“Relashio!”: Liberating the Common Law on Judicial Cooperation from its State of Arrested Development - The British Atlantic and Caribbean World

Chief Justice Ian KAWALEY*

Introduction

“The English position on recognition of foreign adjudications has been in a state of arrested development for almost a century…the overall position, with respect to both individual and company insolvencies, may be summed up as one which is imbued with a positive spirit to facilitate international cooperation between the different jurisdictions which are actively concerned in any particular case…the Common Law, for all its remarkable qualities, does not provide a fully balanced and readily accessible framework for cross-border assistance…for the time being, and for the foreseeable future, we must deal with the state of the world in which we find ourselves, and that perforce requires us to pay serious attention to the role of private international law in assisting us to devise principled and, if possible, predictable solutions to issues born of legal diversity.”

Overview

1 Common law judicial cooperation in cross-border insolvency cases remains an extremely important topic in the gradually diminishing number of jurisdictions without statutory international cooperation regimes. It is relevant not simply in what might be described as the “British Atlantic and Caribbean World”, this writer’s regional domicile. The topic remains pertinent to the wider common law

* Ian Kawaley is Chief Justice of Bermuda.

1 Defined at: <http://harrypotter.wikia.com/wiki/List_of-spells> to mean “a spell that forces an object or person to release its hold on something”.


3 I.e. past or present British territories in the Atlantic and Caribbean region, loosely defined.
world (including major commercial hubs such as India, Nigeria, Singapore\(^4\) and Hong Kong\(^5\)) where modern insolvency legislation is lacking as well. The topic is of particular relevance in what has been elsewhere referred to as the “British Offshore World”,\(^6\) because those jurisdictions form part of the front line of cross-border commerce and are routinely required to meet cross-border insolvency challenges.

2 The strength of the common law is its ability to deliver simple practical solutions to even intractable legal problems. The potential weakness of an absence of theoretical coherence, however, has historically been mitigated by borrowing from first civil law and eventually common law academicians and by the modern interposition of codifying (or pseudo-codifying) legislation. As most insolvency judges in common law jurisdictions today are primary engaged in the task of interpreting insolvency statutes, it is particularly challenging to apply the different techniques of devising purely common law remedies for cross-border insolvency problems. The academic attention which Professor Fletcher has given to an area of the law, common law recognition and assistance, the significance of which is waning in his own jurisdiction, is a boon to those jurisdictions where the topic continues to be of central practical concern.

3 Table 10.1 below sets out, as far as can be ascertained at the time of writing, British Atlantic and Caribbean jurisdictions which have no statutory international recognition and assistance regimes presently in force. However the topic is also important in those jurisdictions where statutory assistance is only available to foreign representatives in a limited range of designated countries (e.g. Article 49 of the Désastre Law 1990, Jersey).\(^7\)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. ANGUILLA*</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>2. BAHAMAS</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>3. BELIZE</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>4. BERMUDA*</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>5. BVI*</td>
<td>Yes but not in force</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>6. DOMINICA (Civil Code)</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

\(^4\) The Senior Law Minister announced in August 2014 plans to implement the UNCITRAL Model Law in Singapore. Speech by Senior Minister of State for Law, Indranee Rajah, at the Regional Insolvency Conference 2014, copy available at: <www.mlaw.gov.sg> (last viewed 25 August 2014).

\(^5\) Adopting the UNCITRAL Model Law on Cross-Border Insolvency is reportedly being considered in Hong Kong.


4 Professor Ian Fletcher in “Insolvency in Private International Law” provides valuable insights to the common law judicial cooperation jurisdiction as an aspect of private international in three important respects:

(1) he identifies the Dutch law roots of the common law powers and acknowledges the important role played in the 19th century development of English law by the Court of Demerara and Essequibo in then British Guiana,9 crediting Court President Jabez Henry with subsequently campaigning for internationally accepted rules which have yet to be achieved but are still relevant today;

(2) he highlights the internationalist spirit of the common law approach to judicial cooperation and its non-discriminatory approach as its main strengths and suggests that the worth and utility of common law recognition and assistance is significantly undervalued and/or misunderstood;

(3) he distinguishes the older domain of recognising and assisting foreign liquidation courts from the more modern field of recognising and assisting foreign restructuring proceedings; and

(4) he acknowledges the limitations of a common law approach to cross-border cooperation, without ignoring the fact that statutory regimes will inevitably generate new complications as well.

5 Focussing on corporate insolvency, the present paper provides an overview of attempts made in recent years to liberate common law judicial cooperation from the state of arrested development which Professor Fletcher opined it had fallen into, over a decade ago. It is argued that Professor Fletcher himself has both inspired and facilitated this liberation process. The analysis uses as key markers two decisions of the Privy Council: (1) Cambridge Gas Transportation Corp v Official Committee

---

of Unsecured Creditors of Navigator Holdings plc and others [2007] 1 AC 508; [2006] UKPC 26, and (2) Singularis Holdings Limited v PricewaterhouseCoopers [2014] UKPC 36. Attention will focus on the most basic form of common law assistance, namely recognizing and assisting liquidators appointed in the foreign debtor’s place of incorporation. However, passing mention will be made of cross-border restructurings as well.

6 This tribute to Professor Fletcher will seek to demonstrate that in those jurisdictions which lack modern statutory international insolvency cooperation regimes, the common law has been a vital resource the value of which has been increasingly understood. It will also reveal a sometimes sharp philosophical divide between judges who conceive of the common law as powerful tool for judge-made cross-border insolvency solutions, harking back to the most creative days of the common law, and those who perceive the primary role of judges in this legal area as being to interpret and apply statutory codes and little more.

7 The differences between the statutory insolvency code world and the purely common law cross-border world may somewhat mischievously be compared the difference between the fictional Muggle and Magical worlds of Harry Potter fame. The purely common law jurisdictions may thus be seen as informed by mediaeval notions of a world governed in part at least by magical laws and powers, laws and powers which are defined and applied by “Wizard” judges in service of the goal of doing justice in the case at hand, not in fulfilment of a rationally grounded “sovereign” will expressed through the exercise of Executive or Legislative power. Those common law jurisdictions with statutory international cooperation frameworks may conveniently be seen as dominated by “Muggle” or modern notions of a world governed entirely by rational and tangibly ascertainable laws and powers. It is a central article of faith in this modern legal world that a statutory power conferred by Parliament can only be used for the purposes intended by the creator of the power. Clear precedents should also be found to justify the existence of common law powers.

8 In reality, the majority of the modern legal world, even in fora common law rules of contract and tort hold sway, is dominated by legal rules which are practically if not formally governed by codified rules. This is partly due to the lucid summary of guiding principles in leading practitioners’ texts. However, the Civil Law approach to comprehensive and coherent law-making emanating from the Legislative branch of Government is increasingly gaining influence in most parts of the common law world. Against this background common law judicial cooperation appears to have a magical quality to it precisely because it lacks the coherent and concrete qualities that serve as vital navigational aids to judges and lawyers alike in more developed areas of the common law. This perhaps why Lord Neuberger sagely observed in Singularis [2014] UKPC 36:
“154…The extent of the extra-statutory powers of a common law court to assist foreign liquidators is a very tricky topic on which the Board, the House of Lords and the Supreme Court have not been conspicuously successful in giving clear or consistent guidance – see the judgment of Lord Hoffmann on behalf of the Board in Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2007] 1 AC 508, all five opinions in the House of Lords in In re HIH Casualty and General Insurance Ltd [2008] 1 WLR 852, and the judgment of Lord Collins for the majority of the Supreme Court in Rubin v Eurofinance SA [2013] 1 AC 236, discussed by Lord Sumption at paras 16-19, and the judgment of Lord Collins in this case.”

**Cambridge Gas**

**Overview**

9 Cambridge Gas was a significant shareholder of an Isle of Man company subject to a Chapter 11 restructuring in New York. Under the Plan, its shares were vested in the debtor’s creditors. It did not submit to the jurisdiction of the US Bankruptcy Court. But when the Committee of Unsecured Creditors of the Manx company issued a letter of request to the Manx High Court and sought common law recognition of the Chapter 11 Plan, Cambridge Gas argued that it was not bound by the Plan which divested it of its shareholding. An initial plan which would have transferred the underlying assets (ships) to shareholder interests (including) the company which controlled Cambridge Gas (Vela) had been rejected by the US Bankruptcy Court.

10. So although Cambridge Gas had not itself participated in the US Bankruptcy Court proceedings, its parent was bound by the Order confirming the Plan. Its sudden interest in protecting its share rights in the Manx recognition and enforcement proceedings appeared on the face of it to be tactical in the extreme. It was also commercially hollow; as a result of Navigator’s insolvency the shares were worthless and shareholders had no tangible economic interest in the insolvent company. The following decisions were made:

(a) at first instance, the Deemster held that the US Order was a judgment *in rem*, purporting to effect a transfer of rights to property located outside the jurisdiction of the US Court, and refused recognition;

(b) on appeal the Staff of Government Division held that the judgment was an *in personam* judgment in proceedings commenced by Navigator, and accordingly the US Order could be recognized;

(c) on further appeal to the Privy Council, the Judicial Committee agreed that recognition should be afforded to the US Order as part of a foreign insolvency proceeding which should be assisted, but characterized the order as a *sui generis* judgment, neither *in personam* nor *in rem*. Lord Hoffman (delivering the Court’s judgment) held that the traditional rules of private international law did not apply in the cross-border insolvency context. The Plan could have been implemented under Manx law through a scheme of arrangement, and in these circumstances it could and should be recognized at common law.
In the course of arriving at what would prove to be a controversial decision in a doctrinal sense, if not in a commercial or practical sense, Lord Hoffman brought a sleeping beauty back to life. In extending the traditional common law discretion to recognize and assist foreign liquidators appointed in a company’s place of incorporation to what in UNCITRAL terms would be characterized as a “foreign main proceeding”, he gave fresh life to those established private international law rules. In doing so, he was clearly in part inspired by Professor Fletcher’s own wistful ruminations on the becalmed state of the English common law in this field. Lord Hoffman stated:

“18 As Professor Fletcher points out (Insolvency in Private International Law, 1st ed (1999), p 93) the common law on cross-border insolvency has for some time been “in a state of arrested development”, partly no doubt because in England a good deal of the ground has been occupied by statutory provisions…

20 Corporate insolvency is different in that, even in the case of moveables, there is no question of recognising a vesting of the company’s assets in some other person. They remain the assets of the company. But the underlying principle of universality is of equal application 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. In addition, as Innes CJ said in the Transvaal case of In re African Farms Ltd [1906] TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, ‘recognition which carries with it the active assistance of the court’…

22 What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply “the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction”. At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.”

These broad and purposive words were treated like manna from heaven by internationalist first instance judges in jurisdictions such as Bermuda, faced with a plethora or cross-border insolvency conundrums, but often equipped with no more than common law discretionary cooperation powers. It is impossible to overstate the difference in legal atmosphere between a jurisdiction where statutory international cooperation provisions exist, even if only in skeletal form, and a jurisdiction where the common law alone delineates both the substantive jurisdictional rules and the content of the remedies which may be deployed.

It was doubtless fully appreciated by all who read them that to some extent Lord Hoffman’s remarks were by the way, or obiter. Because the issue before the Privy
Kawaley CJ: “Relashio!”

Council Board in Cambridge Gas, narrowly defined, was one of recognition of a foreign insolvency order which purported to transfer the shares of a Manx company which was not formally before the foreign court. This central question engaged jurisdictional rules of private international law which do not arise in the bedrock context of recognizing and assisting liquidators appointed in the insolvent company’s domicile, which is the classical form of common law assistance. Because the Privy Council cut through these traditional jurisdictional rules with a view to achieving a commercially sensible practical result, criticism of this approach on very narrow technical legal grounds tended to obscure the fundamental merits of the decision in illuminating the important topic of common law assistance in two principal manifestations:

1. the traditional function of a common law court recognising and assisting liquidators appointed in the foreign company’s domicile; and

2. the modern function of a common law court recognising and assisting foreign insolvency courts managing restructuring proceedings in a de facto company’s centre of main interest, both with and without parallel proceedings.

In common law jurisdictions lacking modern statutory international cooperation provisions in their insolvency statutes, such as Bermuda and the Isle of Man, these two forms of common law assistance are as central to the international insolvency jurisdiction as they are peripheral in jurisdictions such as England and Wales and the United States where legislative regimes have held sway for decades.

Cambridge Gas Applied

In the Bermudian experience, there are two broad categories of common law recognition and assistance in cross-border insolvency cases. One category, illustrated by the actual facts in Cambridge Gas, is where a local company is involved in, to borrow UNCITRAL terms, a foreign main restructuring proceeding. The other category is the more traditional matrix of liquidators of a foreign company which is being wound-up in its place of incorporation seeking recognition and assistance at common law in Bermuda, the scenario mentioned obiter in Cambridge Gas.

In terms of Bermudian companies involved in foreign main restructuring proceedings, the practice evolved in the 1980s and 1990s in relation to insolvent liquidation proceedings and schemes of arrangement of coordinating parallel liquidation or provisional liquidation proceedings in London and Bermuda. This was a modest but significant first step primarily grounded on the statutory winding-up regime. But there was no express statutory case management power addressing the issue of the Bermuda Court effectively following the lead of a foreign court in relation to the restructuring of a Bermudian company (which wrote reinsurance
business as part of a London-based pool). This practice was effectively judge-made law although it could, more conservatively, be viewed as simply an exercise of inherent case management powers ultimately derived from the Supreme Court Act 1905. When the dotcom bubble burst in the late 1990s, this practice of recognizing the primacy of foreign restructuring proceedings was extended to the United States and parallel Chapter 11 of the US Bankruptcy Code proceedings in the US and provisional liquidation proceedings in Bermuda were routinely coordinated.

17 This was a quintessentially common law results-oriented practical approach in which doing practical justice was accorded precedence over abstract legal theory. This approach was first explicitly explained by L. Austin Ward CJ in his landmark 26 November 1999 judgment in Re ICO.10

“A look at the background to the application may be instructive. On [27 August 1999] a Petition was filed by the company which was insolvent seeking the appointment of joint provisional liquidators. There was no prayer that the company be wound up immediately. On the same date the company filed for protection under Chapter 11 of the U.S. Federal Bankruptcy Code to allow it to consider a re-financing/re-organisation which, if successful, would result in the company continuing business.

An Order was made that Messrs. Wallace and Butterfield be appointed joint provisional liquidators. I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court.

I do not accept that because the company is a Bermuda registered company therefore the Bermuda Court should claim primacy in the winding-up proceedings and deny the joint provisional liquidators the opportunity of implementing a U.S. Chapter 11 re-organisation. Nor do I accept that a Chapter 11 re-organisation will, of its very nature, destroy the rights of creditors and contributories under the regime being established. Such an approach would be to deny the realities of international liquidations where action must be taken in many jurisdictions simultaneously. In this case proceedings are being conducted in the USA and in the Cayman Islands as well as in Bermuda. The aim of the proceedings is to enable the company to re-finance in the sum of [USD] 1.2 billion or to re-organise so as to continue in operation. Under such circumstances the Court should co-operate with Courts in other jurisdictions which have the same aim in relation to the affairs of the company. It is not a question of surrendering jurisdiction as much as harmonisation of effort. Moreover, the joint provisional liquidators are officers of this Court who submit confidential Reports informing the court of progress being made in the liquidation from time to time. I am satisfied that proceedings in many jurisdictions relating to the same subject matter may properly be conducted at the same time where there is a connecting factor. Barclays Bank plc v Homan and others [1993] BCLC 680.”

---

10 *Re ICO Global Communications (Holdings) Ltd* [1999] Bda LR 69, at 1-2.
18 This pre-	extit{Cambridge Gas} practice in Bermuda and likely other offshore jurisdictions of not simply harmonizing parallel insolvency proceedings but also, more radically, recognizing the primacy of foreign restructuring proceedings involving offshore companies is illuminating of the 	extit{Cambridge Gas} decision itself. By 2006, the practice of restructuring offshore-incorporated companies through US Chapter 11 proceedings was well established, based on the commercial logic that restructuring proceedings should be permitted to take place wherever the debtor’s main relevant commercial interests are based. In the 	extit{ICO} case, however, a parallel insolvency proceeding had been commenced in Bermuda so that under Bermuda’s own statutory insolvency law, the rights of the shareholders of the admittedly insolvent Bermudian company had been extinguished. It was thus considered possible for the Bermudian Court in the ancillary liquidation proceeding, to recognise and give effect to the orders made in the Chapter 11 proceeding without necessarily implementing a Bermudian scheme of arrangement.\footnote{Whether a local scheme of arrangement is required typically turns on whether or not all creditors are bound by the foreign restructuring proceedings.} After all, in ICO the company itself presented its own winding-up petition and, lacking statutory restructuring powers, appointed provisional liquidators with limited powers to supervise the company’s own management of the restructuring process.

19 Against this background, and from a Bermudian law perspective, the legal basis for the operative decision in 	extit{Cambridge Gas} was objectionable in rather different terms than those which emerged in 	extit{Rubin}. Why, one asked, would a Chapter 11 proceeding in relation to a Manx company be commenced in New York without commencing parallel proceedings in the Manx company’s domicile to engage, \textit{ab initio}, the operation of Manx law? This question was, perhaps, simply the practical side of the same coin which resulted in 	extit{Cambridge Gas} later being criticized in 	extit{Rubin} [2011] on theoretical grounds. The private international law rules on recognition of foreign \textit{in rem} or \textit{in personam} orders are neither so fluid nor so generous as to allow a foreign court to take away share rights governed by local law owned by persons not bound by the foreign proceeding.

20. Offshore courts are likely to experience a sense of being ignored when complex restructurings are carried out in larger jurisdictions by professionals who draft plans which appear to presume that the relevant onshore restructuring law has universal effect, even as regards debtors incorporated abroad. The difficulties faced in enforcing the Plan in the Isle of Man in \textit{Cambridge Gas}, and the subsequent disapproval of the operative decision, firstly by the UK Supreme Court in \textit{Rubin} and ultimately by the Privy Council Board itself in \textit{Singularis}, had an important practical effect. It restored an appropriate equilibrium to the domain of international restructurings involving a foreign company being restructured abroad, requiring due regard to be paid to the debtor’s place of incorporation and the rights of those stakeholders who are governed by that legal system.
21 In most cases, significant onshore restructurings involving offshore companies are led by internationally sensitive onshore professionals working collaboratively with offshore counterparts to ensure that all the necessary multijurisdictional boxes germane to the transaction are duly ticked. The fact pattern in *Cambridge Gas* being somewhat anomalous and the practical result being obviously just, the broader decision of Lord Hoffman to raise the common law assistance flag (or, perhaps, to wave the common law assistance magic wand) could fairly be embraced with great enthusiasm. Pre-existing practice in terms of harmonizing parallel restructuring proceedings involving Bermudian companies subject to foreign main proceedings and local ancillary proceedings could be continued with greater confidence.

22 Nevertheless, anomalies can never be avoided altogether. Bermuda’s Supreme Court (a first instance superior court of record) was confronted with the unusual case a Bermudian company being wound-up in Hong Kong before its liquidators discovered the need to seek the assistance of the Bermudian court. Although the centre of the company’s commercial interests was undoubtedly Hong Kong, the Bermuda law position remained that the company’s directors remained in control of the company. This was “modified *Cambridge Gas*”, in that the order to be recognised was a foreign order appointing liquidators over the local company rather than simply an order made for the purpose of restructuring the company. In *Re Dickson Holdings Limited* [2008] Bda LR 34; (2008) 73 WIR 102, the Court recognised the foreign winding-up proceedings noting that (a) it might have reservations about recognising the foreign liquidation of a Bermudian company without the commencement of local proceedings if local public policy issues were engaged, and (b) the dominant purpose of the foreign winding-up proceedings, as in *Cambridge Gas*, was to restructure the company rather than to finally wind it up. Most pertinently for present purposes, the Court’s primary findings were as follows:

“34. When the commercial realities are looked at in isolation from the legal formalities, the Hong Kong Joint Liquidators in promoting parallel schemes of arrangement in Hong Kong and Bermuda are in essence requesting this Court to assist the Hong Kong Court to restructure the Company. It is impossible on the facts to identify any or any cogent reasons why this assistance may properly be declined.

35. The aim of the Scheme, most directly, is to eliminate the Company’s existing unsecured debt. But this debt restructuring will only become operative if the Restructuring Agreement in relation to the Company’s share capital become effective, outside of the Scheme. Under the latter arrangements, an Investor will acquire most of the Company’s shares. The purchase monies will fund the creditors’ Scheme claims. The Company will be returned to solvency, its shares will be re-listed and the Hong Kong winding-up proceedings will be permanently stayed. As Ms. Fraser rightly submitted, the foreign winding-up order will (if the scheme is implemented) fall away, and no question of the need for a winding-up in Bermuda will arise.

36. This Court is being invited to assist the Hong Kong Court through implementing a parallel scheme of arrangement in Bermuda in circumstances where (a) the Company was
registered as an overseas company in Hong Kong where its principal business and the majority of its assets are clearly located, (b) the estate is apparently not a large one and (c) there is no suggestion of any prejudice to local interests. In these circumstances there is no apparent reason why this Court should decline to assist the Hong Kong Joint Liquidators merely because no winding-up proceedings have been started here…

37. At the end of the day this Court was not asked to recognize a foreign winding-up order which purported to wind-up, for all purposes, the business of a Bermuda-incorporated company.

23 The broad principle in Cambridge Gas was accordingly applied in order to achieve a commercially pragmatic result in circumstances in which there was, admittedly, no hostile participant in the Bermudian proceedings to test the soundness of the course adopted. On the face of it, however, the legal basis for common law recognition of a foreign winding-up order of a local company made by a foreign court with which the company had strong commercial ties was consistent with emerging rules of private international law, rules which Cambridge Gas helped to crystallize. In arriving at this conclusion, however, the Bermudian Court was also assisted by Professor Fletcher’s leading text:

“16. A more positive statement of principle may be derived from Ian F Fletcher, ‘Insolvency in Private International Law’, where the learned author opines as follows:

‘Where the foreign liquidation has been commenced in a country other than that in which the company’s incorporation occurred, there is considerable uncertainty with regard to the prospects of such proceedings being recognized in England, and as to the principles on which such recognition might be based. The lack of explicit authority on this matter in reported cases is to be regretted. Clearly, the possible circumstances in which such foreign liquidations may take place can vary considerably, so that it is important that a flexible approach should be adopted. One situation in which the English position seems to be reasonably predictable is where the foreign liquidation concerns a company actually formed and registered in England. The primacy of the law of the country of incorporation is likely to form the basis of the English court’s reaction to such a case….However, if no winding-up proceedings are taking place in England, despite the company having been formed here (as may be the case if there are no assets in this country, and perhaps no English creditors with interests to defend), it may be that the foreign proceedings can be considered to be the most appropriate way in which to wind up the company, although it is possible that the final process of effecting the dissolution might be reserved by English law to itself, using the power of the Registrar of companies to strike it off the register as a defunct company.’

12 The latter analysis is now supported by high judicial authority.”

24 It seems obvious because the general common law rule is that a company’s liquidation in its place of incorporation will be recognised, that the recognition to be given to a foreign liquidation order in the debtor’s place of incorporation cannot be assured. What assistance will be available to such foreign liquidators will also

---

12 Fletcher, above note 2, at paragraph 3.93.
be fact-specific. In a case where local winding-up proceedings were already on foot, the Cayman Grand Court (Henderson J) was nevertheless willing to confer the status of *amicus curiae* on Singapore liquidators and to give them limited recognition. Recognition of the appointment in a third forum (the Bahamas) of liquidators, whose status in the company’s place of incorporation (Minnesota) was unclear, was declined by the Cayman Grand Court (Levers J). From an internationalist perspective, therefore, the most important common law recognition and assistance rules are those sought in relation to a company being liquidated (or, perhaps, restructured) in its place of incorporation. The existence of these common law principles was appreciated in the British Atlantic and Caribbean region before the *Cambridge Gas* decision. With cross-border commercial activities outstripping statutory insolvency law reform, regional judges were not unwilling to construct practical relief for real-world problems using common law tools. In *Autland*, Rawlins J (subsequently Chief Justice of the Eastern Caribbean Supreme Court) held in his 16 April 2004 judgment:

“International Recognition

[11] According to the evidence of Mr. Fritz, by virtue of the principle of universality, every German insolvency proceeding is entitled to international recognition. There is reciprocity and comity. He said that the principle of universality also extends to foreign insolvency proceedings where assets are located within the German jurisdiction. He cited Article 102 of the Introduction Act to the Insolvency Code as authority for this. According to the deponent, this Article mandates that foreign insolvency proceedings must be recognized in Germany. He said that, in particular, the assets of a foreign company that is the subject of such proceedings outside of Germany are part of the foreign proceedings. Additionally, foreign insolvency proceedings are enforced in Germany in relation to the assets of insolvent foreign companies that have assets in Germany.

[12] In passing, Mr. Fritz afforded an insight into the recent regime for reciprocity within the European Community. This, he said, falls under the European Community Regulation on Insolvency Proceedings that came into effect on 1st June 2003. The effect of it is that insolvency proceedings that are instituted within any member state of the Community are automatically recognized in all Community States.

Findings and Order

[13] No evidence was presented by or on behalf of Autland on the issue that is for consideration on this further hearing. The evidence that was presented on behalf of Holzmann is unchallenged. It is cogent and convincing. I accept that Holzmann is in the process of insolvency proceedings in Germany, and that from 1st June 2002, when the insolvency trustee was appointed, Holzmann’s assets vested in the insolvency trustee. This is under German law. I also accept that under German law, this applies to the assets of Holzmann in foreign countries.

14 *Re Uninvest Multi-Strategy Fund II Ltd* [2006] CILR 452.
15 *Autland Heavy Equipment & Construction v Holzmann International* (by Ottmar Hermann, as the Insolvency Trustee appointed by the District Court of Frankfurt/Main, Germany), BVIHCV: 2002/0111.
Whether this Court would recognize the insolvency proceedings in Germany is a matter of our law. We have no provisions for the reciprocal recognition and/or enforcement of Orders that issue from a German Court. I am not aware of any relevant Treaty provisions that Her Majesty’s Government extended to this Territory. This Court recognizes the importance of extending and accepting recognition of Judgments by comity, particularly in commercial cases. I indicated in the Judgment that was delivered in this case that I would be willing to extend it, once there was sufficient evidence to satisfy me that, under German law, the assets of Holzmann, including its foreign assets, vested in the insolvency trustee prior to the institution of the claim in this case.”

It is interesting to note that the legal basis for recognition was stated as being “comity”. This was precisely the basis for recognition articulated by Jabez Henry in *Odwin v Forbes* 90 years earlier in 1814. It cannot be doubted that Rawlins J considered he was granting common law relief, however, in the sense of applying principles emanating from judge-made as opposed to statutory law. This conclusion is more clearly illustrated by the Eastern Caribbean Court of Appeal Anguillan decision in *Re Globe-X*,16 where Gordon JA opined as follows:

“[13] In Smart’s ‘Cross Border Insolvency’ at Chapter 6, a large number of examples are given of the practice of courts, both common law and non-common law, recognizing the effect of a winding-up order made in the country of domicile of the company being wound up. As learned Queen’s Counsel for the Respondent put it in his argument, it is a necessary concomitant of the recognition accorded to a body corporate established under a foreign legal system. I am therefore satisfied that the High Court of Anguilla has the necessary jurisdiction to recognize the Winding-up Order made by the Bahamian court.”

It is also important to note that beyond the region under present consideration, the Isle of Man Court also applied similar principles before *Cambridge Gas* was decided by the Judicial Committee. In *Re Impex Services Worldwide Ltd* [2004] BPIR 564 (Deemster Doyle), the Manx Court responded to a letter of request obtained by the liquidators of an English company a by recognizing them and ordering the production of documents to aid their investigation of the affairs of the company. There was no statutory jurisdiction to wind-up the overseas company so as to trigger the direct application of the winding-up statute which included the express power to compel the production of information relating to an insolvent company’s affairs and/or assets. Implicit in the court’s reasoning was the assumption that the common law was the source of both the principles governing recognition and the question of what relief could be granted.

In *Re Impex*, the scope of the remedial power to assist was articulated in very broad and ample terms, an approach which would in due course be reflected in the language of Lord Hoffman in *Cambridge Gas*, two years later. He opined, so far as is relevant for present purposes as follows:

---

“[104] Fletcher 1990, at p 186 refers to the approaches to the recognition of foreign insolvency proceedings and of the consequences flowing from them that have been ‘evolved under English common law’. At pp 186-187 Fletcher refers to the relatively under-publicised state of law, ‘much of which is contained in reports of cases originally decided many years ago’ and continues:

‘In conceding that the common law, for all its remarkable qualities does not appear to provide a fully balanced and readily accessible framework for cross-border assistance, it is important to acknowledge the great difficulties - both technical and also political - that confront any attempts to transform the arrangements for international co-operation so that they can be more widely known and understood, and also co-operate under conditions of greater certainty, speed and effectiveness.’

[105] In considering the academic commentaries, I am conscious of the point frequently made that academics are sometimes tempted to state the law as they desire it to be rather than as it is. Judges suffer from the same temptation on occasions. I am however conscious of my oath to ‘execute the laws of this Isle justly ... betwixt party and party as indifferently as the herring backbone doth lie in the midst of the fish’. In my judgment the ‘laws of this Isle’ provide me with jurisdiction to provide co-operation and assistance to foreign courts in insolvency matters, whether they be personal or corporate insolvency matters.

[106]… The jurisdiction at Manx common law permits this court to co-operate with and assist other courts including the English High Court in relation to insolvency matters. The jurisdiction is a wide and discretionary jurisdiction. It will be for the court to decide whether in any given set of circumstances the jurisdiction should be exercised and if so what safeguards or protections need to be put in place in respect of orders which are made when giving such co-operation and assistance to the foreign court."

29 Cambridge Gas was directly followed by the Bermudian Supreme Court (Kawaley J) in Re Founding Partners Global Fund Ltd. [2011] Bda LR 22. Here, the liquidators of an overseas insolvent company sought recognition of their right to represent the company with a view to gaining control of assets held in Bermuda in bank accounts belonging to the company. The issue was controversial because a Receiver appointed in the United States was also seeking to recover the same assets. The Court (in partial reliance on Professor Fletcher) held as follows:

“36…The common law principles which govern the recognition of foreign insolvency proceedings may lack the precision found in modern statutory insolvency law codes such as legislation based upon or heavily influenced by the UNCITRAL Model Law. However, the applicable principles have the solidity of experience built up over more than 200 years, initially in the context of personal bankruptcies with cross-border elements. They also enjoy the wider credibility that derives from the fact that although these rules of private international law flowered in common law soil, the seminal ideas were germinated in the civil law world."

37. The common law rules relating to the recognition and treatment of foreign corporate insolvency proceedings cannot be clearly understood without reference to the related private international law rules relating to corporations generally. It appears to be settled law that (1) a company’s domicile is located in the country where it is incorporated, and (2) a corporation which has central management and control in more than one jurisdiction may be regarded as resident in each jurisdiction concerned:

---

17 Fletcher, above note 2, at paragraph 1.20 et seq.
Lawrence Collins (ed.), ‘Dicey & Morris on the Conflict of Laws’, 12th edition, Rule 154. Equally uncontroversial appears to be Rule 156(2) in the same text, from which the learned authors conclude that: “The cases at least establish that the law of place of incorporation determines who are the corporation’s officials authorised to act on its behalf” (at page 1113). The place of incorporation of the Company is significant in conflict of law terms because the laws of this forum govern matters concerning its constitution and internal management. Where a company is resident may be important for a variety of jurisdictional considerations, but its domicile has a comparatively fundamental and defined significance.

38. The competition between the JOLs and the Receiver over the Bermuda assets does not raise the same issues as arose in the House of Lords in the HIH case. There the question was whether assets under the control of liquidators appointed in ancillary liquidation proceedings should, instead of distributing the assets in the local ancillary proceedings, remit the assets to the primary Australian liquidation Court instead. Here the true controversy turns, in the first instance at least, on competing claims to control assets belonging to the foreign insolvent company which are located in a jurisdiction where no ancillary liquidation proceedings have been commenced. The dispute centres, in effect, on the more fundamental question of who has the best claim to be recognised as agents or representatives of the Company. Dicey & Morris’ Rule 160 in the present context is in my judgment brought into play: ‘The authority of a liquidator appointed under the law of the place of incorporation is recognised in England’. This rule is, according to the learned authors, ‘justified because the law of the place of incorporation determines who is entitled to act on behalf a corporation. If under that law a liquidator is appointed to act then his authority should be recognised here’ (Dicey & Morris, 12th edition, page 1137). Liquidators appointed in other jurisdictions will generally only be recognised as competent to act on behalf of the foreign company in circumstances where such authority will likely be recognised under its domiciliary law.

39. Applying the above settled principles to the present facts, the JOLs must clearly be recognised as the primary representatives of the Company with authority to control the Bermuda assets. This Court has a positive duty to both recognise the Caymanian winding-up order and the orders appointing the JOLs (both provisionally and permanently), which clothe them with authority to represent the Company and control its assets. As Professor Fletcher has fairly pointed out, it is a deficiency of corporate insolvency law (as contrasted with personal bankruptcy law) that the appointment of liquidators does not vest all of the insolvent company’s assets in the liquidator.

66…The JOLs having been duly appointed in the Company’s place of incorporation as its sole representatives and the Company having being wound-up there, this Court under the applicable common law rules of private international law ought properly to (a) recognise those and the related Orders made by the Caymanian Court in the winding up proceedings there; and accordingly (b) declare that the JOLs are entitled to control all monies held locally at HSBC Bank Bermuda Limited accounts belonging to the Company.”

Recognising and Assisting Liquidators appointed in the Foreign Debtor’s Domicile: The Source of Assistance Powers

30. The latter case is an example of the most basic form of recognition and assistance. By recognizing the right of the foreign liquidators to act as agents for the company and effectively granting declaratory relief to this effect, the foreign liquidators were empowered to take control of local assets held in the name of the company. It was not disputed that the Court had jurisdiction to grant the relief
sought; no need to analyse the source of the power to grant declaratory relief arose. However, had the question been cursorily explored, it is difficult to believe that either counsel or the court would have doubted that the power to grant what was in effect declaratory relief derived from the court’s general common law powers, the existence of which had at least some statutory support:

(a) from sections 12 and 18 of the Supreme Court Act 1905, which confer on the Bermudian Supreme Court the powers exercisable by the old courts of, inter alia, Chancery, Exchequer, Ordinary and Bankruptcy, concurrently administering rules and remedies of law and equity; and

(b) from Order 15 rule 16 of the Rules of the Supreme Court, which provides that “the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.”

31 The language used by the court in its conclusions in that case strongly suggests that the question of the source of the power to grant the specific form of relief sought was assumed to be a separate and distinct question from the common law discretionary power to grant recognition and the related consideration of whether or not to grant the assistance sought:

“this Court under the applicable common law rules of private international law ought properly to (a) recognise those and the related Orders made by the Caymanian Court in the winding up proceedings there; and accordingly (b) declare that the JOLs are entitled to control all monies held locally.” (emphasis added)

32 However, it must be acknowledged where all that is sought by way of relief is a declaration as to standing to represent the foreign debtor, it is not really possible to meaningfully separate the common law rules on recognition from the declaratory relief sought. Whether the power to recognise ought properly to be regarded as distinct from the power to give various forms of assistance ought properly to be considered as a matter of general principle, in the first instance at least.

33 Where a recognised remedy was sought in support of a civil action for recognition and assistance at common law, it is suggested that the starting assumption should be that the applicable rules of private international law governed the questions of whether recognition and assistance should be granted and that applicable local procedural law (lex fori) would govern the content and form of relief to be granted. Even though the application was not made in the context of a local primary or ancillary winding-up under the Companies Act 1981, what the court would do in an analogous situation in a winding up under the statutory winding-up code would likely shape the court’s approach to both the content and form of relief granted. This forensic approach was very arguably in mind when Lord Hoffman opined in Cambridge Gas that:

“the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency.”
34 It was surely not anticipated that a first instance judge would in every case have to identify the existence of a freestanding common law power to grant the relevant form of relief sought in the context of an assistance application, either from a precedent or as a matter of first impression. It was surely not envisaged that an assisting court should be constrained not to deploy the Court’s generally applicable common law or statutory remedial powers. After all, the common law recognition and assistance power is not a foreign cause of action but a claim wholly derived from the common law of the assisting forum.

35 The approach adopted by Deemster Doyle in Re Impex of finding, in effect, a “new” common law cross-border insolvency-specific power to order the production of documents to the foreign liquidator despite the absence of a statutory power to do so was articulated by way of response to the argument advanced in opposition to the application that no general power to order discovery in aid of foreign proceedings without statutory support existed (at paragraph [26]). It is submitted that if a general power to grant the assistance sought had been found to exist, no objection could sensibly have been raised to deploying such power in aid of a common law cross-border insolvency assistance application.

36 What support can be found for these propositions in pre-and post-Cambridge Gas jurisprudence? The starting point for present purposes must be Odwin v Forbes (1817) 1 Buck. 57 (PC); Jabez Henry, “The Judgment Of The Court of Demerara, in the case of Odwin v. Forbes”,18 the case Professor Fletcher identifies as a notable foundation of the modern common law on this topic. In his judgment in Odwin v Forbes, Jabez Henry firstly defined the principle of giving effect to mutually acceptable foreign laws, articulated by Huber, as a practical concern:

“For although citizens of one state are not bound, by any pact or necessity of subordination, to observe the laws of another state, yet to refuse effect to these in every case, would render null and void an infinite number of acts and contracts, and put almost a total stop to commercial relations and intercourse….according to the third proposition of Huber, one country gives effect to the laws of another…from a principle of comity and mutual convenience…”19

37 The factual matrix of the case was a dispute as to whether the certificate discharging the English bankrupt’s debts under English law should be recognised and given effect to by the Demerara court as regards local creditors. The legal context was that there was no Demerara statute or judicial authority touching upon the relevant recognition principles:

18 Henry, above note 8, at 89-178.
19 Ibid., at 94, 99-100.
“there never having been here any judicial decision on it before, nor indeed any law, statute or custom prevailing in these colonies directly conclusive on it.”

38 The judge, based on a careful review of decided cases and texts, concluded:

(1) the English courts considered that an English bankruptcy had universal effects with a view to establishing an equality between all creditors;

(2) the English courts applied the same principle to foreign bankruptcy orders;

(3) the Dutch and other Continental courts adopted substantially the same approach.

This conclusion was pivotal because:

“this case…being a casus omissus in or laws, must be regulated by the laws of Holland, or our customs ; and in failure of the civil law, so far as those laws can guide us, according to the instructions framed by the Committee of Ten, for our manner of proceeding in these colonies…”

39 The English assignment of the bankrupt’s assets and subsequent certificate of discharge was recognised and enforced by way of an affirmative answer to:

“the question, how far on the general principle of mutual comity between independent and foreign tribunals, we can give effect to the certificate without prejudice to our citizens…and give it an equitable consideration.”

40. Recognition of the foreign bankruptcy and its effects in terms of divesting the bankrupt of his title to property wherever situate was not sufficient to result without more in a finding that a claim could not be pursued in Demerara and Essequibo against the English bankrupt’s local assets. Effect was given to the English certificate on the basis of substantive Dutch conflict of law rules by granting relief in the local proceedings in terms which appear from the judgment to simply involve applying generally applicable local procedural law. The “Sentence” delivered was in the following principal terms:

“The court having heard the parties, and having read and examined the documents produced by them, and having maturely deliberated on this matter, admit the exception of ‘per regulam tibi adversus me non competit haec actio’.”

41 The “assistance” sought further to recognition of the certificate was in essence a finding that the defendant had a good defence to the plaintiff’s civil action for the sums due under certain bills outstanding for produce shipped before the defendant’s bankruptcy. Although the recognition “cause of action” required the identification of “special” substantive rules of private international law applicable to the recognition of foreign bankruptcy orders, which had not previously been acknowledged to form part of the law of the colony, no legal analysis was wasted on the form of the relief to be granted. The defendant’s jurisdictional plea was

---

20 Ibid., at 91.
21 Ibid., at 174-175.
rejected, but the alternative, loosely translated, plea of “you are not competent to bring this claim against me” simply required the court to apply a generally applicable local remedy in the context of disposing of an otherwise ordinary local proceeding. This plea appears to originally derive from Roman law but to be a more modern procedural feature of Dutch law.

42 Possibly the first Commonwealth court to consider the question of recognising and assisting liquidators of a foreign insolvent company appointed in the debtor’s domicile was the Transvaal Supreme Court in *Re African Farms* [1906] TS 373. The foreign company had been placed into voluntary liquidation in England, but could not be wound up in South Africa. The Transvaal Court, applying the principles then well-recognised in English bankruptcy law, indirectly building on the seminal Caribbean case of *Odwin v Forbes*, held that at common law there was a discretionary power to recognise the foreign winding-up and that recognition carried with it “the active assistance of the court” (at page 377). The form of assistance granted (at 384-385) had three elements to it:

1. a declaration that the foreign liquidator was recognised as entitled to administer all of the company’s assets in the colony;
2. directions for the procedure to be followed to enable local creditors to prove their debts;
3. the Standard Bank’s writ of execution against the company’s assets was stayed.

43 Limbs (1) and (2) of the order made were very closely connected with what might be described as the substantive recognition cause of action. It must be conceded that the provision of assistance was characterised by Innis CJ as being ancillary to the recognition rule itself. The content of the relief was accordingly shaped by and effectively derived from the common law recognition rules themselves. However, as far as limb (3) is concerned, Innis CJ explicitly granted a stay on the basis that this is what would happen under general principles of law in the case of a local liquidation, citing English and South African authorities to this effect. Unsurprisingly, the Court devised novel relief where no relevant precedents existed and applied relevant general legal principles which could usefully be applied to the case at bar. This case therefore supports the following conclusions:

(a) there is a common law discretionary power to recognise a foreign liquidator and winding-up order appointed and made in the company’s domicile;
(b) where the discretionary power to recognise is exercised, there is a closely related duty to assist so far as is possible in accordance with local law and the interests of local creditors;
(c) the forms of assistance which may be granted may be either “new” common law powers tailored to meet the peculiar circumstances of each case or, where available, generally applicable and “insolvency relevant” provisions of local law, statutory or otherwise.
This conclusion is, somewhat obliquely, fortified by a more modern case in which the provisions of section 426 of the Insolvency Act 1986 (UK) were under consideration. Subsection (5) expanded the common law jurisdiction of the Court by empowering the Court to apply provisions of both UK insolvency law and the law of the requesting primary liquidation forum. In *Hughes v Hannover*, the question of whether section 426(5) restricted the Court to applying local insolvency law to the exclusion of general local law was considered by reference to previous statutory bankruptcy assistance provisions. Morrit LJ (delivering the judgment of the English Court of Appeal) opined as follows:

“In my view this historical survey of the authorities and statutory predecessors of s.426 reveals a number of material propositions...in all the earlier cases the assistance afforded to the requesting court was the result of the exercise of this court’s general equitable jurisdiction. Thus receivers were appointed in *Re Osborn*, *Re Jackson* and *Re a Debtor* so as to give control over the assets here of the person made bankrupt in the other jurisdiction. There was no suggestion in either the earlier statutory provisions nor in the cases that the courts here were somehow limited in their jurisdiction to afford assistance to what they were entitled to do under the express provisions of the Bankruptcy Act then in force.”

It is submitted that the same conclusion applies with greater force to the field of common law judicial assistance afforded to foreign liquidators. Absent any statutory assistance jurisdiction, and assuming that the local insolvency statute cannot be applied, the remedial assistance powers must logically include all relevant remedies available under generally applicable local law. The same broad principle can be extracted from the case of *Re Southern Equities* [2001] Ch 429 where section 426(5) relief was afforded by way of applying Australian examination law and procedure to an examination which took place in England. Under Australian insolvency law, unlike under English insolvency law, a debtor could be examined even though a decision had already been taken to pursue litigation against him. Professor Fletcher commented on the novelty of applying foreign procedural law as follows:

“Nor did the Court appear to be troubled by the prospect that this would entail a departure from the long established convention under private international law whereby courts have insisted that in matters of procedure the rules of the forum must be adhered to at all times, and foreign procedural rules excluded from the legal process. In essence, this decision embodies the conclusion that by enacting section 426 in the terms employed, Parliament intended to sanction a departure from this exclusionary treatment of foreign procedural rules, having regard to the fact that the ‘insolvency law’ of the foreign country (as defined by section 426(1)(d)) necessarily consists of an amalgam of procedural and substantive principles and practices which are mutually interdependent...”

In the realm of common law assistance, one can extrapolate from this analysis the forms of assistance which can be granted to the foreign representative may be

---

23 Ibid., at 245.
sourced from the general pool of local procedural law shaped, where appropriate, by local insolvency practice in circumstances where the local insolvency statute is not directly applicable.

47 More recently In The Joint Official Liquidators of a Company v B & C HCMP 902/2014, Jonathan Harris J summarised an application for common law assistance made the Hong Kong Court by Caymanian liquidators thus:

“1. I have before me a number of applications made by the liquidators of a company incorporated in the Cayman Islands which has been wound up by order of the Grand Court of the Cayman Islands, which I shall refer to as the “Cayman Court”. Given the confidential nature of the applications I will refer to the company in liquidation simply as the “Company”. The applications were for the following orders:

(1) A confidentiality order.
(2) Recognition of the liquidation in the Cayman Islands and the appointment by the Cayman Court of the liquidators.
(3) An order that the respondents produce certain documents to the liquidators concerning the details of bank accounts into which substantial sums of money were paid by the Company in circumstances, which suggest they may have been part of a fraudulent scheme.

2. The applications were made pursuant to a letter of request. By that letter the Cayman Court requested the High Court of Hong Kong to make the orders briefly described above. In substance the third order sought was of the type made in Hong Kong under section 221(3) of the Companies Ordinance, cap. 32, in a domestic liquidation on the application of a liquidator or a provisional liquidator. A similar provision exists in section 103 of the Companies Law (Cayman Islands). The respondents did not oppose the applications and I granted the orders….”

48 Harris J then explained why he thought the common law jurisdiction to provide assistance had been underutilized in Hong Kong although it was often a more focussed remedy than commencing an ancillary liquidation, if this option was available:

“The reason in my experience why the Companies Court receives petitions to wind up foreign companies, which can be problematic because of the restricted circumstances in which the Court will wind up a foreign company[1], rather than applications for more focused assistance is identified, in my view correctly, by Professor Ian Fletcher at paragraph 4.02 of the second edition of Insolvency in Private International Law:

‘However, certain factors appear to militate against the English courts’ powers of assistance being more frequently invoked, even against a background of steady growth in the numbers of insolvencies with cross-border aspects. One reason is the relatively under-publicised state of the law, much of which is contained in reports of cases originally decided many years ago. Unfamiliarity with these Common Law precedents and with their significance from the standpoint of obtaining active assistance from the English courts is likely to be one reason for their underutilisation…””
49 Harris J then articulated the basis for his granting the assistance sought as follows:

“12. In Impex Services the English High Court had issued a letter of request at the instigation of the provisional liquidator to the Manx High Court seeking assistance to facilitate the examination of, and production of documents, by various parties based in the Isle of Man. The High Court of the Isle of Man had earlier recognised the appointment and powers of the provisional liquidator. That order had not been challenged by the respondents. The respondents did, however, resist the petition seeking assistance over the matter of their examination. His Honour Deemster Doyle held that the High Court had no jurisdiction under section 206 of the Companies Act (Isle of Man) 1931 to grant such an order as the company was not a “company” for the purposes of that provision. The judge further held that the inherent jurisdiction of the court did not form a basis for granting the order sought by the provisional liquidator pursuant to the letter of request. The judge, however, was satisfied that at common law the Manx court could offer such assistance at the request of the English High Court. In paragraphs 87 to 105 of his judgment His Honour Deemster Doyle considers cases from various common law jurisdictions as well as academic works to establish the extent to which assistance was permissible and determine what the position in Manx common law is, which he sets out in paragraph 106. The judge’s analysis is entirely consistent, as one would expect, with the general statement of principle contained in Lord Collin’s judgment quoted above. It is not necessary for me to set out the analysis here. It is sufficient to say that a review of the authorities and the commentaries contained in academic work establishes that the common law has developed to the point at which the courts in common law jurisdictions consider that they can assist the courts of the place of incorporation of an insolvent company which operates a similar insolvency regime in ensuring that the affairs of the company are properly investigated.

13. A more recent example of this is the judgment of Kawaley J (as he then was) in Re Founding Partners Global Fund Ltd. This case involved a consideration of competing claims to assets of a company incorporated in the Cayman Islands situated in Bermuda advanced respectively by the provisional liquidators appointed by the Cayman Court and a receiver appointed by order of the US District Court for Florida. Bermuda has no legislation dealing specifically with cross-border insolvency and as a consequence the applications before the Court required it to apply the rules of private international law. In paragraph 38 of his decision Kawaley J explained the nature of the controversy to which the applications gave rise:

‘38. The competition between the JOLs and the Receiver over the Bermuda assets does not raise the same issues as arose in the House of Lords in the HIH case. There the question was whether assets under the control of liquidators appointed in ancillary liquidation proceedings should, instead of distributing the assets in the local ancillary proceedings, remit the assets to the primary Australian liquidation Court instead. Here the true controversy turns, in the first instance at least, on competing claims to control assets belonging to the foreign insolvent company which are located in a jurisdiction where no ancillary liquidation proceedings have been commenced. The dispute centres, in effect, on the more fundamental question of who has the best claim to be recognised as agents or representatives of the Company. Dicey & Morris’ Rule 160 in the present context is in my judgment brought into play: “The authority of a liquidator appointed under the law of the place of incorporation is recognised in England”. This rule is, according to the learned authors, “justified because the law of the place of incorporation determines who is entitled to act on behalf a corporation. If under that law a liquidator is appointed to act then his authority should be recognised here” (Dicey & Morris, 12th edition, page 1137). Liquidators appointed in other jurisdictions will generally only be recognised as
Kawaley CJ: “Relashio!”

14. The judge concluded that applying settled principles the Bermudan [sic] Court had a positive duty to assist the liquidators appointed by the Cayman Court and recognise them as entitled to control the company’s assets located in Bermuda unless there is reason to the contrary.

15. In paragraphs 56 to 64 of his judgment Kawaley J considered the precise parameters of the Bermudan [sic] Court’s common law jurisdiction to assist the foreign liquidators appointed by the court of the place of incorporation of the company, although as the Judge acknowledged, it did not strictly arise for determination. After identifying the principles as they emerge from Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc and other, the Court of Appeal’s decision in Rubin v Eurofinance and The Conflict of Laws, Kawaley J concluded in paragraph 60:

‘60. To my mind this Court, applying these principles, could validly recognise the JOLs and empower them to assert in Bermuda whatever claims are available to them under Caymanian law, provided that (a) the foreign substantive law to be applied is broadly similar to local insolvency law, and (b) the specific relief which is sought is available under local law. Without in any way prejudging the application of these broad-brush assertions in relation to any future applications for assistance, it is at the very least arguable that foreign liquidators from jurisdictions with similar insolvency law frameworks can at common law seek to deploy all of the remedial powers conferred on liquidators under Part XIII of our Companies Act without commencing ancillary winding-up proceedings here. The original recognition Order of June 19, 2009 was on this basis probably formulated in somewhat crude and simplistic terms, justifying (at least in part) the doubts about its validity which were helpfully drawn to the Court’s attention to by Mr. Wolonecki.’

16. As Kawaley J explains in the following paragraph this question is particularly important in the Bermuda context because unlike England and Hong Kong, Bermuda has no statutory provision expressly empowering the Court to wind up a foreign incorporated company.

17. The significance of Kawaley J’s decision and Impex Services is that they serve to demonstrate the extent to which the courts in different common law jurisdictions, which do not have provisions similar to section 426 of the Insolvency Act 1986 in England, are adopting a consistent and expansive view of the extent to which established common law principles require the court to recognise foreign liquidators and allow the court to provide assistance to them.

18. In my view the Hong Kong Companies Court can and should adopt a similar approach to applications for recognition and assistance to that described in paragraph 60 of Kawaley J’s judgment. The Companies Court may pursuant to a letter of request from a common law jurisdiction with a similar substantive insolvency law make an order of a type which is available to a provisional liquidator or liquidator under Hong Kong’s insolvency regime. For this reason I granted the orders referred to at the beginning of this decision.”

50. This 21 July 2014 judgment elegantly achieves a result entirely consistent with the majority view of the Judicial Committee of the Privy Council on 10 November 2014 in Singularis [2014] UKPC 40, as to the ability of the common law to assist foreign liquidators to obtain information. It does so without any apparent anxiety about the need to explicitly spell out the source of the assistance powers
confidently deployed. On can reasonably infer, however, that Harris J assumed the sources to be as follows:

(1) Confidentiality Order: the Court’s general and/or inherent case management powers likely embedded in rules of court;

(2) Recognition Order: the relevant common law rules of private international law;

(3) Information Production Order: the common law, as an incident to the recognition power, applied by analogy or consistently with how the corresponding statutory insolvency power would be exercised.

51 In summary, case law pre-Cambridge Gas and post-Cambridge Gas supports the thesis that the sources of the power to grant assistance supplementary to recognising a foreign liquidator appointed in the foreign debtor’s place of incorporation depend on the type of assistance sought and the legal idiosyncrasies of the assisting court. The Court may simply need to grant declaratory relief, deploying a recognised remedy of the forum in aid of the recognition rules prescribed by private international law. The Court may have to deploy other general local procedural powers; but because the purpose of the relief is to assist a foreign insolvency proceeding, the relief granted is likely to be informed by the approach that would be taken in a local liquidation, whether pursuant to statutory insolvency provisions or general “civil litigation” powers.

52 Re Impex [2004] BPIR 564 alone, of the pre-Cambridge Gas cases, explicitly supported the view that assisting judges could effectively conjure up new forms of relief, as if using a Harry Potter “summoning charm”, if existing remedies were not available. The Joint Official Liquidators of a Company v B & C HCM 902/2014, (Harris J) alone, of the post-Cambridge Gas cases, implicitly at least supported a similar view. These cases accordingly represent the high point in terms of recognising the almost magical powers of the common law to shape new remedies designed to deliver justice on the facts of particulars cases to litigants relying upon established substantive “causes of action”. They are entirely consistent with the spirit of the seminal personal bankruptcy case of Odwin v Forbes (1817) 1 Buck. 57 (PC); Jabez Henry, “The Judgment Of The Court of Demerara, in the case of Odwin v. Forbes”. Most judges have leaned towards a more “Muggle-like” approach of finding support for common law assistance relief in existing powers of the court. As the present writer opined judicially at first instance in Re Saad Investment Co. Ltd and Re Singularis [2013] Bda LR 28, relying primarily on existing general legal rules but favouring (almost aspirationally) the principle of being able to deploy insolvency law provisions as well:

“36. My primary finding is that the Court’s power to make the examination/production Order is by analogy with section 195 of the Companies Act 1981 rather than by reference to the statute itself. This is because the Companies Act 1981 does not form part of the general

24 Henry, above note 8, at 89-178.
law of Bermuda but applies to the particular companies that Parliament contemplated it would apply to when enacting the legislation. Part XIII applies to companies which can be wound-up under the Act. This might be described as a more cautious “black letter law” approach…

47. The only gloss which I seek to add to this analysis [Re Impex] is that the procedural tools which are deployed in support of the common law “cause of action” cannot be conjured out of thin air. They must and may be found in the general law of Bermuda, which includes the inherent powers of the old common law and equitable courts preserved in statutory form in section 12 of the Supreme Court Act 1905. In the instant case the procedural powers primarily lie within the Rules of the Supreme Court; however the conditions for the exercise of these discretionary powers (i.e. the substantive principles which inform the purpose for which the procedural tools are utilised) can, as a matter of common law, best be borrowed from cases considering the exercise of the statutory powers which would apply in the context of a local liquidation and, it seems to me, the terms of the statutory provisions themselves. Under settled conflict of law rules, the status of the liquidator and the company in liquidation derives from the company’s domiciliary law. But local law (lex fori) governs both the procedure and remedies which the assisting court provides; this point will be returned to below when considering the alternative theory that this Court may directly apply statutory insolvency law.

48. This approach seems more straightforward and conservative than the alternative approach, entailing the assumption that either (a) the common law discretion to cooperate embodies the power to apply statutory provisions to foreign companies to which they do not otherwise apply, or (b) that the substantive and/or procedural rules which may be deployed to assist a foreign representative who has been recognised are derived wholly from the common law itself and may be defined by the courts on a case by case basis. However, alternative (a) is a serious contender for the most principled legal basis for exercising this discretionary common law jurisdiction…”

53 Bannister J, cannily foreshadowing Lord Sumption’s later reasoning in Re Singularis, has nevertheless suggested (obiter) that the relief granted in Re Impex might have been jurisdictionally grounded on a pre-existing common law remedy as well. In Re C (a Bankrupt) [2013] BVIHC (Com) 0080 (unreported), he stated:

“[14] As for Impex, what the Manx Court did was to use its own powers to compel the attendance of witnesses for examination. It did not do so under the Manx Companies Act, which it held was not available to it because the applicant was not the liquidator of a Manx company. It did it under its inherent jurisdiction and by way of assistance – just as, no doubt, it could have granted Norwich Pharmacal relief to the applicant…”

Common Law Assistance and Local Insolvency Statutory Provisions

54 It remains to consider to what extent the court affording common law assistance outside of an ancillary winding-up proceeding can properly apply local insolvency provisions. This question was not addressed in Cambridge Gas, but Lord Hoffman’s broad assertion (in what were clearly only obiter dicta) that:

25 At paragraphs 41 to 43 of the judgment.
26 [1974] AC 133.
“the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency”27

captured the imagination of some judges, sparking a jurisprudential debate on the extent to which the assisting court’s insolvency law could be deployed in aid of common law assistance.

55 The question of applying local statutory insolvency provisions in aid of a common law assistance application is likely to arise in two obvious and starkly contrasting legal contexts:

1. where the assisting court has jurisdiction to wind-up the foreign debtor, whose liquidators have positively elected to seek common law assistance instead of commencing an ancillary liquidation; and

2. where the assisting court has no jurisdiction to wind-up the foreign company at all.

56 In both cases, it seems reasonable to start from the hypothesis that it is a matter of statutory interpretation in each case whether the provisions of a statute apply to a particular factual and legal matrix. Where the local insolvency statute extends to the overseas insolvent company, it seems more plausible to contend that absent the commencement of ancillary local winding-up proceedings, the relevant statutory provisions may be deployed in aid of a common law assistance application. Where the local insolvency statute does not expressly apply to the foreign debtor at all, it is obviously more problematic to construe the legislative regime as applying to a foreign company the liquidation of which has been recognised at common law alone.

57 In Re Kingate [2011] Bda LR, the present writer, in the somewhat artificial context of a hearing on the hypothesis that the Court had previously erred in asserting jurisdiction to wind-up the foreign company, concluded as follows:

“22. Accordingly, I find that assuming Part XIII the Companies Act 1981 does not apply to the applicant BVI companies, the production of documents order sought can only be made by reference to the general jurisdiction and powers of this Court. For the reasons articulated by Mr. Riihiluoma and set out above, I find that no such general power is available. On these grounds, the JLs’ application must be refused.”

58 This judgment became academic because the related appeal against the winding-up order previously made in respect of the same company was dismissed. However it did represent a reasoned finding that the Bermudian insolvency statute could not be applied to a company which could not be wound-up in Bermuda. A contrary finding was made by the English High Court (Proudman J) in Schmitt v Deichmann et al. [2013] EWHC 62(Ch), where the just noted decision in Kingate was cited but

27 [2007] 1 AC 508, at 518.
not followed. This was a case where the administrator of a German company was forced to seek recognition at common law because neither the European Insolvency Regulation nor the then new UNCITRAL Model Law applied to the foreign debtor. While the recognition granted by the Master was uncontroversial, an appeal was made to Proudman J on the grounds that assistance could not take the form of granting relief under section 423 of the Insolvency Act 1986, an avoidance of antecedent transactions provision. Proudman J crucially held as follows:

“62...Reading together Cambridge Gas, HIH, New Cap and Rubin, I derive the following propositions: (i) there is power to use the common law to recognise and assist an administrator appointed overseas, (ii) assistance includes doing whatever the English court could have done in the case of a domestic insolvency, (iii) bankruptcy proceedings are collective proceedings for the enforcement (not establishment) of rights for the benefit of all creditors, even when those proceedings include proceedings to set aside antecedent transactions, (iv) proceedings to set aside antecedent transactions are central to the purpose of the insolvency.”

59 This judgment was delivered before the Supreme Court decision in Rubin, but was explicitly based on the alluring *dictum* of Lord Hoffman (which Lord Collins affirmed in *Rubin*28) that a court extending common law assistance:

“must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency.”

60. The finding appears to blur the distinction between (a) exercising a common law power in a way which is informed and/or shaped by reference to a corresponding insolvency law power, and (b) directly applying the relevant statutory insolvency power itself. A statute can only be directly applied to the extent that the statute itself is intended to apply. The approach adopted was wholly consistent with the policy goals of common law recognition and assistance in that the fullest extent of assistance in that case entailed deploying a statutory insolvency remedy. But it failed adequately to address the technical but important issue of the basis upon which the statute be said to apply to the foreign company in question.

61 *Picard (as Trustee for the liquidation of the Business of Bernard L. Madoff Investment Securities LLC) et al v Primeo Fund (In Official Liquidation)*, Cayman Grand Court FSD 275 of 2010, Judgment dated 14 January 2013 (Mr. Justice Andrew Jones) also considered whether statutory avoidance provision could found the basis for a claim and, in particular, could be made available to the foreign representative by way of common law assistance. He answered this question in the affirmative on the basis of a careful analysis of the conundrum:

“39. It may be said that orders vesting local assets in a foreign representative or declaring his right to deal with such assets are not dependent upon the exercise of a statutory power available only to official liquidators appointed by this Court. Similarly, the grant of a stay of

28 [2013] 1 AC 236, at paragraph 80(m) (per Lord Collins); at paragraph 202 (m) (per Lord Clarke).
proceedings or a stay execution upon the application of a foreign representative merely involves the exercise of a general power in a manner which recognizes the existence of the foreign insolvency proceeding. Traditional assistance of this sort does not depend upon conferring a course of action upon the foreign representative or giving him access to a remedy under the domestic insolvency law which would not otherwise exist, absent a winding up order. The argument is that traditional assistance is dependent upon recognition alone. Non-traditional assistance is dependent upon the application of an additional ‘sufficient connection test’ to determine whether or not there is a jurisdiction to make a winding up order, without which the local court cannot properly treat the foreign representative as having any of the rights and remedies available only to a locally appointed official liquidator. Mr. Crystal’s argument has a compelling logic, but it is not actually consistent with the approach which appears to have been approved by Lord Collins in Rubin. He stated (at paragraph 33) that ‘Cases of judicial assistance in the traditional sense include In re Impex Services Worldwide Ltd [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England or an English company.’ In this case a foreign liquidator made an application to the Manx court for an order for the examination of an individual in aid of the foreign liquidation proceeding. The application was made under section 206 of the Companies Act (Isle of Man) 1931 which is the equivalent of section 103 of the Companies Law. It was held that the statutory jurisdiction was not available because Impex was not a ‘company’ within the meaning of the Act. Nevertheless, the Manx court held that it had power at common law to make an order for examination in exactly the same terms as the statutory power even though the statutory power did not apply. This decision, which is described by Lord Collins as an example of traditional common law assistance, is inconsistent with Mr. Crystal’s analysis and suggests that recognition is sufficient for granting assistance, even when it involves treating the foreign representative as having rights and remedies otherwise available only to official liquidators appointed by this Court.

40. It might be said that this approach conflicts with the general principle that this Court has no inherent jurisdiction to exercise a statutory power in circumstances not falling within the provision of the Law in question. This point was addressed in the decision of the Privy Council in Al Sabah -v- Grupo Torras SA [2005] 2 AC 333. The case concerned an individual who was subject to a personal bankruptcy proceeding in the Bahamas. The trustee in bankruptcy obtained a letter of request from the Bahamas court seeking the aid of this Court in setting aside two trust settled by the debtor under Cayman Islands law pursuant to section 107 of the Bankruptcy Law (1997 Revision). It was held that this Court had a statutory jurisdiction under section 156 of the Cayman Islands Law and/or under section 12 of the UK Bankruptcy Act 1914. However, in giving judgment Lord Walker made the following observation (at paragraph 35)-

‘The respondents relied in the alternative, on the second issue, 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 is 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 recognized foreign Bankruptcy jurisdiction are more limited in their scope . . . and the inherent Jurisdiction of the Grand Court cannot be wider.’

41. What this means is that the common law cannot bring into play a statutory provision to achieve a purpose which is different from the object of the statute. The object of section 107 of the Bankruptcy Law (1997 Revision) is to confer jurisdiction on the court to set aside voluntary settlements only in connection with personal bankruptcy proceedings. The Law
has no application to corporate insolvency proceedings. Lord Walker’s point is that the common law cannot be invoked to apply provisions of the Bankruptcy Law to achieve an objective outside the scope of the statute. To put the point another way, as Lord Neuberger did in HIH (supra) (at paragraph 76), the common law cannot be used to thwart a statutory purpose. However, bringing the preference claim provisions of section 145 into play in respect of BLMIS in the circumstances of this case does not, in my view, depart from or thwart the statutory objective of the Companies Law in the way contemplated by Lord Walker and Lord Neuberger. Treating BLMIS as being the subject of a liquidation proceeding under Cayman Islands law as at the date of the foreign bankruptcy proceeding (15 December 2008) even though there was no jurisdiction to make a winding up order, is consistent with the general principal of modified universalism and does not, in my view, involve applying the statute for an unintended purpose or tend to thwart its intended purpose. Indeed, the very concept of recognizing a foreign bankruptcy proceeding, involves recognizing that certain legal consequences have occurred from a specific date. The effect of the Recognition Order in this case is, inter alia, that the Trustee is recognized as having authority to act for BLMIS with effect from the date upon which the New York Court made its order, namely 15 December 2008. This Court has recognized that BLMIS has been in bankruptcy since that date. Applying the provisions of section 145 in this way is an incidence of recognition and it is consistent with the statutory objective. For these reasons I have come to the conclusion, not without some hesitation, that this court does have jurisdiction at common law to apply the avoidance provisions of Cayman Islands insolvency law in aid of the BLMIS liquidation whether it would have had jurisdiction to make a winding up order.

62 The conclusion that a statutory provision can be engaged and applied by the common law in circumstances in which the statute does not itself purport to apply, provided that the intended purpose of the provision is not distorted is not supported by the authority on which it purports to be based, Al Sabah v Grupo Torras SA [2005] 2 AC 333. All that the quoted passage asserts is that where a broad statutory assistance power has been created, a corresponding common law power cannot be given an even broader scope. The desirability of the local insolvency statute being available to a foreign liquidator whose status had been recognised at common law was more obvious than the juristic basis for the statute being brought into play by the common law itself. If the passing observations of Lord Hoffman in Cambridge Gas and Lords Collins and Clarke in Rubin are carefully read in light of the dicta of Lord Walker in Al Sabah cited in Primeo, they merely support the following simple proposition. Where Parliament has created a statutory insolvency power, a corresponding common law power may be as ample but not more ample than its statutory counterpart. Moreover if the seminal dicta of Lord Hoffman are properly understood in their Cambridge Gas context, it is clear that the Judicial Committee only had in mind situation where the corporate debtor in question could be wound-up by the assisting court:

“22. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.” (emphasis added)
63 In Re Saad Investment Co. Ltd and Re Singularis [2013] Bda LR 28; [2013] SC (Bda) 28 Com (15 April 2013), which considered the above authorities, the present writer posited the following alternative rationale for a common law power to bring a statutory insolvency provision which did not otherwise apply into play:

“52. Stepping back from the particular context of common law recognition of foreign insolvency orders therefore, it is instructive to consider the elements of common law enforcement of personal money judgments. Ground J (as he then was) summarised the Bermudian law position in Muhl-v-Ardra [1997] Bda LR 36 as follows:

‘There was no real dispute as to the law concerning the enforcement at Common Law of a foreign judgment, although there was a great deal of dispute as to its application to the facts of this case. I summarised the relevant law in my judgment in Ellefsen-v-Ellefsen. Civil Jurisdiction 1993, No. 202 (22nd October 1993), and I consider that that statement of it still represents the law of Bermuda. I will, therefore, simply set it out:

‘The legal position as to the enforcement of foreign judgments is set out in Dicey & Morris on the Conflict of Law, 11th ed. p. 421—

“A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution of the judgment. He must bring an action on the foreign judgment. But he can apply for summary judgment under Order 14 of the Rules of the Supreme Court on the ground that the defendant has no defence to the claim; and if his application is successful, the defendant will not be allowed to defend at all.”

There is no statutory mechanism here for enforcing American judgments by means of registration and execution by the local Court, and so this statement of the common law represents the normal method for enforcing such judgments in Bermuda, and there is no dispute about that.

A final judgment in personam given by a court of a foreign country with jurisdiction to give it may be enforced by an action for the amount due under it if it is for a debt or a definite sum of money (not being a sum payable in respect of taxes or in respect of a fine or other penalty). The only grounds for resisting the enforcement of such a judgment at common law are: (1) want of jurisdiction in the foreign court, according to the view of the English Law; (2) that the judgment was obtained by fraud; (3) that its enforcement would be contrary to public policy; and (4) that the proceedings in which the judgment was obtained were contrary to Natural Justice (or the English idea of ‘substantial justice,’ as it was put in the leading case). Unless the judgment can be impeached on one of those four grounds, the court asked to enforce it will not conduct a rehearing of the foreign judgment or look behind it in any way: see Dicey & Morris, Ibid., p. 420—

“Rule 42—A foreign judgment which is final and conclusive on the merits and not impeachable under any of rules 43 to 46 [which are the four grounds I have set out
The commentary states that this has not been questioned since 1870."

In fact, in *Ellefsen* I enforced a judgment of the Superior Court of New Hampshire by summary judgment here. I therefore cite that case not just for the statement of principle, but to make it quite clear that the Courts of Bermuda stand ready to enforce a foreign judgment if it does not fall within the excluded categories."

53. The last quoted words, in the ears of a cross-border common law judicial cooperation lawyer, have a distinctly familiar ring. The aim of common law proceedings to enforce a foreign money judgment is fundamentally to achieve recognition of such judgment on a summary basis without a full trial in the form of a final local judgment which can then be enforced utilising all of the procedural mechanisms available under local law. In my judgment the aim and function of common law enforcement of a foreign winding-up order and/or order appointing foreign liquidators is broadly similar.

54. Because of the in rem nature of the insolvency orders, the procedure for obtaining a local order granting recognition is somewhat different. But the incidental consequences which flow from the making of a local order recognising a foreign liquidator are perhaps substantially similar. In declaring in a common law “action” that the foreign office holders are recognised as liquidators validly appointed in respect of a foreign company (which can or cannot be wound-up by the assisting court), is the assisting court not effectively “domesticating” the foreign appointment order? Is the main purport of the recognition order not to declare that the foreign liquidator is recognised under local law as having the same status as he enjoys under the law of the primary liquidation under the relevant conflict of law rules? Is the main function of seeking recognition not to enable the foreign liquidator to act as a liquidator within the jurisdiction of the assisting court?

55. If all these questions are answered in the affirmative, as in my judgment they ought to be, then the recognition order itself may be viewed as the trigger which brings into play not simply the general law of Bermuda but its statutory insolvency regime as well, to such extent as the foreign representative (or any other person affected by the recognition order) may reasonably seek to rely upon it, being a way which neither:

(a) distorts the original statutory purpose of the provisions invoked; nor

(b) conflicts with local public policy interests.

56. It would be somewhat odd if the effect of recognising a foreign liquidator by order of this Court did not have the result of making all relevant Bermuda law available to him, including Bermuda insolvency law. An analogy would be if common law enforcement of a foreign money judgment entitled the foreign judgment creditor to obtain a local judgment but not to be able to deploy the local enforcement rules. The dominant impulse of the common law is a results-oriented pragmatism, primarily driven by lawyers and judges who are former lawyers, practitioners who are often more motivated towards achieving a just result in a particular case than in developing the sort of coherent theoretical frameworks championed by the Civil Law tradition and common law academicians. This may explain the somewhat clipped practical terms in which the scope of the discretionary assistance jurisdiction has so often been expressed.”
64 These pronouncements have more of an academic aspirational air to them than a truly rigorous judicial character. After all, they were made in the context of a case where the judge considered it easier to ground the assistance sought on the Court’s general powers, but could not resist the lure of “proselytising” on a legal issue which had vexed insolvency lawyers and judges in various parts of the globe. More importantly still, somewhat like in the Kingate case referred to above, Singularis was argued against the somewhat bizarre background of a related company (Saad Investments Company Ltd.) having been wound-up on the assumption that the insolvency statute did apply. An appeal against the information production order made against Saad was then launched in part on the grounds that no jurisdiction to wind-up the overseas company existed. The Court of Appeal for Bermuda had previously decided in PricewaterhouseCoopers v Kingate Global Fund Ltd and Kingate Euro Fund Ltd. [2011] Bda LR 32 that it was not legally possible to collaterally challenge a winding-up order in this manner. The prevailing legal position when Singularis was argued at first instance was that the insolvency statute did directly apply in the sense that the company could have been wound-up. The application was argued on the purely hypothetical assumption that no ancillary winding-up was available which made it understandably difficult to effectively analyse a scenario which was not considered likely to arise.

65 The hypothesis that the local insolvency statute ought in principle to be available to a foreign liquidator whose status has been recognised at common law in the same way as routinely happens when statutory insolvency assistance is pursued is sound in terms of legal policy. It is far easier to analyse more clinically the question of whether the winding-up provisions of the Bermudian Companies Act can be directly applied to an overseas company which the Bermudian Court does not have jurisdiction to wind-up in light of the recent decision of the Privy Council that no such winding-up jurisdiction can in fact be exercised: PricewaterhouseCoopers (Bermuda Exempted Partnership No. 7420) v Saad Investments Company Ltd. [2014] UKPC 114. Whether or not the hypothesis may be a sound one in other statutory contexts will likely depend on whether or not the relevant insolvency statute can fairly be said to apply to the foreign debtor because either:

(a) the insolvency statute expressly applies to the foreign debtor in the sense that the local court has jurisdiction to wind-up the overseas company; or

(b) the insolvency statute expressly or impliedly applies to a foreign company which cannot be wound up but whose foreign liquidation has been recognised at common law.

66 As far as the Bermudian law position is concerned, the first instance decision in Singularis provided no convincing basis on which the Bermudian statutory insolvency regime (Part XIII of the Companies Act 1981) could be said to be available at common law in aid of a foreign company to which those provisions did not apply. This was because section 4 of the Act dealt with the application of the Act with considerable specificity as follows:
“4(1) This Act shall apply to—
(a) all mutual companies incorporated prior to 1 July 1983 to which Part XII applies; and
(b) any overseas company so far as any provision of this Act requires it to apply.
(c) all mutual companies incorporated prior to 1 July 1983 to which Part XII applies; and
(d) any overseas company so far as any provision of this Act requires it to apply.

(1A) In respect of—
(a) non-resident insurance undertakings, section 2 and Parts XIII and XIV shall apply to them except those sections in Part XIII relating exclusively to members’ voluntary liquidations and for the purposes of section 2 and Parts XIII and XIV “insurance business” has the meaning assigned to it in the Non-Resident Insurance Undertakings Act 1967;
(b) permit companies, section 2 and Parts III, V, XI and XIII except those sections in Part XIII relating exclusively to members’ voluntary liquidations shall apply to them…”

67 These difficulties may to a large extent explain why the primary finding at first instance in *Singularis* was as follows (paragraph 8(a)):

“(i) this Court may validly recognise the SHL JOLs’ appointment in the place of the companies’ incorporation (together with the Caymanian winding-up order) and assist them at common law by analogy with the statutory powers contained in section 195 of the Companies Act by ordering them to produce the same documents which could be ordered under the local statute in the case of a domestic or ancillary liquidation…”

68 This finding, contrasted with the alternative finding that section 195 could be directly applied, reflected an apparent attempt to distinguish (a) applying a common law or general legal power in a manner which was consistent with the way in which a corresponding statutory insolvency power would be exercised and (b) directly applying the statutory provision itself. Option (a) was considered to be the most conservative and straightforward option.

69 Be that as it may, three first instance judges, Proudman J (in England), Andrew Jones J (in Cayman) and Kawaley CJ (in Bermuda) found without wholly convincing justification that Cambridge Gas supported the application of statutory insolvency provisions by operation of the common law in circumstances where the relevant provisions did not otherwise apply to the foreign company seeking assistance from the local court. Before the Judicial Committee put these common law judicial cooperation “zealots” to the sword in *Singularis*, the Court of Appeal for Bermuda opined on this issue: *PricewaterhouseCoopers (Bermuda Exempted Partnership No. 7420) v (1) Saad Investments Company Ltd., (2) Singularis Holdings Ltd.* [2013] Bda LR 82; [2013] CA (Bda) 7 Civ. The Court of Appeal for Bermuda unanimously allowed the appeal against the production order made at first instance in *Singularis* on forum shopping grounds. Sir Robin Auld JA was the only panel member who fully addressed the common law deployment of statutory provisions which did not otherwise apply issue, and he roundly rejected the viability of the approach contended for at first instance:
“34. Before moving on to the judgments of the Supreme Court in Rubin, the last of the four leading cases, I should refer to that of Proudman J, given shortly before the Rubin decision, in Frank Schmitt v Henning Deichmann [2012] EWCH 62, Ch. With respect, I consider that Proudman J erroneously took as a premise that there is conflict as to ratio between Al-Sabah and Cambridge Gas, an analysis mirrored by the Chief Justice in his judgment in this case. The issue in both Al-Sabah and Schmitt, and as here, was “whether the common law power to assist an office-holder permits him to establish and exercise statutory powers not falling within their express scope.” Proudman J held, in para. 64 of her judgment, that she had such power. She did so on the basis of her perceived conflict between the Board in paragraph 35 of its opinion in Al-Sabah and what she described as the broad brush approach of Cambridge Gas and HIH, opting in para. 64 of her judgment, for Lord Hoffmann’s repetition of his Cambridge Gas formula in HIH:

‘In the absence of a determinative decision explaining the apparent conflict between the statement in [35] of Al-Sabah and the broad brush approach of Cambridge Gas and HIH, it seems to me that I should take the later and more considered views of Lord Hoffmann and approved by Lord Walker in HIH. If there is a conflict in a case of this sort between the application of black letter law and a broad commercial support of international comity there can only be one answer… the Court had jurisdiction to grant recognition and assistance.’

35. That proposition, which the Chief Justice characterised, in paragraph 53 of his judgment as a “crucial finding”, was, with respect, little more than a “throw of the dice” on Proudman J’s mis-reading of the authorities before her. I have much sympathy for her dilemma, faced as she was with a body of loosely expressed and indeterminate, jurisprudence and without the benefit of Lord Collins’ analysis in the imminent majority Supreme Court ruling in Rubin. For the reasons I have given, there was no such conflict between the ratios, properly analysed, in Al-Sabah on the one hand, and in Cambridge Gas, on the other. Any that there may have been in this context were not, in any event, about restrictive “black letter law”- construction of a statutory or other instrument’s ambiguous terms, but about an ill-defined insinuation into local statutory law of assumptive power that, as here, local law statutory law excluded – in plain language an assault on local parliamentary supremacy.”

Re Singularis [2014] UKPC 36

Overview

70. In Singularis, the Judicial Committee of the Privy Council had the first opportunity since Cambridge Gas to consider, head-on, the scope of the common law power to recognise and assist foreign liquidators appointed in the foreign debtor’s place of incorporation. Moreover, the power to recognise the liquidators was not in dispute; in issue was the controversial and highly practical consideration of whether assistance could be furnished in the form of making orders for the production of information where the assisting court had no jurisdiction to wind-up
the foreign debtor and/or the relevant statutory insolvency power did not otherwise apply. In summary, the principal findings were as follows:

(a) (by a majority) the power to order the former auditors of the Caymanian company whose liquidation had been recognised at common law by the Bermudian Court to produce documents to the Caymanian liquidators existed as a matter of common law despite the absence of jurisdiction to wind-up the foreign debtor (Lords Sumption, Collins and Clarke; Lords Mance and Neuberger dissenting);

(b) (unanimously) the common law cannot be used to apply a statutory insolvency provision in circumstances to which the statute does not otherwise apply;

(c) (unanimously) the common law cannot be used to grant a form of relief which would not be available under the laws of the primary liquidation forum.

The importance and complexity of the issues addressed is reflected in the handing down of five separate judgments with a 3-2 split on the vexed question of what forms of assistance may be provided at common law. The complexity of the common law assistance issue in particular is also illustrated by the fact that the liquidators apparently relied in argument before the Board primarily on the direct application of the insolvency statute argument rather than the general jurisdiction and powers of the Court as a source of law, upon which the trial judge primarily relied. However, the most important broad contribution that the decision makes to this area of the law is by confirming that while controversy may always exist about the outer boundaries of the forms of assistance which may be given, the common law power to recognise and assist so far as possible liquidators appointed in an insolvent company’s place of incorporation is alive and well.

The factual background against which the requests for an examination/production order were made to the Bermudian Court ought not to be ignored. According to the first instance judgment, an examination/production order was first made by the Caymanian Grand Court on 7 September 2010. This order was effectively ignored by PWC Exempted until a further order made in March 2012 with a penal notice affixed to it was served on them. It was common ground that under Caymanian law only documents belonging to the company had to be produced, while under Bermudian law the auditors’ working papers were liable to be produced. The information was clearly of little practical value to the liquidators. As the Bermudian first instance judge noted:

“80…there is undeniably a massive insolvency and most of the books and records which would normally be obtained from the insolvent Companies’ former management have reportedly been taken to a jurisdiction not noted for its cross-border insolvency cooperation record.”

This was an exceptional case where the information sought by the liquidators from the debtor’s former auditors had an unusually high premium because records which would normally be obtained from the former management were simply inaccessible.

*The Source of the Assistance Power*

Lord Sumption firstly explained the relationship between common law assistance powers and statutory powers in the following way, which probably reflected the unanimous view of the Privy Council Board:

“18. The Board considers it to be clear that although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. So far as Cambridge Gas suggests otherwise, the Board is satisfied that it is wrong for reasons more fully explained in the advice proposed by Lord Collins. If there is a corresponding statutory power for domestic insolvencies there will usually be no objection on public policy grounds to the recognition of a similar common law power. But it cannot follow without more that there is such a power…”

Lord Sumption, after considering *Cambridge Gas*, proceeded to cite with approval the following paragraphs from Lord Hoffman’s judgment in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852:

“6 Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt’s domicile which receives worldwide recognition and it should apply universally to all the bankrupt’s assets.

This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of ‘modified universalism’: see also Fletcher, *Insolvency in Private International Law*, 2nd ed (2005), pp 15–17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.”

The passages quoted, while attributing the term “modified universalism” to Professor Jay Westbrook, also reveal Lord Hoffman’s continued reliance upon Professor Ian Fletcher’s work. Lord Sumption then proceeded to describe in general terms the approach to identifying whether or not an assistance power existed, again in terms which appear to have reflected the unanimous view of the Board:

“19. In the Board’s opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public
policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so.”

It is at this point that the majority and the minority part company as Lord Sumption demonstrates the ability of judges confronted with common law assistance conundrums to seemingly produce a magic wand, intone a “summoning charm”, and conjure up a suitable remedy designed to do justice to the case at hand:

“23. The present case is not a Norwich Pharmacal case. The significance of Norwich Pharmacal in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle. In the Board’s opinion, an analogous power arises in the present case. Relief is not being sought by way of assistance to a litigant who can rely on ordinary forensic procedures for the purpose. It is being sought by the officers of a foreign court. The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company’s incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations 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. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can. The Bermuda court has properly recognised the status of the liquidators as officers of that court. The liquidators require the information for the performance of the ordinary functions attaching to that status. Their acknowledged right to take possession of the company’s world-wide assets is of little use without the ability to identify and locate them, if necessary with the assistance of the court. The information is unlikely to be available in any other way. None of the reasons which account for the common law’s inhibition about the compulsory provision of evidence have any bearing on the present question. The right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the company’s title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holder’s right to act on the company’s behalf in the same way as any other agent of a company appointed in accordance with the law of its incorporation. 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.”

The creative edge of this analysis is only slightly blunted by the reference next made to two previous reported cases where the production of similar information had been ordered as a matter of common law, Moolman v Builders & Developers
The leading judgment makes it clear that, rather than seeking to make broad statements of principle about common law assistance generally, Lord Sumption is only addressing the specific form of assistance before the Board in Singularis. The intricate justification for a sui generis common law assistance power is seemingly based on the following key threads:

(1) as statutory authority has always been accepted as necessary to justify ordering the production of evidence for use in foreign proceedings, a common law power to produce evidence for use in foreign proceedings cannot be justified;

(2) there is a recognised legal distinction between “evidence” for use in adversarial proceedings and “information” required for investigative purposes. A common law power to order the production of vital information needed by foreign liquidators properly recognised may therefore permissibly found to exist as a fundamental and essential form of assistance.

There is nothing in this reasoning which suggests that, where the form of assistance sought can properly be found in the common law and/or statutory rules applicable to civil proceedings generally, such general legal rules cannot be deployed by way of common law assistance to a foreign liquidator. Somewhat surprisingly, it appears that the Singularis liquidators relied solely on the argument that section 195 of the Bermudian Companies Act could be directly applied. The availability of such general powers to compel the production of the information sought by the Caymanian liquidators did not receive the benefit of full argument. Nevertheless the various judgments provide strong support for the proposition that such general powers may in appropriate circumstances be deployed. Lord Collins, for instance, stated:

“38. In my judgment the answer to the present appeal is to be found in the following propositions. First, there is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings. Second, that power is primarily exercised through the existing powers of the court. Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law. Fourth, 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. Fifth, in consequence, those powers do not extend to the application, by
analogy “as if” the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case.” (emphasis added)

Moreover, properly understood, the reasoning underpinning the leading judgment in reality does not entail “discovering” or “conjuring up” an entirely new power. It is, in classical common law fashion extending or developing “existing powers”, as Lord Collins points out. Lord Clarke explained the true character of the judicial exercise more explicitly still:

“111. As Lord Sumption demonstrates in para 20, significant developments have been made by the common law in the past. They included the power to compel a person to give evidence, which was not originally statutory. As Lord Sumption puts it, like the power to order discovery, it was an inherent power of the Court of Chancery devised by judges to remedy the technical and procedural limitations associated with the proof of facts in courts of common law. I agree with Lord Sumption (at para 23) that the significance of the Norwich Pharmacal case in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when it is necessary to do so in order to give effect to a recognised legal principle.” (emphasis added)

In other contexts, British Atlantic and Caribbean courts have been willing to apply such English precedents. A substantive claim for discovery based on the Norwich Pharmacal case was recognised as available under Bermudian law in Utilicorp United Inc and Aquila Energy Resources Corp v Renfro et al [1993] Bda LR 79 where Ground J (as he then was) opined (at page 16) as follows:

“The action for discovery is based upon the principles first adumbrated in Norwich Pharmacal Co. -v- Customs & Excise Commissioners [1974] AC 133, and applied in a financial context in Bankers Trust Co -v- Shaoura [1980] 1 WLR 1274. Suffice it to say that such a claim is capable of subsisting as a cause of action in circumstances where fraud is alleged, and information relating to that fraud is sought from an innocent party. Had that been the only cause of action against the second defendant I doubt if it would have warranted service out of the jurisdiction on the other parties, but it is not, so I do not have to consider that aspect further.”

Where the substantive cause of action is a common law claim for recognition and assistance through the production of documents on very similar grounds (seeking information from an innocent party in aid of an investigation into the nature and location of the assets of an insolvent company), it ought to be possible to simply deploy the general discovery powers of the Court tailored to meet the circumstances of non-adversarial litigation. However, the majority judgment of the Privy Council Board in Singularis supports a more subtle analysis, namely the Court may deploy an inherent power to compel the production of information in support of any legal principle which justifies the exercise of that power. It is clear from Lord Mance’s judgment (paragraph 128) that Gabriel Moss QC in the course

36 For a BVI example of a Norwich Pharmacal application, see Al-Rushaid Petroleum Investment Company et al v TSJ Engineering and Consulting Company Limited, BVIHCV (Com) 37 of 2010 (Hariprasad-Charles, J).
of argument only submitted in passing that had it been necessary to rely upon the *Norwich Pharmacal* principle, the *Singularis* liquidators would easily have been able to do so. However, Lord Mance bemoaned the lack of specificity which surrounded the principles relied upon to support the existence of the relevant common law power and considered this fluid approach to be inconsistent with the more cautious approach typically taken in corresponding areas of the civil law:

“137. In reality, far from displaying uninhibited willingness to develop appropriate remedies requiring the provision of information, courts have in my view been careful to confine such remedies to situations where there is a recognisable legal claim to protect, based either on a title or right to property or on some wrongdoing supported by appropriate evidence. Thus:

i) A court has jurisdiction to protect identifiable property rights, which would include ordering a person shown to be likely to have property belonging to the company to deliver it up or disclose its whereabouts.

ii) A sustainable case of wrongdoing is the basis for the well-established jurisdiction to order the disclosure of information by or in conjunction with the making of an asset freezing (formerly Mareva) order or a search (Anton Pillar) order.

iii) The legal principle recognised in *Norwich Pharmacal* is that persons innocently mixed up in wrongdoing could be expected to disclose a limited amount of information and documentation about it to assist the victims.

138. On this appeal, no case has been advanced under any of these heads. The first could cover the disclosure by an agent of information which he held for, or owed a duty to pass to, his principal. As the transcript extract quoted in para 128 above confirms, no case is advanced on any such basis. Moreover, auditors are not agents, they are independent contractors engaged to review a company’s accounts and report in accordance with statutory and professional requirements - in which connection there has been no suggestion of any failure or shortcoming on PwC’s part. The second and third situations depend upon evidence of wrongdoing, which has again not been asserted or attempted to be established. The third situation in particular bears no resemblance to the present case, in which it is said that innocent third parties can be compelled to produce information and documentation, without any allegation or evidence of wrongdoing, upon insolvency practitioners showing that this could be useful to enable them to locate assets or better to understand the company’s affairs.”

84 Superficially viewed, these remarks could be dismissed as reflecting a limited “Muggle” or modern perspective which is unable to perceive the “magical” dimensions of the common law. At one level, the plea for intrusive common law assistance to be justified by reference to more clearly defined and generally applicable principles of law is insensitive to the often compelling need for first instance judges to deliver “real world” justice in cross-border insolvency cases in jurisdictions where modern statutory international cooperation provisions do not exist. At another level, the insistence on greater specificity for the parameters of common law insolvency assistance remedies is more responsive to the needs of the very same first instance judges for clear and practical guidance likely to facilitate effective yet summary decision-making. Granting common law insolvency assistance by deploying well-defined remedial powers available under the general
law is obviously a far more straightforward task than developing or extending an ancient inherent power in aid of a loosely defined principle of “providing as much assistance as one can”.

85 Lord Neuberger, who felt that “existence of the power” point deserved broader and fuller argument before it was decided, unequivocally opposed the notion of “inventing” a new common law power:

“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.”

86 The hurly-burley of litigation is not always conducive to the most coherent legal argument and judicial analysis. The Singularis liquidators were seeking to appeal a decision which held that the production order was wrongly granted at common law, while (as liquidators of Saad) defending in a consolidated appeal a decision that it was not open to the former auditors to launch a collateral attack on the ancillary winding-up order, which was made on the basis that the insolvency statute (as read with the External Companies (Jurisdiction in Actions) Act 1885) did indeed apply to the overseas companies.

87 As one would expect, there is much to commend in the contrasting views articulated by the “Magical” majority and the “Muggle” minority. There was unanimity on the proposition that a common law power to recognise and assist foreign liquidators does exist. Certain forms of assistance, arguably the most important and widely deployed, authorising the liquidators to act on behalf of the foreign debtor within the jurisdiction of the assisting court, were not controversial. The majority view that new remedies can be invented is as welcome as the intellectual hurdles in reaching such an outcome are daunting. The minority view that one should, in effect, only grant relief based on existing remedies and shaped by coherent guiding principles speaks to the need of judges reliant on common law assistance for greater clarity in terms of delineating the parameters within which such assistance ought properly to be given.

Applying the Insolvency Statute directly as a Form of Common Law Assistance

88 The Judicial Committee in Singularis ripped to shreds the notion, boldly adopted by first instance judges in England and Wales (Schmitt v Deichmann et al [2013] EWHC 62(Ch)), Cayman (Picard (as Trustee for the liquidation of the
Business of Bernard L. Madoff Investment Securities LLC et al v Primeo Fund (In Official Liquidation), Cayman Grand Court FSD 275 of 2010, Judgment dated 14 January 2013, and Bermuda (Re Saad Investment Co. Ltd and Re Singularis [2013] Bda LR 28). After considering these decisions, the three first instance cavaliers for radical common law assistance were principally put to the sword by Lord Collins, who concluded his compelling critique in the following trenchant tones:

“I would therefore humbly advise Her Majesty not only that the appeal should be dismissed, but also that to have allowed it on the basis of the liquidators’ primary argument would have involved Her Majesty’s 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.”

89 As noted above when considering these first instance interpretations of Cambridge Gas, it is difficult to see how the proposition that the local insolvency statute should be applied by way of common law assistance could be sustained in circumstances where the statute would not otherwise apply. It is one thing to apply a statute which applies to a foreign insolvent company to which the statute potentially applies without commencing an ancillary winding-up (as Lord Hoffman in Cambridge Gas perhaps contemplated). It is a totally different proposition to apply statutory insolvency or other provisions in circumstances where they do not on any view apply. If one is considering the law as it ought to be rather than the law as it is, the ideal Bermudian law position would be that an application for common law recognition and assistance would trigger the operation of the local insolvency statute. This is perhaps asking for no more than for the Bermudian Legislature to enact a provision giving the Court a generous jurisdiction to wind-up overseas companies, in place of the present limited class of overseas companies. If the insolvency provisions of the Act expressly “applied” to an overseas company, such application ought not to depend upon the commencement of an ancillary liquidation and should be possible “at common law”. The relevant statute would apply to the foreign debtor, and its liquidators should potentially be able to avail themselves of any applicable provisions of local procedural law.

90. It is submitted that this argument is stronger when the statutory provision being invoked is a procedural provision (such as section 195 of the Bermudian Companies Act) and weaker when the provision in question creates a substantive cause of action. The clear private international law “convention”, as Professor Fletcher has pointed out, is that local procedural law governs a foreign cause of action. It seems more principled to the present writer that once a foreign liquidator is recognised at common law, any procedural relief afforded should be governed by local statutory and non-statutory law. It is also seems to be entirely logical, the contrary holding of the Judicial Committee notwithstanding, that where a common law power to assist exists which corresponds to a statutory insolvency power, the delineation of the common law power may be shaped by the corresponding
statutory power. In the sense of adopting the same approach as is taken by a statutory provision, achieving a result consistent with what would be achieved by applying the statute ought to be permissible.

91 Prior to the enactment of modern limitation statutes dealing with equitable claims, the courts of equity would apparently apply common law limitation periods which did not strictly apply to similar equitable claims. As Mummery LJ explained on behalf of the English Court of Appeal in *Gwembe Valley Development Company Ltd. v Koshy* [2003] EWCA Civ 1048:

“81. The effect of section 36 is to preserve, except as indicated, the cases in which a court of equity would have applied the statutory limitation periods by analogy, as explained in Knox v Gye (1872) L.R. 5 H.L. 656 at 674, per Lord Westbury:-

‘For where the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the statute of limitations a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation…. But if any proceedings in Equity be included within the words of the statute, there a Court of Equity, like a Court of Law, acts in obedience to the statute.’”

92 It would surely be consistent with legal and public policy for common law relief which corresponds to a statutory insolvency remedy to be granted in a way which does not offend the public policy values which are embedded in the corresponding statutory provision. This is very much aligned with the core principles of modified universalism. Any assistance given should be consistent with local law and public policy. This analysis of course assumes that before the Court proceeds to apply the principles or policy underlying a statutory provision by analogy, a broadly similar common law (or general legal) power has already been identified. This does not rationally infringe the prohibition on directly applying a statute to circumstances to which it was not intended to apply. This prohibition unambiguously articulated in the *Singularis* decision was recently respected in a different context by the Bermudian Supreme Court in *Re Petroplus* [2014] SC (Bda) 91 Com (18 November 2014) when Kawaley CJ held as follows:

“10. Ms. Basden helpfully referred the Court to the elegant approach adopted by Hellman J on December 20, 2013 in the related case of *Re Petroplus Finance Ltd.*, Commercial Court, Companies (Winding-Up) 2012: 259, when he made an Order in the following terms:

‘8. The Official Receiver shall deal with the principal creditor, Deutsch Bank Trust Company Americas, on the footing that the principal creditor is a de facto Committee of Inspection.’”

11. In the present case I have decided to make a similar Order in respect of the Joint Liquidators appointed in respect of the present Company, but I do so subject to one important caveat. While as a practical matter the Joint Liquidators are clearly free to consult with the principal creditor in the present case in the same way and in relation to the same sort of matters that a committee of inspection would be consulted on, it seems to me that the position as a matter of strict law is materially different. Where the Companies Act, in particular section 175, specifies certain powers which the liquidators can only exercise with
the approval of either the Court or the committee of inspection, in my judgment the fact that there is a de facto committee of inspection cannot clothe that de facto committee with authority to empower the liquidators in the same way that a duly constituted committee could. To direct that this should happen would, it seems to me, be effectively extending the operation of the statute beyond its intended scope. The approach of applying statutory provisions by analogy has been criticised by Lord Collins in the recent Judicial Committee of the Privy Council decision in Singularis Holdings Ltd. v PricewaterhouseCoopers [2014] UKPC 40, where an order that I made purportedly applying a statute by analogy was described as effectively ‘legislating from the Bench’.

93 It is probably always inappropriate to apply a statutory provision by analogy in circumstances to which it does not apply. It is submitted that there is no necessary objection in principle to exercising a freestanding discretionary common law power by analogy with the way in which a corresponding statutory discretionary power would be exercised in comparable circumstances to which the statute does apply. As noted above, this was perhaps what the first instance judge in Singularis inelegantly sought to convey when summarising his primary finding as entailing the provision of assistance:

“at common law by analogy with the statutory powers contained in section 195 of the Companies Act.”

Forum Shopping and Granting a Remedy which is unavailable under the Foreign Debtor’s Domiciliary Law

94 The Judicial Committee (like the Court of Appeal for Bermuda) unanimously held that the assistance provided ought not to have been granted because the Singularis liquidators in seeking relief they could not obtain from the Caymanian Court were engaged in “forum shopping”. This is the most difficult part of the decision to understand in terms of basic legal principle, putting aside the unique fact that the Bermuda application represented an attempt to have a second bite of the production order cherry. It is also the part of the decision which is least supported by clear authority. Lord Sumption addressed this issue in the following way:

“The second limitation which is relevant presents more formidable problems for the joint liquidators. The material which they 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. Where a domestic court has a power to grant ancillary relief in support of the proceedings of a foreign court, it is not necessarily an objection to its exercise that the foreign court had no power to make a corresponding order itself. Thus in Credit Suisse Fides Trust SA v Cuoghi [1998] QB 818, the English court made a world-wide Mareva injunction in support of Swiss proceedings against Mr Cuoghi in circumstances where the Swiss court could not have made such an order. But that decision cannot be taken to reflect a universal principle. The critical factors which justified the order in that case were that there was an unqualified

37 Lord Collins stated at paragraph 64: “In my view to apply insolvency legislation by analogy “as if” it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function.”
statutory power to give ancillary relief and that the Swiss court’s inability to make the order was due to the fact that Mr Cuoghi was not resident in Switzerland whereas he was resident in England. Rather different considerations apply to the common law power with which the Board is presently concerned. Its whole juridical basis is the right and duty of the Bermuda court to assist the Cayman court so far as it properly can. It is right for the Bermuda court, within the limits of its own inherent powers, to assist the officers 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 order sought would not constitute assistance, because it is not just the limits of the territorial reach of the Cayman court’s powers which impede the liquidators’ work, but the limited nature of the powers themselves. The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the Board to be 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. This was in substance the ground on which the liquidators failed in the Court of Appeal when they characterised the present application as “forum-shopping”. In the opinion of the Board it is correct.

95 It is obvious that the universalist principle contemplates according recognition and assistance to the insolvency courts in the primary liquidation forum with a view to achieving, so far as is possible, a unified administration of the company’s worldwide assets under a single system of law. It is also beyond dispute that according to the applicable rules of private international law, the status of a company and the authority and powers of its liquidators are determined by the law of the company’s domicile. However, there is an admittedly difficult to define demarcation line between the powers of a company’s liquidators and the remedies available to them under local law. It is obvious that, absent the commencement of an ancillary liquidation abroad, liquidators’ competence to bring proceedings overseas, including proceedings for common law or statutory recognition and assistance, will be governed by the insolvency statute in the liquidation forum. However, it would be odd to contend that a common law assisting court is required to scrutinize every application for assistance to ensure that any relief granted conforms wholly or substantially with the law in the liquidation forum. Such an approach would be inconsistent with dominant impulse of common law assistance, as articulated by various judges for over 100 years including Lord Sumption himself in Singularis (at paragraph 23):

“The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can.”

96 The limits of assistance have usually been expressed with reference to the limits of the assisting court’s jurisdiction, not the limits of the primary liquidation court. It is submitted that the scope of the assistance powers have been viewed through this lens because the form of assistance rendered is usually treated as a matter of local procedural law, which relief is (subject to local public policy interests) subservient to the dominant and more substantive goal of ensuring a unitary distribution of the debtor’s worldwide assets. The law of the primary liquidation forum is typically given extra-territorial effect and primacy, at common law at least, as regards the distribution rules and, perhaps, substantive causes of action against directors and
officers as well. But where foreign liquidators are simply seeking common law assistance with a view to securing cash in the company’s overseas bank account or information about the existence or location of assets, there is no obvious legal policy reason why the relief sought should correspond exactly with equivalent relief available from the liquidation court. As noted above, Professor Fletcher considered the ability of section 426 of the Insolvency Act 1986 (UK) as applied in Re Southern Equities38 to empower an English court to apply more extensive Australian examination rules to an examination conducted in England as a dramatic departure from the common law position:39

“Nor did the Court appear to be troubled by the prospect that this would entail a departure from the long established convention under private international law whereby courts have insisted that in matters of procedure the rules of the forum must be adhered to at all times, and foreign procedural rules excluded from the legal process. In essence, this decision embodies the conclusion that by enacting section 426 in the terms employed, Parliament intended to sanction a departure from this exclusionary treatment of foreign procedural rules, having regard to the fact that the ‘insolvency law’ of the foreign country (as defined by section 426(1)(d)) necessarily consists of an amalgam of procedural and substantive principles and practices which are mutually interdependent…” (emphasis added)

97 The proposition that the rationale of common law recognition is to allow the foreign liquidators to do in the assisting forum what they could do in the primary liquidation forum probably holds good for many, but not all purposes. It ought not to restrict the availability of relief in accordance with local law for the following principal reasons:

(1) a primary liquidation court ought to be permitted to empower its liquidators to seek assistance from overseas courts where assets or information are believed to be located on the practical and commercially efficient basis that whatever remedies are available under local law can be pursued. This is precisely the (tacit) basis on which liquidation courts authorise their officers to seek overseas assistance;

(2) it would be wholly uncommercial and impractical for authorisation of the pursuit of often urgent assistance to be delayed by arcane comparative analyses to ensure parity between the remedies being sought abroad and the remedies available in the primary liquidation forum;

(3) it would be wholly uncommercial and impractical for the local court requested to provide common law recognition and assistance of an asset collection, preservation and investigation nature to be required in each case to satisfy itself that the nature and/or extent of the relief sought corresponds to equivalent relief available in the liquidation forum;

(4) forum shopping in the traditional sense can be discouraged by declining to grant relief applying suitably modified versions of the rules of forum non conveniens and/or res judicata which have been developed in the context of adversarial litigation. There is no need to create a new exclusionary rule requiring a parity of procedural or quasi-procedural remedies between the requesting and assisting forum. The traditional approach of restricting the assistance provided by reference to scope of relief available under local law is more

38 [2001] Ch 429.
39 Ibid., at 245.
consistent with the public policy underpinnings of the modified universalism principle. This principle aims to achieve a universal regime for administering and distributing assets in the primary liquidation forum, not a universal regime for locating and preserving such assets.

98 It is submitted that the “forum-shopping” basis on which the Judicial Committee dismissed the Singularis liquidators’ appeal can only properly be justified with reference to the following implicit finding: it was improper for a second examination and production application to be made against the debtor’s former auditors in Bermuda, after the said auditors had complied with an initial application made to the Caymanian Court. To the extent that the application for information by way of common law assistance was not made in the usual context of seeking a remedy which was wholly unavailable from the primary liquidation court (because the party with the assets or information was beyond the reach of that court), the traditional public policy rationale for affording assistance may be viewed as greatly weakened, if not absent altogether.

99 It ought not to be in general terms an objection to the granting relief by way of common law assistance that the remedy available from the local court is more generous than under corresponding provisions of law in the liquidation forum. No or no direct authority was cited for this proposition in any of the Privy Council judgments in Singularis. Nor is such a principle convincingly supported in the opinions of their Lordships.

100. The cross-border insolvency context in any event properly requires a distinctive approach to forum shopping from that taken in the context of adversarial litigation in the traditional sense of the resolution of substantive disputes. The dominant goal of a court adjudicating an application for common law recognition and assistance ought properly to be affording practical assistance to the primary liquidation court for the ultimate benefit of the foreign debtor’s creditors; not raising novel and technical impediments in the path of the legally and commercially important task of maximising the assets that can be collected for ultimate distribution to the debtor’s unfortunate unsecured creditors.

Conclusion

101 Professor Fletcher’s writings have not only revealed the magical qualities of the common law; they have inspired judges in various common law jurisdictions (including Bermuda, Cayman, Isle of Man and Hong Kong) to explore and apply these magical qualities as well. Most famously, he described the common law on cross-border insolvency as being in “an arrested state of development”, writing at a time when Britain and many Commonwealth countries had supplanted the common law with statutory cross-border insolvency solutions.
102 From *Cambridge Gas*\textsuperscript{40} to *Singularis*,\textsuperscript{41} the vitality of common law assistance has (not without some turbulence along the way) been reaffirmed, not least in the British Atlantic and Caribbean World. Eloquent doubts have, it is true, been expressed about the propriety of cross-border insolvency being developed on a foundation of purely judge-made law. These foundations were, however, laid in the field of personal bankruptcy by the Judicial Committee of the Privy Council itself, when it upheld the first instance judgment of the Court of Demerara and Essequibo in *Odwin v Forbes* (1817) 1 Buck. 57 (PC); Jabez Henry, “*The Judgment Of The Court of Demerara, In the case Of Odwin V. Forbes*”,\textsuperscript{42} nearly 200 years later. In the medium to long-term, it must be conceded, modern legislative cross-border insolvency codes will almost inevitably win the day. However, as Professor Fletcher so rightly (and vitally) opined for those jurisdictions who still have one foot in the “past”:

“...for the time being, and for the foreseeable future, we must deal with the state of the world in which we find ourselves, and that perforce requires us to pay serious attention to the role of private international law in assisting us to devise principled and, if possible, predictable solutions to issues born of legal diversity.”

103 The above review of recent case law, principally in the British Atlantic and Caribbean region, supports the conclusion that Professor Ian Fletcher should now be enthroned as the Grand Wizard of common law recognition and assistance in international insolvency law. In critically highlighting the strengths and weaknesses of the common law without ceasing to believe in its innate magical potentialities, the good Professor has effectively performed a remarkable “*Relashio*” spell.\textsuperscript{43} In so doing he has himself liberated the common law on judicial cooperation in cross-border insolvency cases from its arrested state of development. Thank you Grand Wizard Fletcher!

\textsuperscript{40} [2007] 1 AC 508.
\textsuperscript{41} [2014] UKPC 36.
\textsuperscript{42} Henry, above note 8, at 89-178.
\textsuperscript{43} Above note 1.