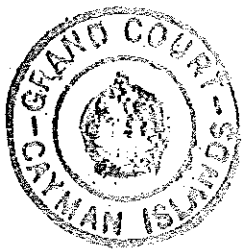
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 275 OF 2010-AJJ

The Hon. Mr. Justice Andrew Jones
In Open Court, 15th – 17th October 2012 and
14th January 2013

BETWEEN:



(1) IRVING H PICARD
(AS TRUSTEE FOR THE LIQUIDATION OF THE BUSINESS OF BERNARD L. MADOFF INVESTMENT SECURITIES LLC) (IN SECURITIES INVESTOR PROTECTOR ACT LIQUIDATION)

(2) BERNARD L. MADOFF INVESTMENT SECURITIES LLC (IN SECURITIES INVESTOR PROTECTION ACT LIQUIDATION)

Plaintiffs

and

PRIMEO FUND (IN OFFICIAL LIQUIDATION)

Defendant

Appearances: Mr. Robin Dicker QC and Mr. Stephen Robins instructed by Mr. John Harris of Higgs & Johnson for the Plaintiffs

Mr. Michael Crystal QC instructed by Mr. Peter Hayden and Mr. Nicholas Fox of Mourant Ozannes for the Defendant

RULING ON PRELIMINARY ISSUES

Introduction and Factual Background

1. This is the trial of certain preliminary issues of law based upon stated assumptions of fact. However, in order to understand the factual assumptions and put the legal argument into context, one does need to have a general understanding of the relevant factual background. My summary is drawn from the pleadings and counsels' written submissions. It is intended to reflect what is common ground between the parties and should not be read as constituting any findings of fact made by the Court.

2. Bernard L. Madoff Investment Securities LLC ("BLMIS") is a company incorporated under the laws of New York, whose principal place of business was in New York City. It was owned and controlled by Bernard L. Madoff ("Madoff"). Throughout the whole of the period relevant to this proceeding, BLMIS' investment advisory business was being carried on fraudulently. Madoff was arrested on 11 December 2008. The Securities and Exchange Commission filed a complaint on the same day, and the United States District Court for the Southern District of New York appointed a receiver. On 15 December 2008, the Securities Investor Protection Corporation filed an application in the District Court for the commencement of liquidation proceedings in respect of BLMIS and Judge Stanton made an order which (i) appointed Mr. Irving H. Picard as trustee ("the Trustee"), (ii) transferred the case to the United States Bankruptcy Court for the Southern District of New York (which I shall refer to as "the New York Court"), and (iii) removed the receiver from office. As a matter of United States law, the statutory avoidance claims which the Trustee seeks to assert against Primeo Fund (In Official Liquidation) ("Primeo") in these proceedings arose at that moment in time. Madoff admitted that he had operated a massive *Ponzi* scheme through BLMIS. On 12 March 2009 he pleaded guilty to 11 counts of fraud and was subsequently sentenced to 150 years in prison.

3. On 5 February 2010, I made a declaration under section 241(1)(a) of the Companies Law by which it is recognized that the Trustee is the only person entitled to act on behalf of BLMIS in this jurisdiction ("the Recognition Order"). This declaration is binding on all persons and for all purposes in the Cayman Islands, whether or not such persons had actual notice of the Trustee's petition. My reasons for making the Recognition Order are reported at 2010 (1) CILR 231. BLMIS' only connection with the Cayman Islands is that Primeo (and at least two other Cayman domiciled investment funds) placed funds with it for investment. BLMIS was never licensed under the Securities Investment Business Law (2003 Revision) to carry on its business in this country and had no property located here. *Prima facie,* this Court therefore has no jurisdiction to make a winding up order in respect of BLMIS under section 91(d) of the Companies Law.

4. Primeo was incorporated under the Companies Law on 18 November 1993 and on 1 January 1994 commenced business as an open-ended investment fund subject to the regulatory requirements of the Mutual Funds Law (Law 13 of 1993). Its offering document, which was required to be filed with the Cayman Islands Monetary Authority, described it as "an open-ended investment fund designed for non-U.S. investors desiring to invest a portion of their assets in a fund emphasizing preservation of capital through diversification of investments". Its participating shares were listed on the Luxembourg Stock Exchange. From the inception of its business, Primeo placed funds for investment with BLIMIS pursuant to three written agreements executed on or about 29 February 1996. These accounts were closed sometime in June 2007. Thereafter, Primeo's investment strategy was changed in that its assets were invested in the participating shares of two investment funds, namely Herald Fund SPC which is a segregated portfolio company incorporated under the Companies Law ("Herald") and Alpha Prime Equity Hedged Fund Limited, a company incorporated in Bermuda ("Alpha Prime"). Herald and Alpha Prime placed funds for investment with BLIMIS. This new investment strategy is said by Primeo to have been disclosed to its investors in a revised offering document issued on 25 April 2007. Funds withdrawn from Primeo's account with BLMIS prior to June 2007 were paid directly to Primeo and are referred to in the pleadings as the "Direct Transfers". Primeo was not the only investor in Herald and Alpha Prime, but at some point it did become the largest single investor in Herald. When Primeo redeemed shares in Herald or Alpha Prime, the assumption is that they in turn withdrew funds from their accounts with BLMIS. To the extent that redemption proceeds received by Primeo from Herald and/or Alpha Prime were funded by withdrawing funds from their BLMIS accounts, it is said by the Trustee that BLMIS indirectly paid money to Primeo. The expression Indirect Transfers is used in the Statement of Claim to describe transactions of this sort.

5. It follows that, even after changing its investment strategy in 2007, Primeo remained highly dependent upon BLMIS' integrity and investment performance. On 12 December 2008, the day after Madoff's arrest, Primeo's directors passed a resolution, *inter alia,* to suspend the calculation of its NAV and suspend subscriptions and

redemptions of its participating shares. On 23 January 2009, the sole voting shareholder of Primeo passed a special resolution for the company to be wound up voluntarily and two qualified insolvency practitioners, Messrs James Cleaver and Richard Fogerty, were appointed as joint voluntary liquidators. On 8 April 2009, an order was made for Primeo's winding up to continue under the supervision of this Court, whereupon Messrs Cleaver and Fogerty were appointed as the joint official liquidators.

6. In these proceedings the Trustee asserts three different types of avoidance claim against Primeo in respect of both Direct and Indirect Transfers. First, in Section VI of the Statement of Claim he asserts claims under section 241 of the Companies Law and/or at common law based upon the application of the substantive United States law, including: (a) immediate transferee claims under section 548 of the US Bankruptcy Code (two-year fraudulent transfers); (b) immediate transferee claims under the New York Debtor and Creditor Law (six-year fraudulent transfers); (c) subsequent transferee claims to recover payments avoided under section 547 of the U.S. Bankruptcy Code (90-day preference payments); and (d) subsequent transferee claims to recover payments avoided under section 548 of the U.S. Bankruptcy Code (two-year fraudulent transfers). The US law in this respect is materially different from the provisions contained in Part V of the Companies Law (2011 Revision), in particular section 145, although it may be said that the underlying policy objective of ensuring the fair and equal treatment of creditors is the same.

7. Secondly, in Section X of the Statement of Claim, the Trustee asserts claims under section 241 of the Companies Law and/or at common law in accordance with section 145 of the Companies Law (voidable preferences), as if the liquidation of BLMIS were occurring in the Cayman Islands rather than in the United States, for the purpose of recovering Indirect Transfers in the total sum of approximately US$588 million which were paid to Primeo within the period of six months immediately preceding the commencement of the foreign liquidation on 18 December 2008. These transfers are referred to as the "Six Month Payments". Whether the applicable voidable preference

provision is section 168 of the Companies Law (2007 Revision) which was in force at the time when the Six Month Payments were made or section 145 of the 2010 Revision which did not come into force until 1 March 2009 (being after commencement of the liquidation) is an issue which does not fall to be decided at this stage of the proceedings.

8. Thirdly, in Section XII of the Statement of Claim, the Trustee asserts claims under section 147 of the Companies Law (fraudulent trading), so as to require Primeo to make a contribution to the estate of BLMIS. However, it is now conceded by counsel for the Trustee that this claim must fail by reason of the fact that section 147 did not come into force until 1 March 2009. It follows that I am now only concerned with two broad issues – whether the Trustee is entitled, either pursuant to section 241 or at common law, to assert US law avoidance claims (as pleaded in Section VI of his Statement of Claim) and/or Cayman Island law preference claims (as pleaded in Section X of the Statement of Claim).

9. By the Order which I made on 19 January 2011, the Court will now determine the following preliminary issues of law :

(1) Whether, on the assumption that the Plaintiffs have avoidance claims against the Defendant under U.S. insolvency law on the basis pleaded in the Plaintiffs' Statement of Claim, the Grand Court is able to apply U.S. insolvency law under section 241 and/or section 242 of the Companies Law and/or at common law (Section VI of the Statement of Claim) ("Preliminary Issue 1").

(2) Whether the Court is entitled to apply section 145 of the Companies Law or equivalent rules as a matter of common law or under sections 241 or 242 of the Companies Law so as to avoid the Six Month Payments (as defined in the Statement of Claim) and/or to entitle the Plaintiffs to judgment for the Credit Balance (as defined in the Statement of Claim) and/or for any shortfall, as if (contrary to reality) BLMIS had gone into liquidation in the Cayman Islands on 15 December 2008 (Section X of the Statement of Claim). This formulation

does not take into account the possibility that the Court might be entitled to apply section 168 of the Companies Law (2007 Revision) rather than section 145 of the current law.[1] Counsel agreed that this preliminary issue should be re-formulated as follows – Whether the Court is able to apply avoidance provisions of Cayman Islands insolvency law in aid of a foreign insolvency proceeding as a matter of common law or under sections 241 and 242 of the Companies Law. ("Preliminary Issue 2").

(3) Whether the Court is entitled to apply section 147 of the Companies Law or equivalent rules as a matter of common law under sections 241 or 242 of the Companies Law to require the Defendant to make a contribution to the estate of BLMIS (Section XII of the Statement of Claim) ("Preliminary Issue 3"). This issue no longer falls to be decided.

(4) Whether Sections VI, X and/or XII of the Statement of Claim should therefore be struck out as disclosing no reasonable cause of action ("Preliminary Issue 4"). It is now accepted that Section XII should be struck out.

(5) Whether, in the event that the Plaintiffs or either of them have valid non-proprietary claims against the Defendant as pleaded in the Statement of Claim any sums due from the Defendant to the Plaintiffs or either of them in respect of such claims would be off-set pursuant to section 140 of the Companies Law against sums due from the Plaintiffs or either of them in respect of any claims sounding in debt, damages, equitable compensation or restitution which the Defendant may have against the Plaintiffs or either of them in respect of investments made with the Second Plaintiff by or on behalf of the Defendant ("Preliminary Issue 5").

(6) Whether, in the event that there is no off-set between any sums due in respect of the Plaintiffs' Claims and any sums due in respect of the Defendants' Claims, the rule in *Cherry v Boultbee* (1839) 4 My & Cr 442 applies so that the

[1] Section 168 formed part of the Companies Law, Cap.22 as originally enacted in 1961.

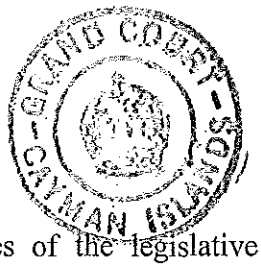
liquidators of the Defendant would have a right of quasi-retainer exercisable against the Plaintiffs so as to entitle the Defendant to retain dividends otherwise payable by the Defendant to the Plaintiffs or either of them in respect of the Plaintiffs' Claims ("Preliminary Issue 6").

(7) Whether, if the Liquidators of the Defendant would have a right of quasi-retainer, the entitlement to retain is up to an amount equal to the full amount of the liability of the Plaintiffs or either of them to the Defendant in respect of the Defendants' Claims or some lesser amount and, if so, what amount ("Preliminary Issue 7")

These preliminary issues give rise to important questions about the nature and extent of this Court's statutory jurisdiction to make orders ancillary to a foreign insolvency proceeding and its common law jurisdiction to provide assistance in connection with foreign bankruptcy proceedings.

Cross border insolvency co-operation: Part XVII of the Companies Law

10. Until recently the corporate insolvency law of the Cayman Islands was based almost entirely upon Part IV of the English Companies Act, 1862. This surprising state of affairs came about because the draftsman of the Companies Law, Cap.22 originally enacted by the Cayman Islands Legislature in 1961 chose to adopt parts of the existing Jamaican Companies Law, Cap.69 and parts of the English Companies Act 1948. The provisions relating to the liquidation of solvent and insolvent companies contained in Part V of the Cayman Islands Law were reproduced (with certain omissions) from Part II of the Jamaican Law which was itself reproduced from Part IV of the English 1862 Act. This statutory provision remained in force, largely without amendment, until the Companies (Amendment) Law 2007 was brought into force on 1 March 2009. Prior to this date matters relating to cross-border insolvencies were not addressed in the legislation at all. The main focus of the 2007 Law is the amendment of the law applicable to domestic liquidation proceedings and the introduction of a comprehensive set of winding up rules which had not previously existed. It addresses the international aspects of corporate insolvency proceedings in two respects only.



11. One of the unfortunate and probably unforeseen consequences of the legislative draftsman's decision in 1961 to adopt Part IV (but not Part VIII) of the 1862 Act is that it was generally accepted, at least until 2005,[2] that this Court had no jurisdiction to make winding up orders in respect of insolvent foreign companies even if they were carrying on business and had assets in this country. The jurisdiction was limited to companies "formed and registered" under the Cayman Islands Law. The 2007 Law cures this problem by conferring jurisdiction upon this Court, under what is now section 91(d) of the Companies Law (2011 Revision), to make winding up orders in respect of an insolvent foreign company which (i) has property in the Cayman Islands; or (ii) is carrying on business in the Cayman Islands; or (iii) is the general partner of a limited partnership registered under Cayman Islands law; or (iv) is registered under Part IX of the Companies Law as a foreign company whether or not it has actually carried on business here. This Court has not yet had an opportunity to consider the criteria which must be applied in deciding how to exercise this discretionary jurisdiction.

12. The 2007 Law also introduced Part XVII of what is now the Companies Law (2012 Revision). It sets out a mechanism by which this Court can provide assistance to the representative of a foreign company which is the subject of a bankruptcy proceeding in its country of incorporation. The material text of Part XVII is as follows:

> "240. "In this Part –
>
> 'debtor' means a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established;
>
> 'foreign bankruptcy proceeding' includes proceedings for the purpose of reorganising or rehabilitating an insolvent debtor; and
>
> 'foreign representative' means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding".

[22] In *Dyoll Insurance Company Limited* 2004-5 CILR 412 Levers J. did in fact make a winding up order in respect of a foreign company based upon a novel and highly artificial interpretation of what is meant by "forming and registering" a company under Cayman Islands law.

241.(1) "Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of –

(a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;

(b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

(c) staying the enforcement of any judgment against a debtor;

(d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and

(e) ordering the turnover to a foreign representative of any property belonging to a debtor".

(2) An ancillary order may only be made under subsection (1)(d) against -

(a) .....

(b) a person who was or is a relevant person as defined in section 103(1).

242. (1) In determining whether to make an ancillary order under section 241, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with –

(a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

(b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

(c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

(d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;

(e) the recognition and enforcement of security interests created by the debtor;

(f) the non-enforcement of foreign taxes, fines and penalties; and

(g) comity;

(2) In the case of a debtor which is registered under Part IX, the Court shall not make an ancillary order under section 241 without also considering whether it should make a winding up order under Part V in respect of its local branch."

13. I make some general observations about this provision. First, Part XVII supplements and partially codifies the common law. It does not abolish the common law rules which continue to exist alongside the new statutory provision. Second, the statutory

provision reflects the traditional English common law rule that this Court will recognize only the authority of a liquidator or trustee appointed under the law of the country of incorporation. (*Dicey, Morris & Collins, The Conflict of Laws,* 14th Ed. Para.30R-097). This contrasts with the approach reflected in the UNCITRAL Model Law which recognizes the courts of the country in which an insolvent company has its "centre of main interest" as being competent to exercise bankruptcy jurisdiction, which is not necessarily the country in which the company is incorporated. The Cayman Islands legislature chose not to adopt this model. This Court has no jurisdiction to provide judicial assistance under section 241 upon the application of a foreign representative of an insolvent company appointed by a court in any country other than the country of its incorporation. Third, the Recognition Order which I made under section 241(1)(a) has two related consequences. It constitutes recognition that the Trustee is the only person entitled to act as agent on behalf of BLMIS for the purpose of enforcing in this jurisdiction any cause of action belonging to the company. It also determined that the New York court is competent to exercise bankruptcy jurisdiction in respect of BLMIS and that the Trustee, as its appointed officeholder, is therefore entitled to seek the assistance of this Court pursuant to section 241 and/or at common law. What I have to decide in this case is whether the scope of the assistance available to the Trustee, whether under section 241 or at common law, enables him to pursue transaction avoidance claims against Primeo and, if so, whether this Court should apply the substantive foreign law applicable in the New York bankruptcy proceeding or the domestic law which would be applicable if a winding up order had been made against BLMIS in this jurisdiction.

14. Mr. Crystal's argument is that the power to apply transaction avoidance provisions (whether domestic or foreign) in support of a foreign bankruptcy proceeding is not included in section 241(a) to (e) as one of the forms of relief which may be granted by this Court. I accept that the list is exhaustive. It does not use language such as "including" or "for example". There is no catch all provision for "making any other appropriate relief". The contrary argument is that paragraphs (a) to (e) list "purposes", not "powers". Mr. Dicker's point is that section 241(1) confers only one general

power upon the Court, which is the power to make orders ancillary to a foreign bankruptcy proceeding. He says that paragraphs (a) to (e) merely describe various purposes for which this single generalized power may be exercised. If these paragraphs are not a list of powers, it may be said that the application of transaction avoidance provisions (whether domestic or foreign) is merely incidental to the exercise of the Court's general power. I do not accept this argument. It seems to me that paragraphs (a) to (e) describe *both* powers and the purposes for which they may be exercised. For example, the effect of paragraph (c) is that the Court may make an order staying the enforcement of any judgment against a debtor. It seems to me that the draftsman is identifying a power (in this case the power to make an order or injunction which is negative in effect) and describing the particular purpose for which it may be exercised (that is, to prevent enforcement of a judgment against an insolvent debtor). Paragraph (d) identifies a power to make an order or injunction which is mandatory in effect. It also describes the purpose for which it may be exercised, in this case requiring persons to give evidence and/or produce documents. On its true construction, I think that section 241(1) is intended to be an exhaustive list of the Court's statutory powers to grant ancillary relief in aid of a foreign bankruptcy proceeding.

15. Having reached this conclusion, the next point is whether, on its true construction, paragraph (e) constitutes a power to make orders for the purpose of setting aside antecedent transactions and ordering the repayment of money to the debtor. It states that the Court may order "the turnover to a foreign representative of any property belonging to a debtor". Mr. Dicker makes the obvious point that the power to set aside antecedent transactions is an essential feature of any personal bankruptcy or corporate insolvency regime. This explains why "the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate" is one of the matters required by section 242(1) to be taken into account by the Court in deciding whether to exercise its discretionary powers. I would go further and say that the absence of this feature under the applicable foreign law might point to the conclusion that the foreign proceeding should not be characterized as a "bankruptcy proceeding" at all for the purposes of Part XVII. For these reasons it would not have been surprising if the

Legislature had included within section 241(1) a power to make orders for the purpose of setting aside preferential payments or the fraudulent dispositions of property comprised in a debtor's estate. On the other hand, if this had been the Legislature's intention, I think it is surprising that it is not stated expressly.

16. Mr. Dicker submits that I should have regard to the legislative history as an aid to the construction of Part XVII. It is open to the Court to have regard to what was said in the Law Reform Commission's report entitled *Review of the Corporate Insolvency Law and Recommendations for the Amendment of Part V of the Companies Law* dated 12th April 2006 for the purpose of identifying the statutory objective and the mischief at which the provisions of Part XVII are aimed. (Bennion's *Statutory Interpretation,* 4th Edition, Section 216). The report's executive summary states –

> " • There is currently a considerable degree of cross-border co-operation in respect of insolvency matters, but the basis upon which this co-operation is afforded depends largely upon judicial practice.
>
> • The Commission therefore recommends that the law relating to international co-operation in respect of insolvency matters be codified and included in a new Part [XVII] of the Companies Law."

The Commission was clearly recommending "codification" rather than reform. The mischief appears to have been the absence of "black letter law". The report itself is a very high level summary which does not contain any real analysis of the issues which must have been considered by the Commission. Section 17.3 merely recommends that this Court be given a statutory power to make ancillary orders and states that "The powers are set out in a proposed Part [XVII] of the Companies Law and are based upon the corresponding provisions of the United States Bankruptcy Code with which local practitioners are very familiar." It does not even identify the "corresponding provisions." It is also open to the Court to have regard to what was said by the Attorney-General when introducing the Companies (Amendment) Bill to the Legislative Assembly for the purpose of identifying its legislative objective when the criteria described by the rule in

Pepper –v- Hart[3] are met. Even if I did think that Part XVII of the Law, or any part of it, is ambiguous or obscure (which I do not), what the Attorney-General actually said in the Legislative Assembly would be of no real assistance. He merely said, "The powers set out in Part [XVII] are based upon the corresponding provisions of the United States Bankruptcy Code with which local practitioners are familiar."[4] He said nothing more. He was merely repeating the statement in the Commission's report without any explanation whatsoever.

17. However, it is reasonably apparent from the language of sections 241 and 242 of the 2007 Law that the legislative draftsman must have paid some regard to section 304 of the US Bankruptcy Code, notwithstanding that it had been repealed long before the bill was published. It seems to me that he looked to section 304 only because he was not intending to enact provisions based upon the UNCITRAL Model Law as was done by the United States in October 2005 (Chapter 15 of the Bankruptcy Code) and by the United Kingdom in April 2006 (the Cross-Border Insolvency Regulations). The obvious alternative model to which the Legislature might have looked for guidance is that reflected in section 426 of the UK Insolvency Act 1986. A key feature of this model is that the court is empowered to give assistance only in connection with insolvency proceedings pending in "designated countries". The designated countries are limited to the British Overseas Territories and certain Commonwealth countries whose corporate insolvency laws are similar to or based directly upon the English law. The United States is not one of them. Rather than adopt this model, which would have depended upon the Governor in Cabinet to designate the countries whose courts could be assisted, the Legislature decided to give the Court a discretionary power to provide assistance provided that (a) the foreign bankruptcy proceeding is capable of recognition in accordance with the traditional common law rules and (b) the substantive law of the foreign proceeding is consistent with Cayman Islands policy

[3] The decision of the House of Lords in *Pepper (Inspector of Taxes) –v- Hart* [1993] AC 593 has been followed and applied in this jurisdiction. It explains the circumstances in which it is permissible for this Court to have regard to statements made by ministers to the Legislative Assembly, as reported in the Official Hansard Report, in arriving at the legal meaning of an enactment.

[4] See *Official Hansard Report*, 2007/8 Session, Monday 17 September 2007, page 456.

objectives relating to the matters set out in section 242(1), including just treatment of all creditors, preferential or fraudulent dispositions and the recognition of security interests. Even if the foreign proceeding is recognized, as it has been in this case, this Court could still decline to provide assistance if the order sought by the Trustee would likely produce or contribute to an economic result which is inconsistent with the policy objectives of the Cayman Islands corporate insolvency law.

18. In my view, this is the extent to which it can be said that the Cayman Islands Legislature had regard to model reflected in section 304, which had of course been repealed and replaced with Chapter 15 by the time that the 2007 Law was enacted. However, Mr Dicker goes further and suggests that, to the extent that the language of sections 241 and 242 is actually the same or similar to that used in section 304, I should construe and apply the Cayman Islands law in the same way as the US courts had construed and applied the US law. He referred to the decision of Buschman J. in *Re Metzeler,* 78 B.R. 674 (Bankr. SDNY 1987) as an authoritative statement of the way in which the US courts had interpreted and applied section 304. This case concerned an ancillary petition filed in the New York Court by Mr. Friedrich Metzeler, who had been appointed by a German court as trustee of an insolvent German company. He sought an order for the recovery of $508,952 as a preferential and fraudulent transfer. One of several issues was whether the trustee could rely upon the US law or was limited to reliance upon the German Bankruptcy Act. It was held that the US court would apply the foreign law. In the course of his judgment Buschman J referred to a decision of the US Supreme Court in *United States –v- Whiting Pools Inc,* 462 U.S. 198 FN10 and said –

> "To be sure, this analysis depends in large part on the *Whiting Pools* analysis that estate property includes property recoverable under § 547 and § 548, and we have held above that the voidability powers of a foreign representative and the nature of the foreign estate must be tested by foreign law. In this, there is no inconsistency. The term "property of the estate" employed in § 109(a) is to be construed according to the definition adopted in *Whiting Pools*. Although, *Whiting Pools* refers to transfer avoidable under §§ 547 and 548, our task is to construe § 304. That Congress provided for turnover actions in § 1410(b) is sufficient indication of its expectation that the concept applies to similar avoidance actions based on foreign law in light of the policies sought to be achieved. It thus seems clear that Congress intended that foreign preference and fraudulent transfer

> actions seeking to recover property located here are a sufficient basis on which to ground a § 304 petition and we so hold."

It is clear that the expression "property of the estate" includes property recoverable under the avoidable transfer provisions and that the expression "turnover of the property of such estate" (as used in section 304) includes actions (referred to as "turnover actions") to set aside antecedent preferential payments and fraudulent dispositions. Mr Dicker focuses on the use of the word "turnover" in section 241 and invites me give it an American meaning. In my view, this is not an approach which I am entitled to adopt for two reasons. First, for the reasons which I have explained, there is no sufficient basis upon which I can properly infer that the Legislature intended that words and expressions used in Part XVII should be given the technical meanings which would likely be ascribed to them if those words had been used by the United States Congress in a statute relating to the same general subject-matter. I think that the Legislature merely looked to (the then repealed) section 304 of the US Bankruptcy Code as a general model which was thought to be more appropriate than the model reflected in section 426 of the UK Insolvency Act. Second, I should avoid falling into the error of focusing unduly on the single word "turnover" and failing to pay proper regard to the provision as a whole. Section 241(1)(e) empowers the Court to order "the turnover to a foreign representative of any property of the debtor". Property of the debtor means property of the company, which is not the same thing as "property of the estate".

19. The conceptual difference between the "property of the debtor" and the "property of the estate" is perfectly clear and well understood by insolvency practitioners. (See the decision of the English Court of Appeal in *Re Oasis Merchandising Ltd* [1998] Ch. 170). The expression "property of the debtor" means the assets which are the property of a company at the time of the commencement of the liquidation and the property representing it, including rights of action which might have been pursued by the company itself prior to the liquidation. This contrasts with "property of the estate" which means the assets available for distribution to the creditors in a company's liquidation, including the rights of action which are available only to the official liquidator as a result of a winding up order having been made. An official liquidator's right to pursue preference claims and the recoveries made are part of the "property of

the estate" available for distribution to creditors but not part of the "property of the debtor" within the meaning of section 241(1)(e). I think what the draftsman had in mind was situations of the kind which arose in *Re Reserve International Liquidity Fund Ltd (In Liquidation)* (Unreported, 1 April 2010). This case concerned a company incorporated in the British Virgin Islands which carried on business as a money market daily liquidity fund. It got into financial difficulty as a result of the credit crunch in September 2008. Its directors believed that these difficulties could be overcome and resisted any form of liquidation or reorganization proceeding, but an unpaid creditor succeeded in persuading the High Court in the British Virgin Islands to make an order for its compulsory liquidation and the appointment of official liquidators. The company had $10 million on deposit with each of the Cayman Islands branches of two well known banks. The official liquidators gave instructions for these funds to be transferred to an account in Tortola under their control. The company's directors refused to recognize the liquidators' authority and instructed the banks to transfer the funds to an account in New York which would be under their own control. This Court made an order under section 241(1)(a) recognizing the BVI official liquidators as the persons entitled to give instructions to the banks on behalf of the company. I think that this factual scenario illustrates what is meant by "ordering the turnover to a foreign representative of property belong to the debtor". It relates to property belonging to a company prior to the commencement of its insolvent liquidation and does not include property which is recoverable only by an officeholder pursuant to the transaction avoidance provisions of the applicable bankruptcy law. I think this interpretation is also consistent with the fact that Part XVII provides foreign representatives with a simple procedural mechanism for obtaining various different kinds of ancillary relief in a single proceeding. Transaction avoidance and preference claims may give rise to complex legal and factual disputes which are best resolved in an action commenced by writ. It follows that the Trustee has no statutory right under section 241 to pursue an action against Primeo for recovery of the Six Month Payments.

20. I shall nevertheless go on to consider whether the foreign or domestic law would be the substantive law applicable in the event that it is subsequently held that the Trustee is entitled to pursue his claim under section 241. Mr. Dicker argues that there are a

series of reasons why I should conclude that if section 241 applied, it would enable the Trustee to assert transaction avoidance claims based upon the United States law. Firstly, he says that the concept of making "orders ancillary to a foreign bankruptcy proceeding" implies that the focus is on the foreign proceeding and the foreign law. The word "ancillary" means "subservient, subordinate and ministering to something else". However, section 241 should be interpreted in the light of the amendments made to Part V and enacted at the same time. As I have already observed, section 91(1)(d) expressly empowers this Court to make winding up orders in respect of foreign companies and section 242(2) mandates that it must consider doing so before deciding to make any ancillary order if the company in question is registered under Part IX of the Companies Law.[5] In these circumstances the Cayman Islands liquidation would be regarded as "ancillary" to the foreign liquidation, but it is perfectly clear that a local liquidation proceeding can only be conducted in accordance with Part V of the Companies Law. I think that Mr. Dicker is attempting to read too much into the use of the word "ancillary".

21. Secondly, it is said that as a matter of principle the application of the foreign substantive law to transaction avoidance and preference claims is the logical choice because this is the law applicable to the distributional regime. It is said to be illogical to "mix and match" by applying the domestic law to avoidance issues when the distribution regime is governed by a foreign law. I follow the logic, but this is the result at common law and it seems to me that if the Legislature intended to change the common law it would have said so expressly. Thirdly, Mr. Dicker argues that the application of foreign law is consistent with the reference in section 242(1)(c) to the "prevention of preferential or fraudulent dispositions of property comprised in a debtor's estate". He says that this sub-section refers to dispositions taking place before the commencement of the foreign bankruptcy proceeding. This must be right. It means that Part V of the Companies Law would be applied as if a local liquidation proceeding had commenced in respect of BMLIS on 15 December 2008, with the

[5] Part IX of the Companies Law (2011 Revision) provides that any foreign incorporated company which establishes a place of business or carries on business in the Cayman Islands must make a filing with the Registrar of Companies and become registered as a "foreign company".

result that the "suspect period" is calculated back from this date. However, this requirement does not point to the conclusion that sections 241 and 242 require the application of the foreign substantive law.

22. Fourthly, it is argued that the application of foreign law would be consistent with the reference to in section 242(1)(c) to property comprised in the "debtor's estate" which, as I have already explained, means the property available for distribution to creditors including the proceeds of preference claims. The exercise of this Court's jurisdiction to make orders ancillary to a foreign bankruptcy proceeding does not result in the establishment of a separate parallel liquidation proceeding in this jurisdiction. Nor does it result in the creation of a separate local estate on a territorial basis. It follows that the "debtor's estate" referred to in sub-section (1)(c) must mean the estate as defined and constituted under the foreign law. However, the purpose of an ancillary order is not to ensure the constitution of an estate in accordance with the foreign law in question. Its purpose is the more general one of assisting the foreign court to achieve an economic and expeditious administration of the estate in a manner consistent with Cayman Islands policy objectives in respect of the matters reflected in section 242(1). However, laws relating to the avoidance of antecedent transactions vary significantly from country to country and it could be said that mandating the application of a myriad of foreign laws would actually be *inconsistent* with this general objective.

23. Mr. Dicker's fifth point is that the reference to "comity" in Section 242(1) demands the application of foreign law. In *HSH Cayman II GP Ltd –v- ABN Amro Bank NV* 2010 (1) CILR 375 the Court of Appeal defined the concept of comity in terms used by the US Supreme Court over a hundred years ago in *Hilton –v- Guyot* (1895) 159 US 113-

> "Comity is the recognition which one nation allows within its territory to the legislative, executive and/or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons under the protection of its laws".

What this means in the present context is that the courts of two countries can be expected to seek and grant assistance in corporate insolvency proceedings for the purpose of achieving commonly held policy objectives, notwithstanding that the application of their own laws to any given set of factual circumstances would not necessarily produce exactly the same or even a similar economic result. Both the US Bankruptcy Code and Part V of the Cayman Islands Companies Law recognize the need to set aside antecedent transactions in certain circumstances in order to achieve the policy objective of treating an insolvent company's creditors equally, but the actual rules of law are materially different. In principle, comity enables this Court to lend its assistance to the New York proceeding notwithstanding that the application of the foreign versus the domestic law could produce materially different economic results. Adherence to the concept of comity does not necessarily mean that the New York court should be expected to apply Cayman Islands law or that the Cayman Islands court should be expected to apply United States law in any given set of circumstances. For these reasons I do not think that the requirement to have regard to comity implies that the Legislature intended applications for ancillary relief under section 241 to be governed by foreign law. The application of Cayman Islands law is entirely consistent with an adherence to comity.

24. Mr. Dicker's sixth point is that the legislative history of Part XVII, to which I have already referred, points to the conclusion that the Legislature must have intended this Court to apply the foreign substantive law when deciding whether to make ancillary orders under section 241, with the exception of orders for evidence under section 241(1)(d) which can only be made against a "relevant person" as defined by Cayman Islands law. He relies on *Re Metzeler* (supra) in which Buschman J. held that "a foreign representative may assert under section 304, only those avoiding powers vested in him by the law applicable to the foreign estate". For the reasons which I have

already given, the fact that the US courts interpreted section 304 in this way does not lead me to infer that the Legislature intended this Court to interpret section 241 in the same way. If the Legislature had intended to abolish the common law rule (which applies the domestic law), it would have said so expressly.

25. Mr. Dicker also points to sub-section (2)(b) as implying that, upon its true construction, the whole of section 241 requires the application of the substantive foreign law. Sub-section (2)(b) says that an order for evidence can only be made against someone who is a "relevant person" within the meaning of section 103(1) of the Companies Law.[6] This amounts to an express requirement to apply the substantive domestic law for this purpose, thereby implying, according to Mr. Dicker, that foreign law must be applicable in all other respects otherwise sub-section (2)(b) would have been unnecessary. The difficulty with this argument is that it suggests an intention to "mix and match" the application of both domestic and foreign law, which the Legislature is inherently unlikely to have intended. For example, this approach might lead to the conclusion that this Court must apply section 103(1) of the Companies Law for the purpose of identifying the target of an order for production of documents and at the same time apply the foreign law, rather than section 103(3)(b), for the purpose of defining the subject matter of the order.[7] This is inherently unlikely. I think that the purpose of section 241(2)(b) is merely to emphasize that orders for evidence and production of documents will only be made against those whom the law regards as "insiders".

26. This Court's common law jurisdiction to provide assistance in respect of foreign corporate insolvency proceedings (whatever its scope) depends upon the application of the domestic law. If the Legislature had intended this rule to be abolished by the enactment of Part XVII, it would have said so expressly. If, and to the extent that, the Trustee is entitled to proceed under section 241 at all, on its true construction I think that section 241 requires the application of Cayman Islands law

[6] Put simply, a "relevant person" is an insider. It is defined narrowly to mean those involved in the promotion or management of a company.

[7] Section 103(3)(b) provides that the subject-matter of a production order will be limited to "documents belonging to the company".

Cross-border insolvency co-operation: the position at common law

27. I now turn to consider the scope of the Trustee's common law right to seek the assistance of this Court. The starting point for this analysis is the decision of the Privy Council in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508. This case concerned an insolvent group of companies engaged in the shipping industry. The group structure was complex. For the purposes of understanding the Privy Council's decision, it can be stated in the following simplified way. The top holding company was a Bahamian company called Vela Energy Holdings Ltd ("Vela"), which owned an intermediate holding company incorporated in the Cayman Islands called Cambridge Gas Transportation Corporation ("Cambridge Gas"). Cambridge Gas owned 70% of the shares of Navigator Holdings Plc, ("Navigator") which was incorporated in the Isle of Man. Navigator owned the shares of the ship owning companies. Navigator filed a petition in the New York Court for relief under Chapter 11 of the US Bankruptcy Code. Its principal creditors were the holders of a $300 million bond issue. The group's investors, acting through Vela, proposed a reorganization plan which the New York Court rejected in favour of a plan proposed by Navigator's creditors. The approved reorganization plan provided that, upon entry of the court's confirmation order, title to all the shares in Navigator would vest in the creditors' committee, thereby extinguishing the interest of its shareholders, including Cambridge Gas which owned 70% of the shares. The overall intended economic result was that the creditors would acquire ownership and control of the underlying ship owning companies. Since Navigator was incorporated in the Isle of Man, the applicable conflict of laws rules establish that its shares are treated as property located in the Isle of Man. The New York Court therefore issued a letter of request to the Manx court and the creditors' committee petitioned the Manx court for an order vesting the shares in their representatives.

28. In the Manx court Cambridge Gas contested the creditors' right to have the New York Court's confirmation order recognized and enforced. It was argued that the confirmation order must be either a judgment *in rem* or a judgment *in personam* and

that, in either case, it was not capable of being recognised and enforced in the Isle of Man in accordance with the well established common law rules relating to the enforcement of foreign judgments.[8] If the New York Court's order was properly characterized as a judgment *in rem,* it could not be recognized as affecting title to the Navigator shares because they are treated as property located in the Isle of Man, not New York. Alternatively, if it was characterized as a judgment *in personam,* it could not be enforced because Cambridge Gas itself had not submitted to the jurisdiction of the New York Court. The Manx court accepted this argument, as did the Court of Appeal, although its conclusion that Cambridge Gas had not submitted to the jurisdiction of the New York court was regarded as highly technical bearing in mind that the Chapter 11 petition had been filed by Navigator (its indirect subsidiary) and Vela (its indirect parent company) had participated in the proceeding by proposing is own reorganization plan. Nevertheless, the case proceeded before the Privy Council on the basis that Cambridge Gas had not submitted to the jurisdiction of the New York Court.

29. The Privy Council held that orders made in bankruptcy proceedings, including corporate insolvency proceedings, do not fall into the category of either judgments *in rem* or judgments *in personam.* Lord Hoffmann said (at paragraphs 13 and 14) that –

> "Judgments *in rem* and *in personam* are judicial determinations of the existence of rights: in one case rights over property and in the other, rights against a person. When a judgment *in rem* or *in personam* is recognized by a foreign court, it is accepted as establishing the right which it purports to have determined, without further enquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."

The Privy Council treated the New York Court's confirmation order as a judgment in, and for the purposes of, the collective enforcement regime of the bankruptcy proceedings, which are governed by the sui generis private international law rules relating to

[8] See Dicey, Morris & Collins *The Conflict of Laws,* 14th Edition, Rule 36.

insolvency. On this basis the New York Court's confirmation order was recognized and enforced in the Isle of Man.

30. The rationale for this approach is derived from the principle of universality in bankruptcy proceedings. Lord Hoffmann said (at paragraph 16) –

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

In the case of corporate insolvency proceedings this principle of universality is given effect by recognizing the person who is empowered by the foreign law to act on behalf of the insolvent company as entitled to do so in the Cayman Islands. Two key questions then arise. Firstly, what are the criteria under Cayman Islands law by which this Court must decide whether or not to recognize the foreign representative? In the United Kingdom this question has been answered by the Cross-Border Insolvency Regulations 2006. In the United States it has been answered by Chapter 15 of the Bankruptcy Code. Both these legislative provisions are based upon the UNCITRAL Model Law which introduces the concept that recognition should depend upon identifying a company's "centre of main interest". The Cayman Islands legislature had the opportunity to enact this model but chose not to do so. Section 241 of the Companies Law answers this question by codifying the traditional conflict of laws rule that the authority of a trustee or liquidator appointed in the place of incorporation will be recognized in the Cayman Islands. The second question is what is the effect of recognition, once granted? Lord Hoffmann answered this question by deciding that "recognition carries with it the active assistance of the court". In *Cambridge Gas* itself the only form of assistance sought by the creditors was the recognition and enforcement of the New York Court's confirmation order. However, Lord Hoffmann also answered the broader question about the nature and scope of the assistance available at common law in the following way (at paragraph 22) –

> "What are the limits of the assistance which the court can give? … 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 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".

31. Lord Hoffmann returned to this subject again in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. The case concerned four Australian insurance companies which were being wound up in Australia and in respect of which provisional liquidators had been appointed in England. The question was whether the English court had power to direct remission of assets collected in England to Australia, notwithstanding that there were material differences between the English and Australian statutory regimes for distribution which meant that some creditors would benefit from remission whilst others would be worse off. The House of Lords unanimously decided that remission should take place, but their lordships' reasoning differed. The decision of the majority (Lord Scott, Lord Neuberger and Lord Phillips) was based entirely upon the English statutory power to assist foreign insolvency proceedings. Lord Hoffmann (with whom Lord Walker agreed) also considered that such a power existed at common law. Lord Hoffmann characterized the principle of universality as a principle of English private international law that, where possible, there should be a unitary insolvency proceeding in the courts of the insolvent's domicile which receives worldwide recognition and which should apply universally to all the bankrupt's assets (at paragraph 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 world-wide recognition and it should apply universally to all the bankrupt's assets."

The purpose of the principle is to ensure that the debtor's assets are distributed under one scheme of distribution (paragraph 30):

> "The primary rule of private international law which seems to be applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

32. In *Schmitt –v- Deichmann* [2012] 2 All E.R. 1217 the English High Court considered whether an administrator appointed in respect of a foreign bankruptcy proceeding has a right at common law to pursue transaction avoidance claims in the English court. The case concerned a German incorporated company, Phoenix Kapitaldienst GmbH ("Phoenix"), which had carried on an investment management business in Germany and elsewhere. Its German appointed administrator alleged that its business had been carried on fraudulently in much the same way as the fraud committed against BLMIS' investors. The administrator sought to commence proceedings to set aside transactions allegedly done at an undervalue with the intention of defrauding creditors. However, it was common ground that the statutory scheme did not apply and so the question was whether the English court had power at common law to assist the foreign administrator and, if so, whether the assistance extended to doing whatever the English court could have done in the case of a domestic liquidation proceeding, including the exercise of its statutory powers to set aside antecedent transactions. The court ordered that Phoenix' administrator could assert avoidance claims based upon the substantive UK law. Proudman J. said (at paragraph 62) –

> "….Reading together the *Cambridge Gas Transport* case, *RE HIH Casualty and General Insurance Ltd, Re New Cap Reinsurance Corp Ltd and Rubin's* case, 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."

The question which I have to ask myself is whether this statement of the common law has survived the recent decision of the UK Supreme Court in *Rubin –v- Eurofinance SA* [2012] UKSC 46.

33. In *Rubin* the UK Supreme Court held by a majority (Lord Clarke dissenting) that *Cambridge Gas* had been wrongly decided. A default judgment had been entered against Eurofinance SA in a bankruptcy proceeding pending before the New York Court for about $10 million based upon, *inter alia*, various transaction avoidance provisions of the US Bankruptcy Code. It was common ground that it was an *in personam* judgment and that the judgment debtor was not present in the United States and had not submitted to the jurisdiction of the New York Court within the meaning of the common law rule stated as "Rule 43" in *Dicey, Morris & Collins,* 15th Edition, para.14R-054. The Court of Appeal had followed Lord Hoffmann's reasoning in *Cambridge Gas* and held that *Dicey's* Rule 43 does not apply to foreign judgments made in transaction avoidance proceedings because they are essential to the collective enforcement regime in insolvency and are governed by special rules. In the Supreme Court, the majority rejected this proposition and held that *Cambridge Gas* had been wrongly decided. However, they did not reject the underlying proposition that recognition at common law "carries with it the active assistance of the court". They only rejected the proposition that "active assistance" extended to the enforcement of *in personam* judgments made in bankruptcy proceedings which would not otherwise be enforceable in accordance with the established conflict of laws rules articulated in *Dicey's* Rule 43. Lord Collins said (at paragraphs 29 and 31) –

> "29. …at common law the court has power to recognize and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element. The underlying principle has been stated in different ways: 'recognition….. carries with it the active assistance of the court': *In re African Farms Ltd* [1906] TS 373, 377; 'This court… will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which disturbs the orderly administration of [the company] in Texas under Ch. 11': *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117."

> "31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or

> orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there..."

34. Lord Collins did not express a view on the question which I have to decide, which is whether the assistance available to the Trustee at common law extends to providing him with what he later described as a "direct remedy", meaning an original cause of action which can be pursued against a person in this jurisdiction. However, it seems to me that he was leaving open the possibility that the office holder in *Rubin* would be entitled at common law to pursue transaction avoidance claims under English law (as well as pre-existing causes of action not dependent upon the existence of bankruptcy proceedings). He said (at paragraph 131) -

> "131. .....It would not be appropriate to express a view on whether the officeholders in the present cases would have, or would have had, a direct remedy in England, because there might be, or might have been, issues as to the governing law, or issues as to time-limits or as to good faith. Subject to those reservations, several of the ways in which the claims were put (especially those parts of the judgment which were not the subject of these proceedings) in the United States proceedings in *Rubin* could have founded proceedings by trustees in England for the benefit of the creditors (as beneficiaries of the express trust). In addition there are several other avenues available to officeholders ... [under the various statutory provisions applicable in the UK]."

It remains open to this Court to accept Lord Hoffmann's answer to the question which I have to decide. I conclude, as Proudman J. did in *Schmitt –v- Deichmann,* that the scope of the assistance available at common law includes the power to entertain a preference claim under section 145 (or its predecessor section).

35. Having prepared a draft judgment, I invited further written submissions from counsel on the question whether the common law jurisdiction to provide assistance in this way (which Mr. Crystal describes as "non-traditional assistance") is possible if the only connection with this jurisdiction is the fact that the counterparty to the relevant transactions (in this case Primeo as recipient of the Six Month Payments) happens to be incorporated in this jurisdiction and therefore subject to the territorial jurisdiction of this Court. My initial view was that the common law jurisdiction to provide active assistance by enabling the foreign representative to invoke the Court's statutory

jurisdiction to set aside preferential payments as if BLMIS was in liquidation in this jurisdiction ought to depend upon the existence of a sufficient connection between the foreign company and this jurisdiction, determined by reference to the criteria set out in section 91(d). In Mr Dicker's submission, this approach would be inconsistent with the case law and wrong in principle.

36. In *Cambridge Gas* the Privy Council relied upon a decision of the Transvaal Supreme Court in *Re African Farms Ltd* [1906] TS 373. It concerned a company incorporated in England, having its head office in London, but carrying on business and owning assets in the Transvaal (which subsequently became part of the Union of South Africa). In February 1906 the company was put into voluntary liquidation. Two months later an unpaid creditor, with notice of the liquidation, obtained judgment against the company in the Transvaal court, whereupon the English liquidator presented a petition by which he sought either a winding up order or an order recognizing and authorizing him to take possession of the local assets and distribute them amongst the creditors in accordance with the English statutory scheme. It was held that the Transvaal court had no jurisdiction to make a winding up order, but it nevertheless made a declaration that the English liquidator was entitled to the sole administration of all the company's assets in the Transvaal subject to certain conditions. A stay of execution against the local judgment creditor was implicit in the court's order. Innes C.J. said (at page 378) -

> "...the grant of assistance to the English liquidator, in a case where the Court could not wind up itself, may possibly be open to the objection that we are doing by indirect means what the law has given us no power to do directly."

He went on to answer this point (at page381-2) in the following way –

> "The true test appears to me to be not whether we have the power to order a similar liquidation here, but whether our recognizing the foreign liquidation is actually prohibited by any local rules; whether it is against the policy of our laws, or whether its consequences would be unfair to local creditors, or on other grounds undesirable. And that test is, in the present case fully satisfied."

37. The decision in *Re African Farms Ltd* was cited with approval by Lord Hoffmann in *Cambridge Gas* in support of the proposition that recognition carries with it the active assistance of the Court. The question whether the scope of the available assistance was

in any way dependent upon the Manx court having jurisdiction to make a winding up order in respect of Navigator did not arise because Navigator was incorporated in the Isle of Man. However, this point was subsequently addressed by the Supreme Court of Bermuda in *Re Founding Partners Global Fund Ltd* [2011] Bda L.R. 22. *Founding* was a company incorporated in the Cayman Islands in respect of which this Court had made a provisional winding up order. Upon the application of the provisional liquidators, this Court issued a letter of request to the Bermudian court by which it was asked to direct that they should have all the powers of a liquidator as if they had been appointed by the Bermudian court. Upon their *ex parte* application the court made an order, in reliance upon the Transvaal court's decision in *African Farms* and the Privy Council's decision in *Cambridge Gas,* that the appropriate assistance which could be afforded to the Cayman liquidators was to empower them to exercise all the powers conferred on liquidators under the Bermudian Companies Act 1981, notwithstanding that the Bermudian court did not have jurisdiction to make a winding up order in respect of the company. Based upon the analysis of Lord Hoffman in *Cambridge Gas* and Ward L.J. in *Rubin,* Kawaley J. said that "it is wholly irrelevant for the purposes of recognition at common law whether or not this Court could (if needed) wind up the company". I think what he meant by this statement is that the scope of the assistance available at common law is not dependent in any way upon the existence of jurisdiction to make a winding up order. The matter in issue before the court was simply the right to collect the monies deposited in the company's account with a local bank, but the scope of the order for directions seems to have encompassed the possibility that the Bermudian court would have jurisdiction under the Companies Act to make an order setting aside a payment as a fraudulent preference, even though it had no jurisdiction to make a winding up order. However, it seems to me that Kawaley J's analysis has to be reconsidered in light of the fact that the UK Supreme Court overruled the Court of Appeal's decision in *Rubin* and held that *Cambridge Gas* was wrongly decided.

38. In *Rubin* the UK Supreme Court confirmed the common law power to recognize and grant assistance to foreign proceedings and Lord Collins expressly approved the statement made by Innes C.J in *African Farms* that recognition carries with it the

active assistance of the court, but he did not address the question whether recognition carries with it the right to pursue causes of action which would not otherwise exist in the absence of a winding up order. Lord Collins said –

> "29. Fourth, at common law the court has power to recognize and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element. The underlying principle has been stated in different ways: "recognition .... carries with it the active assistance of the court": *In re African Farms Ltd [1906] TS 373, 377;* "This court ... will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under ch.11": *Banque Indosuez SA v Ferromet Resources In [1993] BCLC 112, 117"*

He went on to give examples of the way in which courts have provided assistance at common law.

> "31. The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or orders for examination in support of foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there."

Mr. Crystal characterizes these examples as "traditional assistance", the availability of which is dependent upon recognition alone. He contrasts this with "non-traditional assistance" of a kind which involves conferring upon the foreign representative a cause of action under the local insolvency law (in this case the fraudulent preference provisions of section 145 of the Companies Law or its predecessor section 168), which would not otherwise be available in the absence of a winding up order. He argues that the justification for this type of assistance is, as a matter of comity, to avoid putting the foreign representative (and so creditors of the foreign estate) to the expense of having to commence a parallel winding up proceeding in this jurisdiction merely to access relief available to an official liquidator under Part V of the Companies Law.

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 proceedings or a stay of 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 cause 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 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 of 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 provisions 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 trusts 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 122 of the UK Bankruptcy Act 1914.[9] 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 it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognized foreign bankruptcy jurisdiction are more limited in their scope ..... and the inherent jurisdiction of the Grand Court cannot be wider."

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

[9] These statutes relate only to personal bankruptcy and have no application to corporate insolvency proceedings.

objective of the Companies Law in the way contemplated by Lord Walker and Lord Neuberger.

41. 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 principle of modified universalism and does not, in my view, involve applying the statute for an unintended purpose or tend to thwart its intended purpose.[10] 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.

Insolvency set-off and the rule in Cherry –v- Boultbee

42. I now turn to Preliminary Issues 5 and 6 which concern the applicability of insolvency set-off under section 140 of the Companies Law and the rule in *Cherry –v- Boultbee.* The preliminary issues proceed on the hypothesis that the Plaintiffs have valid non-proprietary claims (whether arising under foreign or domestic law) as pleaded in their Statement of Claim and that Primeo has claims sounding in debt, damages, equitable compensation or restitution against the Plaintiffs, or either of them, which it will be entitled to plead by way of counterclaim. Primeo is in liquidation under the

[10] Section 91(d) of the Companies Law was not in force on 18 December 2008. Even if it had been in force, the factual circumstances relating to BLMIS are such that the Court would have had no power to make a winding up order.

supervision of this Court with the result that its assets will be distributed subject to the insolvency set-off provisions contained in section 140 of the Companies Law which provides as follows:–

> "(1) Subject to sub-section (2), the property of the company shall be applied in satisfaction of its liabilities *pari passu* and subject thereto shall be distributed amongst the members according to their rights and interests in the company.
>
> (2) The collection in and application of the property of the company referred to in subsection (1) is without prejudice to and after taking into account and giving effect to the rights of the preferred and secured creditors and to any agreement between the company and any creditors that the claims of such creditors shall be subordinated or otherwise deferred to the claims of any other creditors and to any contractual rights of set –off or netting of claims between the company and any person or persons (including without limitation any bilateral or any multi-lateral set-off or netting arrangement between the company and any person or persons) and subject to any agreement between the company and any person or persons to waive or limit the same.
>
> (3) In the absence of any contractual right of set-off or non set-off, an account shall be taken of what is due from each party to the other in respect of their mutual dealings, and the sums due from one party shall be set-off against the sums due from the other.
>
> (4) Sums due from the company to another party shall not be included in the account taken under subsection (3) if that other party had notice at the time they became due that a petition for the winding up of the company was pending.
>
> (5) Only the balance, if any, of the account taken under subsection (3) shall be provable in the liquidation or, as the case may be, payable to the liquidator as part of the assets."

43. This provision was introduced by the 2007 Law and codifies the pre-existing law which was that contractual rights of set-off or non set-off concluded in the ordinary course of business prior to the commencement of the liquidation were enforceable by and against the liquidator and, in the absence of any contractual right, rule 4.90 of the English Insolvency Rules 1986 would be applied. To this extent it can be said that section 140 is based upon rule 4.90 with the result that this Court will regard the decisions of the English courts on the meaning and effect of rule 4.90 and its predecessors as persuasive authorities relating to the interpretation of the Cayman Islands statute. It is common ground that there is no relevant contractual right as between Primeo and BLMIS and that for present purposes I am only concerned with

the residual insolvency set-off rule. It is also common ground that its application is automatic and self-executing.

44. It is well established as a matter of English law, and I think also as a matter of Cayman Islands law, that there are certain situations in which insolvency set-off will not apply so as to enable a creditor of a company in liquidation to rely on his claim against the company to extinguish or reduce the company's claim against him. Insolvency set-off cannot be relied upon as a defence to a liquidator's claim against a contributory for calls on unpaid or part-paid shares: *Re Overend, Gurney & Co., Grissell's case* (1866) LR 1 Ch. App 528. Nor can insolvency set-off be relied upon as a defence to a misfeasance claim against directors and others: *re Anglo Co-operative Society, ex parte Pelly* (1882) 21 Ch. D 492. Nor is it a defence to a claim by a liquidator to recover voidable preferences: *Lister –v- Hooson* [1908] 1 KB 174. The rationale for the non-application of the insolvency set-off in these special situations is obvious. The legislative intention that contributories make good a company's capital, that delinquent directors pay compensation and that recipients of preferential payments be put back in the position they would have been in had the payment not been received, would be defeated by the application of set-off. It follows that if BLMIS was in compulsory liquidation under Cayman Islands law, Primeo's liquidator would not be entitled to set-off its ordinary non-proprietary claim for a debt etc against a preference claim asserted by BLMIS' liquidator under section 145 (or the predecessor section 168) of the Companies Law.

45. I am wholly un-persuaded that Primeo can avoid this result in the event that the Trustee is entitled to assert a preference claim at common law as if it were in liquidation in this jurisdiction. For present purposes I have to assume two things. First, I must assume that the Trustee and/or BLMIS is entitled to claim recovery of the Six Month Payments as a preferential payment under Cayman Islands law as pleaded in Part X of the Statement of Claim. For the reasons which I have explained, the substantive law applicable to this claim is Cayman Islands law, which includes section 140 of the Companies Law as interpreted and applied in the manner which I have described. Second, I must assume that Primeo has a non-proprietary claim against

BLMIS for a debt etc, being a cause of action which existed prior to the commencement of its liquidation, which for these purposes is treated as being 15 December 2008. On the basis of these assumptions, the Trustee is entitled to pursue a preference claim against Primeo under Cayman Islands law and Primeo is entitled to prove in BLMIS' notional liquidation as an ordinary unsecured creditor. In these circumstances, mandatory insolvency set-off under section 140 does not apply. This result turns upon the characterization of BLMIS' claim and Primeo's cross-claim. The result would be different if the Trustee was pursuing on behalf of BLMIS an ordinary contractual or tortious cause of action which had arisen prior to the liquidation. In such a case the Trustee would prove in the liquidation as an ordinary unsecured creditor and set-off would apply. The result is different if the Trustee's claim is properly characterized as the kind of claim which is not subject to set-off under section 140, which depends upon the Court determining that the Trustee is entitled at common law to pursue a preference claim under Cayman Islands law. The right to pursue a preference claim under the domestic law necessarily carries with it the domestic set-off rules as interpreted and applied in accordance with the authorities to which I have referred.

46. In my view it is impossible to arrive at a different result by calling in aid the rule in *Cherry –v- Boultbee.* This is a principle of equity which means that where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed so to participate unless and until he has fulfilled his duty to contribute. It can apply to a variety of different situations, including the case of an insolvent company in liquidation. Primeo's argument is that its liquidators will be entitled to withhold payment of any dividend to BLMIS in respect of a judgment on its pleaded claim for recovery of the Six Month Payments unless and until it pays in full the amount owing to Primeo on a judgment in respect of its (as yet un-pleaded) counterclaim. So long as BLMIS can properly be treated as if it is in liquidation in this jurisdiction and its pleaded claim against Primeo is properly characterized as one to which mandatory set-off under section 140 does not apply, it is not open to Primeo to rely upon the rule in *Cherry –v- Boultbee* as a means of circumventing this result. The reason for this conclusion is explained in the UK Supreme Court's decision in *Re*

Kaupthing Singer & Friedlander Ltd (No.2) [2012] 1 AC, per Lord Walker at paragraphs 52 and 53.

> "52 The situation in this line of authority is that a shareholder is a creditor of an insolvent company, but his shares are not fully paid up, so that he is liable as a contributory. Suppose he has 10,000 £1 shares, 10p paid, and is owed £15,000, but the dividend prospectively payable is only 30p in the pound. If the liquidator calls on him for £9,000 to make his shares fully paid up, he has no right of set-off, and to that extent he is disadvantaged (that is *In re Auriferous Properties Ltd* [1898] 1 Ch 691). If he seeks to prove in the liquidation, the liquidator can rely on the equitable rule as it applies in a case of this sort—that is, that he can receive *nothing* until he has paid *everything* that he owes as a contributory. That is *In re Auriferous Properties Ltd (No 2)* [1898] 2 Ch 428. The rule is also very clearly stated by Buckley J in *In re West Coast Gold Fields Ltd* [1905] 1 Ch 597, 602 (affirmed [1906] 1 Ch 1, and cited in para 20 above). Payment of the call is a condition precedent to the shareholder's participation in any distribution, and again the shareholder is to that extent disadvantaged."
>
> "53 So the equitable rule may be said to fill the gap left by disapplication of set-off, but it does not work in opposition to set-off. It produces a similar netting-off effect except where some cogent principle of law requires one claim to be given strict priority to another. The principle that a company's contributories must stand in the queue behind its creditors is one such principle....."

Another such principle is that the recipients of preference payments must repay without the benefit of set-off. Assuming that the Trustee's pleaded claim is properly characterized as a preference claim which is not subject to mandatory set-off, Primeo cannot rely on the rule in *Cherry –v- Boultbee.*

47. However, I should perhaps mention one other aspect of the matter which does not form part of the preliminary issues which I have to decide but was touched upon in the course of the argument. When a creditor has repaid the amount adjudicated to have been a preference payment under section 145 (or its predecessor section 168), he then becomes entitled to prove in the liquidation for that amount. The policy of the law is that the recipient of a preferential payment should be put back in the same economic position that he would have been in, had he not received the payment (which is of course why insolvency set-off does not apply). However, it has been said that if Primeo were to repay the Six Month Payments as constituting preferential payments under Cayman Islands law, it would still not be entitled (as a matter of US law) to

prove in the liquidation of BLMIS for this amount or have this amount taken into account for the purpose of making a claim based upon a "cash in/cash out" calculation. This Court's common law jurisdiction to assist in connection with a foreign bankruptcy proceeding is discretionary. In determining whether it can properly provide such assistance, it seems to me that the Court must take into account the same policy considerations which would be applicable under section 242(1). The mere fact that the application of the foreign law produces an economic result which is different from that which would be produced by the application of Cayman Islands law is not of course a reason for refusing this Court's assistance. However, if it were to be established that the assistance sought by a foreign representative is intended to produce an economic result which is plainly contrary to a fundamental policy of the Cayman Islands law, the claim would be dismissed.

Conclusions

48. This Court has no power to entertain preference or transaction avoidance claims under section 241(1)(e) of the Companies Law (2011 Revision) and, even if such power existed, the Court would have no power to apply foreign law. It follows that Section VI of the Statement of Claim must be struck out as disclosing no reasonable cause of action.

49. Having determined that the Trustee is entitled to recognition under section 241, it follows that the Court does have a discretionary power at common law to entertain the Plaintiffs' preference claim based upon the application of the domestic corporate insolvency law as if BLMIS was the subject of a winding up order. The Court's power is not dependent upon establishing that there is jurisdiction under section 91(d) to make a winding up order in respect of BLMIS. It follows that Section X of the Statement of Claim does disclose a reasonable cause of action should not be struck out.

50. In the event that the Plaintiffs establish their claim, as pleaded in Section X of the Statement of Claim, any sums due from Primeo to the Plaintiffs (or either of them) will not be set-off pursuant to section 140 of the Companies Law against any sums due

from the Plaintiffs (or either of them) in respect of any claims sounding in debt, damages, equitable compensation or restitution which Primeo may have against the Plaintiffs (or either of them) in respect of investments placed with BLMIS. Nor will the rule in Cherry –v- Boultbee apply, so the official liquidators of Primeo will have no right of quasi-retainer exercisable against the Plaintiffs.

51. Having reached these conclusions, I did not consider it necessary to deal with Preliminary Issue 7.

DATED this 14 day of January 2013

The Honourable Mr. Justice Andrew J. Jones QC
JUDGE OF THE GRAND COURT