**OPINIONS OF THE PRIVY COUNCIL IN**

***PRICEWATERHOUSECOOPERS v SAAD INVESTMENTS COMPANY LIMITED***

**[2014] UKPC 35 (‘*SAAD’*)**

**&**

***SINGULARIS HOLDINGS LIMITED v PRICEWATERHOUSECOOPERS* [2014] UKPC 36 (‘*SINGULARIS*’)**

**CASE NOTE**

**30 November 2014**

1. The opinions of the Privy Council in *Saad* and *Singularis* (awaited since April) have been handed down.

2. In *Singularis* the Privy Council has taken the opportunity to give further guidance on the appropriate approach to be taken by lower courts dealing with the tension between local (sometimes more restrictive) statutory provisions relating to the recognition and assistance of foreign office holders in cross-border insolvency cases and the broader common law principle of ‘*modified universalism*’ expounded by Lord Hoffman in *Cambridge Gas Transportation Corp’n v Official Committee of Unsecured Creditors of Navigator Holdings PLC* [2007] 1 AC 508 [PC].

3. This is the first opportunity for the Privy Council to give such guidance since a more restrictive approach to the principle was taken by the Supreme Court in *Rubin v Eurofinance SA* [2012] 3WLR 1019 SC. The Board sitting in the appeals (Lords Sumption, Collins, Clarke, Mance and Neuberger) was particularly well suited to providing that further guidance as all save Lord Neuberger were members of the panel in *Rubin.*

<u>*Summary*</u>

4. Both cases involved challenges to orders for production of documents by PWC, the Bermudian former auditors of Saad and Singularis. The companies in question were Cayman incorporated companies, in liquidation in Cayman. In the case of *Saad*, an ancillary order for winding up was sought and obtained in Bermuda. The Bermudian Court then made orders for production of documents under domestic insolvency legislation. In the case of *Singularis* no attempt was made to place that company in ancillary liquidation. Instead production orders were sought from the Bermudian court as a matter of judicial comity and international insolvency assistance. Those orders were made at first instance but overturned on appeal.

5. In *Saad* the Privy Council considered the question of whether and when it was possible to challenge the making of a winding up order. Although PWC did not fall within the categories of persons given a statutory right to challenge the making of the winding up order, justice in this case gave them a right to raise the point that the

winding up order had been wrongly made and, that being the case, the winding up order and the production order were set aside.

6. In *SIngularis*, the Privy Council endorsed the principle of modified universalism. That principle is that, so far as legally possible, assistance will be given by domestic courts to overseas insolvency officeholders so as to achieve the same result as if there was one universal insolvency jurisdiction. However, that principle did not enable the court to apply legislation limited in its application to domestic insolvencies, either directly or by analogy. The principle of modified universalism is subject to local law and local public policy and the court, in granting assistance, can only act within the limits of its statutory and common law powers.

7. The precise limits of the court's common law powers to assist may (as the disagreement among the panel justices demonstrated) not be easy to define in any particular area. However, as the majority determined, it did stretch so far as to enable the ordering of the provision of information, this being a development of the court's established common law discovery or disclosure powers.

8. So far as the limits of those powers are concerned, the Board stated that three important limitations are as follows. First, it is only available to assist '*public officers*' and therefore not liquidators in a voluntary winding up. Second, it is not available to enable the officeholder to do or obtain something which he could not do or obtain under the law by which he was appointed (other than because of a want of international jurisdiction in his appointing court). Third, the order has to be consistent with the substantive law and public policy of the assisting court and will thus not be available in circumstances where there are other applicable schemes (such as for the provision of information for use in actual or anticipated litigation). On the facts in this case, the order originally obtained had been obtained on the basis of impermissible forum shopping, being an order that could not have been obtained in Cayman (assuming international jurisdiction). Accordingly, the order had correctly been set aside by the Bermudian Court of Appeal.

*The orders challenged: provision of information to insolvency officeholders*

9. The cases concerns challenges by PWC to orders made by the Bermudian court pursuant to section 195 of the Bermudian Companies Act 1981 obliging it to produce books and papers in its custody or power relating to the companies and to have a partner, employee or agent acceptable to the liquidators available to answer oral or written interrogatories.[1].

10. Saad (by its liquidators) sought and was granted recognition of its Cayman appointed liquidators in Bermuda, an order winding it up ancillary to the Cayman winding up

[1] 195(1) of the Companies Act 1981 Act provides that 'at any time after the appointment of a provisional liquidator or the making of a winding up order' the Supreme Court 'may…summon before it…any person whom the court deems capable of giving information concerning the…dealings, affairs or property of the company'. Section 195(2) empowers the court to 'examine such person on oath…either by word of mouth or on written interrogatories'. Section 195(3) empowers the court to 'require such person to produce any books or papers in his custody or power relating to the company'.

and an order in the ancillary winding up obliging PWC to make extensive disclosure of documents relating to Saad, particularly disclosure of its working papers. Singularis (by its liquidators) sought and was granted recognition of its liquidators and the disclosure sought despite not petitioning for, or being in, ancillary winding up in Bermuda.

11. PWC challenged the orders contending that the Bermudian Supreme Court (i) had no jurisdiction to wind up Saad since the company was not engaged in or carrying on a trade or business, or with a place of business, in Bermuda and (ii), as Singularis was not the subject of winding up in Bermuda and the Bermudian court had no jurisdiction to wind up, and ought not to have wound up, Saad, section 195 was inapplicable in both cases. It was argued that the court had no statutory or common law jurisdiction to apply section 195 outside the confines of a Bermudian liquidation either directly or '*by analogy*' to assist foreign officeholders.

*The Bermudian Court of Appeal decision*

12. Acting JA Bell, giving the judgment of the majority in the Bermudian Court of Appeal, concluded that the production order granted in favour of Saad should stand on the basis that PWC was out of time to challenge the validity of the winding up order and so should not be permitted to challenge as ultra vires an order made under it.

13. As to Singularis, he concluded that the order granted in its favour should be set aside for the following reasons:

'*One is…looking at a winding-up order made in the Cayman Islands of a Caymanian company with only the most tenuous links to Bermuda; that is was audited by the Dubai office of a Bermuda exempted partnership. Such a connection would not found jurisdiction in Bermuda against SHL, and it does not seem to me that it should lead to the making of an order under or analogous to section 195 of the 1981 Act by way of cross-border insolvency assistance, in circumstances where the Join Liquidators are unable to secure an equivalent order in the Cayman Islands.*[2] *To make such an order on the basis of the auditors' connection to Bermuda seems to me to represent unjustifiable forum-shopping, and I would therefore allow the appeal against the as against the SHL order*.'

14. In giving our talk at this year's XXIV Caribbean conference, we considered whether the Bermudian court could properly use the principle of modified universalism at common law to make the disclosure orders, even if it had no statutory jurisdiction to grant the relief sought by Saad and Singularis against PWC.

15. We suggested that, following *Rubin*, the Privy Council was likely to conclude that common law recognition was insufficient, without more, to enable a foreign

[2] The Bermudian statutory provisions enabled to court to make much wider orders in Bermuda, encompassing information 'relevant' to the company and concerning its property affairs or business. The Cayman court, on the other hand, under s103 of the Cayman Islands Companies Law, only had power to order transfer or delivery up to liquidators of 'property or documents belonging to the company'. It was assumed that the working papers of PWC did not 'belong' to the companies although that was a conclusion that the Privy Council questioned.

officeholder to '*tap into*' a local statutory insolvency scheme and be treated as having the same standing to apply for orders as a locally appointed liquidator. An ancillary winding up should be necessary in order to obtain such relief. Even if such relief was granted in the context of an ancillary winding up, the local court was obliged to apply its local law but, as the jurisdiction was discretionary, it was open to the local court to ensure that the foreign liquidator did not obtain wider orders than he could have done in his home court.

*The Privy Council's opinion: Saad*

16. The issue before the Privy Council in PWC's appeal in *Saad* was whether the Supreme Court had *statutory* jurisdiction to wind up Saad in Bermuda in the first place and, if it did not, whether the Bermudian disclosure order made under section 195 of the Bermudian Companies Law 1981 could stand given that it was wider than the liquidator could have obtained in his home court in Cayman.

17. The Board allowed PWC's appeal and set aside the Bermudian winding up order using its statutory power in section 184(1) of the Companies Law 1981 with the result that the section 195 order was discharged.

18. Setting out the unanimous opinion of the Board, Lord Neuberger noted that the Bermudian court's jurisdiction to wind up companies was purely statutory. The Board's opinion was that, on the proper construction of the relevant statutory provisions of the Bermudian Companies Law 1981 and the External Companies (Jurisdiction in Actions) Act 1885, the Supreme Court had no jurisdiction to wind up an overseas company which did not trade or carry on business in Bermuda. Saad was such a company and the Supreme Court had no jurisdiction to wind it up.

19. The Board's opinion is of interest to company and insolvency practitioners as it is authority for the proposition that, in appropriately exceptional circumstances, a '*stranger*' to a winding up (as was PWC, being neither the company itself, the Official Receiver, a liquidator, contributory or creditor) may have standing to challenge a winding up order even where the statutory scheme does not (as section 184 did not) provide for an application to stay a winding up order to be made by a stranger.

20. The Board's opinion is founded on the common law principle of natural justice that a person whose rights are to be affected by a decision of the court should have a right to be heard.

21. These were just such exceptional circumstances. The challenge to the winding up order was based purely on jurisdiction and the sole ground for making the winding up order was to obtain relief against PWC. It would be a breach of natural justice if PWC was denied the opportunity of challenging the petition. On the very unusual facts of the case PWC had the right to be added as a party to the petition.

22. It followed that, as PWC had not been given notice of the petition hearing, it should be entitled to raise the question whether the Supreme Court had jurisdiction to make the winding up order on appeal. The Court of Appeal had jurisdiction to add, and should have added, PWC as a party to the winding up proceedings, given it

permission to appeal out of time against the making of the winding up order, acceded to its argument that the order was made without jurisdiction and set it aside.

23. Even if the Board had concluded that the winding up order should remain in place, in the exceptional circumstances of the case, PWC would still have been entitled to have the section 195 order set aside. As the winding up order should not have been made in the first place and PWC had no opportunity to challenge it in the petition proceedings, it would represent a serious breach of its rights if it could not at least rely on the fact that there had been no jurisdiction to make the winding up order as a reason for denying Saad relief under section 195.

*The Privy Council's opinion: Singularis*

24. Singularis appealed against the Court of Appeal's decision to set aside the production order against PWC. It contended that Kawaley CJ at first instance had been correct to exercise a common law power by application of or '*by analogy with the statutory powers contained in section 195 of the Companies Act*' to order the production of information as if its provisions applied to an application by an overseas liquidator.

25. It followed that the Chief Justice had been correct (i) to order PWC to produce the same documents which it could have been ordered to produce under section 195 and to have a partner, employee or agent acceptable to the liquidators available to answer oral or written interrogatories and (ii) to give leave to Singularis to serve the proceedings on PWC out of the jurisdiction.

26. Only at a late stage in argument did Singularis adopt and, even then, only as a secondary ground of appeal, the contention that the court had a purely common law power to make the orders.

27. Notwithstanding that, the Privy Council dealt with the appeal principally be reference to whether or not the Bermudian court had a purely common law power to make the orders that it did.

28. The Board considered the following two issues: (i) whether the Bermudian court had a common law power to assist a foreign liquidation by ordering the production of information in circumstances where (a) the Bermudian court had no power to wind up the overseas company in question and (b) its statutory power to order the production of information was limited to cases where the company had been wound up in Bermuda; and (ii) whether, if such a power existed, it was exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation was proceeding.

*The opinion of the majority (Sumption, Collins and Clarke SCJJ)*

29. As to the first issue, Lord Sumption was of the opinion that the question of what, if any, power the Bermudian court had to assist a foreign liquidation in the absence of any statutory power to order an ancillary liquidation in Bermuda must depend on the nature of the assistance sought and the extent to which it was available at common law, either as a matter of established precedent or as a matter of appropriate

incremental development of the common law.

30. As a matter of the application of the ordinary principles of private international law, the Bermudian court could, like the English court, recognise as a matter of comity the vesting of the company's assets in an officeholder appointed under the law of its incorporation and use its own statutory powers in an ancillary winding up or at common law to assist the foreign officeholder if there were no local ancillary liquidation.

31. Lord Sumption noted that *Cambridge Gas* was the furthest courts had gone in developing the common law powers of the court to assist a foreign liquidation. To the extent that it was correct, the case was authority for three propositions. The first was the principle of modified universalism, namely that the court had a common law power to assist foreign winding up proceedings so far as it properly could. The second was that this included doing whatever the local court could properly have done in a domestic insolvency. The third (which was implicit in the second) was that this power was itself the source of its jurisdiction over those affected, and that the absence of jurisdiction in rem or in personam over the parties or the subject matter of the dispute according to ordinary common law principles was irrelevant.

32. The first proposition from *Cambridge Gas* was sound (the Board was unanimous on this point). The existence of the principle of modified universalism had not been questioned in any of the cases.

33. Lord Sumption went on to state that the Board took the view that the principle of modified universalism was part of the common law, but it was necessary to bear in mind, first, that it was subject both to local law and local public policy and, secondly, that the court could only ever act within the limits of its own statutory and common law powers.

34. Lord Sumption considered, for the reasons given in Lord Collins' opinion, that the second proposition derived from *Cambridge Gas* – that the local court could and should assist in whatever way it could properly have done in a domestic insolvency in circumstances where there was no local insolvency – was wrong. Accordingly, the third proposition (that this power itself founded the local court's jurisdiction) fell away.

35. The local court could not do '*whatever it could have done in the case of a domestic insolvency*' in order to apply insolvency legislation by analogy '*as if*' it applied when the legislature had provided that it did not apply.

36. Lord Collins' reasoning was as follows. There is a principle of the common law that the court have power to recognise and grant assistance to foreign insolvency proceedings but that power is to be exercised through the existing powers of the court. While those powers can be extended and developed through the traditional judicial law-making techniques of the common law, to apply insolvency legislation by analogy '*as if*' it applied, even though it did not actually apply, would go so far beyond the transitional judicial development of the common law as to be a plain usurpation of the legislative function.

37. Singularis' argument was not only wrong in principle, but also profoundly contrary to the established relationship between the judiciary and the legislature. To the extent that its reasoning depended on *Cambridge Gas*, that decision had been wrong to apply the Manx statutory provisions for approval of schemes of arrangement by analogy or '*as if*' they applied.

38. The Privy Council had rightly taken the contrary approach in *Al Sabah v Gruppo Torras SA* [2005] UKPC 1, [2005] 2 AC 333 in advising that the Caymanian court had no power to apply the Bankruptcy Law '*in circumstances not falling within*' that law. In that case the trustee in bankruptcy of a debtor in the Bahamas obtained from the Bahamian court a letter of request directed to the Grand Court of the Cayman Islands seeking its aid in setting aside two Cayman trusts established by the debtor. In Lord Walker's opinion:

> *'The respondents relied in the alternative…on the inherent jurisdiction of the Grand Court. This point was not much developed in argument and their Lordships can deal with it quite shortly. If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope.'*

39. It followed in Lord Collins' view that those courts which had relied on *Cambridge Gas* as authority permitting them to apply legislation which the legislature had not itself seen fit to apply were wrong, including the decision of the Chief Justice in the present case at first instance. To have allowed the appeal on the basis of the liquidators' primary 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.

40. Having adopted Lord Collins' reasoning, Lord Sumption went on to state that, in the absence of a relevant statutory power, the court's powers depended on the state of the common law, including any proper development of it and went on to examine the extent to which it was appropriate to develop the common law further. It depended on the nature of the power that the court was being asked to exercise in the particular case. The present case depended on whether the Bermudian court had a power at common law to compel the production of information required for the performance of the liquidators' ordinary duties.

41. Lord Sumption noted that the courts had never been inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy called for it. He referred to the *Norwich Pharmacal* jurisdiction to illustrate the capacity of the common law to develop a power in the court to compel the production of information when necessary to give effect to a

recognised legal principle. In the Board's majority opinion an analogous power arose in the *Singularis* case.

42. In this particular case, the liquidators required the information sought for the performance of their ordinary functions attaching to that status. The recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

43. Lord Sumption cited two cases in which an order for the production of documents or information had been made by way of common law assistance to a foreign court as correct in principle: *Moolman v Builders & Developers (Pty) Ltd* [1989] ZASKA 171 (Supreme Court of South Africa) and In re *Impex Services Worldwide Ltd* [2004] BPIR 564 (High Court of the Isle of Man).

44. Lord Sumption concluded that it was the Board's opinion that there was an existing power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information necessary for the administration of a foreign winding up.

45. As to the second issue, namely whether the power was exercisable in order to grant Singularis a wider order than it could obtain against PWC in the Cayman court where the liquidation was proceeding, Lord Sumption stated that the Board's view was that it was not.

46. The purpose of the common law power to order the production of information was to assist the officer of the Cayman court to transcend the *territorial* limits of that court's jurisdiction by enabling them to do in Bermuda that which they *could* do in the Cayman Islands but the Board did not consider it a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law. (On this point, the minority of the Board agreed with the majority).

47. On that basis the majority of the Board (Lords Sumption, Collins and Clarke) upheld the decision of the Court of Appeal and dismissed Singularis' appeal.

*Concerns of the minority (Lords Mance and Neuberger SCJJ)*

48. Lord Mance and Lord Neuberger also considered that Singularis' appeal should be dismissed but disagreed with Lord Sumption as to the extent of the common law power to order a party to come before the court to give information. Lord Sumption set out the common law power (the '*Power*') in the following terms at paragraph 25 of the judgment:

> *In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up…The limits of this power are implicit in the reasons for recognising its existence. In*

*the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction…Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation…that such an order must be consistent with the substantive law and public policy of the assisting court. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information…common law powers of this kind are not a permissible mode of obtaining material for use in actual of anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence…Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency.*

49. Lord Mance considered it unfortunate that the appeal in Singularis had not been disposed of on the narrower ground, on which all were agreed, that, whether or not the Power existed, Singularis was not entitled to an order granting the provision of information from PWC which was considerably wider than the Caymanian court could have granted in the main liquidation.

50. It was unfortunate that the Board had dealt with the question of the common law 'Power' given the limitations in the way in which it had been argued at all lower stages. Singularis had not contended for such a power either before the Court of Appeal or in applying for permission to appeal to the Board. Neither Kawaley CJ nor the Court of Appeal had addressed any observations to the question whether the Power existed, or if it did, whether it could properly be exercised to make orders against and serve officers of PWC outside the jurisdiction of the Bermudian Court on pain of sanction for non-compliance.

51. Lord Mance considered that the order for the production of information made in favour of Singularis' liquidators went well beyond the court's jurisdiction at common law to order persons based in other jurisdictions to appear before it to produce information. As well as ordering PWC in the Bahamas to provide very wide ranging information, the order had also required PWC to produce a partner on 10 days' notice to meet the liquidators to be examined and had given leave to serve the order upon and require attendance by officers of PWC out of the jurisdiction on pain of sanction if they failed to comply.

52. The analogy with the *Norwich Pharmacal* jurisdiction was, in Lord Mance's opinion, a bad one. Singularis' case was merely that PWC had documents and information which it would help Singularis' liquidators to have, there was no allegation that PWC had themselves done anything wrong or that they had been mixed up in any third party's wrongdoing.

53. Lord Mance concluded:

*'In these circumstances, and although anything said may be obiter, I am not at present persuaded that it is appropriate to extend the common law power to assist by ordering the provision of information beyond categories which have some recognisable basis in current law, that is cases where there is (a) evidence that the person ordered to provide the information or documentation has property belonging to the insolvent company, or (b) evidence of some wrongdoing by the person so ordered or (c) evidence of some wrongdoing by another person in which the person so ordered was or is innocently mixed up. A general common law power to order the disclosure of information and documentation by, and the questioning of, anyone, either because a foreign liquidator shows that this may assist him identify or recover assets anywhere in the world or, a fortiori, because it would enable him understand the company's affairs, goes not only beyond anything which it is necessary to contemplate on this appeal, but is also beyond anything that I can, as at present advised, regard as permissible or appropriate.'*

54. Lord Neuberger stated that while he agreed with the opinion of Lord Collins, and otherwise agreed with the opinion of Lord Sumption, if it had been necessary (which it was not) for the purposes of the appeal to decide whether or not the Power existed he would have agreed with Lord Mance that it did not.

55. He expressed concern that the majority of the Board, in the course of rejecting Lord Hoffman's approach in *Cambridge Gas* as involving an impermissible arrogation by the court to itself of radical new common law powers, was at risk of simply setting up different radical new common law powers beyond the scope of its jurisdiction.

56. Lord Neuberger took the view that it would be better for the Board to approach any case in this field with a view to deciding it on a '*relatively minimalist*' basis, rather than by seeking to lay down general principles which were not necessary to determine, particularly when those principles involved extending the court's powers in a way which may have substantial ramifications. He said this:

'*The extreme version of the 'principle of universality', as propounded by Lord Hoffmann in Cambridge Gas, has, as Lord Sumption explains, effectively disappeared, principally as a result of the reasoning of Lord Collins speaking for the majority in Rubin, and speaking for the Board in this appeal. However, as with the Cheshire Cat, the principle's deceptively benevolent smile still appears to linger, and it is now invoked to justify the creation of this new common law Power. It is almost as if the Board is suggesting that, while we went too far in Cambridge Gas and should pull back as indicated in Rubin, we do not want to withdraw as completely as we logically ought. In my view, the logic of the withdrawal from the more extreme version of the principle of universality is that we should not invent a new common law power based on the principle.*'

*Conclusion*

57. The majority view of the Privy Council was that (i) the Bermudian court did have a common law power to assist a foreign liquidator of a company in

compulsory liquidation by ordering the production of information, in circumstances where (a) the Bermuda court had no power to wind up the overseas company in question and (b) its statutory power to order the production of information was limited to cases where the company had been wound up in Bermuda; but that (ii) such a power was not exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding (for these purposes leaving aside any territorial limitation on its powers).

58. The minority opinions of Lord Mance and Lord Neuberger highlight interesting questions as to the extent of this common law jurisdiction which will no doubt be worked out in the course of further litigation.

*And what about Primeo?*

59. In *Picard v Primeo Fund* FSD 275 of 2010 (Cayman Grand Court), Jones J had considered whether it was open to the court to exercise its discretion to grant relief by way of assistance by making transaction avoidance orders at common law in favour of Mr Picard, the liquidator of Bernard L Madoff Investment Securities, by applying section 145 of the Companies' Law (voidable preferences – application of local law) by analogy with or '*as if*' it applied to an overseas liquidator. Jones J had decided that that the Cayman court was able to apply the Cayman voidable preferences provision of its law to the payments in question on the authority of *Cambridge Gas.*

60. Given that the extent of the common law jurisdiction to assist foreign officeholders was soon to be considered by the Privy Council in *Saad* and *Singularis*, the Cayman Court of Appeal stood over the issue of whether the court had jurisdiction at common law to apply transaction avoidance provisions of Cayman Islands' insolvency law in aid of a foreign insolvency proceeding. The appeal in *Primeo* on this point subsequently settled.

61. Having concluded that courts that had relied on Cambridge Gas to apply legislation that the legislature had not itself seen fit to apply were wrong, Lord Collins went on to confirm that the decision of Jones J on that aspect of the *Primeo* case had also been wrong. It was not open to the Caymanian court to apply section 145 of the Companies' law in circumstances where the legislature itself had not seen fit to apply the provision in favour of foreign, as opposed to locally appointed, liquidators.

*Observations*

62. The acceptance and re-statement of the principle of modified universalism at common law are likely to be welcomed. However, in many jurisdictions, the common law will be of little relevance given the widespread adoption of other statutory regimes implementing international co-operation, such as the Model Code.

63. The limits of the principle are going to be largely defined by the limited availability of relevant common law powers. The common law is not going to be developed to

permit enforcement of judgments outside the usual statutory and hitherto understood common law limits. Further, it is not going to be developed to cover the setting aside of transactions in insolvency: although it will be interesting to see if historical research unearths some common law power as a predecessor to the statute of Elizabeth, now manifested in what in England and Wales is section 423 of the Insolvency Act 1986 (transactions defrauding creditors). This may mean that assistance is going to largely be limited to staying proceedings and ordering the production of information.

64. Lord Sumption's opinion raises some uncertainties at the edges of the common law power that he has recognised. For example, why is assistance (and is assistance generally) limited to compulsory winding up or other court based procedures? Even if it is, on which side of the line do winding up subject to supervision (which survives e.g. in Gibraltar) and administrations outside court lie? Finally, in the information gathering context, has Lord Sumption re-created the rigid demarcation line thought to have been created by *Re Castle New Homes* [1979] 1 WLR 1075 and which was perceived as less absolute after *Re Cloverbay Limited (No 2)* [1991] Ch 90.

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