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The Waxing and Waning of the Tides: From the Isle of Man to Bermuda

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Introduction

1 It is an honour to make a small contribution to the Festschrift for Emeritus Professor Ian F Fletcher QC; if I may say so respectfully, an inspirational leader in the field of cross-border insolvency law. While Professor Fletcher may not remember the occasion, I first had the opportunity of meeting him at his office at the University of Aberystwyth, on a wild and wet Welsh day, back in about 1990. I have enjoyed the (unfortunately) infrequent contact that has continued since that time, both while Professor Fletcher was a Visiting Lecturer at the University of Auckland and at various international conferences. By chance, when Professor Fletcher was in Auckland, I was conducting a late evening hearing on a cross-border insolvency issue, which he was good enough to attend. I cannot recall his view on the quality of the decision that I gave!

The Topic

2 My topic is the apparent waning of the common law tide that was thought to be flowing towards a globalist approach to cross-border insolvency. That approach had been articulated by the Privy Council in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings PLC*.¹ In giving the advice of the Privy Council, Lord Hoffmann made reference to one of Professor Fletcher's own writings.²

3 There has been a retreat from the more general propositions advanced in *Cambridge Gas*. In 2012, in *Rubin v Eurofinance SA*,³ the Supreme Court of the

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¹ *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings PLC* [2006] UKPC 26, [2007] 1 AC 508.

² *Ibid.*, at paragraph 18, citing I. Fletcher, *Insolvency in Private International Law* (1999, Oxford University Press, Oxford), at 93.

³ *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236.

United Kingdom questioned the premise on which *Cambridge Gas* had been determined; indeed, a majority of the Court was prepared to say that it had been wrongly decided. In 2014, the Privy Council rejected the ability of a court to develop the common law to provide relief of the type given in *Cambridge Gas*: see *Singularis Holdings Ltd v PricewaterhouseCoopers*.⁴ As a result, *Cambridge Gas* can no longer be regarded as good law.

4 I write on the important questions arising from the Privy Council's decision in *Singularis* from the perspective of a first-instance judge with an interest in the way in which such issues should be addressed on applications that will often require prompt resolution. A full academic critique would require a thorough analysis of the various policy considerations at play, and the authorities to which reference has been made in the cases. My intention is to do no more than to offer some thoughts on an issue that did not receive particular attention in *Singularis*. Time does not permit a more expansive approach. That task must be left for another day.

Cambridge Gas

5 *Cambridge Gas* was an appeal to the Privy Council from a decision of the Staff of Government Division of the High Court of Justice of the Isle of Man. The question was whether the High Court had jurisdiction to make an order giving effect to a plan approved by the Bankruptcy Court of the Southern District of New York under Chapter 11 of the Bankruptcy Code (US). The object of the plan was to enable the relevant entity to be reorganised for the benefit of its creditors.

6 A Letter of Request was issued by the Bankruptcy Court, in which it sought assistance from the Manx Court to give effect to "the plan and the confirmation order". The Privy Council held that a collective insolvency proceeding was neither *in rem* nor *in personam*, but *sui generis*. For that reason, it considered that such cases should be treated differently, for the purposes of private international law, from an adversary proceeding in which one person seeks to establish a private right against another.

7 Drawing on what had been said by Innes CJ in the Supreme Court of the Transvaal in *Re African Farms Ltd*,⁵ the Privy Council stated that:

"the underlying principle of universality is of equal application [to corporate insolvency] and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company *as entitled to do so in England*." (emphasis added)⁶

⁴ *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36.

⁵ *Re African Farms Ltd* 1906 TS 373, at 377.

⁶ *Cambridge Gas*, at paragraph 20.

8 The Privy Council took a broad view of the Manx Court's ability to develop common law principles in order to apply a universal approach. The rationale for that approach was that:

"bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them."⁷

9 From that proposition, the Privy Council held that the:

"English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application",

so that, for practical purposes, a single bankruptcy exists:

"in which all creditors are entitled and required to prove."⁸

Rubin

10 The judgments of the Supreme Court of the United Kingdom in *Rubin* reflect decisions on two distinct appeals. The issue for decision was relatively narrow.

11 The first, *Rubin v Eurofinance SA*, was an appeal against a decision of the Court of Appeal which allowed a default judgment of the Bankruptcy Court for the Southern District of New York to be enforced at common law. The Bankruptcy Court, in default of appearance, had set aside fraudulent conveyances with a value of about USD 10 million. The other, *New Cap Reinsurance Corporation Ltd v Grant*, concerned a default judgment given by the Equity Division of the Supreme Court of New South Wales for about USD 8 million in respect of unfair preferences under Australian law. The question in both appeals was whether the foreign judgment could be enforced in England.

12 A question was whether the principle of "universality" espoused in *Cambridge Gas* could be given effect, notwithstanding orthodox rules of private international law which provide limited circumstances in which default judgments given in one jurisdiction may be enforced in another. In giving his judgment, Lord Collins (with whom Lord Walker and Lord Sumption agreed) referred to *Cambridge Gas*, and to Lord Hoffmann's later speech in the House of Lords in *Re HIH Casualty and General Insurance Ltd*.⁹

13 Lord Collins expressed concern that Cambridge Gas was a company incorporated in the Cayman Islands which had not submitted to the jurisdiction of

⁷ *Ibid.*, at paragraph 15.

⁸ *Ibid.*, at paragraph 16.

⁹ *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852.

the US Bankruptcy Court.¹⁰ He took the view that the judgments in issue were *in personam* and that no separate rule could be developed for the enforcement of judgments arising out of collective insolvency proceedings in another jurisdiction.¹¹ His Lordship considered that there was no prior authority to support a separate rule for collective insolvency proceedings; indeed, he expressed the view that what authority existed ran counter to it. I think it is fair to say that Lord Collins regarded the reasoning in *Cambridge Gas* as conclusory in nature. In his own words, he considered that the decision had:

“all the hallmarks of legislation, and [development of the law] is a matter for the legislature and not for judicial innovation.”¹²

14 So far as outcome was concerned, the Supreme Court took the view that Eurofinance had not submitted to the jurisdiction of the United States Court and there was no other basis on which a default judgment could be enforced. A different conclusion was reached on the *New Cap* appeal because there was jurisdiction under relevant reciprocal enforcement of judgments legislation for the orders of the Supreme Court of New South Wales to be enforced, and there had been a submission to the jurisdiction of the Australian Court.¹³

15 I do not see any real problem in practice as a result of the *Rubin* decision. It does no more than reinforce the need to apply orthodox principles of private international law when considering whether a default judgment may be enforced in another jurisdiction, even where the proceeding in which judgment was entered arose out of a collective insolvency regime. It is difficult to gainsay the Supreme Court’s conclusion that no legitimate distinction can be drawn between collective proceedings and those brought to establish private rights. After all, the preference proceedings were brought by the insolvency representative to establish a right to recover money from the alleged preferred creditor. The fact that the fruits of the successful judgment would be distributed rateably among creditors proving in the bankruptcy seems to be beside the point.

Singularis

16 *Singularis* must be read in conjunction with the companion decision of the Privy Council in *PricewaterhouseCoopers v Saad Investments Co Ltd*.¹⁴ Both *Saad* and *Singularis* arose out of the liquidations of related companies in the Cayman Islands. Both companies had had assets frozen by monetary authorities in Saudi Arabia.

¹⁰ *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236, at paragraphs 36–48.

¹¹ *Ibid.*, at paragraphs 105–128.

¹² *Ibid.*, at paragraph 129.

¹³ *Ibid.*, at paragraphs 168–169 and 170–177.

¹⁴ *PricewaterhouseCoopers v Saad Investments Co Ltd* [2014] UKPC 35, [2014] 1 WLR 4482 (unbound).

One of their bankers, Barclays Capital, sought to recover advances in excess of USD 2 billion that it had made.¹⁵

17 Saad was incorporated in the Cayman Islands. A winding up order was made in that jurisdiction. An order was obtained from the Grand Court of the Cayman Islands to enable liquidators to obtain access to documents held by its auditors, PricewaterhouseCoopers. That firm was registered as an exempted partnership in Bermuda. Although PricewaterhouseCoopers purported to comply with the order, the liquidators remained dissatisfied with the information provided.

18 As a result, the liquidators petitioned the Supreme Court of Bermuda for an order winding up Saad in that jurisdiction. That was done to gain the benefit of examination provisions contained in the Companies Act 1981 (Bermuda) against the auditors in their home base. After a winding up order was made, the Supreme Court made a further order requiring representatives of PricewaterhouseCoopers to attend for examination and to produce all documents in their possession. Although not heard on the winding up application, PricewaterhouseCoopers was given standing to challenge the validity of the order on appeal.

19 The Privy Council held that the Supreme Court of Bermuda did not have jurisdiction to make a winding up order, meaning that the examination and production orders were rendered nugatory. The reason why the Court lacked jurisdiction was because it did not have power to wind up an “overseas company” under the law of Bermuda, even though courts in other jurisdictions may do so.¹⁶

20 The same liquidators had been appointed by the Grand Court when *Singularis* was ordered to be wound up. However, in *Singularis*, the liquidators took a different tack. Rather than seeking a winding up order in Bermuda, they sought assistance from the Bermuda court in the form of an examination and production order. This was done by asking the Supreme Court of Bermuda to recognise their appointment by the Grand Court and to exercise what was termed a common law power “by analogy with the statutory powers contained” in the Bermuda statute.¹⁷

21 The issue in *Singularis* was whether such a common law power existed. In giving the principal judgment, Lord Sumption accepted that a principle of “modified universalism” applied. In other words, subject to pragmatic and policy considerations, common law courts would normally endeavour to take a universal approach, along the lines indicated in *Cambridge Gas*. In endorsing that principle Lord Sumption referred to a speech given by Lord Hoffmann in *Re HIH Casualty*

¹⁵ The background is set out in the advice of the Privy Council in *Saad* given by Lord Neuberger, at paragraphs 2–6.

¹⁶ *Saad*, at paragraphs 14–23.

¹⁷ *Singularis*, at paragraph 6.

and *General Insurance Ltd*,¹⁸ in which reliance was placed on both *Cambridge Gas* and Professor Fletcher's text, *Insolvency in Private International Law*.¹⁹ Lord Sumption acknowledged that the principle of "modified universalism" had not been "discredited".²⁰ He observed that it had been accepted by Lord Phillips, Lord Hoffmann and Lord Walker in *HIH*, and by Lord Collins, Lord Walker and himself in *Rubin*.

22 The Privy Council, in *Singularis*, accepted that the principle of modified universalism was part of the common law, subject to two qualifications. First, it is subject to "local law and local public policy". Second, the court providing assistance:

"can only ever act within the limits of its own statutory and common law powers."²¹

23 Acknowledging that the question how far it is appropriate to develop the common law in such circumstances did "not admit of a single, universal answer", the Privy Council "[confined] itself to the particular form of assistance" sought in *Singularis*; namely, an order for production of information from an entity within the jurisdiction of the Bermuda court.²²

24 The Privy Council accepted that a common law power existed:

"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."

25 Nevertheless, Lord Sumption added that:

"the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information".

26 An express limitation of the common law power was that it could not be used to enable the liquidators to do something which they could not do under the law by which they were appointed.²³ As a result, the Privy Council held that the relief sought in Bermuda was not within the power of the Supreme Court of Bermuda to give because the:

"material which [the liquidators] seek in Bermuda would not be obtainable under the law of the Cayman Islands pursuant to which the winding up is being carried out there."²⁴

¹⁸ *Re HIH*, at paragraphs 6, 7 and 30.

¹⁹ Fletcher, above note 2, at 15–17.

²⁰ *Singularis*, at paragraph 19.

²¹ *Idem*.

²² *Idem*.

²³ *Ibid.*, at paragraph 25.

²⁴ *Ibid.*, at paragraph 29.

27 In a separate judgment, Lord Collins identified five propositions that provided an adverse answer to the application of the joint liquidators to examine persons in Bermuda who had been involved in the audit of *Singularis*, and for them to produce documents for the liquidators' consideration. They were:²⁵

- (a) A court in a common law jurisdiction has power to recognise and to grant assistance to foreign insolvency proceedings;
- (b) That power is exercised primarily through existing powers of the assisting court;
- (c) Those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law;
- (d) The very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply;
- (e) As a result, those powers do not extend to the application, by analogy, of powers that could have been exercised if the foreign insolvency were a domestic insolvency.

28 Lord Collins accepted that the problem in *Singularis* tended to arise:

“largely in relation to those British colonies, dependencies, and overseas territories, such as Bermuda and the Isle of Man, which do not have the statutory powers to assist foreign officeholders which exist under United Kingdom law.”

29 That meant that:

“the practical result of [the *Singularis*] appeal [was] largely confined to such countries, or those countries (such as the Cayman Islands) where the extent of the statutory powers is controversial.”²⁶

30 In agreement with Lord Sumption on this issue, Lord Collins opined that, while the Bermuda court had power to make an order, on the application of foreign liquidators, for examination and production of documents against persons who were subject to its personal jurisdiction (in order to identify and locate assets of the company), it could do so only if the liquidators possessed a similar right under the domestic law of the court which appointed them.²⁷

31 The decisions in *Singularis* and *Saad* raise fundamental concerns. They directly challenge the ability of a court in a common law jurisdiction to develop the law in a manner designed to assist an officeholder in a collective insolvency regime in a different jurisdiction to gather in assets for the benefit of all creditors.

²⁵ *Ibid.*, at paragraph 38.

²⁶ *Ibid.*, at paragraph 42.

²⁷ *Ibid.*, at paragraph 33.

Context

32 Nothing is overseas anymore.²⁸ The speed with which money and other assets can be moved from one jurisdiction to another represents a significant change in both the economic and the social context against which development of the common law is considered. Some States have moved to enact legislation to deal with the problems caused by this phenomenon. Others have not. Both *Saad* and *Singularis* involved countries that do not have robust and modern procedures designed to deal adequately with cross-border insolvency cases.

33 The absence of any coherent international processes by which the problem of swift cross-border movement of assets could be addressed led to the promulgation of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) by the General Assembly of the United Nations in December 1997. A number of independent States have enacted legislation to adopt the Model Law as part of their domestic law in order to meet the need for efficient and effective means by which cross-border insolvency problems can be addressed. But, when remedial legislation of that type has not been enacted, to what extent may the common law legitimately fill any lacuna?

34 The problem in cases such as *Singularis* arises out of the truncated nature of powers conferred on courts in jurisdictions that have not adopted legislation in the form of the Model Law or lack discretionary powers to provide judicial assistance, such as section 426 of the Insolvency Act 1986 (UK).²⁹ Lord Collins did not suggest that a statutory rule in the requesting jurisdiction was irrelevant to the exercise of a discretion conferred on the court in the assisting jurisdiction.³⁰ However, neither he nor the other members of the Board considered that development of the common law was justified either by the promulgation of the Model Law, or principles of comity.

35 This is the point at which I wish to advance a further issue for consideration. It arises out of early bankruptcy statutes enacted by the Imperial Parliament that evidence a recognition of the need for international co-operation in this field. In doing so, I accept that a distinction might legitimately be drawn between personal bankruptcies and liquidations (or other forms of corporate winding up or rehabilitation) in relation to the applicability of the order in aid procedure to which I shall shortly refer. Equally, I acknowledge that arguments may properly be advanced to say these considerations are no longer relevant, given that the statutes to which I shall refer no longer apply. Nevertheless, it is open to serious argument that an early parliamentary articulation of the need for international co-operation (at

²⁸ For a general discussion, see K. Ohmae, *The Borderless World* (1990, Harper Business, New York).

²⁹ *Singularis*, at paragraphs 42–50.

³⁰ *Ibid.*, at paragraph 76. An example of this being done in New Zealand can be found in my own judgment in *Williams v Simpson* [2011] 2 NZLR 380 (HC).

least within the old British Empire) justifies development of the common law to give effect to that policy choice.

Comity and the Order in Aid Procedure

36 The order in aid procedure seems to be a specie of the doctrine of comity. For that reason, I deal first with the issue of comity. The concept of “comity” allows courts in common law countries to assist insolvency administrators appointed in one jurisdiction to gain recognition in another. The underlying principle of comity is that one should do unto others as you would have them do unto you. An example of the underlying principle is *Cunard Steamship Co Ltd v Salen Reefer Services AB*,³¹ applied relatively recently in New Zealand in *Fournier v The Ship “Margaret Z”*³² and *Turners & Growers Exporters Ltd v The Ship “Cornelis Verolme”*.³³

37 The term “comity” appears to have two quite distinct applications. When used in a context unrelated to formal insolvency procedures (for example, where a creditor is seeking to enforce rights against a debtor *in personam*), it is regarded neither as a matter of absolute obligation, nor of mere courtesy and goodwill. It is the ability of a court of one nation to allow the legislative, executive or judicial acts of another nation to be applied within its own borders. Enforcement is permitted, having regard to international obligations and the rights of its own citizens, or others entitled to protection under its laws.³⁴

38 The concept is expressed differently when applied to a collective insolvency process. In *Cunard Steamship Co Ltd v Salen Reefer Services AB*, the Second Circuit of the United States Court of Appeals held that:³⁵

“The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion. Consequently, American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities. ... It has long been established that foreign trustees in bankruptcy were granted standing as a matter of comity to assert the rights of the bankrupt in American courts. ... Although the early cases upheld the priority of local creditors’ attachments ... the modern trend has been toward a more flexible approach which allows the assets to be distributed equitably in the foreign proceeding.”

39 The underlying principle on which the comity jurisdiction is based is not dissimilar to that which informs the order in aid process. In each case there is a recognition that courts in different jurisdictions needed to assist each other to

³¹ *Cunard Steamship Co Ltd v Salen Reefer Services AB* 773 F 2d 452 (1985).

³² *Fournier v The Ship “Margaret Z”* [1997] 1 NZLR 629 (HC).

³³ *Turners & Growers Exporters Ltd v The Ship “Cornelis Verolme”* [1997] 2 NZLR 110 (HC).

³⁴ *Hilton v Guyot* 159 US 113 (1895), at 163–164.

³⁵ *Cunard Steamship Co Ltd v Salen Reefer Services AB* 773 F 2d 452 (1985), at 457–458.

promote the prompt realisation of a debtor's property for distribution among all creditors entitled to payment out of it, in accordance with relevant statutory priorities.

40 The order in aid procedure was set out in section 74 of the Bankruptcy Act 1869 (UK).³⁶ Powers were conferred on various bankruptcy courts having jurisdiction in England, Scotland and Ireland to assist each other "in all matters of bankruptcy". The provision extended to:

"every British Court elsewhere having jurisdiction in bankruptcy or insolvency",

and required:

"the officers of such Courts ... [to] severally act in aid of and be auxiliary to each other in all matters of bankruptcy."³⁷

41 The section went on to state:

"... an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

42 Section 74 was repealed and replaced by section 118 of the Bankruptcy Act 1883 (UK).³⁸ Section 118 appears to have used different language to make clear that an assisting court could make any order that either it *or* the requesting court was empowered to make under relevant domestic legislation. The relevant part of section 118 provided:

"... an order of the court seeking aid, with a request to another of the said courts [including "British" courts], shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as *either* the court which made the request, *or* the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions." (Emphasis added)

43 Further acceptance of this underlying policy can be found in section 122 of the Bankruptcy Act 1914 (UK).³⁹ On repeal of that statute, a more modern expression of the same principle was set out in section 426 of the Insolvency Act 1986 (UK). Nine years later, work began on what became the Model Law.

³⁶ Bankruptcy Act 1869 (UK) (32 & 33 Vict c. 71).

³⁷ There is an earlier expression of the same principle in sections 216–220, Bankruptcy Act 1861 (UK); they applied to courts exercising bankruptcy jurisdiction in Ireland, Scotland and India. Section 220 made explicit reference "to any Court acting in such Matters in any Colony, Island, Plantation, or Place under the Dominion of Her Majesty, or to any British Judge elsewhere so acting".

³⁸ Bankruptcy Act 1883 (UK) (46 & 47 Vict c. 52).

³⁹ Bankruptcy Act 1914 (UK) (4 & 5 Geo V c. 59).

44 The wording of section 122 reflected that of section 118 of the 1883 Act, which empowered an assisting court to exercise the jurisdiction that either it or the requesting court had in respect of the proceeding. The disjunctive way in which both section 118 of the 1883 Act and section 122 of the 1914 Act were expressed tends to support the proposition that “British” courts were expected to assist each other without the need for both courts to have the ability to exercise the same jurisdiction in respect of the subject matter of the request.

45 The extra-territorial effect of section 122’s predecessor, section 74 of the Bankruptcy Act 1869 (UK), had been confirmed by the Privy Council in *Callender, Sykes & Co v Colonial Secretary of Lagos*.⁴⁰ Bermuda and the Cayman Islands are regarded as “British overseas territories”, while the Isle of Man is classified as a “Crown dependency”. It seems that all three of those jurisdictions were intended to be captured by the phrase “British Court”, for the purposes of section 122.

46 Section 122 of the 1914 Imperial statute was applied as recently as 1973 in New Zealand.⁴¹ That was done through the application of transitional rules in the Insolvency Act 1967 (NZ), which itself had enacted a provision akin to section 122. Section 135 of the 1967 Act enjoined (what is now) the High Court of New Zealand⁴² to assist foreign courts having jurisdiction in bankruptcy. Section 135 and its replacement, section 8 of the Insolvency (Cross-border) Act 2006, both empower a New Zealand court to make such orders as it could have made if the foreign bankruptcy had originated in its own jurisdiction.

47 The term “British Courts” in the 1914 Bankruptcy Act (UK) was considered by the Court of Appeal of England and Wales in *Re James*,⁴³ in the context of an application for an English court to act in aid of a bankruptcy in Rhodesia, after the Unilateral Declaration of Independence in that country in 1965. Both Scarman and Geoffrey Lane LJ held that the words “British Court” meant a Court that by its constitution was “British”, rather than one situated geographically in British territory. A contrary view was taken in dissent by Lord Denning MR. Accordingly, the majority took the view that the Rhodesian Court which had requested aid could not, because of the Unilateral Declaration of Independence, be regarded as a “British Court” to which section 122 referred. Given their historical and current status, the Cayman Islands, Bermuda and the Isle of Man are unlikely to be seen in the same light.

⁴⁰ *Callender, Sykes & Co v Colonial Secretary of Lagos* [1891] AC 460 (PC).

⁴¹ *Re Peebles* (Supreme Court Auckland, B53/72, 8 May 1973).

⁴² Then known as the Supreme Court of New Zealand.

⁴³ *Re James* [1977] Ch 41 (CA). See also New Zealand Law Commission, Cross-Border Insolvency (NZLC R 52, 1999), at paragraph 31.

Legislation or Judicial Determination?

48 If the policy reflected in the judge-made law on comity and the statutory reflection of that in the order in aid procedure could be taken into account in determining whether the common law could be developed in the manner sought in *Singularis*, would the result in that case have been the same?

49 In identifying five propositions that provided an adverse answer to the application in *Singularis*, Lord Collins seems to have placed particular reliance on the inability of a common law court to:

“extend to the application, by analogy, ... powers that could have been exercised if the foreign insolvency were a domestic insolvency.”

50 While strictly inapplicable beyond personal insolvencies it can be said that the policy underlying the order in aid provisions of the English Bankruptcy Acts since (at least) 1869 should be seen as a relevant factor supporting a common law court’s ability to develop the common law to meet changing circumstances and to authorise cross-border co-operation.

51 While the order in aid procedure has never been part of statutory company law, it is difficult to discern a reason why its underlying rationale should apply to individual traders and (what we now call) consumer debtors but not to a trading company. The distinction between traders and non-traders, for the purposes of bankruptcy law was abolished by the Bankruptcy Act 1861 (UK).⁴⁴ At that time, the company (in the sense in which we now understand it) was at the beginning of its development as a vehicle for a common commercial enterprise.⁴⁵

52 It may well be that there are substantive answers to the points I have raised. But, I suggest, they are worthy of further consideration in this difficult area of the law. My concern is that the type of jurisdictions to which the Privy Council expressly accepted that its decision in *Singularis* is likely to apply, are the very places to which money and assets will be moved out of the reach of creditors, whether because of status as a tax haven, or otherwise.

⁴⁴ Bankruptcy Act 1861 (UK) (24 & 25 Vict c. 134).

⁴⁵ The Joint Stock Companies Registration and Regulation Act 1844 (UK) (7 & 8 Vict c. 110) did not confer limited liability. That was first done by the Limited Liability Act 1855 (UK) (18 & 19 Vict c. 133).