

BERMUDA PRIVY COUNCIL

PricewaterhouseCoopers (Bermuda exempted partnership No. 7420) -v- (1) Saad Investments Company Limited [2014] UKPC 35 (10 November 2014)

Singularis Holdings Limited -v- PricewaterhouseCoopers (Bermuda exempted partnership No. 7420) [2014] UKPC 36 (10 November 2014)

CROSS-BORDER INSOLVENCY - WINDING UP - DISCLOSURE SOUGHT BY FOREIGN LIQUIDATORS - JUDICIAL ASSISTANCE - EXCESS OF JURISDICTION - EXTENT OF COMMON LAW WHERE EXISTING STATUTE - STANDING - PUBLIC POLICY - MODIFIED UNIVERSALISM

In the *Singularis* case, the Privy Council (Lords Neuberger, Mance, Clarke, Collins and Sumption) delivered an important Judgment: (1) about the jurisdiction of the Bermuda court to assist foreign liquidators by ordering the production of documents and information by persons in Bermuda and (2) defining the common law powers of assistance to foreign liquidators. The interplay or conflict between the decisions of the Privy Council and the UK Supreme Court in *Cambridge Gas -v- Navigator* [2007] 1 AC 508, *Rubin -v- Eurofinance* [2012] UKSC 46 and *Al Sabah -v- Grupo Torras* [2005] 2 AC 333 has been a source of great debate and litigation in the world of cross-border insolvency. The Privy Council has now provided clarity to this area of the law.

In summary:

1. The Bermuda court has no general jurisdiction under the *Companies Act, 1981* or at common law to wind up foreign companies that do not conduct business in Bermuda;
2. “Modified Universalism” is part of the common law and there is a common law power to assist foreign liquidators, inter alia, by ordering the production of documents and information, but this power has the following limits:

- a. Firstly, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It is not available to assist a voluntary winding up that is not conducted by or on behalf of an officer of the courts.
- b. Secondly, it is a power of assistance. It exists for the purpose of enabling courts to surmount the problems posed for a worldwide winding up of the company’s affairs by the territorial limits of each court’s powers. It is not available to enable office-holders to do something which they could not do even under the law by which they were appointed.
- c. Thirdly, it is available only when it is necessary for the performance of the office-holder’s functions.
- d. Fourth, the power is subject to the limitation in *In Re African Farms Ltd*, in *Re HIH Casualty and General Insurance Ltd* and *Rubin*, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda.

PricewaterhouseCoopers (“PwC”) is a Bermuda exempted partnership with its registered office in Bermuda. It is a different legal entity to the PricewaterhouseCoopers Bermuda auditing

firm. Through its Dubai branch, PwC audited two Cayman companies, Saad Investments Company Limited (“SICL”) and Singularis Holdings Ltd. (“Singularis”). PwC did not have any office or other physical presence in Cayman. The Cayman court ordered the compulsory winding up of SICL and Singularis, and Joint Provisional Liquidators (“JPL”) were appointed in Cayman in 2009. Production orders were made against PwC as former auditors in Cayman, that were complied with. The Cayman orders did not and could not require PwC to produce its own working papers (merely documents that were the property of SICL and Singularis).

Some three years after the Cayman winding up orders, in 2012 the JPLs obtained an ancillary winding up order in Bermuda against SICL. They subsequently obtained ex-parte orders against PwC (1) under s195 of the *Companies Act, 1981* requiring the production of extensive documentation relating to SICL, including the auditor’s working papers and the response to interrogatories and (2) at common law against both SICL and SHL requiring the production of substantially the same extensive documentation and interrogatories. PwC challenged the making of these orders, and was unsuccessful at first instance before Kawaley CJ.

PwC appealed to the Bermuda Court of Appeal and was partially successful. Both sides appealed to the Privy Council in two separate appeals. The question whether the Bermuda Court has power at common law and under Bermuda statute to grant assistance in cross-border insolvencies arose for determination. The position was complicated by the fact that Bermuda has no statutory regime similar to that contained in Section 426 of the (English) *Insolvency Act, 1985*, expressly permitting assistance to foreign liquidators.

The two decisions of the Privy Council are complex and the law discussed is difficult.

In the SICL decision, the Privy Council held that the statutory company law regime in Bermuda did not enable the Bermuda courts to wind up foreign companies that were not doing business in Bermuda. This Judgment overturns Bermuda case-law to the contrary going back some 10 years.

In the Singularis decision, the Privy Council held by a majority (Lords Sumption, Clarke and Collins) that “modified universalism” means that while there is indeed a common law power in Bermuda to assist a foreign liquidator by making document and information production orders, that power is not unlimited. The limits on the power are as set out above. Of particular significance for the present case was the fact that

under the Cayman legislation governing their functions, the Cayman liquidators could only obtain production orders in Cayman for documents and records that were the property of the company. An auditor’s working papers are not the property of the company and therefore cannot be obtained in Cayman. The common law power in Bermuda cannot be used to extend the powers of the liquidator to enable him to obtain the auditor’s working papers.

The minority judgments in Singularis (Lords Neuberger and Mance) held that there was no general common law power in Bermuda to order the production of documents or information in aid of a foreign liquidation.

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