Michaelmas Term
[2014] UKPC 36
Privy Council Appeal No 0040 of 2014

JUDGMENT

Singularis Holdings Limited (Appellant) *v* PricewaterhouseCoopers (Respondent)

From the Court of Appeal of Bermuda

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Sumption
Lord Collins

JUDGMENT GIVEN ON

10 November 2014

Heard on 29 and 30 April 2014

Appellant	*Respondent*
Gabriel Moss QC Felicity Toube QC Stephen Robins Rod Attride-Stirling (Instructed by Blake Morgan LLP)	David Chivers QC Paul Smith Scott Pearman (Instructed by Herbert Smith Freehills LLP)

LORD SUMPTION:

Introduction

1. This appeal is closely connected with the concurrent appeal in PricewaterhouseCoopers (Bermuda Exempted Partnership No 7420) v Saad Investments Co Ltd ("SICL"). The two appeals concern related companies incorporated in the Cayman Islands, both of which have been ordered by the Grand Court of the Cayman Islands to be wound up. Hugh Dickson, Stephen Akers and Mark Byers of Grant Thornton Special Services (Cayman) Ltd were appointed by that court as the Joint Official Liquidators of both companies. The background to both appeals is set out in the Advice of the Board on that Appeal, delivered by Lord Neuberger, and it need not be repeated here.

2. The common feature of both appeals is that they concern attempts on the part of the liquidators to obtain from the companies' former auditors PricewaterhouseCoopers ("PwC"), information, whether in oral or documentary form, relating to the companies' affairs. The evidence is that the liquidators have been unable to trace certain assets which they consider must have existed, and that relevant information about those assets is likely to be in the possession of PwC. This has not been accepted in terms, but neither has it been disputed. The Board will proceed upon the footing that it is correct.

3. The Grand Court of the Cayman Islands has power under section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Islands, who has a relevant connection to a company in liquidation (including its former auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company." The Grand Court has made such an order against PwC, and the Board was told that PwC has complied with it. Consistently with the provision conferring the power, it extends only to material belonging to the companies.

4. Both the SICL and the Singularis appeals concern attempts by the Liquidators to obtain material belonging to the auditors themselves, principally their working papers, by invoking the corresponding powers conferred on the Supreme Court of Bermuda. They are in wider terms, which are not limited to information belonging to the company. Section 195 of the Companies Act 1981 of Bermuda provides:

> "Power to summon persons suspected of having property of company etc.
>
> 195. (1) The Court may, at any time after the appointment of a provisional liquidator or the making of a winding up order, summon before it any officer of the company or persons known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.
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> (2) The Court may examine such person on oath, concerning the matters aforesaid, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.
>
> (3) The Court may require such person to produce any books and papers in his custody or power relating to the company, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien."

5. The power of the Bermuda court under section 195 is exercisable only in respect of a company which that court has ordered to be wound up. It was therefore dependent in this case on the existence of a power to wind up a company incorporated outside Bermuda. In the case of SICL the Supreme Court of Bermuda made a winding up order, and then made an order for production and oral examination against PwC in the winding up. However, in the SICL Appeal the Board has advised Her Majesty that the winding up order must be stayed because (with immaterial exceptions) the court had no jurisdiction to wind up a company incorporated outside Bermuda. The consequence is that all proceedings in the winding up of SICL have ceased to be effective, including the order made under section 195.

6. In the case of Singularis a different procedure was adopted. No winding up order was ever sought or made in Bermuda. Instead, Kawaley CJ made an order recognising in Bermuda the status of the Liquidators by virtue of their appointment by the Grand Court of the Cayman Islands, and exercising what he termed a common law power "by analogy with the statutory powers contained in section 195 of the Companies Act" to order PwC and Paul Suddaby (an officer

of PwC) to produce the same documents which they could have been ordered to produce under section 195. PwC were also ordered to have a partner, employee or agent acceptable to the liquidators available to answer oral or written interrogatories. The liquidators were given leave to serve the proceedings on Mr Suddaby and any other "partners or officers" of PwC out of the jurisdiction.

7. The Court of Appeal (Bell AJA, Zacca P and Auld JA) set aside the Chief Justice's order. Bell AJA and Zacca P doubted whether there was jurisdiction to make a section 195 order at common law in circumstances where section 195 did not apply. But the ground of their decision was that it was not in any event an appropriate exercise of discretion, because the court should not make an order in support of a Cayman liquidation which could not have been made by the Cayman court itself. They regarded the Liquidators' claim as "unjustifiable forum-shopping". Auld JA agreed with this, but went further. In his view, there was no jurisdiction because the Bermuda court could not disregard the limitation of section 195 of the Bermuda Act to cases where a winding up order could be and had been made.

8. Accordingly two issues arise on the present appeal. The first is whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form), in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.

A common law power?

9. The common law of Bermuda is the same, in every relevant respect, as that of England. The difficulty is that in England the common law concerning cross-border insolvencies has developed to fill the interstices in what is essentially a statutory framework, and the statutory framework differs in significant respects in Bermuda. The main difference is that the English courts have jurisdiction to wind up unregistered companies, including those incorporated outside the United Kingdom. This jurisdiction has existed since it was first conferred by section 199 of the Companies Act 1862. It is currently conferred by section 221 of the Insolvency Act 1986. The Bermuda courts have no equivalent power.

10. The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent

company. The power was founded partly on statute and partly on the practice of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations. The English court would order the winding up in England of a company already in liquidation or likely to go into liquidation under the law of its incorporation, provided that there was a sufficient connection with England and a reasonable possibility of benefit to the petitioners. In theory, the effect of the winding up order was to create a statutory trust of the world-wide assets of the company to be dealt with in accordance with English statutory rules of distribution: *Ayerst v C & K (Construction) Ltd* [1976] AC 167, *Banco Nacional de Cuba v Cosmos Trading Corporation* [2000] 1 BCLC 813, 819-820 (Sir Richard Scott V-C). In practice, as Millett J pointed out in *In re International Tin Council* [1987] Ch 419, 446-447, "Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation." The English courts recognised the limits of the international reach of their own proceedings by treating the English winding up as ancillary to the principal winding up in the country of the company's incorporation. They exercised their power of direction over the liquidator by limiting his functions to getting in the English assets and to dealing with them in such a way as to bring about a distribution of the company's world-wide assets on as uniform a basis as was consistent with certain overriding principles of English insolvency law. The earliest reported case in which the practice was recognised is the decision of Kay J in *In re Matheson Brothers Ltd* (1884) 27 Ch D 225, but it is likely to have been older than that. In these cases, the court is exercising the ordinary powers of the English court to control the winding up of a company, which are wholly statutory. But the court was using them for a purpose which differed from that for which they were conferred, and on principles which departed from those applicable by law in the winding up of an English company. To that extent only, the English courts were exercising a common law power.

11. In Bermuda, the court has no jurisdiction to conduct an ancillary liquidation, except in the (irrelevant) case of a company to which Part XIII of the Companies Act is expressly applied. The question what if any power the court has to assist a foreign liquidation without conducting an ancillary liquidation of its own, must depend on the nature of the assistance sought. Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First, the proceedings are a "mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established", to use the expression of Lord Hoffmann in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508, para 14. Inherent in this function of a winding up is the statutory trust of the company's assets, to which I have already referred, and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of

creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction. These powers are less extensive in Bermuda than they are in England, but include the avoidance of dispositions after the commencement of the winding up and fraudulent preferences. Fourth, it brings into play procedural powers, generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities. In Bermuda these include the power under section 195 of the Companies Act to order the production of information. In England, the corresponding statutory powers would all be exercisable in an ancillary liquidation.

12. The main purpose of the winding up order in England is usually to enable the court to take control of the English assets of the company, so as to remove them from the free-for-all which would have resulted if creditors were entitled to gain priority by levying execution on them. But, even without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation. For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English moveable assets of a foreign bankrupt which had been transferred to an office-holder in an insolvency proceeding under the law of his domicile. Moreover, while the same rule did not apply to immovable property, the court would ordinarily appoint the foreign office-holder a receiver of the rents and profits: see Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed, rules 216 and 217. The more difficult question in such cases was whether the court, in the absence of winding up proceedings, could impose a stay on creditors trying to levy execution against the English assets equivalent to the automatic stay that would by statute have followed the initiation of winding up proceedings.

13. That question appears to have been first addressed in the common law world in the important decision of the full court of the Supreme Court of the Transvaal in *In re African Farms Ltd* [1906] TS 373. African Farms Ltd was an English company with substantial assets in the Transvaal. It was in liquidation in England. There was no power to wind it up in the Transvaal because the number of members had fallen below the minimum required to qualify it as a "company" for the purpose of the statutory power of winding up. The leading judgment was given by the great South African judge Sir James Rose Innes, then Chief Justice of the Transvaal. Having recognised the absence of a statutory power to wind up the company, he continued, at p 377:

> "It only remains to consider whether we are justified in recognising the position of the English liquidator. And by that expression I do not mean a recognition which consists in a mere acknowledgment

> of the fact that the liquidator has been appointed as such in England, and that he is the representative of the company here; I mean a recognition which carries with it the active assistance of the Court. A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the Court may impose for the protection of local creditors, or in recognition of the requirements of our local laws. If we are able in that sense to recognise and assist the liquidator, then I thin[k] we should do so; because in that way only will the assets here be duly divided and properly applied in satisfaction of the company's debts. If we cannot do so, then this result follows, that the directors cannot deal with the property here, and that the liquidator cannot prevent creditors seizing it in execution of their judgments. Unnecessary expenses will be incurred, and the estate will be left to be scrambled for among those creditors who are in a position to enforce their claims."

Innes CJ then considered (p 378) the objection that "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 rejected the submission because its acceptance would have prevented the court from recognising the power of the liquidator to dispose of property or rights of the company under the law of its incorporation, contrary to ordinary principles of private international law: see pp 378-380. He went on, at pp 381-382:

> "The true test appears to me to be not whether we have the power to order a similar liquidation here, but whether our recognising 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… So far from such circumstances being present here, the case before us is one in which every consideration of equity and convenience demands that the position of the English liquidator should be recognised. Unless that can be done then, as already pointed out, the Transvaal assets are at the mercy of the first creditor who can manage to secure a writ of execution."

In the result, the court recognised the liquidator by virtue of his appointment in England as being entitled to the sole administration of the company's assets in the Transvaal, on terms that the liquidator

> "recognise the right of all creditors in this colony to prove their claims against the Company before the Master; and that the admission or rejection of such claims, the liability of the company therefor to the extent of its assets in the Transvaal, and all questions of mortgage or preference in respect of such assets, shall be regulated by the laws of this colony, as if the Company had been placed in liquidation here."

The proved claims of local creditors were ordered to be satisfied rateably from the local assets and the balance made available for distribution to other creditors. Execution of the local judgment creditor's judgment was stayed to enable this to be done.

14. It is right to point out (i) that the recognition of the English liquidator's power of disposition over the company's assets in the Transvaal was no more than what he was entitled to as a matter of private international law; (ii) that the conduct of what amounted to an ancillary liquidation in the Transvaal was expressed as a discretionary condition of the court's recognition order; and (iii) that the Transvaal court no doubt had the same inherent power as the English court to stay enforcement of its own judgments. But the decision is nevertheless a significant one, because in substance what the court was doing was to direct the assets of the company to be dealt with as if it was in liquidation in the Transvaal, when there was no power to conduct a liquidation there. It also deprived an existing judgment creditor of what was on the face of it an accrued and absolute right under his judgment and exposed him to having his debt written down to a figure consistent with the rateable distribution of assets in the Transvaal. The court therefore unquestionably modified the rights of the company and its creditors. Moreover, the sole basis on which it did so was the inherent power of the court to assist the orderly liquidation of the company's affairs pursuant to a foreign winding up order. As Innes CJ put it, at p 377, "recognition… carries with it the active assistance of the court." Or, in the words of the concurring judgment of Smith J (at p 390), the basis of the order was the recognition and enforcement of rights and the recognition of a status acquired under a foreign law, unless they conflict with the law or policy of the jurisdiction in which they were sought to be enforced.

15. The flexibility and breadth of the English court's powers in an ancillary liquidation, together in more recent times with the incorporation into English law of a number of international schemes of judicial co-operation, have had the effect of arresting the development of the common law in England in this area. However, the issue returned in 2006 with 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. In this case the Privy

Council, affirming the decision of the Staff of Government Division in the Isle of Man, held that effect should be given in the Isle of Man to the judicial reorganisation by a Federal Bankruptcy Court in the United States of a group of Liberian ship-owning companies. The effect of the reorganisation was to vest the shares of an Isle of Man company in the committee of creditors, in circumstances where the US court had neither jurisdiction *in rem* over the shares (because they were rights situated outside its territorial jurisdiction) nor jurisdiction *in personam* over the shareholders (because they were not present in the US and took no part in the US proceedings). The principal shareholder, Cambridge Gas, objected on the ground that it was not bound by the decision of the US court. The advice of the Board was given by Lord Hoffmann. He discerned in the English case-law a consistent "aspiration" to produce a result equivalent to that which would obtain if there were a single universal bankruptcy jurisdiction. He regarded this "principle of universality" as having been the foundation of the decision in *In re African Farms*, and considered that it justified the Isle of Man courts in giving effect to the US reorganisation plan: see paras 16-21. In his view, and that of the Board, the absence of jurisdiction *in rem* or *in personam* in the US court was irrelevant, because the jurisdiction was founded not on any obligation on the part of Cambridge Gas to comply with the judgments of the Federal Bankruptcy Court but on the duty of the Isle of Man court to assist a foreign principal liquidation so as to achieve a universal distribution of the assets on, as far as possible, a common basis. At paras 13-14, he said:

> "13. … Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
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> 14. 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 essence of the decision and the reasoning which supported it is to be found at paras 20-22:

> "20. …But the underlying principle of universality… is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the

> Transvaal case of *In re African Farms Ltd* [1906] TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, 'recognition which carries with it the active assistance of the court'…
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> 21. Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan…
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> 22. …At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

The provisions of the domestic system of insolvency of the Isle of Man, which were relevant in *Cambridge Gas*, were the statutory provisions for sanctioning a scheme of arrangement in the course of a winding up. Because the Isle of Man courts would have had power to wind up Navigator and sanction a scheme of arrangement on terms substantially the same as those of the judicial reorganisation approved by the Federal Bankruptcy Court, it could give effect to the reorganisation plan at common law. "Why therefore," asked Lord Hoffmann (para 25), "should the Manx court not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man?" *Cambridge Gas* is authority, if it is correct, for three propositions. The first is the principle of modified universalism, namely that the court has a common law power to assist foreign winding up proceedings so far as it properly can. The second is that this includes doing whatever it could properly have done in a domestic insolvency, subject to its own law and public policy. The third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction *in rem* or *in personam* according to ordinary common law principles is irrelevant.

16. The first and second propositions were revisited by Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. HIH was an Australian insurance company in liquidation in Australia. A winding up petition had been presented in England and provisional liquidators appointed to conduct an

ancillary liquidation. The question at issue was whether the English court should accede to a letter of request from the Australian court inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators, in circumstances where they would be distributed there in accordance with statutory priorities which differed from those applicable in a domestic winding up in England. At paras 6-7, Lord Hoffmann said:

> "6 Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.
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> 7 This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of 'modified universalism': see also *Fletcher*, *Insolvency in Private International Law*, 2nd ed (2005), pp 15–17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one."

Reviewing the English case-law, Lord Hoffmann discerned in it a "golden thread running through English cross-border insolvency law since the 18th century" which, adopting a label devised by Professor Jay Westbrook, he called the "principle of (modified) universalism" (para 30):

> "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."

17. The Committee in *HIH* was unanimous in holding that the assets should be remitted to Australia, but they were divided in some aspects of their reasoning. Lord Hoffmann, with whom Lord Walker agreed, considered that the court had an inherent power to direct the remittal of the assets at common law. However, that view was not adopted by the rest of the Committee. Lord Scott and Lord Neuberger considered that the power was wholly derived from section 426 of the Insolvency Act 1986. Lord Phillips held that the statutory power was a sufficient jurisdictional basis for the proposed direction, and declined to decide whether jurisdiction could have been established at common law. It is, however, important to appreciate that this difference of opinion related not to the principle of universalism itself, nor to the juridical basis of the power to assist a foreign liquidation in general. The difference was about whether that power could be exercised in a manner which would deprive creditors proving in England of their statutory right under section 107 of the Insolvency Act 1986 to a *pari passu* distribution according to English rules of priority. The principle justifying judicial assistance in a foreign insolvency which was stated in *In re African Farms* and affirmed in *Cambridge Gas* was subject to "such conditions as the court may impose for the protection of local creditors, or in recognition of the requirements of our local laws" (p 377) or, as it was put more broadly in *HIH* itself, "justice and UK public policy" (para 30). The division in the Committee in *HIH* was about whether this meant that it was subject to the mandatory requirements of section 107 of the Insolvency Act 1986. The relevance of section 426 in the view of Lord Scott and Lord Neuberger was that on their construction of that section it authorised the treatment of the assets in accordance with the law of the foreign jurisdiction notwithstanding its inconsistency with mandatory rules of English law: see Lord Scott at para 61, and Lord Neuberger at para 68. Absent that provision, the remittal of the assets to Australia would have been contrary to English law. Lord Phillips did not, any more than Lord Scott and Lord Neuberger, question the principle of modified universalism. Indeed, he regarded it as determinative of the manner in which the discretion should be exercised, albeit leaving open the question of its juridical source: see para 44.

18. *Cambridge Gas* marks the furthest that the common law courts have gone in developing the common law powers of the court to assist a foreign liquidation. It has proved to be a controversial decision. So far as it held that the domestic court had jurisdiction over the parties simply by virtue of its power to assist, it was subjected to fierce academic criticism and held by a majority of the Supreme Court to be wrong in *Rubin v Eurofinance SA* [2013] 1 AC 236. So far as it held that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, its authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, a case cited in argument in *Cambridge Gas* but not in the advice of the Board. Lord Walker, giving the advice of the Board in *Al Sabah*, had expressed the view that there was no

inherent power to set aside Cayman trusts at the request of a foreign court of insolvency, in circumstances where a corresponding statutory power existed under the Cayman Bankruptcy Law but did not apply in the circumstances. The Board considers it to be clear that although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. So far as *Cambridge Gas* suggests otherwise, the Board is satisfied that it is wrong for reasons more fully explained in the advice proposed by Lord Collins. If there is a corresponding statutory power for domestic insolvencies there will usually be no objection on public policy grounds to the recognition of a similar common law power. But it cannot follow without more that there is such a power. It follows that the second and third propositions for which *Cambridge Gas* is authority cannot be supported.

19. However, the first proposition, the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by Lord Phillips, Lord Hoffman and Lord Walker in *HIH*, and by Lord Collins (with whom Lord Walker and Lord Sumption agreed) in *Rubin v Eurofinance SA*. Nothing in the concurring judgment of Lord Mance in that case casts doubt upon it. At paras 29-33 Lord Collins summarised the position in this way:

> "29 Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders 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 US 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 Inc* [1993] BCLC 112, 117.
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> 30 In *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said:
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> 'In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention… It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's

> jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.'
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> 31 The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, 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.
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> …
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> 33. One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf *In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship Cornelis Verolme* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). 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 the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common

law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so.

20. The fundamental question is whether a power of compulsion of this kind requires a statutory basis. For this purpose, it is important to distinguish between evidence and information. By evidence, the Board means evidence to prove facts in legal proceedings. The power to compel a person to give evidence in legal proceedings was not originally statutory. Like the power to order discovery, it was an inherent power of the Court of Chancery, devised by judges to remedy the technical and procedural limitations associated with the proof of fact in courts of common law. In England, it was first put on a statutory basis by the Perjury Act of 1563, which extended the power to issue a *subpoena ad testificandum* to all courts of record. In Bermuda, its basis is now section 4 of the Evidence Act 1905. The origins of these powers in the procedural history of the English courts go some way to explain why those courts have always disclaimed any inherent power to compel the furnishing of evidence for use in foreign proceedings: see *Bent v Young* (1838) 9 Sim 180, 192 (Shadwell V-C); *Dreyfus v Peruvian Guano Co* (1889) 41 Ch D 151; *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] 1 All ER 161 (Div Ct), paras 58-63. No such power existed in England until it was created by statute, initially by the Foreign Tribunals Evidence Act 1856.

21. What is sought in this case, however, is not evidence for use in forensic proceedings but information required for the performance of the liquidators' ordinary duty of identifying and taking possession of assets of the company. In *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112, at para 12 the Court of Appeal doubted whether the distinction between evidence and information was helpful, and their doubt was probably justified in that case, where information was being sought for use in foreign proceedings. But the distinction is of broader legal significance. The courts have never been as inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy calls for it.

22. The classic modern illustration is the jurisdiction recognised by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. The House, drawing mainly on the earlier decisions in *Orr v Diaper* (1876) 25 WR 23 and *Upmann v Elkan* (1871) LR 12 Eq 140, 7 Ch App 130,

recognised a common law power to order the production of information about the identity of a wrongdoer where the defendant had been involved, even innocently, in the wrong. Such an order, as they recognised, would not have been available to compel the giving of evidence, because of the long-standing objection of courts of equity to a bill of discovery against a "mere witness": see, in particular, pp 173-174 (Lord Reid). In *Smith Kline & French Ltd v Global Pharmaceutics Ltd* [1986] RPC 394, the Court of Appeal in England applied the same principle to information about the identity of a wrongdoer outside the jurisdiction. These decisions were founded not on the procedural requirements for proving facts in English litigation, but on the recognition of a duty to provide the information in certain circumstances. The duty of a person who had become involved in another's wrongdoing was held to be to "assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers": [1974] AC 133, 175 (Lord Reid), cf. p 195 (Lord Cross). It is, however, clear that this duty was of a somewhat notional kind. It was not a legal duty in the ordinary sense of the term. Failure to supply the information would not give rise to an action for damages. The concept of duty was simply a way of saying that the court would require disclosure. Indeed, Lord Morris of Borth-y-Gest (pp 181-182) thought that the duty would not arise until the court had held that the conditions were satisfied. Viscount Dilhorne (p 190) agreed and so, it seems, did Lord Cross (p 198). Lord Kilbrandon, citing with apparent approval the South African decision in *Colonial Government v Tatham* (1902) 23 Natal LR 153, observed (p 205) that the duty lay "rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff."

23. The present case is not a *Norwich Pharmacal* case. The significance of *Norwich Pharmacal* in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle. In the Board's opinion, an analogous power arises in the present case. Relief is not being sought by way of assistance to a litigant who can rely on ordinary forensic procedures for the purpose. It is being sought by the officers of a foreign court. The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to

assist in whatever way they properly can. The Bermuda court has properly recognised the status of the liquidators as officers of that court. The liquidators require the information for the performance of the ordinary functions attaching to that status. Their acknowledged right to take possession of the company's world-wide assets is of little use without the ability to identify and locate them, if necessary with the assistance of the court. The information is unlikely to be available in any other way. None of the reasons which account for the common law's inhibition about the compulsory provision of evidence have any bearing on the present question. The right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the company's title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holder's right to act on the company's behalf in the same way as any other agent of a company appointed in accordance with the law of its incorporation. The recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

24. There are two reported cases in which an order for the production of documents or information has been made by way of common law assistance to a foreign court. The first is *Moolman v Builders & Developers (Pty) Ltd* [1989] ZASKA 171, a decision of the Supreme Court of South Africa. The appeal arose out of the winding up in the Transkei of a company incorporated there, at a period of South African history when the Transkei was in law a foreign country. The liquidator sought an order of the South African court for the examination of certain persons in South Africa with a view to locating assets of the company. Such an order would have been available to him by statute if there had been an ancillary liquidation in South Africa, but there was no statutory power to wind up this particular company in South Africa. The court held that a power to make such an order at common law was within the principle of *In re African Farms Ltd* [1906] TS 373. The second case is *In re Impex Services Worldwide Ltd* [2004] BPIR 564, a decision of the High Court of the Isle of Man. Section 206 of the Isle of Man Companies Act 1931 conferred a power to order an examination but only in relation to a Manx company. Deemster Doyle nevertheless gave effect by way of common law judicial assistance to a letter of request of the High Court in England seeking the examination of persons in the Isle of Man on behalf of the liquidator of an English company. The Board would not wish to endorse all of the reasoning given in these judgments, in particular those parts which appear to support the concept of applying statutory powers by mere analogy in cases outside their scope. But the Board considers that the decisions themselves were correct in principle.

25. In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or

documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation in *In re African Farms Ltd* and in *HIH* and *Rubin*, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in *Norwich Pharmacal* and *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* (at both levels) shows, common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency. Finally, as with other powers of compulsion exercisable against an innocent third party, its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance.

26. Order 11, rule 1(2) of the Rules of the Bermuda Supreme Court (as applied by order 11, rule 9(1)) authorises the service of an originating summons, petition, notice of motion or similar originating process out of the jurisdiction without leave in respect of any "claim which by virtue of any enactment the Court has power to hear and determine". Because the common law power of the court to compel the production of information in aid of a foreign liquidation is not statutory nor derived from any analogy with the statute, this rule had no application to it. There is a more general power to serve originating process (other than a writ) out of the jurisdiction with the leave of the court under Order 11, rule 9(4), but it is not exercisable against persons whose engagement in the affairs of a foreign company has no connection with Bermuda and there is no implicit statutory authority for such a course: see *In re Seagull Manufacturing Co Ltd* [1993] Ch 345. It follows that on any view the Chief Justice had no power

to authorise the service out of the jurisdiction on Mr Suddaby or other partners or officers of PwC who were not within the jurisdiction of the court. The most that he could do, in a case within the ambit of the power, was order PwC, as the only party present within the jurisdiction, to comply for their own part and to take reasonable steps to procure the co-operation of others.

Application to the present case

27. The Board has summarised the limitations on the common law power to compel the production of information. Of these limitations, two are potentially relevant in the case of Singularis.

28. The first arises from PwC's argument that the order sought against them is not consistent with the law or public policy of Bermuda, because the statutory power to compel the production of information under section 195 of the Bermuda Companies Act impliedly excludes the possibility of an equivalent power at common law. The argument is that because section 195 is limited to cases where the company is being wound up in Bermuda, it would be inconsistent with the statutory scheme to recognise a common law power which, if it existed, would be subject to no such limitation. The Board is not persuaded by this. The existence of a statutory power covering part of the same ground may impliedly exclude a common law power covering the whole of it. But it does not necessarily do so. An implied exclusion of non-statutory remedies arises only where the statutory scheme can be said to occupy the field. This will normally be the case if the subsistence of the common law power would undermine the operation of the statutory one, usually by circumventing limitations or exceptions to the statutory power which are an integral part of the underlying legislative policy: see *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2007] 1 AC 558, para 19 (Lord Hoffmann); *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15, paras 27-34 (Lord Dyson). There is, however, no reason to suppose that the limitation of the power under section 195 of the Companies Act to companies in the course of winding up in Bermuda reflects a legislative policy adverse to assisting foreign courts of insolvency jurisdiction. It simply reflects the limits of the ambit of the Act. The relevant provisions of the Act have been analysed in the advice of the Board in the *Saad Investments* appeal. In summary, the effect of section 4 is that it applies to companies incorporated in Bermuda or authorised to carry on business there. However, the fact that express provision is made for the powers exercisable on the winding up of companies to which the Act applies, does not in the Board's opinion exclude the use of common law powers in relation to other companies which lie outside the scope of the statute altogether.

29. The second limitation which is relevant presents more formidable problems for the joint liquidators. The material which they seek in Bermuda would not be obtainable under the law of the Cayman Islands pursuant to which the winding up is being carried out there. Where a domestic court has a power to grant ancillary relief in support of the proceedings of a foreign court, it is not necessarily an objection to its exercise that the foreign court had no power to make a corresponding order itself. Thus in *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, the English court made a world-wide *Mareva* injunction in support of Swiss proceedings against Mr Cuoghi in circumstances where the Swiss court could not have made such an order. But that decision cannot be taken to reflect a universal principle. The critical factors which justified the order in that case were that there was an unqualified statutory power to give ancillary relief and that the Swiss court's inability to make the order was due to the fact that Mr Cuoghi was not resident in Switzerland whereas he was resident in England. Rather different considerations apply to the common law power with which the Board is presently concerned. Its whole juridical basis is the right and duty of the Bermuda court to assist the Cayman court so far as it properly can. It is right for the Bermuda court, within the limits of its own inherent powers, to assist the officers of the Cayman court to transcend the territorial limits of that court's jurisdiction by enabling them to do in Bermuda that which they could do in the Cayman Islands. But the order sought would not constitute assistance, because it is not just the limits of the territorial reach of the Cayman court's powers which impede the liquidators' work, but the limited nature of the powers themselves. The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the Board to be a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law. This was in substance the ground on which the liquidators failed in the Court of Appeal when they characterised the present application as "forum-shopping". In the opinion of the Board it is correct.

30. The liquidators have not contended at any stage of this litigation that the order which they seek can be justified at common law independently of the power of the Bermuda court to assist a foreign court of insolvency jurisdiction. Moreover, they have accepted before the Board that the information which they seek belongs to PwC and was therefore properly excluded from the order made by the Grand Court of the Cayman Islands. Whether this was correct was not therefore a point argued before the Board. Nonetheless, the Board would not wish to part with this case without expressing their doubts about whether information which PwC acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property.

Conclusion

31. The Board will humbly advise Her Majesty that this appeal should be dismissed.

LORD COLLINS:

Introduction

32. In my opinion the appeal should be dismissed because the ground on which the joint liquidators based their appeal is unsupportable, namely that the court has at common law the ability to exercise powers which are analogous to statutory powers which would have been exercisable in the case of a domestic insolvency, but which do not apply in the international context. This opinion is intended to explain why that conclusion is inescapable in the light of the relationship between the judiciary and the legislature.

33. As the Supreme Court confirmed in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 the court has a common law power to assist foreign winding up proceedings so far as it properly can. In my view, in common with Lord Sumption and despite Lord Mance's powerful opinion to the contrary, the Bermuda court has the power to make an order against persons subject to its personal jurisdiction in favour of foreign liquidators for production of information for the purpose of identifying and locating assets of the company, provided they have a similar right under the domestic law of the court which appointed them. I therefore agree with Lord Sumption that this was not a proper case for exercise of that power.

34. The existence of a common law power to order information (otherwise than by analogy with local statutory powers) was not pursued by the liquidators on the appeal, and it was virtually disclaimed by them until questioning by the Board (quoted in Lord Mance's opinion at para 128) may have led them to adopt it as a subsidiary basis for their appeal.

35. Consequently the parties are entitled to have the views of the Board on the argument which was actually put before it, in essence whether *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26, [2007] 1 AC 508 ("*Cambridge Gas*") correctly decided that the court has a common law power to assist foreign winding up proceedings by exercising powers which are analogous to statutory powers which would have been exercisable in the case of a domestic insolvency, but do not apply to the international insolvency.

36. The primary way in which the case was put by the liquidators was that the common law develops to meet changing circumstances and that in international insolvencies the common law should be developed by the adoption of a principle that where local legislation does not provide for relevant assistance to a foreign officeholder, the legislation should be applied by analogy "as if" the foreign insolvency were a local insolvency. This argument was accepted by the Chief Justice. But it involves a fundamental misunderstanding of the limits of the judicial law-making power, and should not go unanswered.

37. A second reason for dealing with the main point of the liquidators' appeal was that the question whether local legislation could be applied by analogy arose in an appeal in the Cayman Islands Court of Appeal, and that court gave only an interim judgment pending the decision of this Board on this appeal: *Picard v Primeo Fund*, April 16, 2014. That case, as will appear below, involved anti-avoidance proceedings for the recovery of assets, and not (as in the present case) proceedings to obtain information to recover assets. On the principal argument of the liquidators, there is no material difference between this case and the Cayman Islands case. In each case the argument was that the local legislation should, if it does not apply according to its terms (and there is a question about this in the Cayman Islands case), be applied by analogy or on an "as if" basis. The Board took the view that it would be failing in its duty if it did not reach this question on this appeal, and simply left the Cayman Islands Court of Appeal to decide the matter with a possible further appeal to the Privy Council. That appeal has recently been settled, but the point of principle may still arise.

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

The practical issue

39. Both the Cayman Islands and Bermuda have statutory provisions for the examination of persons connected with an insolvent company. In England the statutory power is contained in the Insolvency Act 1986, section 236.

40. This is an exclusively statutory power, which goes back a very long way. As early as the Statute of Bankrupts Act 1542, the authorities (including, among others, the Lord Chancellor and the Chief Justices) were given power to examine on oath persons who were suspected of having property (including debts) belonging to the debtor. The Joint Stock Companies Act 1844 gave a similar power to the court in the case of companies, and there is a continuous line of statutory authority in both corporate and personal insolvency confirming (and extending) the power thereafter to the present day.

41. The provisions of neither the Cayman Islands nor Bermuda statutes apply to the material sought by the liquidators in this case. That is because: (1) the power in section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Cayman Islands, who has a relevant connection with a company in liquidation (including its former auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company" extends only to material belonging to the companies (subject to what Lord Sumption says at para 29); and (2) the power to summon persons suspected of having property of company etc. in section 195 of the Companies Act 1981 of Bermuda does not apply because the power is exercisable only in respect of a company which that court has ordered to be wound up, and in the SICL appeal the Board has advised that the winding up order must be stayed because the court has no jurisdiction to wind up a company incorporated outside Bermuda, to which Part XIII of the Companies Act is not expressly applied.

42. The problem in this and other similar or analogous cases has arisen largely in relation to those British colonies, dependencies, and overseas territories, such as Bermuda, and the Isle of Man, which do not have the statutory powers to assist foreign officeholders which exist under United Kingdom law. Consequently, except in a rare situation to which I will revert, the practical result of this appeal is largely confined to such countries, or those countries (such as the Cayman Islands) where the extent of the statutory powers is controversial.

43. Some of these territories do have such powers. The British Virgin Islands has given effect to the UNCITRAL Model Law in the Insolvency Act 2003, Part XIX, which contains powers to assist foreign officeholders, but only from countries or territories which are designated by the Financial Services Commission. There are 9 such countries or territories, including the United States and the United Kingdom. Section 470 of the Insolvency Act 2003 preserves the power of the court to provide assistance under any other rule of law.

44. The Cayman Islands Companies Law, section 241, gives the court power to make orders ancillary to a foreign bankruptcy proceeding (including the power to

require a person in possession of information relating to the business or affairs of a bankrupt: section 241(1)(d)). But the application of these powers to anti-avoidance proceedings has been controversial. The Cayman Islands Court of Appeal reserved pending the outcome of this appeal the question whether the anti-avoidance provisions of its law can be used at common law (in addition to, or alternatively to, its statutory power to do so) in aid of a US bankruptcy proceeding: *Picard v Primeo Fund*, April 16, 2014. As mentioned above, the appeal has recently been settled.

45. In the United Kingdom, except where the EU Insolvency Regulation (Council Regulation (EC) 1346/2000) applies, the English court has a very wide power to wind up foreign companies, and where a foreign company is being wound up in England the liquidator is generally free to invoke the relevant provisions of the Insolvency Act 1986 in discharge of his functions, which would include the power to ask for examination under the Insolvency Act 1986, section 236.

46. Where the foreign company is not being wound up in England, under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030), which give effect to the UNCITRAL Model Law, the court may co-operate to the maximum extent possible with foreign courts or foreign representatives (article 25(1)). By article 21(1) of the 2006 Regulations, upon recognition of a foreign proceeding, the English court may grant appropriate relief, including the examination of witnesses, and the taking of evidence or the delivery of information concerning (inter alia) the debtor's assets. Secondary proceedings may be opened in the United Kingdom, but only where the debtor has an establishment in the United Kingdom and only as regards assets in the United Kingdom.

47. Under section 426 of the Insolvency Act 1986 the English court with jurisdiction in relation to insolvency is to assist the courts having the corresponding jurisdiction in any other part of the United Kingdom "or any relevant country or territory" (section 426(4)) by applying the law of either jurisdiction (section 426(5), a very difficult section: see Dicey, Morris and Collins, *Conflict of Laws*, 15th ed 2012, paras 30-110 *et seq*). These powers apply to only a limited numbers of countries (including Australia, the Bahamas, and the Isle of Man).

48. An order for examination may be made under this section in aid of a foreign liquidation. In *England v Smith* [2001] Ch 419 it was held, in a case of an order for examination under Australian law of a person concerned with the affairs of a company, that application of the law of the requesting state should not be circumscribed by limitations to be found in the corresponding provisions of section 236 of the 1986 Act unless some principle of English public policy were infringed.

49. Where the EU Insolvency Regulation applies, a foreign officeholder may exercise all the powers conferred on him by the law of the state of the opening of proceedings (article 18(1)).

50. Accordingly the statutory powers of the UK courts to assist foreign officeholders to trace assets are very extensive. It follows that the existence of a common law power to order examination will almost certainly never arise in England, and the same is true of the other statutory powers of which foreign officeholders may wish to take advantage. This is subject to what is said below about *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61, where clawback under the Insolvency Act 1986, section 423 (transactions at an undervalue) was sought and granted, in a case where the EU Insolvency Regulation did not apply because the German company involved was an investment undertaking; the UNCITRAL Model Law did not apply because the 2006 Regulations were not in effect at the relevant time; and Germany was not a relevant country for the purposes of section 426(4).

Assistance at common law in international insolvency

51. The UK Supreme Court accepted, and re-confirmed, in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 that at common law the court has power to recognise and grant assistance to foreign insolvency proceedings: para 29.

52. In my judgment in *Rubin v Eurofinance SA*, at para 29, I quoted what Millett LJ had said in *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827:

> "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. … It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

53. The common thread in those cases in which assistance has been given is the application or extension of the existing common law or statutory powers of the court.

54. Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay

proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA* at para 33. They include (subject to what is said below) *Re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship Cornelis Verolme* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency).

55. In my judgment too much has been read into *In re African Farms Ltd* [1906] TS 373. It was not mentioned in any English case until it was cited in argument in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, 219, for the proposition that the English court will not allow funds to be transmitted to the jurisdiction of the foreign court of the principal winding up without first making provision for the local secured, preferential and statutory creditors, and then subsequently approved in *Cambridge Gas*. It had never been mentioned in the classic company law texts, Buckley, Gore-Browne, and Palmer (nor in Williams on Bankruptcy), nor in Fletcher, *Insolvency in Private International Law* (2nd ed 2005). It received only a passing mention in the successive editions of Forsyth on South African private international law now called *Private International Law: The Modern Roman-Dutch Law* (now 5th ed 2012, p 456), although it has been mentioned (obiter) with approval by the Supreme Court of Appeal of South Africa: *Gurr v Zambia Airways Corp Ltd*, 1998 2 All SA 479 (A).

56. Apart from the stay of execution ordered against a secured creditor (Standard Bank) which had obtained a judgment, the only part of the order in *In re African Farms Ltd* which is relevant for present purposes is the order that all questions of mortgage or preference be regulated by Transvaal law as if the company had been placed in liquidation in the Transvaal. It is not stated how that was to be achieved, but it is significant that the Chief Justice said: "Such conditions are not easy to devise; and it is possible that to place the foreign liquidator in such a position as to ensure beyond doubt a distribution such as I have indicated would require reciprocal legislation in the two countries" (at p 382). Even though the company could not have been wound up in the Transvaal, the decision is certainly not authority for the proposition that local statutory law may be applied by analogy.

57. *In re Impex Services Worldwide Ltd* [2004] BPIR 564 also falls into the category of the use or extension of the existing powers of the court. In that case a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company. That was referred to in *Rubin v Eurofinance SA* at para 33 as a case of judicial assistance in the traditional sense because the order was based on a request by the English court, but the decision was not the subject of examination before the Supreme Court and cannot be said to have been approved by it. The request could not be accommodated under the Manx Companies Act 1931, or under the inherent jurisdiction of the court, but the order was made at common law without articulation of its basis.

58. A second group of cases is where the statutory powers of the court have been used in aid of foreign insolvencies. The best known example is the use of the long-standing power to wind up foreign companies which are being wound up (or even have been dissolved) in the country of incorporation. In *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 Sir Richard Scott V-C conducted an exhaustive analysis of the cases on ancillary liquidations, and concluded (at p 246): (1) Where a foreign company was in liquidation in its country of incorporation, a winding up order made in England would normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England would be ancillary in the sense that it would not be within the power of the English liquidators to get in and realise all the assets of the company worldwide: they would necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it would be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England would be ancillary in the sense, also, that it would be the liquidators in the principal liquidation who would be best placed to declare the dividend and to distribute the assets in the pool accordingly. (4) None the less, the ancillary character of an English winding up did not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which was brought before the court.

59. *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 also falls within this category because the majority in the House of Lords decided that the power of the English court to accede to the letter of request from the Australian court, inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators derives from section 426 of the Insolvency Act 1986.

60. As part of the majority in *HIH* Lord Scott (at para 59) re-affirmed what he had said in *In re Bank of Credit and Commerce International SA (No 10)*: "The English courts have a statutory obligation in an English winding up to apply the English statutory scheme and have, in my opinion, in respectful disagreement with my noble and learned friend Lord Hoffmann, no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme." See also Lord Neuberger at para 72.

The liquidators' argument and the Chief Justice's decision

61. The primary argument of the liquidators before the Board, which had found favour with the Chief Justice as the principal ground of his decision (which he described as "more principled" at para 49), was that the Bermuda court should apply directly the examination provisions of section 195 of the Companies Act 1981 by analogy.

62. That was said to be based on what Lord Hoffmann had said in *Cambridge Gas* (at para 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 insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

63. In the Court of Appeal in the present case Auld JA had described the development of the common law jurisdiction to grant assistance to a foreign liquidator as if the foreign company were being wound up locally as amounting to impermissible "legislation from the bench." In answer, the liquidators in their argument to the Board relied on many dicta to the effect that the common law develops to meet changing circumstances.

64. In my view to apply insolvency legislation by analogy "as if" it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function.

Judicial law-making

65. The liquidators are plainly right to say that the common law develops, sometimes radically, to meet changing circumstances. It hardly requires citation of authority to make that point. No-one now doubts that judges make law, although English and Scottish judges were slow to acknowledge it until the seminal writings by Lords Reid, Denning and Devlin, citation of which is unnecessary. But there are limits to their power to make law. In *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 Lord Goff of Chieveley said (at p 378):

> "When a judge decides a case which comes before him, he does so on the basis of what he understands the law to be. This he discovers from the applicable statutes, if any, and from precedents drawn from reports of previous judicial decisions. Nowadays, he derives much assistance from academic writings in interpreting statutes and, more especially, the effect of reported cases; and he has regard, where appropriate, to decisions of judges in other jurisdictions. In the course of deciding the case before him he may, on occasion, develop the common law in the perceived interests of justice, though as a general rule he does this 'only interstitially,' to use the expression of O. W. Holmes J. in *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205, 221. This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole. In this process, what Maitland has called the 'seamless web,' and I myself (*The Search for Principle*, Proc. Brit. Acad. vol. LXIX (1983) 170, 186) have called the 'mosaic,' of the common law, is kept in a constant state of adaptation and repair …."

66. What Justice Holmes said in the passage to which Lord Goff referred was: "I recognise without hesitation that judges do and must legislate, but they can do so only interstitially." The point was developed by Justice Cardozo in *The Nature of the Legal Process* (1921), at pp 103, 113:

> "We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges throughout the centuries of the common law have set to judge-made innovations … We do not pick our rules of law full-blossomed from the trees… "[The judge] legislates only between gaps. He fills the open spaces in the law ..."

67. More recently similar points have been made by eminent judges of our time. Judge Richard Posner said in *How Judges Think* (2008), at p 86:

> "The amount of legislating that a judge does depends on the breadth of his 'zone of reasonableness' – the area within which he has discretion to decide a case either way without disgracing himself."

68. And Lord Bingham said, in *The Business of Judging* (2000), p 32:

> "On the whole, the law advances in small steps, not by giant bounds."

69. The approach which is articulated by Lord Sumption is itself an example of the development of the common law since, as Lord Mance's opinion clearly shows, it goes beyond what has previously been understood to be the power of the court to order information.

The judiciary and legislation

70. But that is not the issue on this part of the appeal, which is whether, as the liquidators argue, legislation may be extended by the judiciary to apply to cases where the legislature has not applied it. It raises a much more radical question than the familiar question whether a common law rule should be extended or developed or whether the extension or development should be left to Parliament.

71. The latter question arises frequently and yields different answers. In the human rights context, it was the subject of intense debate in the recent case on assisted suicide: *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 [2014] 3 WLR 200. In the private law area, for example, the majority in *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398 decided to remove immunity from expert witnesses. The minority thought that that was a question which should be left to consideration by the Law Commission and reform by Parliament.

72. By contrast, in *Rubin v Eurofinance SA* the majority considered that a change in the law relating to foreign judgments to apply a different rule (removing the need for a jurisdictional basis) in the context of insolvency was a matter for the legislature. Similarly members of the present Board have at various times made the same point in other contexts: *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415, para 83 (Lord Neuberger); *Test Claimants in the FII Group*

Litigation v Revenue and Customs Comrs [2012] UKSC 19, [2012] 2 AC 337, para 200 (Lord Sumption); *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, [2012] 1 AC 383, para 174 (Lord Mance).

73. But I emphasise that that is not the issue here. Nor is the issue the question whether legislation may influence the development of a common law rule. A famous early example where that was regarded as legitimate was *R v Bourne* [1939] 1 KB 687, where a direction was given that the eminent obstetrician Aleck Bourne was entitled as a defence to an abortion charge to rely by analogy on the provision of the Infant Life (Preservation) Act 1929 that infanticide could be justified to preserve the life of the mother.

74. The question of the extent to which statutes may influence the development of the common law is a well-known and controversial one. Professor Atiyah addressed the questions in this way (*Common Law and Statute Law* (1985) 48 MLR 1, 6):

> "...is [it] possible for the courts to take account of statute law, in the very development of the common law itself? Can the courts, for instance, use statutes as analogies for the purpose of developing the common law? Can they justify jettisoning obsolete cases, not because they have been actually reversed by some statutory provision, but because a statute suggests that they are based on outdated values? Could the courts legitimately draw some general principle from a limited statutory provision, and apply that principle as a matter of common law?"

75. In each of those situations it is not difficult to find cases which justify the forms of reasoning which Professor Atiyah identifies. But none of them comes anywhere near what the Board is asked to do in this case.

76. Nor is the issue whether a statutory rule may be taken into account in the exercise of a discretion. An example is the use of statutory limitation periods in the exercise of the equitable doctrine of laches: *P & O Nedlloyd BV v Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288; *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] 2 WLR 355, at para 12.

77. Nor is the issue whether the courts may develop the common law by entering or re-entering a field regulated by legislation. As Lord Nicholls said in *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, para 30, the courts have been slow to do that because "otherwise there would inevitably be the prospect of the common

law shaping powers and duties and provisions inconsistent with those prescribed by Parliament."

The equity of a statute

78. What the liquidators propose is very much more radical. It is that the court should apply legislation, which ex hypothesi does not apply, "as if" it applied.

79. That proposition is reminiscent of the concept of the "equity of a statute." When used properly today, it means no more than interpreting a statute by reference to its purpose or the mischief which it was designed to cure: e.g. *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73, 88.

80. But it once meant something which "has been relegated to the limbo of legal antiquities" (Loyd, *The Equity of a Statute* (1909) 58 U Penn L Rev 76), and had been formulated in this way: "Equitie is a construction made by the Judges that cases out of the letter of a statute yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth ..." (Co. Litt. Lib. 1, Ch II, para 21, quoting Bracton).

81. Under that doctrine the courts felt themselves free to enlarge a statute so as to apply it to situations which were not covered by the words of the statute but were regarded by the courts as within its spirit and analogous: Burrows, *The relationship between common law and statute in the law of obligations* (2012) 128 LQR 232, 241; Atiyah, *Common Law and Statute Law* (1985) 48 MLR 1, 7-8. That concept of the "equity of a statute" fell into disfavour in the eighteenth century and was abandoned by the beginning of the nineteenth century, and the judges were no longer able in effect to exercise a direct legislative function.

82. The liquidators' argument is that the common law rule of assistance in insolvency matters extends to the application of local legislation even though as a matter of its legislative scope it does not apply to the case in hand. In the present case the argument is that, even if section 195 of the Companies Act 1981 does not apply to foreign companies, it should be applied by analogy or "as if" the Cayman Islands company were a Bermuda company.

83. In my judgment, that argument is not only wrong in principle, but also profoundly contrary to the established relationship between the judiciary and the legislature. To the extent that it depends on some part of the opinion in *Cambridge Gas*, that decision was not only wrong in its recognition of the New

York order regulating the title to Manx shares, as decided in *Rubin v Eurofinance SA*, it was also wrong to apply the Manx statutory provisions for approval of schemes of arrangement by analogy or "as if" they applied.

Cambridge Gas

84. The essence of the decision in *Cambridge Gas* was that the New York order would be recognised, and would be given effect because a similar scheme could have been sanctioned as a scheme of arrangement under the Isle of Man law.

85. The facts of *Cambridge Gas* are set out in *Rubin* at paras 36 et seq. For present purposes it is only necessary to recall that a gas transport shipping business venture ended in failure, and resulted in a Chapter 11 proceeding in the US Bankruptcy Court in New York. The question for the Privy Council on appeal from the Isle of Man was whether an order of the New York court was entitled to implementation in the Isle of Man. The New York court had rejected the investors' plan and accepted the bondholders' plan.

86. The corporate structure of the business was that the investors owned, directly or indirectly, a Bahamian company called Vela Energy Holdings Ltd ("Vela"). Vela owned (through an intermediate Bahamian holding company) Cambridge Gas, a Cayman Islands company. Cambridge Gas owned directly or indirectly about 70% of the shares of Navigator Holdings plc ("Navigator"), an Isle of Man company. Navigator owned all the shares of an Isle of Man company which in turn owned companies which each owned one ship.

87. The New York order vested the shares in Navigator (the Isle of Man company) in the creditors' committee, which subsequently petitioned the Manx court for an order vesting the shares in their representatives. The Manx Staff of Government Division acceded to this petition by making an order under the Manx Companies Act 1931, section 101, rectifying the share register by entering the creditors' committee as shareholders. In the Privy Council, Lord Hoffmann rejected this solution on this basis: the power was exercisable when "the name of any person is, without sufficient cause, entered in or omitted from the register". But for that purpose it was necessary to show that by the law of the Isle of Man the company was obliged to do so. The source of such an obligation could be found only in an order of the court, pursuant to its common law power of assistance, which required the company to make such an entry. Consequently, the argument based on section 101 was therefore circular. The prior question was whether the court has power to declare that the Chapter 11 plan should be carried into effect.

88. The Privy Council held that the plan could be carried into effect in the Isle of Man. The reasoning was as follows. First, if the judgment had to be classified as in personam or in rem the appeal would have to be allowed, but bankruptcy proceedings did not fall into either category. Second, the principle of universality underlay the common law principles of judicial assistance in international insolvency, and those principles were sufficient to confer jurisdiction on the Manx court to assist, by doing whatever it could have done in the case of a domestic insolvency. Third, exactly the same result could have been achieved by a scheme of arrangement under the Isle of Man Companies Act 1931, section 152.

89. In *Rubin* a majority of the Supreme Court (Lords Collins, Walker and Sumption) decided that *Cambridge Gas* was wrongly decided because the shares in Navigator owned by Cambridge Gas (a Cayman Islands company) were, on ordinary principles of the conflict of laws, situated in the Isle of Man, and the shareholder relationship between Navigator and Cambridge Gas was governed by Manx law. Consequently the property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man. Lord Mance, in his concurring judgment, left the correctness of the decision open, and Lord Clarke, dissenting, thought that it was correctly decided.

90. I have already quoted the passage in *Cambridge Gas* (at para 22) in which Lord Hoffmann said that "the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency" and that the purpose of recognition of the foreign officeholders was to "to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

91. The effect of this part of the opinion in *Cambridge Gas* was to make an order equivalent to one which could have been made under a Manx scheme of arrangement without going through the statutory procedures for approval of a scheme. The passages in the opinion which are relevant are these:

> "24 In the present case it is clear that the New York creditors, by starting proceedings to wind up the Navigator companies and then proposing a scheme of arrangement under section 152 of the Companies Act 1931, could have achieved exactly the same result as the Chapter 11 plan. The Manx statute provides:

‘(1) Where a compromise or arrangement is proposed between a company and its creditors … the court may on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors … to be summoned in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors … agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors … and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.’

25 The jurisdiction is extremely wide. All that is necessary is that the proposed scheme should be a ‘compromise or arrangement' and that it should be approved by the appropriate majority. Why, therefore, should the Manx court not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man? …

26 … [A]s between the shareholder and the company itself, the shareholder's rights may be varied or extinguished by the mechanisms provided by the articles of association or the Companies Act. One of those mechanisms is the scheme of arrangement under section 152. As a shareholder, Cambridge is bound by the transactions into which the company has entered, including a plan under Chapter 11 or a scheme under section 152. It is the object of such a scheme to give effect to an arrangement which varies or extinguishes the rights of creditors and shareholders. Thus, in the case of an insolvent company, in which the shareholders have no interest of any value, the court may sanction a scheme which leaves them with nothing …. The scheme may divest the company of its assets and leave the shareholders with shares in an empty shell. It may extinguish their shares and recapitalise the company by issuing new shares to others for fresh consideration. Or it may, as in this case, provide that someone else is to be registered as holder of the shares. Whatever the scheme, it is, by virtue of section 152, binding upon the shareholders when it receives the sanction of the court. The protection for the shareholders is that the court will not sanction a scheme, even if adopted by the statutory majority, if it appears unfair. And no doubt the discretion to refuse assistance in the implementation of an equivalent plan which has been confirmed in a foreign

> jurisdiction would be exercised on similar lines. But no such question arises in this case. Although it must be accepted that Cambridge did not technically submit to the jurisdiction in New York, it had no economic interest in the proceedings and ample opportunity to participate if it wished to do so. It would therefore not be unfair for the plan to be carried into effect. Their Lordships therefore consider that the Court of Appeal was right to order its implementation."

92. It is to be noted that Lord Hoffmann said that the New York creditors *could have achieved* exactly the same result as the Chapter 11 plan by a scheme of arrangement under the Companies Act 1931, section 152, and asked why the Manx court could not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man.

93. Those proceedings required the calling of meetings and the passage of appropriate resolutions. The majority of the UK Supreme Court decided in *Rubin v Eurofinance SA* that *Cambridge Gas* was wrongly decided on the ground that the New York court did not have jurisdiction over title to shares in a Manx company. The question whether there was any lawful basis for applying the legislation on an "as if" basis, or of dispensing with the statutory procedure, did not therefore arise in *Rubin v Eurofinance SA*. But for the reasons I have given, in my judgment there can be no doubt that, unless Manx law allowed the relaxation of the statutory procedures for the approval of schemes of arrangement, the judiciary was not entitled to apply those procedures by analogy at common law.

The application of Cambridge Gas

94. It follows in my view that those courts which have relied on these passages to apply legislation which the legislature had not itself seen fit to apply are wrong, including the decision of the Chief Justice in the present case.

95. That conclusion also applies to the decision in *Re Phoenix Kapitaldienst GmbH* [2012] EWHC 62 (Ch), [2013] Ch 61. In that case a company incorporated in Germany for the apparent purpose of investing individuals' funds in futures trading was used as a vehicle for a worldwide fraud. The German administrator applied for relief pursuant to the Insolvency Act 1986, section 423 (transactions at an undervalue) against former investors of the company who were resident in England, claiming back initial investment funds and fictitious profits for the

benefit of the company's creditors by setting aside transactions entered into at an undervalue.

96. As I have said, the EU Insolvency Regulation did not apply because the German company involved was an investment undertaking; the UNCITRAL Model Law did not apply because the 2006 Regulations were not in effect at the relevant time; and Germany was not a relevant country for the purposes of section 426(4).

97. Proudman J decided that the court had the power at common law to recognise a foreign administrator and to provide him with the same assistance as it was entitled to provide in a domestic insolvency; and that since proceedings to set aside antecedent transactions were central to the purpose of an insolvency the court therefore had jurisdiction to authorise the administrator to invoke section 423. Applying *Cambridge Gas* Proudman J held that the power to use the common law to recognise and assist an administrator appointed overseas "includes doing whatever the English court could have done in the case of a domestic insolvency" (at para 62).

98. In my judgment that decision is wrong because it involved an impermissible application of legislation by analogy.

99. In *Picard v Primeo Fund*, January 14, 2013 the US bankruptcy trustee of the principal Bernard Madoff company sought to claw back payments made by the company to a Cayman Islands company. The claims were based on US law (fraudulent transfers and preferential payments) and on Cayman law (preferential payments). The Cayman Islands have mutual assistance provisions (Companies Law (2012 Revision), sections 241-242), but the judge (Jones J) held that they did not apply because the power to make orders "ordering the turnover to a foreign representative of any property belonging to a debtor" did not apply to property which was only recoverable under transaction avoidance provisions.

100. The judge then went on to decide that the Cayman court was able to apply the Cayman voidable preferences provision of its law (section 145) to the payments made by the US company to the Cayman company, by applying *Cambridge Gas* and *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61.

101. On April 16, 2014 the Court of Appeal of the Cayman Islands (consisting of Sir John Chadwick P and Mottley and Sir Anthony Campbell JJA), reversed Jones J on the first part of the case and held that the Cayman court was entitled to apply the Cayman anti-avoidance provisions under the assistance provisions of Cayman company law, because the making of a transaction avoidance order

restores to the debtor the property which is the subject of that order, and so enables the court to order the "turnover" of that restored property to the foreign representative: para 45.

102. The Court of Appeal did not reach the question whether Jones J was entitled to apply the Cayman anti-avoidance provision at common law. The court had been informed that an issue central to that question, namely whether *Cambridge Gas* should be followed, was before the Court of Appeal of Bermuda. Because the matter was before this Board and shortly to be heard, the Court of Appeal was invited to hand down an interim judgment dealing only with the issues on the mutual assistance statutory provisions. The appeal has now been settled. It follows from what I have said that the decision of Jones J on the present aspect of the case was wrong.

Al Sabah v Grupo Torras SA

103. There was also a prior opinion of the Privy Council, in which what was said is directly contrary to the approach in *Cambridge Gas* advocated by the liquidators. In *Al Sabah v Grupo Torras SA* [2005] UKPC 1, [2005] 2 AC 333 the trustee in bankruptcy of a debtor in the Bahamas obtained from the Bahamian court a letter of request directed to the Grand Court of the Cayman Islands seeking its aid in setting aside two Cayman trusts established by the debtor. The Grand Court (affirmed by the Court of Appeal of the Cayman Islands) held that it had jurisdiction to provide such assistance under either section 156 of the Bankruptcy Law of the Cayman Islands or section 122 of the Bankruptcy Act 1914 (which provided for mutual assistance between bankruptcy courts throughout the UK and the Empire) or under the court's inherent jurisdiction, and that it should as a matter of discretion grant the Bahamian trustee powers under section 107 of the Cayman Bankruptcy Law to enable him to set aside the trusts. The Privy Council held that (i) section 156 of the Cayman Bankruptcy Law did not apply, but that (ii) section 122 had not been repealed in its application to the Cayman Islands and did apply, so that there was jurisdiction to authorise the Bahamian trustee to exercise the statutory power even though it might not have been available to him if the trusts had been governed by Bahamian law.

104. But the Board in an opinion given through Lord Walker said (at para 35):

> "The respondents relied in the alternative … 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 recognised foreign bankruptcy jurisdiction are more limited in their scope [citing what is now Dicey, Morris and Collins, *Conflict of Laws*, 15th ed (2012), vol 2, paras 31R-059 *et seq*] and the inherent jurisdiction of the Grand Court cannot be wider."

105. The Board plainly considered that the court had no power to apply the Bankruptcy Law "in circumstances not falling within" the Law. *In re Phoenix Kapitaldienst GmbH*, above, Proudman J distinguished this clear statement on the basis that she should follow what she described as "the later and more considered views expressed by Lord Hoffmann and approved by Lord Walker" in the *HIH* case, namely that the court was able, if consistent with justice and UK public policy, to achieve the aim of a unitary and universal bankruptcy law. In *Picard v Primeo Fund* Jones J explained the dictum in *Al Sabah* as meaning that the common law cannot be invoked to apply provisions of the Bankruptcy Law to achieve an objective outside its scope.

106. Neither of these supposed distinctions is valid. There is nothing in *HIH* to support Proudman J's suggestion that Lord Walker had changed his view, and Jones J's suggestion that Lord Walker was only directing his intention to objectives outside the scope of the Bankruptcy Law is wholly inconsistent with Lord Walker's plain words that the court does not have an inherent jurisdiction to exercise the powers conferred by the Bankruptcy Law "in circumstances *not falling within the terms* of that section" (emphasis added).

107. In my judgment Lord Walker's dictum in the opinion in *Al Sabah v Grupo Torres* (in which, among others, Lords Hoffmann and Scott concurred) was plainly right, and, to the extent it is inconsistent with the passage in *Cambridge Gas* applying the Isle of Man scheme of arrangement provisions on an "as if" basis, it is to be preferred to *Cambridge Gas.*

108. I would therefore humbly advise Her Majesty not only that the appeal should be dismissed, but also that to have allowed it on the basis of the liquidators' primary argument would have involved Her Majesty's judges in a development of the law and their law-making powers which would have been wholly inconsistent with established principles governing the relationship between the judiciary and the legislature and therefore profoundly unconstitutional.

LORD CLARKE:

109. I agree that this appeal should be dismissed for the reasons given by Lord Sumption. I add a short judgment of my own on the first issue raised by Lord Sumption in para 8, namely whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form) in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.

110. I have reached the conclusion that, for the reasons given by Lord Sumption, the answer to the first issue is that the Bermuda court does have such a power. The steps which lead me to that conclusion are these. While the recognition of such a power in an ancillary liquidation has not thus far been recognised at common law, it is common ground that the common law has developed step by step and that it may be extended or developed in appropriate circumstances. It follows that the question is whether the circumstances are appropriate to justify the recognition of such a power in this class of case.

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

112. The recognised legal principle in the present case is the principle of modified universalism derived from *Cambridge Gas*: see paras 19 and 23 in Lord Sumption's judgment. I agree with him that it is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis notwithstanding the territorial limits of their jurisdiction. An important aspect of that public interest is a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be

recognised and effective internationally. I also agree with Lord Sumption at para 23 (i) that this is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation; (ii) that the Bermuda court has properly recognised the status of the liquidators as officers of that court; (iii) that the liquidators require the information for the performance of the ordinary functions attaching to that status; (iv) that the information is unlikely to be available in any other way; (v) that none of the reasons which account for the common law's inhibition about the compulsory provision of evidence have any bearing on the present question; (vi) that the right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the company's title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holder's right to act on the company's behalf in the same way as any other agent of a company appointed in accordance with the law of its incorporation; and (vii) that the recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

113. These are powerful factors. What then are the limits? I agree with Lord Sumption that, as he puts it at para 25, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information but that the limits of this power are implicit in the reasons for recognising its existence. He gives four reasons. (1) It is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. (2) It is a power of assistance and exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers; so that it is not available to enable them to do something which they could not do even under the law by which they were appointed. (3) It is available only when it is necessary for the performance of the office-holder's functions. (4) It is subject to the limitation that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. I further agree with Lord Sumption that it follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. Common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be

contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency.

114. I further agree with Lord Sumption, for the reasons he gives in para 28, that the common law power is not impliedly excluded by reason of section 195 of the Bermuda Companies Act but that it cannot be applied on the facts of this case because there is no similar power in the Cayman Islands and it would not be a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law.

115. Like Lord Sumption, I appreciate that it is important that this development should not open the floodgates to different unrelated classes of case. However, I see no reason why it should. I appreciate that Lord Mance has reached a different conclusion. I do not pretend that it is possible to predict precisely how the development of the principle, which has been identified by Lord Sumption and which both Lord Collins and I support, will proceed. I agree with Lord Mance that it is a step forward but do not agree that it is a step leap. I also agree with him (at para 137) that courts have tended to confine remedies of the kind we are discussing to situations where there is a recognisable legal claim to protect, based either on a title or right to property or on some wrongdoing supported by appropriate evidence. However, there is no reason why the common law should not be developed, provided that the development is measured and supports a recognised principle.

116. It will not always be easy to draw the line between permissible applications and impermissible applications. However, Lord Sumption has identified, not only the policy, but also the principle derived from the policy and some of the limitations to its exercise, which to my mind provide a sensible approach for the future. I respectfully disagree with Lord Mance when he says at para 146 that this is a development which is neither permissible nor appropriate. In doing so, I express no view on Lord Mance's concerns (expressed in paras 120 and 121) as to the breadth of the terms of the order and as to the lack of safeguards to protect against costs or loss. These may well be sound and can be investigated in a case where such issues fall for decision. That is not this case because of the narrow ground upon which the appeal must be dismissed.

LORD MANCE:

117. There are two potential issues of importance on this appeal:

a. whether the common law power to assist a foreign (Cayman Islands) liquidation enables the Bermudian courts to order anyone within its jurisdiction who may have relevant information or documentation about the company's assets (or, possibly also, its affairs generally) to attend for questioning about and disclose the same;

b. whether, if this power exists, it should be exercised by ordering such disclosure and questioning when the Cayman Islands courts have no equivalent power over persons within their jurisdiction.

118. I agree with Lord Sumption that the short answer to the second question is negative. So it is unnecessary on this appeal to answer the first question, although Lord Sumption has devoted the major part of his Opinion to this question. I understand why it might be helpful if the Board could give a clear answer to it, but I think it unfortunate that it should try to do so on this appeal, bearing in mind the limitations in the way in which the question has been argued at all lower stages (see para 122 below) and its largely unexplored ramifications (see generally paras 130 to 145 below).

119. Before addressing the second issue in detail, it is relevant – and in my view important – to note three points. The first is the Chief Justice's order which the Court of Appeal set aside, and which the appellants ask the Board to restore. The respondents, PwC, were (by clause 3a) ordered within 14 days to provide to the joint official liquidators ("JOLs")

> "all information they may have, including information and documentation in their possession, power, custody or control, concerning the promotion, formation, trade, dealings, affairs or property of the Company [and] for the avoidance of doubt, such information and documentation to be provided is not to be limited to audit information".

In addition PwC was (by clause 3d)

> "required to have a partner and/or employee or agent acceptable to the JOLs, examined on oath forthwith, within ten (10) days of being called upon to meet by the JOLs, concerning the matters aforesaid, by word of mouth and on written interrogatories, and be required to reduce his/her answer to writing and require him/her to sign this".

By clause 3e the JOLs were given leave to serve "Paul Suddaby and any other partners or officers of PwC … out of the jurisdiction", specific liberty was given to examine Paul Suddaby and he was specifically ordered to produce information in accordance with clause 3a.

Clause 3f provided that

> "If PwC … does refuse to comply with any of the orders set out herein, it and its partners and officers shall be in contempt of court and they may be imprisoned, fined or their assets seized."

120. No doubt in case clause 3 did not go far enough, clause 4 provided:

> "Further and without limiting the generality of the foregoing, that the documentation referred to in Exhibit HD-7 of Hugh Dickson's third affidavit dated 7 February 2013 be produced within 7 days by PwC…, in relation to SHL ….
>
> "That the JOLs be able to obtain all information and documentation described herein that is in the possession, power, custody, or control of PwC …., whether this be in Bermuda, Dubai, or wherever it may be located. …"

Redaction was only to be permitted where necessary to protect information of a confidential nature belonging to third parties, and clause 4b required that

> "the relevant partners and officers of PwC … do confirm on oath that all the documents requested have been produced."

The only exempt documents were to be those required to be produced in the Cayman Islands - that is documents actually belonging to SHL.

121. No provision was made for the JOLs to meet, still less secure, any costs that PwC or its partners, officers or agents would incur complying with such an order, and no undertaking was given to meet any such costs or any other loss or liability that might result from doing so – even though PwC had asked the Chief Justice to deal with this aspect. This omission was raised in the Court of Appeal, where it remained relevant in relation to the order against SICL which that court upheld. PwC suggested that costs could be in the order of $500,000 and the JOLs argued that management time spent in compliance could not be recovered. The Court of

Appeal declined to make any order or require any undertaking "in the absence of authority" and "particularly in circumstances where the cost of compliance is far from clear". "Absence of authority" is hardly surprising in relation to an order which was itself effectively unprecedented. PwC's costs of compliance would clearly be likely to be very substantial. Whether or not they were or could be quantified when the order was made, PwC should have been protected in respect of them. Common justice and established practice relating to freezing injunctions, *Anton Pillar* orders and *Norwich Pharmacal* relief should have confirmed the need for an appropriate order or undertaking in that respect.

122. The second point is that, in respect of SHL, the only basis of Kawaley CJ's order against PwC and its officers was that the Bermudian courts have a common law power to grant assistance in aid of the Cayman Islands liquidation by applying local procedural remedies, in particular either "by directly applying" or "by analogy with" section 195 of the Bermudian Companies Act 1981, although it was common ground that this section does not in terms apply. This was also the only case put by the JOLs' written submissions to or adjudicated upon by the Court of Appeal as well as the only basis on which permission was sought to appeal to the Board. Kawaley CJ considered that he could nonetheless rely directly on section 195 by virtue of inter alia *In re African Farms* [1906] TS LR 373, *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 and *Rubin v Eurofinance SA* [2013] 1 AC 236 (paras 8 and 49 to 74), or alternatively that he could proceed "by analogy with" it (paras 8 and 36 to 48). The Court of Appeal held the contrary (see para 52, per Bell AJA, para 1, per Zacca P, and paras 4 to 59, per Auld JA). There is a hint in paras 49(1) and 50 of Auld JA's case that the JOLs may have begun to put their case more widely in oral submissions by suggesting some wider power based on "modified universalism" and independent of the Bermudian statutory power. But, if this is so, it can have received little prominence. Only before the Board has focus been directed to such an argument. As to the submission which was pursued below and accepted by Kawaley CJ, I agree with Lord Sumption and Lord Collins that there is no basis for judicial re-fashioning of, or action outside the bounds of but by analogy with, domestic legislation such as section 195. The Chief Justice's order cannot therefore be justified on the basis on which he made it. But it is perhaps ironic that so firm a rejection of any possibility of the domestic court exercising the powers conferred on domestic liquidators should be replaced by an embrace of the possibility of the domestic court giving effect to the wishes and/or powers of foreign liquidators: see paras 130 et seq below.

123. Neither court below addressed any observations to the question whether any jurisdiction existed, or if it existed, could properly be exercised to make orders against and serve Paul Suddaby and other partners or officers of PwC outside the jurisdiction of the Bermudian court. As paras 119 and 120 above show, the Chief Justice's order did that, though without joining Mr Suddaby or any other officer

or partner in their personal capacities. In their written submissions before the Court of Appeal, the JOLs submitted that section 195 gave jurisdiction to serve abroad and relied on the English authority of *In re Seagull Manufacturing Co Ltd* [1993] Ch 345 (decided under a section of the Insolvency Act 1986 using similar terms to section 195). Once one concludes, as the Board has, that section 195 is applicable neither directly nor by analogy, the question becomes whether there can be any such common law jurisdiction to order service out, on pain of sanctions, as that for which the JOLs argue.

124. Approaching the matter on that basis, it is clear that the Chief Justice's order must on any view have gone well beyond any jurisdiction which exists at common law in relation to PwC's partners and officers outside the Bermudian jurisdiction, as opposed to PwC itself which was within such jurisdiction. The area was examined in *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2009] UKHL 43, [2010] 1 AC 90, para 12, where the House of Lords (in a judgment given by myself with which all other members of the House concurred) spoke in these terms of:

> "…. the limitation of the court's power to enforce the attendance of witnesses or fine defaulting witnesses. From the Statute of Elizabeth 1562…onwards, this had been regulated by statute and had never extended beyond the United Kingdom. The procedure enacted in relation to other jurisdictions involves the taking of evidence, on commission or otherwise, with the assistance of the foreign court. The service of a writ of subpoena is still only possible under section 36 of the Supreme Court Act 1981 in respect of persons in one of the parts of the United Kingdom. The limitation of the court's power in this respect corresponds with the principle of international law, summarised robustly by Dr Mann in his Hague lecture 'The Doctrine of Jurisdiction in International Law', *Recueil des Cours*, 1964-I, *The Definition of Jurisdiction,* p 137):
>
> > 'Nor is a state entitled to enforce the attendance of a foreign witness before its own tribunals by threatening him with penalties in case of non-compliance. There is, it is true, no objection to a state, by lawful means, inviting or perhaps requiring a foreign witness to appear for the purpose of giving evidence. But the foreign witness is under no duty to comply, and to impose penalties upon him and to enforce them either against his property or against him personally on the occasion of a future visit constitutes an excess of criminal jurisdiction and

> runs contrary to the practice of states in regard to the taking of evidence as it has developed over a long period of time.'"

125. The issue in *Masri* was whether a power under rules (CPR r 71) made under statutory authority extended to enable an order for examination of an officer of a judgment creditor company, who was out of the jurisdiction. The House held that, in view of the presumption against extra-territoriality, it did not. In the course of so doing, it considered prior authority on other powers with a statutory basis. In *Ex p Tucker* [1990] Ch 148, section 25(1) of the Bankruptcy Act 1914 gave the court power to summon before it for examination "any person whom the court may deem capable of giving information respecting the debtor, his dealings or property". But the Court of Appeal set aside an order obtained by a trustee in bankruptcy for the examination of the debtor's brother, a British subject resident in Belgium. Dillon LJ, after noting the limitations of the powers to serve out of the jurisdiction (then contained in RSC Ord 11) and to subpoena witnesses, said against this background that he "would not expect section 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court" (p 158E-F).

126. In contrast, in *In re Seagull Manufacturing Co Ltd* [1993] Ch 345, section 133 of the Insolvency Act 1986 authorised the public examination of a narrower category of persons, viz "any person who - (a) is or has been an officer of the company; or (b) has acted as liquidator or administrator of the company or as receiver or manager …; or (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company", and rule 12.12 of the Insolvency Rules 1986 gave the court express authority to order service out of the jurisdiction of any process or order requiring to be so served for the purposes of insolvency proceedings. The Court of Appeal upheld an order made for the public examination of a former director living in Alderney. Peter Gibson J, with whose judgment the other members of the court concurred, said (p 354F-H) that:

> "Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public. Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice."

127. Although the House in *Masri* regarded impracticability of enforcement as a factor of greater significance than Peter Gibson J had suggested, it acknowledged the public interest served by section 133, and referred (in para 23) to "The universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate". That factor being absent in *Masri*, it could lend no assistance to the argument that CPR r 71 extended extra-territorially. But the important feature of all these cases is that they turned on express statutorily conferred powers. There was no suggestion in any of them of any relevant common law power in any of the areas discussed.

128. The third point is that the JOLs' case has been at all times and is advanced solely on the basis that PwC have documents and information which it would help the JOLs to inspect and about which it would be helpful for them to be able to question PwC and its officers. The basis is not that PwC have property or assets of SHL (beyond the documents which they have already been ordered by the Cayman Islands court to produce); nor is it that PwC have themselves done anything wrong or that they have been or are mixed up in any third party's wrongdoing. The House of Lords authority of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 was not relied upon, or even among the authorities put, before the Supreme Court. It was mentioned in passing during the final oral submissions in reply of Mr Moss QC for the JOLs, when the transcript records this exchange:

> "LORD MANCE: If they are accountants, as you told me earlier that they were, then on the face of it there is an advisory relationship and if you wish to know something which you yourself have mislaid or don't have from your accountant advisers one might think there was quite a good case for saying they owed a duty to disclose it to you, to help you.
>
> MR MOSS: There might be an arguable case relating to that advice, but what we're interested in are these audit documents which go to the assets of the company. I don't know whether the accounting had anything to do with that at all.
>
> LORD COLLINS: Is there nowhere a *Norwich Pharmacal* order can be obtained?
>
> MR MOSS: Well, yes. We've had a discussion about this. The problem with *Norwich Pharmacal* is that it is based on fraud.
>
> LORD COLLINS: Any wrongdoing, I think.

LORD SUMPTION: It is based on wrongdoing generally.

MR MOSS: Yes, but it does involve alleging wrongdoing. You would have to allege that PwC became innocently mixed up in that wrongdoing –

LORD CLARKE: They only have to be innocently mixed up

MR MOSS: Yes.

LORD SUMPTION: That's a fairly low threshold, after all the Customs & Excise were about as innocent mixed up people almost that you could probably want.

MR MOSS: Yes. The result of that would be if we can get *Norwich Pharmacal* relief, then the Bermuda courts do have common law powers to give us exactly the type relief that we have here. It actually comes to the same thing. It wouldn't make much sense to send us right back to the Chief Justice to then ask for *Norwich Pharmacal* relief –

LORD MANCE: It may not be as easy as that. You haven't formulated it as *Norwich Pharmacal*.

MR MOSS: Yes, it would have to be abandoned and reformulated as a *Norwich Pharmacal*, but in substance it comes to the same sort of end. What that perhaps illustrates is that what we have and what we seek to maintain, or rather we have at one stage and the Court of Appeal have taken it away on a rather narrow ground, but we seek to have back is not something that radical in these types of circumstances, where there is a gigantic deficit, there has clearly been wrongdoing, documents have been taken and not available. It's exactly the kind of context in which one would expect relief to be given. It's not extravagant in any shape or form."

129. Contrary to Mr Moss's submission, the JOLs are seeking to do something very radical, and there is a deep dividing line between the basis on which they put their case and *Norwich Pharmacal*. The JOLs are seeking (a) to justify a far wider and more stringent order than could ever be obtained in *Norwich Pharmacal* proceedings and (b) to do so on the basis of an unverified assertion

that they would, if they had tried, have been able to obtain a *Norwich Pharmacal* and without exposing themselves to the trouble and difficulty of showing that PwC were mixed up in any sort of wrongdoing about which they have any relevant information or documentation. I see neither force nor attraction in Mr Moss's invitation to prejudge the outcome of normal procedures by short-cutting them.

130. In the light of these points, I come to the substance of the argument now presented. That is that a common law power exists to assist any foreign liquidation by ordering any person (whether or not an officer or agent of the company) to attend and be interrogated and produce documentation and information, on pain of contempt, in the manner which the JOLs advocate. The only explicit limits to the jurisdiction for which the JOLs now contend is that it should not be inconsistent with the law or policy of the forum. The negative answer which the Board is giving to the second issue on this appeal means that there would exist a further limitation, that the jurisdiction would not exist or be exercisable to enable an order which could not be made against a person within the jurisdiction of the country of the insolvency.

131. Lord Sumption now suggests that the principle should be further limited to any court-ordered liquidation (though that, in turn, leaves uncertain the status of any winding up under supervision in any jurisdiction where that possibility, which existed formerly under section 311 of the English Companies Act 1948, still exists). Although Lord Sumption speaks at one point of this as a "means of identifying or locating" assets (para 23), elsewhere he speaks of "enabling [foreign] courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers" (para 25). The order in fact made by the Chief Justice was, as noted, of great width. The scope of the proposed common law jurisdiction is therefore uncertain.

132. The suggested jurisdiction is said to follow from the principle of "modified universalism". This is a principle developed in English common law over the last 20 years with the strong support of Lord Hoffmann, though recognised over a 100 years ago in a Transvaal case which was itself until recently lost in (unfair) obscurity. *In re African Farms* [1906] TS 373, was decided by Sir James Innes, who in addition to his own great legal distinction was grandfather of the distinguished wartime humanitarian lawyer Helmuth James von Moltke. The essence of the principle consists, as Lord Sumption notes in his para 14(i), in the recognition by one court of the foreign liquidator's power of disposition over the company's assets in the domestic jurisdiction. That justified an order restraining their disposition or seizure inconsistently with the foreign liquidation. The novelty of this decision lay in the making of such an order in circumstances where there was no power to wind up the company in the domestic forum. In this respect, therefore, the cooperation extended in *In re African Farms* went a step

further than that demonstrated in *In re Matheson Bros Ltd* (1884) 27 Ch D 225, where Kay J was, in the light of the fact that the English courts would have had power to wind the relevant foreign company up in England, prepared to secure English assets to prevent English creditors executing against them, pending steps in the company's winding up in its country of incorporation to make the assets available for the company's English creditors *pari passu* with its foreign creditors.

133. The principle may also justify an order for the remission of the assets out of the jurisdiction to the foreign liquidator, if the foreign liquidation rules would distribute them in the same way as the domestic jurisdiction. Even if the foreign liquidation rules would distribute them differently, but there is express statutory power enabling the remission to take place nonetheless, the principle may lend support to the exercise of that express statutory power. Beyond that, I do not read the majority of the House in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 as going, and anything that any of its members did say more widely about the existence or scope of a common law power was on any view obiter, since the appeal was decided on the basis that there existed express statutory authority for a remission although the assets would be distributed in the Australian liquidation differently from the way in which they would have been distributed in the English liquidation.

134. I agree with Lord Sumption and Lord Collins that the second and third propositions for which *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings Plc* stands cannot be supported. A domestic court does not have power to assist a foreign court by doing anything which it could properly have done in a domestic insolvency; and it cannot acquire jurisdiction by virtue of any such power. As to the first proposition, for reasons which I explained in *Rubin v Eurofinance SA* [2013] 1 AC 236, *Cambridge Gas* can, if correct, stand for no more than the proposition that a domestic court should, so far as it can consistently with its own law, recognise a foreign bankruptcy order and deal with identifiable assets within its jurisdiction consistently with the way in which the foreign insolvency would deal with them. In another earlier decision of the Board, *Al Sabah v Grupo Torras SA* [2005] UKPC 1, [2005] 2 AC 333, para 35, Lord Walker said, aptly in my view, that the Cayman court "might have had some limited inherent power" to act in aid of the Bahamian winding up, but that it could not have the suggested power to set aside a voidable disposition modelled on a section in the Cayman Island bankruptcy legislation governing domestic liquidation which did not in terms apply in relation to a Bahamian winding up.

135. Where I part company with Lord Sumption is in his assertion that the hitherto limited principle of modified universalism which I have just described extends to or justifies (or would be "an empty formula" without) the assumption or

exercise of a common law power to "haul" anyone before the court (to use Dillon LJ's word in *Ex P Tucker*), to be interrogated and to produce documentation on pain of being in contempt, simply because it would be useful for the foreign liquidator to be able to do so and might enable him to locate some assets (or better understand the company's affairs). There is a step leap between enforcing rights to identifiable assets and obliging third parties to assist with documentation and information in order to discover a company's assets (or, still more widely, in order to enable insolvency practitioners to understand a company's affairs). Lord Sumption relies in para 23 on the House of Lords' decision in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 as illustrating "the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle." But the reference to "a recognised legal principle" begs the question whether the principle of modified universalism extends beyond the protection of identifiable assets within the jurisdiction, to enable orders to be made compelling third parties to assist with the provision of information and documentation which may assist the tracing of such assets (or otherwise assist the insolvency practitioners in their understanding of the company's affairs).

136. Information is a precious commodity, but it is not one which is generally capable of being extracted in court from private individuals without special reason; and the potentially intrusive, vexatious and costly nature of the exercise of any power to do so is apparent from the form of the Chief Justice's order in this case. The common law has not hitherto accepted any such jurisdiction. The existence of foreign insolvency proceedings, conducted for the benefit of creditors, does not appear to me to provide any justification for doing so now. The mere fact that insolvency practitioners are, at least in a compulsory liquidation, officers of the foreign court charged with winding up its affairs seems quite insufficient at common law, though it may be a factor which assists determine the scope of Parliament's likely intention where relevant legislation exists. There are many ordinary creditors, litigants and other persons who would like a facility to gather information to discover or trace assets or to assist them to pursue claims or to conduct their affairs generally. It is unclear what the logic is or would be for restricting the suggested common law power to foreign insolvencies. However much it may be intended, by using adjectives like "promiscuous", to discourage attempts to bring within this new jurisdiction either domestic insolvencies (if and where no complete common law scheme exists) or situations entirely outside the insolvency context, such attempts seem bound to occur. In the absence of any clear justification for giving insolvency practitioners the unique common law privilege which the JOLs now claim, such attempts may well be difficult to resist. Although I disagree with it, such attempts can only be encouraged by the statement at the end of para 21 of Lord Sumption's opinion that "The courts have never been as inhibited in their willingness to develop appropriate remedies to

require the provision of information when a sufficiently compelling legal policy calls for it."

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

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

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

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

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

139. It is notable that, even in the context of wrongdoing, the courts have been at pains to emphasise the narrow scope of the *Norwich Pharmacal* jurisdiction. It is "an exceptional one": *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, para 57, per Lord Woolf CJ. It depends upon the existence of wrongdoing. The

person with information must have been mixed up, however innocently in wrongdoing: *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118, [2014] QB 112. Originally the jurisdiction was confined to discovery of the identity of the wrongdoer: *Ashworth Hospital Authority*, para 26, per Lord Woolf CJ; *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911, 914, per Hoffmann J, emphasising that it was "no authority for imposing upon 'mixed up' third parties a general obligation to give discovery or information when the identity of the defendant is already known."

140. More recently, the Divisional Court has said that *Norwich Pharmacal* may extend beyond the discovery of the identity of a wrongdoer or of a "missing piece of the jigsaw", but under the strict caveat that "the action cannot be used for wide-ranging discovery or the gathering of evidence and is strictly confined to necessary information": *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2009] 1 WLR 2579, para 133, cited by the Court of Appeal in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2011] EWCA Civ 1587, paras 4 and 18.

141. Lord Sumption suggests (para 20) that it will be possible in the present situation to draw a distinction between information which can permissibly be sought and evidence which cannot. At least two problems arise in this connection. First, it is, as I have noted, unclear whether any distinction or limitation is proposed between on the one hand information and documentation relating to assets and on the other hand information and documentation relating more generally to the company's affairs. Any such distinction or limitation seems likely in any event to be in practice illusory. An insolvency practitioner is ultimately only interested in assets and their distribution. Any questioning put, or information or documentation sought, will be scrutinised with a view to identifying assets, in whatever form, even if they only consist of potential claims for maladministration or negligence.

142. The second problem is that the distinction between information and evidence seems likely also to be illusory. Evidence is at least confined to the issues in identified litigation, domestic or foreign. In contrast, the proposed relief sought against PwC is completely unconfined, in nature and scope. The later *Omar* case [2013] EWCA Civ 118, [2014] QB 112 highlights (para 12) a justified scepticism about maintaining a distinction between information and evidence which gives cause for caution about further extension by analogy of the *Norwich Pharmacal* jurisdiction to circumstances where identifiable wrongdoing is not in issue. The Chief Justice's remark in para 80 that "PwC… is not an overt target for adverse litigation brought by the JOLs at this stage" was I think also shrewd. Who can doubt that the JOLs would, in their examination both of the working papers and other documents and information disclosed by PwC and in their questioning of the partners and officers attending under an order such as that made by the Chief

Justice, have a close eye on the possibility that this might show some possible claim against PwC as auditors? The Chief Justice's ensuing comment that the court should take "a healthily sceptical approach in evaluating the complaints made about the validity and scope of the Ex Parte Orders", because "it seems clear that a combative and sophisticated defensive strategy has been engaged" appears to me in contrast unjustified. The jurisdiction to make or justification for such an order cannot depend upon the defensive strategy adopted to resist it.

143. The principle now advanced by the JOLs lacks any substantial authority. The two first instance authorities cited by Lord Sumption in para 24 offer the weakest of encouragement for the novel jurisdiction now proposed. *Moolman v Builders & Developers (Pty) Ltd* [1989] ZASCA 171 treats the issue as one of applying *In re African Farms*, giving as the only reason that information is necessary if the ultimate aim of recovery of assets is to be realised. The court then in fact applied the statutory provisions of the forum on an "as if" basis: see sub-paragraph (d) on pp 5-6 and p 23. That I agree with Lord Sumption and Lord Collins is not a sustainable approach.

144. The judgment in *In re Impex Services Worldwide Ltd* [2004] BPIR 564 suggests a breadth of common law power which would again be completely unlimited in its scope, enabling the Manx court "if it thinks fit" to make "an order summoning before it any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings and affairs or property of the Company": para 106(8). Deemster Doyle explained this on the basis that (para 107):

> "Friendly and sophisticated jurisdictions which respect the rule of law and human rights need to be aware that if things go wrong in their jurisdiction and entities in the Isle of Man have information, documentation and evidence in their possession custody control or power that would assist them, then the Manx courts, in a proper case and subject to suitable safeguards and protections where necessary, will offer judicial co-operation and assistance where that is reasonably requested by the judicial authority in that friendly jurisdiction. When the call for help comes the Manx courts will, in proper cases, answer the call positively and provide the necessary co-operation and assistance."

English liquidators were the beneficiary of the far-reaching principle thus promulgated, but I cannot accept that it represents English or Bermudian common law. If there might seem to be a hint in the Deemster's phrase "if things go wrong" that the reasoning and order may have been based on wrongdoing, that does not appear to be borne out by the full account of the background and

proposed questions given earlier in his judgment. Like the order made by the Chief Justice in the present case, the Deemster's ready acceptance of the scope of the assistance which might be provided as extending to any information about the company's promotion, formation, trade, dealings and affairs or property as well as to evidence once again indicates the difficulty that there could be in keeping this novel power within bounds.

145. Lord Collins's approving dictum in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33, quoted by Lord Sumption in his para 19, is found in a paragraph listing a series of authorities on modified universalism, in circumstances where there was no examination in argument or in the Board's opinion of differences between them, or between situations where identifiable assets were in issue and other situations. But another dictum of Lord Collins in that case is in my view relevant. At para 129, he said that:

> "The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, 'if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it': *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 489."

That stands in stark contrast with the development of common law powers which the majority on this appeal supports.

146. The description of *In re Impex* as a case of "judicial assistance in the traditional sense" can be seen now to be on any view unsustainable, and Lord Sumption himself says (para 24) that he "would not wish to endorse all of the reasoning given" in the judgments in either *Moolman* or *In re Impex*. He instances "in particular" those parts which appear to support the concept of applying statutory powers by mere analogy. That leaves open - in the context of the JOLs' present case that the Bermudian court can assist the Cayman Islands' liquidation without relying on Bermudian law - how far his approach accepts or disapproves the breadth of the reasoning and orders in *In re Impex* (see the previous paragraph) - or indeed in the present case (see paras 119 and 120 above). That is another of the unresolved uncertainties about the scope of the proposed new jurisdiction.

147. In these circumstances, and although anything said may be obiter, I am not at present persuaded that it is appropriate to extend the common law power to assist by ordering the provision of information beyond categories which have some

recognisable basis in current law, that is cases where there is (a) evidence that the person ordered to provide the information or documentation has property belonging to the insolvent company, or (b) evidence of some wrongdoing by the person so ordered or (c) evidence of some wrongdoing by another person in which the person so ordered was or is innocently mixed up. A general common law power to order the disclosure of information and documentation by, and the questioning of, anyone, either because a foreign liquidator shows that this may assist him identify or recover assets anywhere in the world or, a fortiori, because it would enable him understand the company's affairs, goes not only beyond anything which it is necessary to contemplate on this appeal, but is also beyond anything that I can, as at present advised, regard as permissible or appropriate.

148. I therefore consider that the appeal must be dismissed, because of the negative answer given to the second issue. But I would, if necessary, also have considered that it should be dismissed on the ground that a negative answer should be given on the first issue.

LORD NEUBERGER:

149. I agree with the other members of the Board that we should humbly advise Her Majesty that this appeal should be dismissed. However, there is an issue which divides the members of the Board. It is whether, as Lord Sumption, Lord Clarke and Lord Collins consider, the appeal should only be dismissed on the grounds (i) that there is no common law power to apply legislation which applies to domestic insolvencies by analogy to foreign insolvencies, and (ii) that the Bermudian courts should not exercise a common law power ("the Power") described by Lord Sumption in para 25, because, as he explains in paras 29-30, the Cayman Islands courts have no such power, or whether, as Lord Mance concludes, the appeal should also be dismissed on the ground (iii) that the common law power in question does not exist. On that issue, if it is appropriate to decide whether the alleged power exists, I would be in agreement with Lord Mance.

150. As this is a judgment which dissents from the majority view on ground (iii), and there is little which I wish to add to the judgment of Lord Mance, I can express my reasons relatively shortly.

151. It is unnecessary to decide whether the Power exists, because we are all agreed that, even if it does, it should not be exercised. I accept, of course, that we can decide (albeit, at least arguably, strictly only obiter) whether the Power exists. However, as it is not necessary for us to rule on that issue in order to dispose of this appeal, we should, in my opinion, be very cautious of doing so. While judges

in a final court of appeal, perhaps particularly in a common law system, should give as much guidance as they can as to the substantive and procedural law in any area, they must always bear in mind the risks inherent in determining issues which do not have to be decided in order to dispose of the case before them.

152. As new problems arise, and as societal values and practices, technological techniques and business practices change, it is inevitable that judges can and should introduce new common law principles or procedures or make alterations to established common law principles and procedures. However, such developments should always be adopted cautiously, not least because, even with the benefit of submissions from advocates and consideration of previous cases, textbooks and articles, the wider implications of any new principle or alteration to an existing principle are very hard to assess. The need for caution in this connection is, in my view, supported by the judicial observations cited by Lord Collins in paras 65-68, although those observations were made in relation to a different aspect of the need for caution.

153. In the present case, there is obvious force in the point that the Board should determine whether the common law power alleged by the liquidators exists, as it is an important issue upon which the sooner an authoritative decision is given the better, especially in the light of the somewhat confused state of the law as revealed in the judgments in this case.

154. However, that very confusion underlines the need for caution. The extent of the extra-statutory powers of a common law court to assist foreign liquidators is a very tricky topic on which the Board, the House of Lords and the Supreme Court have not been conspicuously successful in giving clear or consistent guidance – see the judgment of Lord Hoffmann on behalf of the Board in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508, all five opinions in the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, and the judgment of Lord Collins for the majority of the Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, discussed by Lord Sumption at paras 16-19, and the judgment of Lord Collins in this case.

155. The message I take from those cases is that, at least in this area, it would be better for the Board to approach any case in this field with a view to deciding it on a relatively minimalist basis, rather than by seeking to lay down general principles which it is not necessary to determine, particularly when those principles involve extending the court's powers in a way which may have substantial ramifications. While Lord Sumption's explanation of the nature and extent of this alleged common law power appears very attractive, I think it could lead to all sorts of problems and uncertainties, as is implicit in the qualifications which Lord

Sumption makes in para 25. It is all very well saying that they can be dealt with when they arise, but the fact that it is apparent that there will be problems and complications if the law is developed in a certain way suggests to me that the development should not be adopted unless it is necessary to do so. Accordingly, as it is unnecessary to decide whether the common law power exists, I would have preferred to leave the issue to be decided when it needs to be – with the benefit of the powerful arguments either way contained in the judgments on this appeal, which, with all respect to counsel, range more widely and deeply than the arguments which the Board heard during the hearing.

156. If, however, it is incumbent on me to express a view, I would conclude, in agreement with Lord Mance, that the alleged common law power does not exist. He has set out the grounds for that conclusion convincingly, and they include reasons both of principle and of practicality. Accordingly, I do not propose to repeat those reasons, but there are one or two points I would like to emphasise.

157. The extreme version of the "principle of universality", as propounded by Lord Hoffmann in *Cambridge Gas,* has, as Lord Sumption explains, effectively disappeared, principally as a result of the reasoning of Lord Collins speaking for the majority in *Rubin,* and speaking for the Board in this appeal. However, as with the Cheshire Cat, the principle's deceptively benevolent smile still appears to linger, and it is now invoked to justify the creation of this new common law Power. It is almost as if the Board is suggesting that, while we went too far in *Cambridge Gas* and should pull back as indicated in *Rubin,* we do not want to withdraw as completely as we logically ought. In my view, the logic of the withdrawal from the more extreme version of the principle of universality is that we should not invent a new common law power based on the principle.

158. The limitation of the Power to insolvency cases may be seen by many to be questionable. More specifically, the limitation to liquidations which are being conducted by officers of a foreign court seems to me to be potentially arbitrary. Companies may be in court-imposed liquidation in many jurisdictions when it is "just and equitable" to wind them up, even if they are solvent: I do not see why liquidators in such a case should be able to invoke the Power when other people running solvent companies could not do so. Further, there is no reason why a statutory regime should not provide that voluntary liquidations are to be conducted under the aegis of the court, and, if so, the Power would seem to apply in such cases. And the status of administrators in administrations may be unclear in this connection.

159. The need to make subtle distinctions also concerns me. Thus, the distinction between information and documentation which is obtainable under this Power, and "material for use in actual or anticipated litigation", appears very likely to

give rise to difficult practical problems. I appreciate that these problems can arise in other circumstances, but that is not a reason for extending the circumstances in which these problems may arise; and, as the facts of this case suggest, I suspect that they are particularly likely to arise in relation to the exercise of the Power. Similarly, the question what is necessary for the performance of a liquidator's functions, which is said to be a prerequisite for the exercise of the Power, seems to be a fertile area for uncertainty and dispute.

160. More broadly, these distinctions seem to me to embody the sort of requirements one would expect to see in a statutory code rather than in judge-made law. As the judicial observations cited by Lord Collins suggest, judge-made law should be limited to "very modest development[s] … of existing principle", and should be made "in small steps" or "within … interstitial limits". Although I accept that the United Kingdom courts have been prepared to recognise a new common law right in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, the right involved was only exercisable in very specific circumstances where a serious wrong had been committed. I do not consider that that decision alters the fact that the creation of the Power would represent a development in the law which is, as Lord Mance puts it, "radical". It may not seem radical in the sense that it can be said to be a fairly routine feature of the extreme "principle of universality" enunciated by Lord Hoffmann in *Cambridge Gas*, but that view is no longer maintainable given that extreme principle has now been rejected by Lord Collins, speaking for the majority of the House of Lords in *Rubin* and for the Board on this appeal.

161. The contention that judges should not be creating the Power is reinforced when one considers the extent of domestic statutory law and international convention law in the area of international insolvency. Examples of such laws are described and discussed in paras 40-50 of Lord Collins's judgment. In this highly legislated area, I consider that the power which is said to arise in this case is one which should be bestowed on the court by the legislature, and not arrogated to the court of its own motion.

162. I acknowledge the force of the arguments the other way, which are so clearly set out by Lord Sumption. However, as already intimated, while I agree with the judgment of Lord Collins and otherwise agree with the judgment of Lord Sumption, I would for my part reject the existence of the Power, if it is appropriate to decide that issue at all.