of case law heard before the Irish and United Kingdom Supreme Courts, *Cambridge Gas* ~~has come~~ came to be doubted as to its subject matter, which was the enforcement of a foreign judgement non-compliant with the traditional common law rules on jurisdiction *in personam* and *in rem*.<sup>30</sup> Its insistence on “active assistance” ~~continues~~ continued, however, to find echoes in the jurisprudence. In 2013, an attempt in the *Tambrook* case to limit the assistance forthcoming under section 426 to only those situations where pre-existing proceedings were afoot was rejected with the *Cambridge Gas* articulation of its principles receiving mention.<sup>31</sup> “Active assistance” in that case was to be furthered by allowing for the “passporting” of a request for proceedings to be opened in the United Kingdom to avoid unnecessary duplication of effort in the home jurisdiction, which would only be purposeless and wasteful of effort and costs.<sup>32</sup>

Furthermore, the line of jurisprudence inaugurated by *Re Phoenix*, itself reliant on *Cambridge Gas*, came to be applied in some Caribbean and North Atlantic jurisdictions. *Re Phoenix* was a case where assistance was provided at common law to extend a domestic statutory power to enable proceedings to be brought by the foreign office-holder within the jurisdiction. The judge held, simply, that the common law had long contained powers to recognise and assist foreign office-holders. In this context, assistance meant doing whatever the court could do in domestic proceedings. Furthermore, insolvency proceedings were about collective enforcement for the benefit of all creditors and included, the particular issue in the case, set aside proceedings directed at third parties, which the judge also held to be central to the purpose of insolvency proceedings.<sup>33</sup> The 2013 decisions in the Cayman Islands<sup>34</sup> and

<sup>29</sup> *Re Phoenix Kapitaldienst GmbH, Schmitt v Deichmann & Ors* [2012] EWHC 62 (Ch) (“*Re Phoenix*”). See, by this author, The Resurgence of Cross-Border Recognition and Enforcement of Insolvency Judgments: The *Re Phoenix* Case [2013] 9 ICCLR 329.

<sup>30</sup> *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation)* [2012] IESC 12; *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 (“*Rubin*”). The latter also held *Cambridge Gas* to have been wrongly decided, a view that ~~is was, even then,~~ not without contention. See, by this author, An Irish Perspective on Insolvency Cooperation: The *Re Flightlease* Case (2013) 10 ICR 158; The Limits of Co-Operation at Common Law: *Rubin v Eurofinance* in the Supreme Court (2013) 10 ICR 106.

<sup>31</sup> *HSBC Bank v Tambrook Jersey Limited* [2013] EWCA Civ 576 (22 May 2013) (“*Tambrook*”). See, by this author, Visa Denied: An End to the Jersey Practice of Insolvency “Passporting”? (2013) 17 JGLR 182; Passport Renewed: Extension of Rescue Proceedings to Foreign Companies under Section 426 of the Insolvency Act 1986 (2013) 10 ICR 310. Together, the articles deal with the 3 hearings (1 in Jersey, 2 in the United Kingdom) in this case.

<sup>32</sup> *Tambrook*, at paragraph 39.

<sup>33</sup> *Re Phoenix*, at paragraph 62.

<sup>34</sup> *Picard and Anor v Primeo Fund (In Official Liquidation)* (unreported) (14 January 2013) (*coram* Jones J, sitting in the Grand Court of the Cayman Islands (Financial Services Division)) (“*Primeo GC*”). See, by this author, *Après Rubin: le Déluge?* Thoughts on the Future of Common Law Insolvency Cooperation (2013) 10 ICR 356. The author is grateful to

Bermuda,<sup>35</sup> which followed *Re Phoenix*, also signalled a desire to continue adherence to the cooperative precepts in *Cambridge Gas*, in the first case to allow the pursuit of transaction avoidance claims by the foreign office-holder, while, in the second, facilitating the summons of persons to be examined and to order the production of documents. The steps in either case were to be achieved by the extension of domestic statutory rules to a situation in which neither an ancillary nor a domestic liquidation were envisaged. Both cases also attempted a reconciliation between *Cambridge Gas* and *Rubin*, the judicial enthusiasm apparently being for the views expressed in the former.

This apparent preference for the *Cambridge Gas* methodology, did not, however, remain without challenge. Both decisions were taken to appeal. In the decision first in time, handed down in November 2013, the Bermudian appellate court held the expansive views of the judge at first instance to be simply wrong.<sup>36</sup> Although the appeal in the Cayman case was also heard in November, judgment did not appear till April 2014. By then, it had been overtaken by events, as the Bermudian case had been further appealed to the Privy Council, where it was heard ~~at the end of on 29-30~~ April.<sup>37</sup> As a result, in light of the Bermudian appeal, part of the Cayman judgment ~~has been was~~ reserved for a later date, pending the outcome of the Privy Council case.<sup>38</sup> It is the unreserved part of the judgment, delivered in April 2014, which is the subject of the commentary in this article.

### The Facts in *Primeo*<sup>39</sup>

The facts arose from the Madoff Ponzi scheme, which has generated some considerable litigation. The vehicle by which the investments were solicited was a company incorporated in New York and which was placed in liquidation on 15 December 2008. The plaintiff in the instant case was appointed trustee over the insolvent entity.<sup>40</sup> On 5 February 2010, the Cayman court gave an order recognising the capacity of the plaintiff as the sole person entitled to act on behalf of the insolvent company. The court deemed that it had no jurisdiction to place the company into liquidation as it had no property in the islands, nor was it licensed to carry out business under the Securities

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Nicholas Fox, of Mourant Ozannes and Counsel in the case, for copies of both the first instance and appeal judgments.

<sup>35</sup> *Re Saad Investments Company Ltd (In Official Liquidation) and Re Singularis Holdings Ltd (In Official Liquidation)* [2013] SC Bda 28 Com (15 April 2013). See, by this author, The “Empire” Strikes Back: Lessons for the Mother Country in Insolvency Cooperation [2013] 11 ICCLR 411.

<sup>36</sup> *Re Saad Investments Company Ltd (In Official Liquidation) and Re Singularis Holdings Ltd (In Official Liquidation)* [2013] CA (Bda) 7 Civ (18 November 2013). See, by this author, A Singular Tide in Insolvency Cooperation in Bermuda (2014) 11 ICR 159.

<sup>37</sup> ~~On 29-30 April, in fact. At time of writing, judgment is still awaited.~~

<sup>38</sup> ~~The two related judgments have now appeared and is—are reported as: *PwC v Saad Investments Company Ltd* [2014] UKPC 35 and *Singularis Holdings Ltd v PwC* [2014] UKPC 36 (“*Singularis PC*”) (“*Re Saad PC*”).~~

<sup>39</sup> The account of the facts and first instance judgment that follows is largely excerpted from the commentary on the first instance decision, published as the article mentioned earlier, above note 34.

<sup>40</sup> *Primeo GC*, at paragraph 2.

Investment Business Law (2003 Revision).<sup>41</sup> Its only connection with the islands was the fact that a number of funds, including the defendant in the instant case, had placed funds with it for investment. The defendant company was incorporated under Cayman law and licensed under the Mutual Funds Law (Law 13 of 1993). At first, between 1996 and 2007, the defendant invested directly in the insolvent company. Thereafter, it channelled investment funds it had withdrawn from the insolvent company via two further entities (incorporated in the Caymans and Bermuda) back into the company. Whether the investments were direct or indirect, the plaintiff maintained that the funds the defendant received and distributed to its own investors were wholly derived from the insolvent company and its illegal activities.<sup>42</sup>

When Madoff was arrested in late 2008, the defendant company's directors suspended any payments out and, on 23 January 2009, its sole shareholder filed for voluntary winding up, which was converted in April of that year into a winding up under court supervision.<sup>43</sup> The substance of the plaintiff's claim was that the moneys paid by the insolvent company could be recouped from the defendant company on the basis of transaction avoidance rules (fraudulent transfers and/or voidable preferences), whether under United States or Cayman law.<sup>44</sup> The vehicle for this claim was the power the court had to it under the Cayman assistance statute<sup>45</sup> or at common law. The defendant company asserted various rights in defence, including set off and other claims that would avoid or minimise its liability to make payment.

### **The Judgement at First Instance**

The court set out, by its order of 19 January 2011, the following issues, *inter alia*, for determination:<sup>46</sup>

- (i) Assuming the plaintiff had available to it the claims under United States law it asserted, whether the Caymans court could assist by virtue of the domestic assistance provision by applying the foreign law to the matter?
- (ii) Assuming the plaintiff enjoyed a similar facility for claims under the domestic statute, whether the Caymans court could assist by using the same means in order to apply that domestic law to the fact situation?<sup>47</sup>

The judge first referred to the fact that the Companies Law 1961 (Cap 22) was based on a blend of a Jamaican statute and the United Kingdom Companies

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<sup>41</sup> *Ibid.*, at paragraph 3.

<sup>42</sup> *Ibid.*, at paragraph 4.

<sup>43</sup> *Ibid.*, at paragraph 5.

<sup>44</sup> *Ibid.*, at paragraphs 6-7, referring to sections 547-548, Bankruptcy Code (United States) (90-day preferences and fraudulent transfers) and Article 10, New York Debtor and Creditor Law (fraudulent transfers); sections 168 or 145, Companies Law (2007 or 2010 Revision) (Cayman Islands) (voidable preferences). A fraudulent trading claim was dropped (at paragraph 8).

<sup>45</sup> Sections 241-242 of the Companies Law (2010 Revision).

<sup>46</sup> *Primeo GC*, at paragraph 9.

<sup>47</sup> The points were also put on the basis of powers argued as available (or not) to the judge at common law.

Act 1948. The winding up provisions were derived from the Jamaican text, which meant that it replicated the position in the United Kingdom Companies Act 1862. Thus it did not contain the provisions permitting liquidation of a foreign entity that were introduced into United Kingdom law in 1929.<sup>48</sup> The Companies (Amendment) Law 2007 (in force 1 March 2009) introduced section 91(d) and sections 241-242.<sup>49</sup> The judge then asserted that the provisions in Part XVII, including sections 241-242, were intended to partially codify the common law position with respect to ancillary liquidations in aid of a main liquidation occurring in the jurisdiction of incorporation, a position very different to the UNCITRAL Model Law on Cross-Border Insolvency 1997 position that would allow main proceedings to occur where the debtor had its centre of main interests, not necessarily where it was incorporated. He stated that the partial codification did not abolish the availability of the common law to come to the assistance of the foreign office-holder.

In the instant case, the plaintiff had, under the recognition order, been given status as the sole recognised official capable of representing the insolvent company and bringing any causes of action it may have within the jurisdiction. The issue for the judge was whether the cooperation provisions in the statute

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<sup>48</sup> Ibid., at paragraph 10. These are the ancillary liquidation provisions now in sections 221 and 225, Insolvency Act 1986 (United Kingdom). References below to sections of legislation, other than to sections 304 or 426, are to Cayman Islands legislation.

<sup>49</sup> Ibid., at paragraphs 11-12, the provisions being in Part XVII titled "International Cooperation". These read as follows:

"91. The Court has jurisdiction to make winding up orders in respect of- ...

(d) a foreign company which-

(i) has property located in the Islands;

(ii) is carrying on business in the Islands;

(iii) is the general partner of a limited partnership; or

(iv) is registered under Part IX [Companies incorporated outside the islands carrying on business within the islands].

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.

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 [Winding up of companies and associations];

(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. ...".

or at common law would entitle the court to assist the plaintiff to do so.<sup>50</sup> The defendant's assertion was that the statute did not contemplate the bringing of transaction avoidance provisions within its remit as its enumeration of available relief was exhaustive, while the plaintiff's was that the general purpose of the provision was to allow ancillary assistance with the examples of relief given not detracting from the court's inherent power to assist. On the construction of the provision in section 241, the judge came to the view that the list was exhaustive.<sup>51</sup>

As such, argument turned to whether the provision in paragraph (e) on the turnover of property belonging to the debtor could be read so as to include property to be recovered as a result of a transaction avoidance claim. The plaintiff's view was that the nature and function of insolvency proceedings invariably included such a power and was reflected in the section 242(1)(c) mention of such transactions as legitimately motivating the court's ability to offer ancillary assistance. Although the judge was surprised that the legislature chose not to make express such a fundamental component of any bankruptcy system in section 241,<sup>52</sup> he was invited by the plaintiff to turn to the legislative history of the provision, particularly where the Law Commission Report stated that the provision was intended to "codify" the law and was to be based on American provisions with which local practitioners were familiar, an oblique reference to the former section 304 of the Bankruptcy Code ("section 304"), since replaced by Chapter 15 of the same code incorporating the Model Law.<sup>53</sup> The judge noted that the legislature, in carrying out the codification of the common law rules, did look to a model akin to section 304. It did so, perhaps deliberately, so as not to either choose the Model Law or indeed the United Kingdom's section 426, particular since, in the case of the latter, it would also have required necessitated the designation of countries eligible for cooperation. Nonetheless, the judge made the point that the codification of the common law rules must still be taken to mean that the court retained a discretion to assist, even where the foreign proceedings met the criterion of proceedings capable of recognition and the substantive law of the foreign proceedings was consistent with Cayman Islands public policy.<sup>54</sup>

The plaintiff's case was that the reference to section 304 enabled the judge to have regard to case law in the United States with respect to its workings, citation being made of *Re Metzeler*,<sup>55</sup> where the American court applied foreign (German) law to the recovery of preferential and/or fraudulent transfers and where "property" of the estate was defined to mean property recovered by such claims. The judge was not persuaded that the legislature, in being inspired by the general model offered by section 304, also intended that the words of the codification should be given technical meanings in line with prevailing United States jurisprudence.<sup>56</sup> In any event, there was a

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<sup>50</sup> *Ibid.*, at paragraph 13.

<sup>51</sup> *Ibid.*, at paragraph 14.

<sup>52</sup> *Ibid.*, at paragraph 15.

<sup>53</sup> *Ibid.*, at paragraph 16.

<sup>54</sup> *Ibid.*, at paragraph 17.

<sup>55</sup> *Re Metzeler* 78 BR 674 (Bankr SDNY 1987).

<sup>56</sup> *Primeo GC*, at paragraph 18.

conceptual difference between the words actually used “property of the debtor” and “property of the estate”, the former being that in the debtor’s possession at the time proceedings are opened, while the latter refers to the property available for distribution to creditors, swelled, as it may be, by the fruits of transaction avoidance claims.<sup>57</sup> Referring to the often factually complex issues raised by such claims, the judge was of the view that Part XVII, in furnishing a procedural mechanism for obtaining ancillary relief, was not designed for establishing the merit of claims that would be better determined in proceedings commenced by writ. As such, he concluded that section 241 did not enable him to offer the plaintiff the remedy that he sought.<sup>58</sup>

On the question, however, of what law would apply, had this relief been available,<sup>59</sup> the judge came to the conclusion that the local law would apply. He did not accept the plaintiff’s contention that the use of the word ancillary meant that the focus was on assistance to foreign proceedings using foreign law, as the availability of section 241 was predicated on the court not having jurisdiction under section 91(d) and under which proceedings would take place under local law with presumably the application of local provisions.<sup>60</sup> Furthermore, the judge did not accept the assertion that logic required the application of the same law to transaction avoidance claims as distributions, since the common law did not contemplate this position and the legislature did not make it express that this needed to be the case,<sup>61</sup> nor did he agree with the argument based on a requirement for consistency, under which the references in section 242(1)(c) to transaction avoidance and to the debtor’s property must be taken to refer to transactions under a foreign law and property as defined by that law.

The judge’s view was that the ancillary assistance provisions did not create parallel territorial proceedings, but simply provided for assistance to foreign proceedings consonant with Cayman Islands public policy and that mandating the application of any number of foreign laws could be contrary to the general policy of achieving “an economic and expeditious administration of the estate” on the basis of the assistance given.<sup>62</sup> An argument based on comity was given short shrift as the judge was of the view that assistance alone did not imply that a foreign law was automatically imported as the means of providing such assistance unless the legislature expressly contemplated this would be the case, which here the judge did not think to be its intention. In the judge’s view, the application of local law, that he deems would have been applied, was entirely consistent with the principle of comity. Furthermore, the judge did not think that the views in *Re Metzeler*, where the American court stated that a

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<sup>57</sup> The example of *Re Reserve International Liquidity Fund Limited* (unreported) (1 April 2010) was proffered by the judge in explanation, where the British Virgin Islands court authorised the liquidators of a company to countermand instructions given by its directors for the movement of moneys it had on deposit and recover the company’s property for the purposes of the insolvency.

<sup>58</sup> *Primeo GC*, at paragraph 19.

<sup>59</sup> The judge was also mindful of the fact that his judgment was likely to be appealed.

<sup>60</sup> *Primeo GC*, at paragraph 20.

<sup>61</sup> *Ibid.*, at paragraph 21.

<sup>62</sup> *Ibid.*, at paragraph 22.

foreign trustee could only exercise those avoidance powers conferred under his home law, should bind the Cayman court in its interpretation of section 221, no matter that arguments could be made that the provisions were comparable in origin.<sup>63</sup>

In light of the rejection of the availability of the domestic assistance provision, the judge based his eventual granting of the necessary powers on the common law, agreeing with the judge in *Re Phoenix*. As such, the Cayman court held that it had the authority to entertain at common law an action based on the transaction avoidance provisions, whether in their 2007 or 2010 incarnation.<sup>64</sup> For the purpose of these claims, the court deemed the insolvent company to be treated as if it had been the subject of liquidation before the Cayman court, despite the fact that section 91(d) could not have been invoked to assert this jurisdiction.<sup>65</sup> It is this part of the judgment that ~~has been was~~ stayed pending the outcome of the Privy Council hearing, with the Cayman Court of Appeal April 2014 judgment restricting itself to the issue of whether the domestic assistance provision had the impact the judge at first instance declared it to have.

### **The Court of Appeal Judgment**

For both parties, the result was unsatisfactory. The trustee of the American bankruptcy clearly wanted the application of the foreign avoidance provisions, as they were procedurally advantageous to him, but was prepared to settle for the domestic provisions being extended on the basis of the statutory assistance mechanisms the judge below had said was not available. The fund, against whom an order had been rendered, disputed that the common law furnished the necessary powers the judge held were available, but was prepared to concede that, if those powers were available at common law, they should only be available where section 91 could be deployed to create a domestic winding up proceeding in respect of the insolvent entity.<sup>66</sup> At the hearing in November 2013,<sup>67</sup> the issues were summarised as being: (i) whether the court could use the domestic statute to extend deploy foreign transaction avoidance provisions; (ii) whether the domestic statute could be used to apply the domestic provisions to the same effect; and (iii) whether the common law could furnish the necessary powers and under what conditions.<sup>68</sup> Referring to the Bermudian appeal and the fact it would impact on the third issue, the court noted that it had been invited to deliver an interim judgment addressing only the first two issues.<sup>69</sup> After setting out the relevant provisions and recounting in some detail the process by which the judge below had

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<sup>63</sup> *Ibid.*, at paragraphs 23-26.

<sup>64</sup> *Ibid.*, at paragraph 34.

<sup>65</sup> *Ibid.*, at paragraph 35.

<sup>66</sup> Appeals no. CICA 1/2013 and CICA 2/2013 ("*Primeo CA*"), at paragraphs 9-10. The preceding paragraphs introduce the appeal, iterate the facts, preliminary issues and outcome of the hearing below.

<sup>67</sup> *Coram* Sir John Chadwick P, Motley JA and Campbell JA.

<sup>68</sup> *Primeo CA*, at paragraph 11.

<sup>69</sup> *Ibid.*, at paragraph 12.

arrived at his conclusion,<sup>70</sup> the court turns to its own assessment of the domestic rules. With the text of section 304 in mind,<sup>71</sup> the court's view is that it is appropriate for it to dissect the issues in the same way the trial judge did, first to determine whether the domestic statute authorises the deployment of any transaction avoidance provisions in aid of foreign proceedings and, secondly, it being the case, whether the applicable law of those provisions is foreign or domestic.<sup>72</sup>

*(i) Deploying The Transaction Avoidance Provision*

Starting with the first issue, authority for the deployment of transaction avoidance provision, the court sets out the rival contentions of the parties.<sup>73</sup> The trustee's submissions are six-fold: (i) paragraphs (a) to (e) of section 241 do not constitute an exhaustive list of the court's powers, but rather the section enables the court to make any orders ancillary to a foreign proceeding for the purposes of achieving the objectives they contain; (ii) section 241 can be construed in the same way as its legislative model, section 304; (iii) in that light, the word "turnover" it adopts should, as a technical term in United States law, be given the same meaning as in the jurisprudence, to wit including transaction avoidance claims, the risk otherwise being to create material differences between two provisions with a common ancestry and cause confusion amongst practitioners familiar with the American model; (iv) given the source of the provision, the judge below erred in giving the term "property belonging to a debtor" a meaning consonant, not with United States law, where a related term appears in section 304 (as "property of the estate"), but with English law; (v) in that light, the meaning the judge gives, which has the effect of determining that property recovered by transaction avoidance cannot fall within the term "property of the debtor" as used in section 241, thus excluding those types of action from its scope, also risks creating a difference; and, as a summary, (vi) sections 241-242 are clearly connected with transaction avoidance and the court has the power to make the necessary ancillary orders to permit proceedings with the result of making the recovered property "property of a debtor" as envisaged in the sections.<sup>74</sup>

Summarising the arguments on the fund's behalf, the court states these to be five-fold: (i) sections 241-242, in the way they are cast as provisions within Part XVII, reflect the common law rule that a court can only recognise the authority of an office-holder appointed under the law of the place of incorporation in respect of a proceeding opened there; (ii) paragraphs (a) to (e) of section 241 are an exhaustive statement of the orders a court may grant, there being no provision comparable to section 304(b)(3) that enables the granting of "other appropriate relief", and, thus, the section cannot be construed to enable the granting of other forms of ancillary relief, even in circumstances that might lead to the fulfilment of one of the purposes

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<sup>70</sup> *Ibid.*, at paragraphs 13-35, essentially repeating the reasoning in *Primeo GC*, at paragraphs 10-25 (detailed above).

<sup>71</sup> *Ibid.*, at paragraph 37.

<sup>72</sup> *Ibid.*, at paragraph 36.

<sup>73</sup> *Ibid.*, at paragraph 38.

<sup>74</sup> *Ibid.*, at paragraph 39.

mentioned in those paragraphs; (iii) the guidance in section 242 does not extend to enabling ancillary orders in circumstances section 241 does not expressly authorise, the language also incidentally speaking of “prevention”, rather than “reversal”, a reading supported by the way section 241 provisions can be deployed to “prevent” such dispositions through recognition of title and/or orders for the production and examination of documents; (iv) the term “turnover” cannot be read in the way the trustee wishes, the fund’s view being that the legislature, if intending to confer powers to support transaction avoidance proceedings, would have done so expressly; and, finally, (v) the legislature’s use of the terms “property belonging to the debtor” and “property of the company” connotes a distinction between the terms chosen in the statute, making the use of the former term in the section highly relevant and, as a result, not susceptible of the interpretation the trustee wishes to place on it.<sup>75</sup>

In light of the arguments, the court naturally views the common ground between the parties as resting on the specific interpretation of sections 241-242 and whether they collectively support the application of transaction avoidance provisions. It thus expresses the need to apply the principles of statutory construction in force in the Cayman Islands, giving its views relatively succinctly.<sup>76</sup> The court is of the opinion that section 241, as the judge below had also held, did not confer a general power to make orders ancillary to a foreign proceeding at its discretion. The issue was therefore whether a power to make transaction avoidance orders was a power that could be exercised for one or more of the purposes section 241 contained, there being no power to order “other appropriate relief”, unlike in the section 304 model on which section 241 was based.<sup>77</sup> For the court, though, the guidance in section 242, which specifies matters the court is to take into account for the purpose of exercising the powers in section 241, makes explicit reference to “the prevention of preferential or fraudulent dispositions of property” (paragraph (c)). Although this does not add to the range of orders that may be given under section 241, the inclusion of the mention appears to be sufficient evidence of the legislature’s intention that orders made with the purposes of section 241 in mind could include orders having such a preventative effect.<sup>78</sup>

Furthermore, the guidance in paragraph (c) must be taken as guidance for the making of orders achieving any of the purposes in section 241, not just the ones put forward by the fund (recognition of title and/or production and examination of documents). In that light, an order for turnover of the debtor’s property to a foreign office-holder could be made for the purposes of “the prevention of preferential or fraudulent dispositions of property”.<sup>79</sup> An order authorising the bringing of a transaction avoidance claim would have the effect of restoring property to the debtor’s estate, which the court could order

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<sup>75</sup> *Ibid.*, at paragraph 40.

<sup>76</sup> *Ibid.*, at paragraph 41.

<sup>77</sup> *Ibid.*, at paragraph 42.

<sup>78</sup> *Ibid.*, at paragraph 43.

<sup>79</sup> *Ibid.*, at paragraph 44.

to be turned over to the foreign office-holder.<sup>80</sup> The distinction between the terms “property belonging to a debtor” and “property comprised in the debtor’s estate” used variously in sections 241-242 can be understood, the avoidance of dispositions of property in the debtor’s estate having simply the effect of restoring to the debtor property belonging to him and which will, because of the insolvency order, be within the estate for the purposes of distribution and, as in the instant case, for the purposes of turnover prior to such a distribution.<sup>81</sup> The court is able to do this, it says, without needing to rely on the definitions and interpretations as developed within United States jurisprudence with respect to section 304, giving a “true construction” of sections 241-242 in accordance uniquely with the precepts of local law.<sup>82</sup> Summarising its view, the court holds simply that it has jurisdiction to apply transaction avoidance provisions in aid of foreign proceedings.<sup>83</sup>

(ii) *The Applicable Law: Foreign or Domestic?*

Turning to the second issue, the court focuses on the nature of the applicable law, beginning with the arguments presented by the parties.<sup>84</sup> Here the arguments for the trustee are quite complex with essentially six points: (i) the judge below erred in holding that to assist a foreign procedure by the making of ancillary orders does not require the application of a law, in the instance a foreign law, that would be more than just incidental to the determination within foreign proceedings of what constituted the estate and what antecedent transactions required reversal so as to reconstitute it; (ii) since what is within the estate is a matter of foreign law, the judge should have held that section 242 required at the very least the option to choose and/or to apply the foreign law; (iii) similarly, the principle of comity, excluded by the judge below from having that effect, should also be treated as permitting the choice and/or application of foreign law; (iv) the limitation in section 241(2) to orders only against the debtor or relevant parties<sup>85</sup> would not make sense unless the legislature intended, as a possibility, for courts to be able to apply foreign law, with the limitation reflecting the boundaries to this application; (v) the principle of modified universalism, also rejected by the judge below, would require section 241 to be interpreted so as to be able to apply foreign law, given the desirability that avoidance actions be governed by the *lex concursus*; and (finally) (vi) other principles such as “fairness, equity and equality” also militated for the like treatment of creditors through the application of the same rules of substantive law to them, such as in the case of preferences.<sup>86</sup> Almost as an aside, the trustee conceded in the alternative that section 241 could also confer a power to apply local law, thus reinforcing the position at common law the judge below held gave such a power.<sup>87</sup>

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<sup>80</sup> *Ibid.*, at paragraph 45.

<sup>81</sup> *Ibid.*, at paragraph 46.

<sup>82</sup> *Ibid.*, at paragraph 47.

<sup>83</sup> *Ibid.*, at paragraph 48.

<sup>84</sup> *Ibid.*, at paragraph 49.

<sup>85</sup> As defined in section 103, which imposes a duty of cooperation with a company’s liquidator on, *inter alia*, persons responsible for promotion, management or liquidation of the company as well as professional service providers.

<sup>86</sup> *Primeo CA*, at paragraph 50.

<sup>87</sup> *Ibid.*, at paragraph 51.

The arguments put on behalf of the fund are similarly complex and can be resumed in seven points: (i) the power to apply foreign law is so significant a power to give to a court it might be reasonably expected a legislature would only do so expressly;<sup>88</sup> (ii) section 241 is not a recognition section, though with power for the court to grant relief in aid of foreign proceedings, thus militating against arguments that the application of foreign law to avoidance transaction situations is a necessary corollary of the recognition of foreign proceedings; (iii) comity cannot of itself supply the necessary authority for giving effect to foreign law; (iv) similarly, the incidental limitation in section 241(2) is not to buttress, albeit place parameters on, the application of foreign law, but simply to ensure that the same persons are subject to section 241 as are mentioned in section 103; (v) modified universalism cannot of itself supply grounds for the recognition of the application of foreign law as a substitute for the type of unity and universality that can only be achieved through treaty; (vi) further, other principles cited by the trustee do not lend themselves to any interpretation requiring imperatively the application of foreign law; and, finally, (vii) section 241 should not be interpreted in light of the United States provision that is section 304 without there being the clearest statement that this is intended to be so. The domestic provision has differences, witness the exclusion of the power to order “other appropriate relief”, suggesting that this is now a local provision that has to be interpreted consonant with local principles and as part of the autochthonous Companies Law.<sup>89</sup>

When it comes, the court’s view is admirably succinct. It does not, as expressed earlier in relation to the first issue, think it appropriate to construe sections 241-242 by reference to the United States text or jurisprudence.<sup>90</sup> It considers, in agreement with the fund, that the application of foreign law is a radical departure that would need to be authorised expressly, which is not the case. This is so, notwithstanding that this would lead to the result that the transaction avoidance rules are governed by a different law to that of the procedure and distribution regime the rules are intended to support. The fact that companies may not be registered under the law is also not an argument sufficiently compelling for the application of foreign law to them and would result in quite different treatment to those circumstances in which the court was able to use section 91 to wind such companies up.<sup>91</sup> As such, the court clearly holds it does not have the power to apply foreign law pursuant to orders made under sections 241-242.<sup>92</sup>

## Analysis and Impact

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<sup>88</sup> Some support for this point may be seen in the express statement in the United Kingdom’s section 426(5), which allows the court to apply both domestic and foreign law to matters before it, though subject to considerations of private international law.

<sup>89</sup> *Primeo CA*, at paragraph 52.

<sup>90</sup> *Ibid.*, at paragraph 53.

<sup>91</sup> *Ibid.*, at paragraph 54.

<sup>92</sup> *Ibid.*, at paragraph 55. Paragraphs 56-59 simply summarise the parties’ essential arguments in relation to the preliminary findings and the court’s own findings.

This is most certainly an interesting outcome in what has been a by-product of the “active assistance” saga and complex tale of the influence of *Cambridge Gas*. It also incidentally illustrates a problem with the unvarnished use of legal transplants without great care taken to decide what of their context can be legitimately imported. In this case, the judges have stepped up to the plate and determined the extent of the influence that section 304 might trace on the development of sections 241-242. Indeed, the court in the Cayman Islands has held that its domestic assistance provision can be deployed to provide the help that is sought, although it can only do so using domestic law. This is a position the judge below reached using the common law as his springboard. In correcting the misapprehension of the judge below who assumed the statutory provisions did not have the same effect, the court adds to the panoply of instruments that may be used. ~~Will-Could~~ it, however, also decide that the common law ~~can-should~~ continue to be so used, where the domestic statute has already provided? This ~~is-was~~ certainly the desire evident in *Re Phoenix*, where the judge expressed her hope that the common law and any statutory provisions should develop in parallel to achieve the same ends.

In the end, though, ~~it will depend on what~~ the Privy Council emitted a very cautious view in the Bermudian appeal, stating that, while the common law should evolve tools to assist in instances of cross-border insolvency, judges should be careful not to trespass on the prerogatives of the legislature by fashioning rules beyond their permissible constitutional role as interpreters of the law. As such, judges should be cautious in seeking to create rules except where there was a sound and pragmatic need for intervention to assist the management of cases with an international element.~~will say.~~ Given that the composition of the bench ~~hearing the further appeal in the Bermudian case~~ overlap~~ped~~s significantly with that of the Supreme Court in *Rubin*, where *Cambridge Gas* was determined to be wrong, ~~the wise may be betting on an unfavourable result~~ was always on the cards. ~~The future is, for the moment however, still open and sufficiently unpredictable.~~ However, The Privy Council, in the person of Lord Collins, went further to make reference expressly to the Caymans case and to hold that the approach of the judge at first instance was wrong.<sup>93</sup> It seems as if the answer is now certain and the Court of Appeal need not pronounce on the remaining outstanding issue.

## Summary

In summary, judicial creativity continues to occur of necessity in a number of jurisdictions across the common law world, particularly those where domestic cross-border mechanisms may not exist or may be deficient or, as in the present case, require determination as to their meaning and extent. The facility given to judges of the common law courts to do so means that their views can assist or hinder the development of efforts to assist the organisation and management of cross-border instances. Though the judges are quite wary of trespassing on the prerogative of the legislature and would, undoubtedly, prefer it if the legislature developed the tools necessary for cross-border assistance, nonetheless, their views are a vital part of the overall

<sup>93</sup> ~~Re Saad~~ *Singularis PC*, above note 37, at paragraph 102.

process of development. In some instances, the attempts by judges to push the law further are later rejected, in others they are successful. In time, these more forward views may be adopted elsewhere, illustrating the incremental approach to the construction of the common law across the members of the common law family through persuasive precedent. In this, the guidance of the higher courts is vital to ensuring the common law does not stagnate and that a firm and principled approach serves as the precept to guide its continued development. While the Privy Council appears to have brought an end to one series of developments, it is by no means certain that this will be the end of the story.

**20 May 2014** (revised 179 November 2014)