

Cross-border insolvency

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Has the golden thread of modified universalism in cross-border insolvency been broken in Bermuda, following the decision by the Bermuda Court of Appeal in *PWC v Saad Investments Company Limited and Singularis Holdings Limited*?

Cross-border insolvencies are notorious for throwing up complex and novel questions of private international law. The question of whether and how far a court can or should go to give effect to a foreign liquidation order, or accede to applications made by foreign liquidators, directly or indirectly, has been the subject of debate for many years. In 2013 in *Rubin v Eurofinance SA*,² the English Supreme Court has expressed approval of a narrower approach than had previously been applied in the *Cambridge Gas*³ case, also decided by the English Supreme Court (then the House of Lords), in which Lord Hoffman picked out a golden thread of modified universalism in cross border insolvency.

In Bermuda, the courts at first instance had been increasingly receptive over the last 20 years to applications made by liquidators of companies incorporated in other jurisdictions to recognise and cooperate, to the greatest extent possible, to grant relief to achieve a workable international collaboration in the administration of cross-border insolvencies.

The attitude of the Bermuda courts is not surprising, given Bermuda's position as a leading off-shore financial centre, which has been especially dominant in the reinsurance sector for the last 35 years. Liquidators appointed by the Bermuda court invariably require the assistance of foreign legal systems to fulfil the often difficult and complicated task of gathering assets and administering assets across multiple jurisdictions. Bermuda liquidators are therefore accustomed to making requests for international judicial assistance and, in large measure, receiving that assistance. It is natural therefore, in the spirit of reciprocity that the Bermuda court should feel bound to give support to incoming requests for judicial assistance from liquidators in other jurisdictions faced with the same sorts of problems that Bermuda liquidators encounter.

This has been generally expressed to be on the principle of comity, provided that the court can establish that the foreign office holder has been appointed by a court that is jurisdictionally competent to make the appointment. Subject to broad principles of fairness, and in consistency with Bermuda public

policy, the Bermuda court has been prepared to make orders in aid of the foreign liquidation proceedings.

The Bermuda court's attitude to foreign requests for judicial assistance was explained in the 2009 first instance decision of *Founding Partners Global Fund Limited*, granting relief in response to a letter of request from the Grand Court of the Cayman Islands in respect of a Cayman fund. In that case, the Bermuda court granted the provisional liquidators of the Cayman Fund powers to gather in the assets, books and records within the jurisdiction of Bermuda and a stay of proceedings against the Cayman company or its property in Bermuda. The Judge at first instance (Kawaley J as he then was) stated that: "The Bermudian court has cooperated extensively with foreign insolvency courts in relation to parallel proceedings involving Bermudian companies over the last two decades. It is quite rare to receive requests for assistance from foreign insolvency courts for recognition of a foreign insolvency order in relation to companies not incorporated in Bermuda. In the absence of a Bermudian statutory framework delineating the circumstances in which judicial cooperation with foreign insolvency courts will take place, there is a need for clarity as to the content and scope of the applicable common law rules."

He then adopted the dictum of Lord Hoffman in *Cambridge Gas* that the domestic court must at least be able to provide assistance to the foreign liquidator by doing whatever it could have done in the case of a domestic insolvency, based on notions of comity.

The Saad Investments case

However, the jurisprudential basis for the Bermuda court's capacity to give cooperation to foreign liquidators was reconsidered by the Court of Appeal in the case of *PricewaterhouseCoopers v Saad Investments Company Limited and Singularis Holdings Limited*.

The issue arose in the context of two separate applications in relation to two separate but related foreign liquidation proceedings commenced in the Cayman Islands. In the first, *Saad Investments Company Limited* ("*Saad*"), an application was made for a

winding-up order in Bermuda by the provisional liquidator who had been appointed by order of the Cayman Islands. In the second application, in respect of Singularis Holdings Limited (“SHL”), no application was made for a winding-up order in Bermuda. In respect of each of the two companies, two separate but related applications were made to the Bermuda court for orders against PricewaterhouseCoopers to compel the production of:

- 1) papers belonging to the companies which were in the possession of PricewaterhouseCoopers in their capacity as former auditors; and
- 2) the auditors' internal working papers.

The significance in the distinction of these categories was that in the Cayman liquidation proceedings, the working papers of the former auditors would not have been disclosable, but under the Bermuda Companies Act, the court was competent to order production of the auditors' working papers under section 195 of the Act.

The court at first instance (Kawaley CJ) had acceded to the provisional liquidator's applications in both cases:

- a) in the case of *Saad*, on the basis that a winding-up order had been made by the Bermuda court and had not been challenged in time, so that the court was competent to exercise its powers to order production of all categories of documents requested on the basis of the genuine need for disclosure described in the evidence filed by the liquidators, notwithstanding that the Cayman court itself could not have ordered production of the working papers; and
- b) in the case of *SHL*, on the basis of the court's inherent jurisdiction, applying the principle of comity and the objective of “modified universalism” desirable in international insolvency cases.

The Court of Appeal for Bermuda upheld the Chief Justice's decision (by a majority) in respect of *Saad* solely on the basis that given the winding-up order was not open to challenge in those proceedings, it was not permissible for the auditors to make a collateral attack on the winding-up order in the context of an application made within the liquidation proceeding itself. The Court of Appeal (by a majority) also upheld the scope of the order, in *Saad*'s case (including the requirement to disclose the working papers) on the basis that there had been genuine grounds to support the order made by the Chief Justice at first instance under the terms of the Bermuda section, irrespective of the more limited scope of order which could have been made by the Cayman Court in the administration of its own liquidation procedure.

In relation to *SHL*, the Court of Appeal

unanimously set aside the Chief Justice's order on the basis that *SHL* was not a “company” within the meaning of the Bermuda Companies Act and therefore the court had no statutory jurisdiction to make a winding-up order in respect of that company and therefore had no jurisdiction to make an order under section 195 of the Companies Act. The Court of Appeal further held unanimously that there was no analogous common law or inherent jurisdiction to make such an order where the liquidators would not have been able to secure an equivalent order in the Cayman Islands.

The decision of the Court of Appeal leaves the position on an uneasy footing because the basic principle decided by the Court of Appeal unanimously (expressed in relation to *SHL*) is that a company can only be wound up by the Bermuda court if it is a ‘company’ falling within the definition of section 4 of the Companies Act, which does not include unregistered foreign companies. If that is the correct legal analysis, then the same reasoning must apply to *Saad*. The only basis on which the Court of Appeal upheld the order in relation to *Saad* was the procedural ground that a challenge to the winding-up order had not been made on a timely basis. It follows, therefore, that had a timely objection been made to the winding-up order, the same result would have followed in the case of *Saad*.

It is equally disappointing that no principled *explanation* was given by the Court of Appeal for its jurisdiction to order the production of documents in the ancillary Bermuda liquidation proceeding, when production of those documents could not have been ordered in the principal liquidation proceeding in the Cayman Islands. There is no provision in the Bermuda Companies Act which entitles the Bermuda court to make an order in terms wider than those which could have been made in a foreign liquidation proceeding (unlike section 426 of the English Insolvency Act 1986). It also strains the notion of comity for a Bermuda court to exceed the jurisdictional limits imposed by the foreign liquidation law, in the absence of a statutory power to do so.

The decision is subject to appeal to the Judicial Committee of the Privy Council.

In a powerful dissenting judgment in the *Saad* case, Auld JA expressed the view that the logic applied by the majority of the Bermuda Court of Appeal led to an absurd result, and the case illustrated the pressing need for reform in this area of the law to give effect to a more comprehensive system of international cooperation in cross-border insolvency.

It appears therefore that the “golden thread” of modified universalism has been broken at least in Bermuda, unless the Judicial Committee of the Privy

Council is minded to weave another alternative strand of principle to achieve the desired result. In the meantime, Bermuda urgently needs to consider an immediate amendment to the Companies Act to restore the statutory regime to a more workable state in order to achieve international cooperation.

By contrast, in the Cayman Islands, the court is empowered by section 91 of the Companies Law to wind-up a foreign company if it has assets; carries on business within the jurisdiction; is the general partner of a limited partnership; or is registered as a foreign company. There is, however, apparently no express power to make orders for production of documents in the Cayman Islands which exceeds the scope of orders which it could have made itself or which could be made in the principal foreign liquidation proceeding.

In the British Virgin Islands (BVI), there is no definition of a foreign company, however, the BVI Court has a separate statutory power under the Insolvency Act 2003 to allow the BVI Court to make a range of orders in aid of foreign proceedings which may, depending on the circumstances, allow the domestic BVI Court to assist a foreign insolvency representative in such a way as to give effect to an order from his or her domestic court. Neither the BVI Insolvency Act, nor the inherent jurisdiction of the court, can grant the domestic BVI Insolvency Act powers to a foreign liquidator, and the court's power to give assistance is limited to a number of specified countries, including Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the US.

In Jersey, the Royal Court has power to provide assistance to jurisdictions listed in the Bankruptcy

(*Désastre*) (Jersey) Order 2006 (including Australia, Finland, Guernsey, the Isle of Man and the UK), and has held that it has inherent jurisdiction to give assistance to countries not listed, provided that there is a valid connection between the debtor and the law under which the insolvency occurred.⁴

Bermuda should respond to the call for statutory reform in this area of the law: "There is an urgent need for an international coherent and readily identifiable set of legal norms and forensic tools in this field to provide a speedy, practical inexpensive service to the commercial community for resolution of jurisdictional disputes and other enforcement issues" per Auld JA (dissenting) in *PWC v Saad Investments Company Limited and Singularis Holdings Limited*.

Notes:

¹ (2013) CA (BDA) 7 Civ.

² (2013) 1 AC 236.

³ (2001) AC 508.

⁴ *Re F and O Finance AG* (2000 JLR Notes-5a).

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