HO-03

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 21 of 2002
(Grand Court Cause No. 154 of 2002)

IN THE MATTER OF SHEIKH FAHAD MOHAMMED AL SABAH,
A BANKRUPT

AND IN THE MATTER OF AN APPLICATION BY G. CLIFFORD CULMER FOR RECOGNITION AS TRUSTEE IN BANKRUPTCY OF THE PROPERTY OF SHEIKH FAHAD MOHAMMED AL SABAH AND FOR OTHER RELIEF PURSUANT TO A LETTER OF REQUEST FROM THE SUPREME COURT OF THE BAHAMAS TO THE GRAND COURT OF THE CAYMAN ISLANDS DATED 14 FEBRUARY 2002

(Grand Court Cause No. 271 of 1995)

AND BETWEEN

(1) GRUPO TORRAS S.A.

Plaintiff/Respondent

AND

(5) BARBARA ALICE AL SABAH
(6) MISHAL ROGER AL SABAH

Defendants/Appellants

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice I. Rowe, Justice of Appeal
The Honourable Mr. Justice M. Taylor, Justice of Appeal

Robert Hildyard, Q.C., Adrian Beltrani and Dairmid Murray, for the Appellants
Anthony Mann, Q.C., and Graham Ritchie, for the Respondents

Heard: July 22, 25 and 26, 2003 Reasons released: October 1, 2003

REASONS FOR DECISION

TAYLOR, J.A.

Sheikh Fahad Mohammed Al Sabah has been found guilty of massive frauds against the London-based Kuwaiti government overseas investment agency of which he was once in charge, and as a result faces a judgment in England for approximately (U.S.)$800,000,000 and has been declared a bankrupt in the Bahamas, where he now lives.

The Cayman Islands are among jurisdictions in which assets of Sheikh Fahad have been settled in trusts for the benefit of members of his family and himself, and by this appeal his wife and son seek to overturn an order of the Grand Court, made in response to a letter of request from the Supreme Court of the Bahamas, authorizing his Bahamian trustee-in-bankruptcy to invoke against two of the Cayman trusts a provision of the Cayman bankruptcy statute under which voluntary settlements of a bankrupt may be set aside. The issues raised are: (i) whether the Cayman court has jurisdiction to comply with a letter of request seeking assistance under the Cayman bankruptcy statute in a Bahamian bankruptcy; (ii) if so, whether such jurisdiction extends to granting the Bahamian trustee-in-bankruptcy the benefit of the Cayman avoidance provision; and (iii) if so, whether, under principles of private international law and in the exercise of judicial discretion, such relief should in this case be granted.

We had the benefit of oral and written submissions regarding the interpretation of statutes enacted in the United Kingdom, Jamaica and the Cayman Islands over a period of more than 130 years. It may be helpful at this point to mention three.

(a) The Principal Statutory Provisions

The present Cayman Islands *Bankruptcy Law* is essentially that passed by the legislature of Jamaica in 1880, when it had legislative jurisdiction over both Jamaica and the Cayman Islands; this statute was adopted in 1964 by the Cayman Legislative Assembly with minor revisions, to some extent reflecting differences between the two jurisdictions including the fact that Jamaica has several bankruptcy courts but the Cayman Islands only one.

The appeal centres on two provisions authorizing trans-jurisdictional co-operation in bankruptcy matters, one in an imperial statute, the other in the Cayman law.

The first is s. 122 of the 1914 *Bankruptcy Act* of the Westminster Parliament (to which alone we shall, for clarity, refer as "Parliament"), a statute the whole of which has been held to have extended throughout the then empire:

> 122. The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

The 1914 *Bankruptcy Act* has been repealed under a provision of the 1985 *Insolvency Act*, a United Kingdom statute which does not have imperial status but provides that any of its provisions may be applied to a colony if so extended by order-in-council. Since its provisions

repealing other statutes were never so extended, the respondents contend that so far as the Cayman Islands are concerned the 1914 Act remains in force.

The second reciprocal judicial assistance provision directly involved is s. 156 of the Cayman *Bankruptcy Law*, whose language is similar:

> 156. All the Courts in bankruptcy and the officers of such Courts shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy, and any order of any one Court in a proceeding in bankruptcy may, on application to another Court, be made an order of such other court and be carried into effect accordingly. An order of any Court in bankruptcy seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court that made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

This section was taken from s. 161 of the Jamaican *Bankruptcy Law,* 1880, when that statute was revised to reflect differences between the jurisdictions by a Commission appointed under the *Revised Edition (Law of the Cayman Islands) Law*, 1960. The changes were included in an amending statute enacted by the Cayman Legislative Assembly which had effect immediately prior to the coming into force of the revised laws on January 1, 1964. The Assembly passed a resolution authorizing the Governor to proclaim the revised law in force, as provided by s. 9(2) of the 1960 law revision statute, and the Governor did so.

Section 156 of the Cayman *Bankruptcy Law* thus to a large extent reflects the intention which the Jamaican legislature formed in 1880, when the Cayman Islands had no bankruptcy court. It seems likely that the 1880 statute first had effect in the Cayman Islands in 1894, when the Grand Court is known to have had bankruptcy jurisdiction, with whatever changes were thought necessary by the court itself. On December 31, 1963, it was formally amended to

accommodate jurisdictional differences, as proposed by the law revision Commission. By resolution of the Cayman legislature and proclamation of the Governor its revised form became part of the statute law of the Cayman Islands in 1964.

Since there is only one Cayman bankruptcy court, the reference in s. 156 to the rendering of mutual assistance between bankruptcy courts would naturally seem to refer to co-operation between the Cayman court and courts of other jurisdictions. The statute could extend no such authority or duty to courts in other jurisdictions. But with respect to United Kingdom and other "British" courts this had already been accomplished by s. 122 of the 1914 *Bankruptcy Act*. The purpose of s. 156 could therefore be simply to declare the law already laid down by Parliament in s. 122 of the 1914 Act. Its purpose might instead, as held in the decision under appeal, be to enable the Cayman court to assist, and seek assistance from, the courts of any country. But the appellants say that it bears neither such meaning. They say that as part of the law of Jamaica the section referred to assistance between the bankruptcy courts of Jamaica. When incorporated into an exclusively Cayman statute, as part of a statute law revision approved by the Cayman Legislative Assembly after the Jamaican legislature ceased in 1962 to have jurisdiction with respect to the Cayman Islands, the section could no longer bear that meaning. The appellants contend that for so long as the Cayman Islands have only one bankruptcy court it has no application at all. In an exclusively Caymanian statute it must be taken to have been adopted either with an eye to the future, they say, or simply by mistake.

The third statutory provision directly involved is s. 107(1) of the 1964 Cayman *Bankruptcy Law*, the 'avoidance' provision. It reads:

> 107(1). Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a

> purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage, in right of his wife, shall, if a provisional order in bankruptcy, or an absolute order in bankruptcy in cases where no provisional order is made, takes effect against the settlor within two years after the date of the settlement, be void against the Trustee and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the Trustee unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property has passed to the trustee of such settlement on the execution thereof.

An important difference between this and the corresponding provision of the *Bankruptcy Act* of the Bahamas is that the latter applies only where the bankrupt is a "trader", as defined, and the appellants take the position that Sheikh Fahad was not a "trader".

The appellants contend that if the Grand Court had jurisdiction to render assistance in this case, whether under s. 156 of the of Cayman *Bankruptcy Law*, s. 122 of the 1914 *Bankruptcy Act* of Parliament or its inherent jurisdiction, which they deny, its jurisdiction does not extend to granting the benefit of s. 107(1) in an overseas bankruptcy, and that if it does, the court ought not as a matter of discretion to exercise that jurisdiction in this case.

(b) The Previous Proceedings

The letter of request, dated February 14, 2002, was issued pursuant to an *ex parte* order made by Mr. Justice Lyons of the Supreme Court of the Bahamas under s. 122 of the 1914 *Bankruptcy Act*, which the judge found still to be part of the law of the independent Commonwealth of the Bahamas, and the inherent jurisdiction of that court.

The request asks that the appointment as trustee-in-bankruptcy of the present respondent G. Clifford Culmer be recognized by the Grand Court, and that he be granted "all general law powers and the statutory powers accorded to a trustee-in-bankruptcy in the jurisdiction of the Cayman Islands, and in particular the powers granted under s. 107(1) of the Cayman *Bankruptcy Law* (1997 Revision)", together with such other powers against the assets of the bankrupt as the Grand Court might deem fit. In his reasons for judgment authorizing issuance of the request, Mr. Justice Lyons concluded, after citing relatively recent Australian authority on the point, that notwithstanding that the Bahamas has independent status within the Commonwealth, its court remains a "British court" for the purposes of s. 122. We do not understand this conclusion to be challenged. The judge expressed the view that the Cayman court would be able to comply with the request under s. 156 of the Cayman *Bankruptcy Law*, which he described as "not dissimilar to s. 122", or under its own inherent jurisdiction.

The trustee-in-bankruptcy brought the letter of request before the Chief Justice of the Grand Court, who made an *ex parte* order granting assistance under s. 122 of the 1914 *Bankruptcy Act*, s. 156 of the Cayman Islands *Bankruptcy Law* and the inherent jurisdiction of the Grand Court. The Chief Justice directed that the Bahamian trustee-in-bankruptcy be vested with the requested powers, including those under s. 107(1) of the Cayman *Bankruptcy Law*, and that the Clerk of the Courts of the Cayman Islands, the sole trustee-in-bankruptcy designated by the Cayman statute, act as "auxiliary" to the Bahamian trustee.

In his written reasons the Chief Justice traced the history of the two reciprocal judicial assistance provisions and of the exercise of legislative jurisdiction over the Islands. He concluded that s. 156 of the Cayman statute had its origin in the similarly-worded s. 64 of the Jamaican *Bankruptcy Law* of 1871, later replaced by the 1880 statute, and that the 1871 Act was

enacted in furtherance of s. 74 of the 1869 *Bankruptcy Act* of Parliament which required, in terms similar to the later s. 122 of the Act of 1914, that bankruptcy courts of the United Kingdom and "every British court elsewhere having jurisdiction in bankruptcy or insolvency" act in aid of each other and as auxiliary to each other. The Chief Justice found that the 1914 Act remained in effect in the Cayman Islands by reason of having been adopted by s. 57(1) of the *Cayman Islands Constitution* of 1972, an order-in-council under the 1962 *West Indies Act* of Parliament, and also because the provision authorizing repeal of the 1914 Act contained in the 1985 *Insolvency Act* of Parliament was not extended to the Cayman Islands.

The Chief Justice thus viewed the Jamaican predecessor sections to s. 156 of the Cayman statute as having at all times incorporated the full scope of what later became s. 122 of the 1914 Act, and not that part only that required and authorized domestic bankruptcy courts to assist each other, and found also that s. 122 of the 1914 Act itself remains in force here.

The order of the Chief Justice was brought on for review *inter partes* before Mr. Justice Henderson on the application of the present appellants, and this review was heard together with applications in the other proceeding involved in the present appeal.

The other proceeding is an action commenced in 1995 by the respondent Grupo Torras S.A., a Spanish company owned by the Kuwaiti government through which overseas investments were made by the Kuwait Investment Authority while Sheik Fahad was Chairman of both. The action is against Sheik Fahad, his wife and son, together with trustees of his Cayman trusts and other parties connected with his affairs. The applications before Mr. Justice Henderson were to add the Bahamian trustee-in-bankruptcy as plaintiff in this action, discontinue certain claims and amend the statement of claim so as to plead s. 107 of the Cayman *Bankruptcy Law*, the

avoidance provision. The outcome of this last application, the only application to be contested, turned on the outcome of the review of the order of the Chief Justice.

With the benefit of arguments not addressed to the Chief Justice, Mr. Justice Henderson upheld the *ex parte* order on somewhat different grounds.

Mr. Justice Henderson concluded that although s. 156 of the Cayman *Bankruptcy Law* was clearly copied from s. 64 of the Jamaican statute, it ought not to be inferred that the legislative intent was in both cases the same. While in the Jamaican context the provision may have referred only to assistance rendered by one local bankruptcy court to another, in an exclusively Cayman context its intent must, he found, be that assistance be rendered by the Cayman court to courts of other jurisdictions. The judge did not accept that the section merely recorded what had already been enacted in s. 122 of the 1914 Act of Parliament. He found that in adopting broader language ("All the courts in bankruptcy") than contained in s. 122, the legislature should be taken to have intended that the Cayman court act in aid of *all* courts elsewhere, this being the only interpretation "that breathes life into s. 156".

In light of this conclusion Mr. Justice Henderson did not find it necessary to decide whether s. 122 of the 1914 Act had been repealed by Parliament so far as it applies to the Cayman Islands. He agreed with the Chief Justice that the request could, in any event, be granted under the court's inherent jurisdiction.

Mr. Justice Henderson went on to deal with allegations by the present appellants of non-disclosure by the trustee-in-bankruptcy in the *ex parte* proceedings before the Chief Justice, and their assertion that, in seeking to avail himself of the broader scope of the Cayman avoidance provision as opposed to that of the Bahamas, the trustee had engaged in "forum shopping". The

judge found that disclosure in the proceedings before the Chief Justice was adequate to show that settlements into the Cayman trusts had little connection with the Cayman Islands, and that any facts undisclosed in this connection were immaterial. Failure to disclose the particular difference between the Bahamian avoidance provision and that of the Cayman statute was material to the exercise of discretion by the Chief Justice, he found, but the nature of the application itself sufficed to show that the trustee was reluctant to invoke the avoidance provision of his own jurisdiction, and the failure to disclose what the actual difference was could not in the circumstances be considered misleading.

With respect to the appropriateness of granting the trustee the right to claim the benefit of s. 107 on the facts of the case, Mr. Justice Henderson concluded that the discretionary nature of relief available allowed the court to defer until all the facts were before it the decision whether there is a sufficient connection with the Cayman Islands to justify the granting of relief under s. 107. With respect to the allegation of "forum shopping", the judge was of the view that by giving the court authority to apply either its own law or that of a requesting jurisdiction, s. 156 "countenances some degree of forum shopping". We take this statement to mean that the section expressly authorizes the application of law other than that most closely connected with the bankrupt or the bankruptcy, wherever this would serve the interests of justice.

For these reasons Mr. Justice Henderson upheld the *ex parte* order of the Chief Justice and allowed amendment of the statement of claim to add the claim by the trustee-in-bankruptcy under s. 107. From this decision the present appeal is brought.

(c) The Meaning of Section 156

The first issue to be decided turns on the meaning of the opening words of s. 156 of the Cayman *Bankruptcy Law*: "All the Courts in bankruptcy".

We must decide whether these words refer: (i) to all United Kingdom and other British bankruptcy courts, so as to mirror the opening words of s. 122 of the 1914 Act of Parliament, as accepted by the Chief Justice; (ii) to all bankruptcy courts in the world, as found by Mr. Justice Henderson; or (iii) as the appellants contend, to all bankruptcy courts of the Cayman Islands, so as to have no present application at all. We do not believe that the expression could, in an exclusively Cayman context, be taken to refer to Caymanian and Jamaican courts, and we do not understand the appellants to advance that contention.

We are of the view that when considered in the context of the Cayman bankruptcy scheme, and without reference to any meaning it may previously have had in the Jamaican context, s. 156 cannot in this respect be considered ambiguous. Since s. 156 could impose no duty on any bankruptcy court other than the single Cayman court, its pluralistic reference to "courts" naturally encompasses courts outside the jurisdiction of the Cayman legislature which had reciprocal powers and duties of assistance. Assuming that it was within the competence of the Cayman legislature to repeat in its own bankruptcy statute the law established by Parliament in s. 122 of the 1914 *Bankruptcy Act*, that would be consistent with the view of the appellants that the Cayman statute is intended to represent a "complete bankruptcy code for the Islands". So viewed, s. 156 has a sensible present meaning and is not open to any other equally-reasonable meaning. While, taken alone, it could be thought to authorize the Cayman court to respond to requests from any court in all the world, its words do not so readily yield this meaning, speaking

as they do of reciprocal duties which the legislature could not impose and which Parliament had imposed only on United Kingdom and other "British" courts. The contention of the appellants that the section was intended to apply only in the unlikely event that another Cayman bankruptcy court is created, and thus has no present application, cannot in our view be entitled to equal standing with a construction giving it some coherent present meaning.

The ambiguity which the appellants seek to resolve in favour of giving to s. 156 no more than a potential future application, or explaining it as a mistake, thus comes about only if the section is viewed in its former context, as part of the law of Jamaica. In that context the section is capable of bearing a completely domestic meaning. The words "all the courts in bankruptcy" could in that context refer to all of the bankruptcy courts of Jamaica, rather than all of the United Kingdom and other British courts – that is to say, having in mind its Victorian ancestry, simply "all the Queen's courts in bankruptcy".

Counsel have found no Jamaican authority construing the section. A thorough search of bankruptcy statutes passed by other colonial legislatures – particularly those of jurisdictions having only one bankruptcy court – might have assisted, but that task has yet to be undertaken. We are asked to decide the construction of s. 156 with reference to its history as part of Jamaican statute law, and on the understanding that there is no authority on point.

As has been mentioned, the first bankruptcy statute in effect in Jamaica was the 1869 *Bankruptcy Act* of Parliament. Section 74 of that Act provided:

> The London Bankruptcy Court, the local Bankruptcy Court, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, shall severally act in aid of and be auxillary to each

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

This section must be considered together with the similar language two years later of s. 64 of the Jamaican *Bankruptcy Law* of 1871. It says:

> All the courts in bankruptcy, and the officers of such courts, shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy, and any order of any one court in a proceeding in bankruptcy may, on application to another court, be made an order of such other court, and may be carried into effect accordingly; And an order of any court in bankruptcy seeking aid, together with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.

The ambiguity in the Jamaican statute law to which we have been directed continued through successive statutes of Parliament and the Jamaican legislature.

With respect to s. 64 of the 1871 Jamaican law it must be observed that whichever meaning is adopted – "all local courts" or "all British courts" – the result is simply to adopt, repeat or declare, the law already laid down by s. 74 of the 1869 Act of Parliament. To adopt a purely domestic construction results in the law being less than fully stated. The section is obviously addressed only to local courts, but it would have been incorrect to suggest to them that their powers and duties of judicial co-operation in bankruptcy matters lay towards each other

only, when in fact they also had the right and duty to assist, and call for assistance from, United Kingdom courts and all other courts administering British bankruptcy law.

That the broader, and correct, statement of the prevailing law was intended can be supported by a comparison of words of s. 64 with those of the two following provisions, which together with s. 64 comprise a complete part of the statute:

> ORDERS AND WARRANTS OF COURT
>
> Sixty-fourth – *All the courts in bankruptcy*, and the officers of such courts, shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy, and any order of any one court in a proceeding in bankruptcy may, on application to another court, be made an order of such other court, and may be carried into effect accordingly; And an order of *any court in bankruptcy* seeking aid, together with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.
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> Sixty-fifth – Any warrant of *a court having jurisdiction in bankruptcy under this law* may be executed in any part of this island in the same manner and subject to the same privileges in, and subject to which a warrant issued by any justice of the peace against a person for an indictable offence may be executed; and any search warrant issued by a court having jurisdiction in bankruptcy under this law for the discovery of any property of a bankrupt may be executed in manner prescribed, or in the same manner and subject to the same privileges in, and subject to which a search warrant for property supposed to be stolen may be executed according to law.
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> Sixty-sixth – Where *any court having jurisdiction in bankruptcy under this law* commits any person to prison, the commitment may, unless otherwise prescribed, be to such convenient prison as the court thinks expedient; and if the gaoler of any prison refuses to receive any prisoner so committed, he shall be liable, for every such refusal, to a penalty not exceeding one hundred pounds.
>
> [Emphasis added]

These sections, which remained much the same in subsequent versions of the statute, show that where the Jamaican legislature meant to refer only to local courts, in provisions immediately associated with s. 64, it did so in different and narrower language, a practice adopted in the corresponding ss. 157 and 158 of the current Cayman *Bankruptcy Law*.

This strongly suggests that the broader 'empire-wide' meaning must have been intended by the expression "All the Courts in bankruptcy" with which s. 64 opens, and by the words "any court in bankruptcy" used later in the section.

In their reply the appellants contend that it was not within the powers of the Jamaican legislature to repeat in the Jamaican *Bankruptcy Law* of 1871 the empire-wide judicial assistance provision of the 1869 *Bankruptcy Act* of Parliament, thereby raising the question whether the requirements of s. 122 of the 1914 Act could be included in s. 156 of the Cayman statute. No authority is cited on the point. Were the contention of the appellants correct, such authority would surely be found in the law of federal countries of the Commonwealth. We believe the proper view to be that a correct statement of prevailing law contained in an enactment will fall within the competence of the enacting body notwithstanding that such body does not itself have authority to make or change the law so stated – that such a practice is constitutionally unobjectionable, whether in state or provincial legislation, municipal bylaws, rules and regulations of administrative tribunals or other branches of government or bylaws or articles of a body corporate created under statutory authority.

We find it sufficient to say that nothing in the words or history of the Jamaican statute gives to the section in question any such meaning as would preclude the legislative Commissioner who adapted the Jamaican law for exclusively Caymanian use in 1963, and the

Legislative Assembly of the Cayman Islands which approved the statute as amended in 1964, from properly resolving any ambiguity which it contained by concluding that in the Caymanian context s. 156 recites the authority and obligation given to and imposed on the Cayman court by s. 122 of the 1914 *Bankruptcy Act* of Parliament – that is to say; the right and duty to assist and seek assistance from any British bankruptcy court in the world.

We agree with the view of the Chief Justice that this is the meaning properly given to the language used in s. 156 of the Cayman *Bankruptcy Law*.

(d) The Repeal of Section 122

The alternative contention of the respondents, which has relevance only if we are wrong in the above conclusion, is that s. 122 of the 1914 Act itself continues in force in the Cayman Islands, notwithstanding its repeal under the 1985 *Insolvency Act* of Parliament.

The respondents do not advance the proposition that the 1914 Act continues in force here by virtue of s. 57(1) of the *Cayman Islands Constitution*, created by order-in-council under the *West Indies Act of Parliament* of 1962, an enactment which adopts those measures authorized by the earlier order to which it refers. The contention of the respondents is that the 1985 *Insolvency Act*, which substitutes a new insolvency regime with application only to the United Kingdom, was not intended to repeal the 1914 Act insofar as it applied to the dependencies. Nothing could, of course, have been gained for the United Kingdom, and much lost for it as well as the dependencies and other jurisdictions, had the dependencies been deprived by the same Act of their ability to participate in inter-jurisdictional bankruptcy co-operation by such repeal. The purpose of the 1985 Act in this regard, to be found in s. 426, was to enhance the ability of United

Kingdom courts to engage in co-operation with courts of other jurisdictions, and it makes no sense that Parliament would intend at the same time to deprive the court of any overseas dependency of its ability to engage in such co-operation.

The relevant provisions of the 1985 Act are: (i) s. 426, which replaces s. 122 of the *Bankruptcy Act* of 1914, (ii) s. 235(3) which provides for repeal, under Part IV of Schedule 10, of s. 122 of the 1914 Act, and (iii) s. 236(5) which authorizes extension of provisions of the Act to the Channel Islands and colonies by order-in-council. They are as follows:

> 426. *Cooperation between courts exercising jurisdiction in relation to insolvency* – (1) An order made by a court in any part of the United Kingdom in the exercise of jurisdiction in relation to insolvency law shall be enforced in any other part of the United Kingdom as if it were made by a court exercising the corresponding jurisdiction in that other part.
>
> . . . .
>
> (4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> (5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.
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> . . . .
>
> (10) In this section "insolvency law" means –
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> (a) in relation to England and Wales, provision made by or under this Act or sections 6 to 10, 12, 15, 19(c) and 20 (with Schedule 1) of the Company

Directors Disqualification Act 1986 and extending to England and Wales.

. . . .

(d) in relation to any relevant country or territory, so much of the law of that country or territory as corresponds to provisions falling within any of the foregoing paragraphs; and references in this subsection to any enactment include, in relation to any time before the coming into force of that enactment the corresponding enactment in force at that time.

. . . .

(11) In this section "relevant country or territory" means – (a) any of the Channel Islands or the Isle of Man, or (b) any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument.

235(3) The enactments mentioned in Schedule 10 to this Act are hereby repealed to the extent specified in the third column to that Schedule.

SCHEDULE 10

Part IV

4&5 Geo.5 c.59 The Bankruptcy Act 1914 Sections 121 to 123

236(2) This act shall come into force on such day as the Secretary of State may, by order made by statutory instrument, appoint, and different days may be so appointed for different purposes and for different provisions.

. . . .

(5) Her Majesty may, by Order in Council, direct that such of the provisions of this Act as are specified in the Order shall extend to any of the Channel Islands or any colony with such modifications as may be so specified.

A ministerial order was made under s 236(2) on February 6, 1986, (SI 1986/185) to bring into effect s. 235(3) so as to repeal s. 122 of the 1914 Act "except insofar as it relates to courts in the United Kingdom acting in aid of and being auxiliary to British courts elsewhere", that is to say to repeal s. 122 as it applied to the dependencies. In other respects s. 122 was repealed by later ministerial order, and such orders ultimately repealed the whole of the 1914 Act. The 1985 Act was then repealed and replaced by the similar but consolidated *Insolvency Act* of 1986. At no time was any order-in-council made under s. 236(5) extending s. 235(3) or any other provision of the Act to any of the dependencies.

Our concern must therefore be to determine the validity of the ministerial order of February 6, 1986. Its purpose is plainly to repeal s. 122 of the 1914 Act insofar as that section confers authority and imposes duties on bankruptcy courts of the dependencies.

The case for the respondents must be that this ministerial order went beyond the authority given by s. 236(2) to the Secretary of State. Those responsible for the order may have been of the view that s. 236(5) contemplated an order-in-council only for the purpose of extending to dependencies provisions of the 1985 Act making new law, and not for the purpose of those 'unmaking' existing law by repeal. But the fact that a minister's advisors believe the minister to have authority to make an order cannot, of course, take the court far in determining whether Parliament intended to confer that authority.

The position of the appellants is that the repeal of a statute automatically has the effect that "except as to transactions past and closed, the statute is to be treated as if it never existed", so that "the entire basis of both the law and its extra-territorial effect has been removed". Their

position is that this principle of statutory construction excludes the relevant repeal provision of the 1985 Act, s. 235(3), from the scope of s. 236(5) which authorizes the extension of provisions of the Act to a dependency only by an order-in-council to that effect.

In the context of the law of the Commonwealth as developed in modern times we do not believe the matter to be so simple as that.

As exemplified by the decision of the Supreme Court of the Bahamas in this case, the repeal of an 'imperial' statute does not affect its operation in an independent Commonwealth country. Thus United Kingdom legislation which has been repealed by Parliament continues to have effect, perhaps on a wide scale, in jurisdictions around the world. The practice of creating 'imperial' legislation to govern the remaining dependencies has been less favoured by Parliament in recent times, the modern practice being to include in United Kingdom statutes a section authorizing extension to dependencies by order-in-council, as in the Act of 1985. As a result of this practice statutes so extended continue to have effect in such dependencies despite subsequent repeal by Parliament, in the same way that repealed United Kingdom legislation continues in effect in independent Commonwealth countries. Such "extended" legislation continues to be part of the law of a dependency until the extending order-in-council is repealed. See in this regard: *Halsbury* (4th ed.) Vol. 6, Sections 1104-1106.

Thus in the context of modern Commonwealth law and practice it would not be illogical that s. 236(5) of the 1985 *Insolvency Act* be construed as having the effect that no change in the law of a dependency is to be brought about by *any* provision of that Act – whether one making new law or one 'unmaking' the present law – until that provision had been extended to the dependency by order-in-council. In this way Parliament, in which the dependencies are

necessarily unrepresented, could ensure that no change is made by it in the law of any dependency until the wishes and interests of that dependency have been ascertained by the appropriate executive authority in London, and any necessary replacement or transitional measures have been put in place there.

But in the present case the repeal provision was to be given effect only by later ministerial order, thus providing an opportunity for intervening consultation with the dependencies. If the view taken by those responsible was that s. 122 of the 1914 Act had already been made part of the statute law of dependencies, as we have found in the case of the Cayman Islands, it would make sense that the section as it affected dependencies be repealed. Its repeal, and ultimately that of the whole 1914 Act, would then serve the interests of the dependencies by freeing them from the restraint of imperial legislation under s. 2 of the 1865 *Colonial Laws Validity Act*, and enable them to modernize their insolvency laws themselves.

It is in this context that we are asked to decide whether the permissive language of s. 236(5) of the 1985 Act – "may be extended" – should be taken to mean that unless so extended *no* provision of the Act would have effect in any dependency, or whether it should be read subject to an implied proviso excepting from the need for "extension" those provisions of the Act that might be said 'naturally' to apply to dependencies, including provisions respecting the operation of 'imperial' legislation. In addressing this question it would have been most desirable that the court have the benefit of a survey of imperial legislation repealed in modern times by 'non-imperial' Acts of Parliament, and of modern statutes of Parliament having 'extension' provisions such as s. 236(5). This would be helpful in determining what consequences would flow from adoption of the first suggested construction – that is to say, what imperial statutes now regarded as repealed might be disentombed, on the one hand, and what local statutes now

thought to be in effect be found as a consequence to be *ultra vires* by operation of s. 2 of the *Colonial Laws Validity Act* of 1865, on the other. In this way both established practice and the probable impact of the suggested construction could be given weight in determining the intent which should be ascribed to Parliament in enacting s. 236(5).

The decision in the Australian case of *Ukley v. Ukley*, [1977] VR 121 (Supreme Court of Victoria, Full Court), contains a helpful discussion of the principles involved in a strikingly similar situation involving a United Kingdom statute capable of "extension" which contained a provision by which an earlier imperial statute was repealed. But in that case the overseas jurisdiction concerned had long been part of a fully self-governing Dominion, whose constituent parts could not be affected by the United Kingdom repealing legislation by reason of s. 4 of the *Statute of Westminster*, 1931. It is, however, notable that the court concluded that inclusion of a section permitting extension of provisions of the later Act to "any colony" strongly suggested that its repeal provision could have colonial effect only if so extended.

Since we do not have the survey of potentially-affected legislation described above, and because resolution of this issue is not essential to the outcome of the appeal in view of our conclusion with respect to the meaning of s. 156 of the Cayman *Bankruptcy Law*, we would prefer to leave the point for resolution at another time.

A question which remains, however, and was not addressed in argument, is whether s. 156 can still be in effect if s. 122 has been repealed. It is our view that if s. 122 were no longer in force here, s. 156 would still form a valid part of the Cayman law insofar as it states the powers and duties of the Cayman court in responding to requests from United Kingdom bankruptcy courts under s. 426 of the present *Insolvency Act*, from bankruptcy courts of

independent Commonwealth countries which retain the benefit of s. 122 and from dependencies having similar provisions. Nothing to which we have been referred suggests the contrary. We have in mind that s. 122 remains in effect in countries such as the Bahamas and that the Cayman Islands has been named a "relevant jurisdiction" under s. 426 of the *Insolvency Act*, so as to enable United Kingdom courts to extend assistance to the Cayman court. There is no reason why a provision enabling the Cayman court to make or respond to such requests should be beyond the competence of the Cayman legislature.

We are accordingly satisfied that we need not for the purposes of this appeal resolve the question whether s. 122 of the 1914 *Bankruptcy Act* itself remains in force in the Cayman Islands, and for the reason given we prefer not to do so.

(e) The Application of Section 107

The appellants contend that s. 107(1) of the Cayman *Bankruptcy Law*, earlier reproduced, permits the court to make a declaration setting aside a voluntary pre-bankruptcy settlement in favour of the trustee-in-bankruptcy only where the bankruptcy in question is a Cayman bankruptcy and the trustee-in-bankruptcy is the person designated by the Cayman statute as such – that is to say the Clerk of the Cayman Courts – and that for the court to extend the benefit of the section to an overseas trustee-in-bankruptcy in respect of an overseas bankruptcy would mean that the court had, in effect, "re-written" the section.

The appellants argue that no part of the statutory scheme applicable to Cayman bankruptcies and to the Cayman trustee can be extended by s. 156 (or, presumably, by s. 122 of the 1914 Act of Parliament, if in effect) to an overseas trustee or an overseas bankruptcy. They

contend that this is so even if the local trustee is appointed to act as "auxiliary" to the overseas trustee, as provided by the order of the Chief Justice in this case. They say that the "equitable", or non-statutory, powers of the Court can be so extended – such as the power to appoint a receiver to assist an overseas trustee in taking possession of assets here – but that little or nothing of the receiving court's statutory bankruptcy law will be available to assist in response to such a request. The argument thus centres on the meaning of the word "jurisdiction" (singular) as contained in the final sentence of s. 156:

> An order of any Court in bankruptcy seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like *jurisdiction which* the Court that made the request, as well as *the Court to which the request is made, could exercise* in regard to similar matters within their respective jurisdictions. [Emphasis added]

While these words are less clear than those of s. 122 of the 1914 Act of Parliament, it is not suggested that their effect differs, and were there any ambiguity in the matter it would be resolved by s. 2 of the *Colonial Laws Validity Act*, 1865. The assisting court is given discretion to apply either its own "jurisdiction" or that of the court making the request, and in this context "jurisdiction" must refer to the powers normally available to the court.

There are few reported decisions dealing with either s. 122 of the 1914 Act or the replacement s. 426 of the 1985 and 1986 *Insolvency Acts*. A summary of the few cases that there are is found in the judgment of the Court of Appeal in *Hughes et al v. Hannover Ruckversicherungs-Aktiengesellschaft*, [1997] 1 BCLC 497. Lord Justice Morritt there observes that in all the cases under s. 122 or its predecessors the assistance given was under the equitable jurisdiction, and not under the *Bankruptcy Act*, but adds (at p. 515):

> There was no suggestion in either the earlier statutory provisions nor in the cases that the courts were somehow limited in their jurisdiction to afford assistance to what they were entitled to do under the express provisions of the Bankruptcy Act then in force.

In a further reference to s. 122 of the 1914 *Bankruptcy Act* and its predecessors, Lord Justice Morritt later makes (at p. 516) the observation:

> The earlier references to 'jurisdiction in bankruptcy' and 'jurisdiction in bankruptcy and insolvency' were used to identify the courts to which reference was being made. But the jurisdiction which might be exercised was not so limited. Thus a request to the High Court in England for assistance in a form it could not give did not inhibit it from exercising its equitable jurisdiction to appoint a receiver. The fact that the jurisdiction to do so did not arise under the Bankruptcy Act for the time being in force was immaterial.

These statements in our view take it to be settled that the assisting court may apply the law found in its own bankruptcy statute. The matter in doubt was the extent to which the court's other powers may be employed. We find no basis for the contention that a court receiving a request could not under s. 122 apply its own statutory insolvency powers. If there was any doubt on this point it seems now to have been authoritatively resolved.

The purpose of s. 156 is both to broaden the 'jurisdiction' of a court receiving a request – meaning in this sense its authority to deal with and decide matters – so as to enable it to exercise its authority in bankruptcy matters over which it would otherwise have no authority, and also to authorize the court in so doing to apply its own law, including that contained in its bankruptcy legislation, the word "jurisdiction" in this latter sense being a reference to the bankruptcy and associated law which the assisting court normally administers.

The objection taken by the appellants to the application of s. 107 of the Cayman statute, that it cannot apply to an overseas bankruptcy without being "rewritten", is one which would presumably be made with equal force in respect of the application of almost any section of the statute. The statutory scheme is necessarily intended to apply only to Cayman bankruptcies administered by the designated Cayman trustee-in-bankruptcy. The statute can be applied in aid of an overseas bankruptcy at the request of the overseas court only by what Lord Morritt refers to in *Hughes v. Hanover* (at p. 517) as a "hypothesis that the matters specified in the request fall within the jurisdiction of the court". This must, in our view, include a hypothesis that the overseas bankruptcy is a Cayman bankruptcy, and the overseas trustee the Cayman trustee-in-bankruptcy. Such hypothesis can be made without difficulty, having in mind that the bankruptcy orders of the requesting court are, by the opening words of the judicial assistance sections, to be made orders also of the court rendering assistance. Where the assisting court decides to exercise its authority to apply its own statutory bankruptcy law, it would only be by such hypothesis that the law contained in the statute could be applied. This is the way in which statute law is applied under s. 426 of the present *Insolvency Act* of the United Kingdom, and we conclude that the same is intended by s. 156 of the Cayman *Bankruptcy Law*. It was by an analogous hypothesis that in *Re Dallhold Estates (UK) Pty. Ltd.*, [1992] BCLC 621 (Ch.D.), an overseas company was treated on an application under s. 426 as though it were an English company for the purpose of applying s. 8 of the 1986 *Insolvency Act*.

In *Re Bank of Credit and Commerce International SA (No. 9)*, [1994] 2 BCLC 637 (Ch. D), the benefit of s. 238 of the 1986 *Insolvency Act* was sought by liquidators of a Cayman bank under a letter of request made by the Grand Court under s. 426. The section sought to be invoked provided for avoidance of transactions entered into at an undervalue in circumstances in

which no relief would be available in the Cayman Islands. Mr. Justice Rattee allowed the claim under s. 426, notwithstanding that relief under that section is available only to liquidators appointed in England and in respect of the liquidation of English companies.

The Chief Justice and Mr. Justice Henderson were in our view right to conclude that the Grand Court had jurisdiction in this case under s. 156 of the Cayman *Bankruptcy Law* to authorize Mr. Culver to seek the benefit of s. 107.

(f) The Exercise of Discretion

Having found that the court had jurisdiction to apply s. 156 of the Cayman *Bankruptcy Act* in responding to the letter of request, and that the section authorizes the court to extend to the Bahamian trustee-in-bankruptcy the benefit of s. 107 of the statute, we must deal with the extent of the court's discretion to grant such relief, and whether that discretion was properly exercised in this case in favour of permitting the trustee-in-bankruptcy to advance a claim under s. 107, which is all that is authorized by the order under appeal.

In speaking of deferring decision on the exercise of the court's discretion, Mr. Justice Henderson referred to the discretionary nature of relief under s. 107, that is to say the discretion of the court to grant or refuse a declaration under that section setting aside a transaction in favour of the trustee-in-bankruptcy, the authority under its bankruptcy statute which the Cayman court was asked to exercise in aid of the overseas court. Mr. Justice Henderson was of the view that the discretion to be exercised under s. 107 involves consideration of the same factors, including principles of private international law or "foreign elements", as would the exercise of discretion in determining whether to grant assistance under s. 156. We think it proper to conclude that the

intent of his order is to authorize the trustee-in-bankruptcy to bring a claim under s. 156, thus deciding all questions of the court's jurisdiction to entertain such a claim at the request of the overseas court, but to defer until all the facts are before it the decision whether, under s. 156 and s. 107, such discretionary relief should in this case be granted.

The exercise of discretion by Mr. Justice Henderson in upholding the order of the Chief Justice granting the request despite failure of the trustee to disclose before the Chief Justice or the Bahamas court certain relevant facts is not directly attacked by the appellants. But they say that the non-disclosure is a factor to be considered along with others in determining whether the discretion of the court ought to be exercised in favour of the trustee in allowing him to advance the claim under s. 107. They say that there is little connection between the Cayman Islands and the matters raised, and that the letter of request was initiated by the trustee in what they describe as an exercise of "naked forum shopping".

The appellants go on to characterize as "an abdication of the judicial role" the decision of Mr. Justice Henderson to defer, until all relevant facts are before the court, a decision whether the discretion under s. 156 should be exercised in favour of the request.

The Court of Appeal in *Hughes v. Hanover* (above) (at p. 517) makes it clear that in exercising discretion whether to extend assistance under a provision such as s. 156 the court is to "perform its normal function of seeking to do justice according to the law". Section 426(5) of the present United Kingdom *Insolvency Act* states that principles of private international law are to be taken into account in the exercise of this discretion, and we assume this to be true also of the exercise of discretion under s. 156. The appellants say that so far as the Cayman trusts are concerned any connection with the Cayman Islands is peripheral. As to the "Comfort Trust", its

sole trustee is a Cayman-incorporated bank doing business in Cayman Islands and its affairs are subject to Cayman law, but its assets are elsewhere and they include land in the Bahamas. The "Eaglet Trust" has as its trustees a Cayman bank and an associated Swiss bank. It, too, is declared subject to Cayman law by its founding deed, but its assets consist of investments elsewhere. The transactions which the trustee seeks to have declared void under s. 107 are in one case transfers of Bahamas real estate, and funds through another trust, into what became the Comfort Trust, and in the case of the Eaglet Trust the transfer at its inception into that trust of money held for Sheikh Fahad in a Swiss bank account.

The conclusion of Mr. Justice Henderson that no decision regarding the exercise of discretion should be made until all the relevant facts are before the court is essentially procedural. It should not, in our view, be disturbed unless the undisputed facts establish that the case is one in which a court *could not* properly grant the requested assistance.

The facts of the case will obviously be important in any exercise of discretion directed to achievement of the interests of justice. The transactions involved took place towards the end of, or immediately after, the period when Sheikh Fahad perpetrated his frauds against the Kuwait Investment Authority and Grupo Torras S.A., of both of which he was Chairman. The bankruptcy results from his failure to repay enormous sums gained by these frauds. The present appellants are persons closely related to Sheikh Fahad who hope to benefit from the trusts in this jurisdiction which hold his former assets, and thus to receive the bounty of a person enriched by fraud in preference to the claim of the victim of the fraud. Counsel for the appellants correctly stated, early in his submission, that the court must not be influenced by these factors in determining the issues of jurisdiction, which have ramifications beyond this case, but conceded

that the court is "entitled to have regard to the position of Grupo Torras", that is to say its position as a victim of fraud, on any question of discretion.

We must therefore ask whether the undisputed facts show the case to be one in which the court plainly could not, in its discretion, grant the request.

The charge of "forum shopping" has in our view no application. The proper court of the bankruptcy, that of the Bahamas, has issued a request to the Cayman court, that of the jurisdiction where the defendant transferees were incorporated and carry on their business and where assets are held, asking that the Cayman court grant the trustee-in-bankruptcy the benefit of the Cayman avoidance provision. "Forum shopping" is defined in *Black's Law Dictionary* as "the practice of choosing the most favourable jurisdiction or court in which a claim might be heard", and has been described in the United States as "a national legal pastime". In its pejorative sense it can have no application in this case, because in seeking through the court of the bankruptcy to obtain the assistance of another Commonwealth bankruptcy court with broader authority, the trustee is doing that which the statutory judicial co-operation provisions authorize, and which they must be taken to intend that he should do.

The principal remaining issue under s. 156 is choice of law. The choice cannot be equated with that normally made under principles of private international law, because here there are but two options – the law of the bankruptcy, which is the domicile of the bankrupt, or the law of the trusts and of the trustees who hold title to and control the assets said to have been transferred by the bankrupt without consideration for the benefit of the bankrupt and his immediate family. The appellants take the position that the transfers cannot be avoided under the bankruptcy law of the Bahamas and that it is the law of the Bahamas, and not that of the ultimate

transferees, that should properly be applied. While the appellants concede that there are some "connecting factors" linking the assets with the Cayman Islands, they say that these cannot suffice to establish that Cayman law, rather than that of the Bahamas, should apply. Indeed, they denounce the conduct of the trustee-in-bankruptcy seeking application of the Cayman avoidance provision as "a stark example of abuse".

Choosing the "proper law" of avoidance within the limited choice of law available under s. 156 requires consideration of the purposes of having the trusts governed by Cayman law and of the location here of those with legal title and control of the assets. This is the task deferred by the order under appeal until more of the facts are known.

A lucid discussion of the uncertainties which prevail under private international law concerning choice of law in trans-jurisdictional insolvency transaction avoidance proceedings is to be found in Bridge and Stevens, *Cross-Border Security and Insolvency* (at pages 279-281). The authors conclude that it would be wrong under s. 426 of the United Kingdom *Insolvency Act* that a court "proceed to apply its own avoidance rule irrespective of the connecting factors that can be shown to have some material relationship to the *transaction and the parties*". Even if the proper "law of the transaction" in the case of transfers sought to be impeached were other than that of the Cayman Islands, that could not be decisive. The court must also consider connecting factors associated with the *parties*, including the Cayman trustees, and the fact that the chosen law of the trusts is that of this jurisdiction. In regard to the reason why the trusts were located in the Cayman Islands and the law of this jurisdiction engaged, which could well have bearing on the choice of law for avoidance purposes, it may prove significant that another trust established by Sheikh Fahad is said recently to have been found here, the subject of another proceeding. A question that arises is whether, in the interests of justice, those concerned with these trusts can

properly select only those aspects of the legal system governing the trusts that serve the purposes of the scheme. The parties are not agreed on the purposes for which the trusts were established here and why Cayman trustees and Cayman law were engaged.

The conclusion reached by Rebecca Parry, in *Transaction Avoidances in Insolvencies* (at p. 471), is that while the choice of law option available to the assisting court under s. 426 of the *Insolvency Act* "seems to undermine the principle that there should be predictability for defendants in the laws to which they are subject", the broad discretion found by the Court of Appeal in *Hughes v. Hannover* to be available under the section ensures that "if it would cause injustice to the defendant, the court may be able to refuse to grant the relief requested". If in the present case commercial interests were involved, and there were no such connections with the Cayman Islands as might alert those involved to the possibility that Cayman law might be applied in respect of their dealings, the discretion could on this view be exercised against granting the trustee-in-bankruptcy assistance under s. 156.

The uncertainty of international law regarding choice of law in insolvency transaction-avoidance cases is also frankly and succinctly discussed by Professor J.L. Westbrook of the University of Texas School of Law in a paper, *Lessons of Maxwell Communication*, (1996) 64 Fordham Law Review 2531, which considers issues raised in proceedings relating to the collapse of the notorious Maxwell empire in England and the United States, described by the author as "one of the most important transnational insolvencies of modern times". Professor Westbrook writes of the importance of predictability in preference avoidance law, so that those dealing with businesses in financial difficulty will know the risks of credit extension and the cost and benefits of obtaining security. While believing that adoption of a rebuttable presumption in favour of the home jurisdiction of the debtor-transferor of the preference as the source of the proper law

provides the best assurance of the necessary predictability, Professor Westbrook cautions (at p. 2540) that "any predictable rule tends to be mechanical, with the frequent consequences of potential manipulation, and of results too often unrelated to the interests at stake", thus underlining the need for flexibility, or for exceptions.

The proceedings to which Professor Westbrook refers, and in which he played a role as *amicus curiae*, came to a conclusion in the decision of the Second Circuit Court of Appeals, in *Re: Maxwell Communication Corp. plc*, (1996) 93 F. 3d 1036. The choice there was between the preference avoidance law available to a United States court conducting an insolvency proceeding under Chapter 11 of the *United States Bankruptcy Code* and that available to the High Court in England in an administration under the 1985 *Companies Act*. The trial judge in the United States proceeding found the "centre of gravity" of the transfers resulting in creditor preference lay in England, and declined to apply United States law. That decision was upheld on appeal. Giving the decision in the final appeal Circuit Judge Cardamone weighed factors such as the nationality of the debtors and most of the creditors being British or being companies incorporated under the laws of England, that the principal debtor was governed by British directors and managed in London by British executives, and that the payments were made in England, on the one hand, against the fact that the money paid came in part from the sale of subsidiaries in the United States where most of the group's assets were located, on the other. The judge refers to such factors as the need for international judicial comity, the greater interest of England in applying its own avoidance law, and presumed expectations as to the applicable law of the businesses that had dealt with the debtor companies.

Those are factors that cannot be found in the present case. They do not arise in a unilateral pre-bankruptcy relocation of assets by an insolvent, such as that achieved by the

present scheme, nor to a situation in which the choice of law arises on a request for assistance from the sole court conducting insolvency proceedings.

The choice-of-law issue which arises where a request is received from a court of another jurisdiction under a judicial co-operation provision necessarily differs from that which arises as between two courts in deciding which should decide a matter arising in an insolvency that is subject to proceedings in both. In the latter case questions of comity arise, and deference may be shown to the court in whose jurisdiction the "centre of gravity" lies. In the case of a request for judicial assistance there is no such jurisdictional contest. There is a difference, too, between the choice-of-law issue which arises in an avoidance proceeding relating to pre-bankruptcy voluntary settlements, on the one hand, and that which arises where the transfer sought to be voided is a pre-bankruptcy preference between equally-ranked creditors, on the other. In the latter case reasonable expectations concerning the applicable law likely to have been entertained by those extending credit must be taken into account, for which purpose the "centre of gravity" test may be the next best thing to a *prima facie* rule in providing the necessary predictability of the outcome of business dealings. In the case of unilateral voluntary settlements no such need arises. Considerations of justice in the individual case may therefore play a larger role in the exercise of discretion where a request for judicial assistance is involved, and where the transfers sought to be avoided are part of a voluntary settlement scheme.

There is nothing in any of the judicial assistance provisions, including s. 426 of the present English *Insolvency Act*, to suggest that the assisting court may apply its own law only where this would constitute the "proper law" under private international law in a contest between the laws of several jurisdictions. The requirement of s. 426(5), that in exercising its discretion the court "shall have regard in particular to the rules of private international law", falls

deliberately short of this. Earlier provisions, such as s. 156 of the Cayman statute, are silent on the point. In the absence of established rules of international law in this area, we think it proper to say that there must, in order for the assisting court to apply its own law, be a substantial connection between the circumstances of the case and the jurisdiction concerned such as will render it fair and just, in the judgment of the court, that the law of that jurisdiction be applied in responding to the request. In the present case it may be that the court will conclude that the deliberate purpose of the arrangements made by the insolvent, and by those entrusted by him with the relevant portions of his estate, was that the law of the Bahamas *not* apply to the assets concerned, but rather that they be subjected only to the law of the Cayman Islands. If that were so, and no one will be affected other than the bankrupt and those for whose future benefit he has designated his assets, the application of the Cayman avoidance provision would not seem inconsistent with the objectives of private international law.

Counsel for the potential beneficiaries concedes that the court is entitled in matters of discretion to take into account the position of the petitioning creditor as a victim of the bankrupt's frauds. The authorities caution, however, against making a choice of law based simply on desire to achieve a particular outcome. The question for the court must be whether the connections between the settlements and this jurisdiction, while not necessarily such as to tip the scales in an "centre of gravity" analysis, are nevertheless sufficient to justify the application of the Cayman avoidance provision, and if so, whether its application would in the circumstances serve the other interests of justice involved. In answering this question it may well be of assistance to the court to know why the trusts were established and the transfers made, and particularly why Cayman trustees and Cayman law was chosen in preference to those of the United Kingdom or the Bahamas, where the settlor was at various times domiciled. If the

purpose of the trusts was to "re-domicile" parts of the settlor's estate, for his benefit and that of his family, this might well establish a connection with this jurisdiction sufficient to justify the application for bankruptcy purposes of the chosen law of the trusts. Such an outcome would not result in establishment of any rule of private international law capable of leading to uncertainty in commercial dealings, nor were we told of any rule of international law applicable to transaction avoidance which it could be said to transgress.

We are unable to say that the case is one in which the court would be bound under s. 156 to decline to allow a claim under s. 107. We agree with the view of Mr. Justice Henderson that the allegation by the appellants of "forum shopping" has no relevance in the case of a claim under a provision such as s. 156 which requires the court to select among two systems of law which it will apply. We find no merit at this stage in the disclosure issue.

We find no error in the decision of Mr. Justice Henderson to defer for later determination the exercise of the court's discretion under ss. 156 and 107.

(g) Conclusion

We have held that s. 156 of the Cayman *Bankruptcy Law* permits the Grand Court to grant the request for assistance of the court in the Bahamas, that the jurisdiction of the Grand Court in so doing extends to permitting the Bahamian trustee-in-bankruptcy to seek a declaration under s. 107 of the Cayman *Bankruptcy Law* setting aside the transfers of assets which form the subject of these proceedings, and that the Grand Court was entitled to defer until all relevant facts are before it a decision whether the interests of justice, including considerations of private international law, would be served by granting relief under ss. 156 and 107. We do not find it

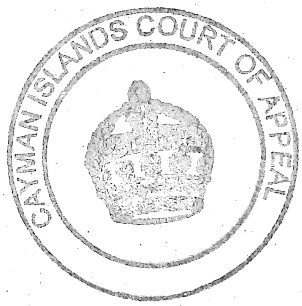
necessary to decide whether the Grand Court still has authority to grant the requested assistance under the 1914 *Bankruptcy Act* of Parliament, or has such authority under its inherent jurisdiction. We find the order of the Chief Justice was properly upheld and would, if the respondents so wish, affirm the appointment of the Cayman trustee-in-bankruptcy as "auxiliary" to the respondent trustee. We find that the trustee was properly granted leave to amend the statement of claim in the second proceeding, so as to add the claim under s. 107(1).

It follows that the appeal must be dismissed. The respondents are entitled to the costs of the appeal, to be taxed if not agreed.

E. Zacca, P.

I.D. Rowe, J.A.

M.R. Taylor, J.A.



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