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Authors Marcus Staff

Common law assistance and cross-border insolvency: from modified universalism to supra-territoriality

KEY POINTS

- A court has a common law power to assist winding up proceedings taking place under the supervision of a foreign court of insolvency jurisdiction so far as it properly can.
- A court has jurisdiction to order a third party to provide information to foreign liquidators.

INTRODUCTION

This article summarises and considers *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36, which was handed down on 10 November 2014. The decision is interesting, in particular, because:

- it confirms that the court has a common law jurisdiction to assist winding up proceedings taking place under the supervision of a foreign court of insolvency jurisdiction. The scope of the jurisdiction is subject to local law and public policy and the assisting court can only act within the limits of its statutory and common law powers. If there is no relevant statutory power, the ability to grant assistance will depend on the common law, including any proper development of the common law [15 and 19]; and
- the judgments of the majority have developed the common law by going beyond what had previously been understood to be the power of the court to order a person to supply information [69]. In short, under the umbrella of the principle of assistance a court has power to order a third party to provide information to foreign liquidators in the public interest to give effect to a recognised legal principle, namely, modified universalism [22]. The development was most closely articulated in the judgment of Lord Sumption, with which Lord Collins and Lord Clarke concurred, but from which Lord Mance and Lord Neuberger dissented.

MODIFIED UNIVERSALISM AND PUBLIC INTEREST

Lord Sumption explained, in essence, that the principle of modified universalism depends on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of a company's incorporation, to conduct an orderly winding up of its affairs on a world-wide basis, despite the territorial limits of that jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global business it is in the interest of every country that companies with transnational assets should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally.

CONDITIONS FOR ASSISTANCE

According to the judgments of the majority, the court may exercise the jurisdiction to assist to give effect to the principle of modified universalism if the following conditions are fulfilled:

1. the applicants for assistance are officers of the foreign court or equivalent public officers;
2. that assistance is being sought to enable the foreign court to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers;
3. that its exercise is necessary for the performance of the foreign office-holder's functions;

4. that it is consistent with the substantive law and public policy of the assisting court;
5. that where compulsion is involved, then as with other powers of compulsion, its exercise is conditional on the applicant being prepared to pay a third party's reasonable costs of compliance [25];
6. that the power is not to be used to make good a limitation on the powers of the foreign court of insolvency jurisdiction under its own law; and
7. where the jurisdiction is invoked to obtain documents or other information it should be the case that these things cannot be obtained in some other way.

The information under this and the foregoing sub-heading represents a distillation of principles laid down in connection with the development of the common law that occurred in the case under review. These serve to explain the parameters of and reasons behind the jurisdiction to assist and provide strong guidelines for liquidators wishing to persuade the court to develop the common law under the jurisdiction in a new way.

JURIDICAL BASIS OF THE JURISDICTION TO ASSIST

The whole juridical basis of the jurisdiction to assist is the right and duty of the assisting court to assist the foreign court [17] and Lord Sumption found the evidence for that proposition in the reasoning in *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133.

Under the *Norwich Pharmacal* jurisdiction, a person comes under a duty to assist because he has, maybe innocently, become mixed up in the wrongdoing of another and, unless he provides the information sought, the

party claiming he has been wronged cannot identify whom to sue and/or particular important information he needs to do so. Obviously, that jurisdiction is ultimately about the vindication of private rights because the applicant is seeking information he needs to claim to enforce those rights. There is a strong public interest in allowing him to do so: see, eg, *Rugby Football Union v Consolidated Information Ltd* [2012] UKSC 55; [2012] 1 WLR 3333, per Lord Kerr at 3339A-B.

Lord Sumption considered the basis of the duty to provide information under the *Norwich Pharmacal* jurisdiction and observed that it is of a somewhat notional kind, in that it is not a legal duty in the ordinary sense of the term that would give a right to an action, eg, for damages. It is a duty on the court, he said, to make an order necessary for the administration of justice. This is achieved by satisfying the public interest in allowing the applicant to vindicate his legal rights. This enabled Lord Sumption to explain that the juridical basis for the power to provide information to assist a foreign court of insolvency jurisdiction is the same as the basis for the analogous power to order a person to provide information under the *Norwich Pharmacal* jurisdiction [23]. In other words, when the court exercises the new power it is responding to its duty to serve the ends of the due administration of justice by satisfying the public interest associated with the principle of modified universalism. That analysis provides the basis for a larger proposition that when an order to provide information is made under the *Norwich Pharmacal* jurisdiction, or under the jurisdiction to assist a foreign court of insolvency jurisdiction, the court is always responding not to a private right but to a species of public duty which exists because it is in the public interest for the order to be made. This shows that the whole juridical basis of the jurisdiction to assist is the right and duty of the assisting court to assist the foreign court.

THE LAW TO DATE

The power to order the disclosure of information and documentation by, and

the questioning of anyone, either because a foreign liquidator shows this might assist him to identify or recover assets anywhere in the world, *a fortiori*, because it would enable him to understand the company's affairs, is new. Previously, such an order could be made only where there is evidence:

- that the person ordered to provide the information or documentation has property belonging to the insolvent company; or
- of some wrongdoing by the person so ordered; or
- of some wrongdoing by another person in which the person so ordered was or is innocently mixed up [137, 147].

SUPRA-TERRITORIALITY

The jurisdiction to assist enables a court to grant assistance even if the court assisted would not have had territorial jurisdiction over the respondent and the assisting court does not have insolvency jurisdiction in any other sense, eg, ancillary winding up. Thus, the principle of assistance is in a sense supra-territorial. The theoretical justification for this arises out of the juridical basis of the duty of the court to assist, detected by Lord Sumption in the reasoning in *Norwich Pharmacal*. But there are limits to this concept of supra-territoriality in the context of cross-border insolvency, eg, in *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236, the majority considered that a change in the law relating to foreign judgments to apply a different rule, removing the need for a jurisdictional (*viz*, territorial) basis, in the context of insolvency, was a matter for the legislature [77].

THE CASE UNDER REVIEW: FACTS AND RESULT

In *Singularis Holdings Limited*, the Cayman Islands court had made an order to wind up a company incorporated in that jurisdiction (*Singularis*) and appointed liquidators over it. PwC, a registered exempted partnership in Bermuda, which was not subject to the *in personam* jurisdiction of the Cayman Islands court,

had, through its branch offices in Dubai, been the auditor of *Singularis*. The liquidators said there was a very large unexplained difference between what the company owed and the assets they identified it had and wished to obtain information from PwC to assist them to identify what, if any, assets the company had or should have had. To obtain that information they made an originating application to the Bermuda court at common law for them to be recognised there as foreign office-holders. They then applied for an order for PwC to produce documents and information. They were recognised, and the production order was granted at first instance but was overturned on appeal, whereupon the liquidators appealed to the Privy Council.

The Cayman liquidators accepted before the board that the information which they were seeking belonged to PwC and that therefore it was properly excluded from the order made by the Cayman court. Whether the liquidators were right about that was not a point argued before the board. Therefore, although the board expressed doubts that the information which PwC acquired solely in its capacity as the company's auditors could be regarded as belonging exclusively to it, simply because the documents in which it recorded that information were its working papers and as such its property, the board decided the case on the basis that the liquidators were right [30].

The Cayman court has a statutory power to order any person who was a professional service provider of the company being wound-up to transfer or deliver up documents to the liquidator, but this is limited to documents "belonging to the company": Cayman Islands, Companies Law 2012 (revision), s 103. This limitation under Cayman law meant that the liquidators were unable to fulfil the sixth condition for assistance (listed above) and for that reason the appeal was dismissed (*ie*, if the order had been made, the power would have been used to make good a limitation on the powers of the foreign court of insolvency jurisdiction under its own law).

Biog box

Marcus Staff is a barrister practising from XXIV Old Buildings, Lincoln's Inn, London. He appeared for the successful appellant in *Rubin v Eurofinance SA* [2013] 1 AC 236. Email: marcus.staff@xxiv.co.uk

POINTS TO APPRECIATE

It is important to appreciate that the power in question is entirely a common law power. It was not, therefore, a consideration relevant to its exercise that where a company is being wound up in Bermuda, the court has a statutory power at any time to summon any person to produce books or papers in his custody or power relating to the debtor company: Companies Act 1981, s 195. The existence of that statutory power was not a reason to suppose there is a legislative policy in Bermuda adverse to assisting foreign courts of insolvency jurisdiction: it simply reflects the limits of the ambit of the Act, and it does not exclude the use of the common law power in relation to other companies which lie outside the scope of the statute altogether, such as companies like *Singularis* for reasons given in para 41 of the judgment [28].

Because the juridical basis of the jurisdiction to assist does not depend on the vindication of a private right but on the fulfilment of a duty that exists solely to serve the public interest (*viz*, a public duty), the absence of a private right in the liquidators or the company should not be a bar to obtaining assistance. And so, while in the judgment under consideration the liquidators' right to assistance was blocked because the information sought did not belong to the company, it was not the absence of that right which led to the dismissal of the liquidators' application but resort to the broader principle that assistance cannot be obtained to make good a limitation under the powers of the foreign court. Accordingly, if the liquidators of a company incorporated and being wound up in Bermuda made a request at common law similar to the one made by the Cayman liquidators, the absence of a proprietary right in the company to the information would have been utterly irrelevant because s 195 of the Bermuda Act does not contain the same limitation as s 103 of the Cayman Act.

REJECTION OF APPLICATION OF LEGISLATION BY ANALOGY

The primary way in which the case was put by the liquidators was that the common law should be developed by a principle that

where legislation in the court of insolvency jurisdiction does not provide for relevant assistance to a foreign office-holder, the legislation of the assisting court should be applied by analogy "as if" the foreign insolvency were a local insolvency. All the members of the board were in agreement that this argument involved a fundamental misunderstanding of the limits of the judicial law-making power. The most detailed criticism of it is contained in the judgment of Lord Collins, who said that the adoption of the argument would have involved judges in a development of the law and their law-making powers which would have been wholly inconsistent with established principles governing the relationship between the judiciary and the legislature and therefore profoundly unconstitutional [108]. The precise reasons why the argument by analogy was held to be misconceived are not explored in this article: it is mentioned only to note that it was resoundingly rejected.

THE DISSENSION OF LORD MANCE

The liquidators' subsidiary argument on the appeal was that there exists a common law power to order information (otherwise then by analogy with local statutory powers). The response of the majority on that issue is identified above. However, in a detailed judgment, Lord Mance said that he cannot advise that the new power to grant assistance to make an order for information is permissible or appropriate and would reject that element in the liquidators' subsidiary argument. This was for reasons including:

- the scope of the proposed jurisdiction is uncertain because at one point Lord Sumption speaks of the common law power to assist a foreign court of insolvency jurisdiction by ordering the production information as being a means to assist in "identifying or locating assets" and in another of "enabling [foreign] courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers". A problem with this uncertainty is that any questioning

put, or information or documentation sought, will be scrutinised with a view to identifying assets, in whatever form, even if these consist only of potential claims for maladministration or negligence [blurring the distinction, if there be one];

- there is a "step leap" between enforcing rights to identifiable assets and obliging third parties to assist with documentation and information in order to discover a company's assets (or, still more widely, to enable insolvency practitioners to understand a company's affairs). This means that the development of the new common law power to assist by ordering the production of information is extravagant;
- there is no reason in principle why liquidators should occupy a better position in relation to the obtention of information than other claimants who would like a facility to gather information to discover or trace assets. Attempts to use the new jurisdiction to obtain information (a precious commodity) in the context of domestic insolvency or outside the context of insolvency altogether are bound to occur; and
- the *Norwich Pharmacal* jurisdiction is in and of itself an exceptional jurisdiction which should not be used to avoid wide-ranging discovery or the gathering of evidence and is strictly confined to necessary information. However, a distinction drawn by Lord Sumption between "information", which it is permissible to seek under the new power and "evidence" which is not, is likely to prove to be illusory. ■

Further reading

- What's left of the golden thread? Modified universalism after *Rubin* and *New Cap* [2012] 11 *JIBFL* 675.
- When will a court not assist a foreign insolvency proceeding? Recent experience in England, the US and Germany [2013] 3 *JIBFL* 159.
- Lexisnexis RANDI blog: R & I – pick of the cases in 2014.