The ebbs and flows of judicial cooperation in the common law

Paul Omar reports on a recent judgement limiting the extent of judicial cooperation

PAUL OMAR
Professor in International Insolvency Law at the Nottingham Law School and Secretary of the INSOL Europe Academic Forum

The Privy Council, final court of appeal for a number of countries and territories in the Commonwealth, has brought an end to the saga begun in the case of Cambridge Gas.[1]

The case of *Singularis*,[2] on appeal from Bermuda, has set a limit on the permissible extent of judicial cooperation in the absence of a domestic cooperation provision or an international text (convention or Model Law). While the judges in that case accepted that the common law should evolve tools to assist in instances of cross-border insolvency, they said that judges should be careful not to trespass on the prerogatives of the legislature by fashioning rules beyond their permissible constitutional role as interpreters of the law. As such, judges should be cautious in seeking to create rules except where there is a sound and pragmatic need for intervention to assist the management of cases with an international element.

> **CASES INVOLVING JUDICIAL COOPERATION IN INSOLVENCY FIRST APPEARED IN THE COMMON LAW IN THE 1700s**

Principled approaches

These issues are not new. Cases involving judicial cooperation in insolvency first appeared in the common law in the 1700s.[3] Over the intervening centuries, it has been possible at common law to achieve a number of things to render assistance in cross-border matters and to make the task of administering a debtor's estate easier. Often, these developments have rested on principled approaches to comity, including theories of unity and universality espoused by the judges. As examples, there can be cited cases in which recognition of the existence of foreign proceedings and of the office-holder's capacity as representative of the estate has been given.[4] Recognition has also been given to the office-holder's title to assets and/or to pursue debts due to the estate.[5] Viewing that management of the estate may be more appropriate elsewhere, courts have also authorised stays or discharges of local proceedings,[6] particularly where foreign proceedings are afoot.[7] The judges have also assisted in the procedural management of foreign instances by restraining actions by creditors within their jurisdiction[8] and by requiring the examination of debtors or third parties, together with the production of documents.[9] Giving support to the idea of a single efficient insolvency procedure, courts have mandated the remittance of funds for the purposes of overseas proceedings[10] and given effect to a reconstruction scheme voted on by the creditors in another jurisdiction.[11]

Ancillary assistance

Furthering the precepts of assistance, the courts also developed at an early stage the doctrine of ancillary assistance, which enabled the opening of liquidations, termed "ancillary" or assisting, so as to deal with issues that could not simply be solved by the making of the above orders.[12] Such ancillary liquidations were deemed to exist so as to assist foreign procedures and allowed for the full panoply of domestic law to come to the aid of the foreign office-holder. Care would be taken to ensure that domestic procedures would not come into conflict between the courts involved, while keeping costs down and ensuring that the interests of creditors were protected.[13] Ancillary liquidation has subsequently become regulated by statute[14] and has been joined by specific assistance provisions.[15] Together, these have allowed for the continued making of orders such as those mentioned above as well as to permit the bringing of vulnerable transaction actions under domestic law[16] and to allow for proceedings against directors to recover a deficiency in the insolvent debtor's assets.[17] Furthermore, the judges have also been able to be creative under the umbrella of the statute, including by interpreting the assistance provisions to allow for the application of rescue proceedings to overseas companies.[18]

International frameworks

In the modern age, the emphasis on creating international frameworks for regulating insolvency matters, a process that has led to the adoption of texts such as the UNCITRAL Model Law on Cross-Border Insolvency 1997 and the European Insolvency Regulation 2000, appeared to have side-lined the common law as a source of developments in judicial cooperation, albeit section 426 (and related provisions in other jurisdictions) continued to generate a modest amount of decisions. However, the advent of *Cambridge Gas* seemed to have given fresh impetus to judicial creativity in the way it sought to reinvigorate the precept of "active assistance", a methodology traced back to early case-law in South Africa.[19] The decision, which stated that a presumption of assistance should exist in furtherance of the principle of universality, was rapidly taken up as precedent in a number of cases across the common law world, including in Australia,[20] Bermuda,[21] the Cayman Islands,[22] Ireland,[23] Jersey,[24] New Zealand[25] and the United Kingdom.[26] Here too, one case went so far as to suggest it was desirable that the common law, whether in furtherance of judge-made cooperation or in decisions interpreting the extent of domestic cross-border statutory

"IN THE MODERN AGE, THE EMPHASIS ON CREATING INTERNATIONAL FRAMEWORKS FOR REGULATING INSOLVENCY MATTERS APPEARED TO BE SIDE-LINED"

> JUDICIAL CREATIVITY CONTINUES TO OCCUR OF NECESSITY IN A NUMBER OF JURISDICTIONS ACROSS THE COMMON LAW WORLD

provisions, should ensure that the same types of assistance were available in both systems.[27]

It seemed as if the common law had found, with *Cambridge Gas*, a new sense of purpose. This was particularly timely and useful, given the limitations on the applicability of those frameworks that existed and that, by no means, ensured global coverage in matters of cross-border insolvency. Despite strong doubts being emitted as to the correctness of *Cambridge Gas* as to its subject matter, the enforcement of a foreign judgement non-compliant with the traditional common law rules on jurisdiction in *personam* and *in rem*,[28] its insistence on "active assistance" continued to find echoes elsewhere. In 2013, an attempt in the *Tambrook* case to limit the assistance forthcoming under section 426 to only those situations where pre-existing proceedings were afoot was rejected with the *Cambridge Gas* articulation of those principles receiving mention.[29] "Active assistance" in that case was to be furthered by allowing for the "passporting" of a request for proceedings to be opened in the United Kingdom to avoid unnecessary duplication of effort in the home jurisdiction, which would only be purposeless and wasteful of effort and costs.[30]

Cooperative precepts

The limitations, if any, on what "active assistance" might mean, however, have recently been aired in the case law. The line of jurisprudence inaugurated by *Re Phoenix*, where, in reliance on *Cambridge Gas*, assistance was provided at common law to extend a domestic statutory power to enable proceedings to be brought by the foreign office-holder within the jurisdiction, has been tested in the Caribbean and North Atlantic jurisdictions. The 2013 decisions in the Cayman Islands[31] and Bermuda[32] signalled a desire to adhere to the cooperative precepts in *Cambridge Gas*, in the first case to allow the pursuit of transaction avoidance claims by the foreign office-holder, while, in the second, facilitating the summons of persons to be examined and to order the production of documents. The steps in either case were to be achieved by the extension of domestic statutory rules to a situation in which neither an ancillary nor a domestic liquidation were envisaged.

Both cases also attempted a reconciliation between *Cambridge Gas* and *Rubin*, the judicial enthusiasm apparently being for the views expressed in the former. Nonetheless, this preference did not remain without challenge. Both decisions were taken to appeal, with the Bermudian appellate court holding the expansive views of the judge at first instance to be wrong,[33] while the Caymans appeal court reversed the trial judge, holding that the domestic statutory provision did indeed confer the powers the judge sought to provide at common law.[34] A decision on whether the judge also had the powers at common law was stayed pending the further appeal in the Bermudian case that was heard before the Privy Council in April 2014. As a result of the decision that the Privy Council has now come to in *Singularis*, its earlier views in *Cambridge Gas* have been repudiated and firm boundaries have now been set in respect of the meaning of "active assistance".

Summary

In summary, judicial creativity continues to occur of necessity in a number of jurisdictions across the common law world, particularly those where domestic cross-border mechanisms may not exist or may be deficient. While in some instances, the attempts by judges to push the law further are later rejected, as appears to be the case with the decision in *Singularis*, in others they may be successful. In time, these more forward views may be adopted elsewhere, illustrating the incremental approach to the construction of the common law through the development of precedent. The guidance of the higher courts is vital in this process to ensuring the common law does not stagnate and that the principles of unity and universality serve as precepts to guide its continued development. While *Singularis* appears to have closed the door on one set of developments, undoubtedly it will not be the end of the story. ■

Footnotes:

1 *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26 (*"Cambridge Gas"*).
2 *Singularis Holdings Ltd v PwC* [2014] UKPC 36 (*"Singularis"*).
3 *Solomons v Ross* (1764) 1 Hy. Bl. 131n; 126 ER 79; *Sill v Worswick* (1781) 1 H. Bl. 665.
4 Idem; *Macaulay v Guaranty Trust Company of New York* (1927) 40 TLR 99.
5 *Bergerem v Marsh* (1921) B&CR 195.
6 *Re Queensland Mercantile Agency* (1888) 58 LT 878.
7 *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112.
8 *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.
9 *In re Impex Services Worldwide Ltd* [2004] BPIR 564.
10 *Re BCCI (No 10)* [1997] Ch 213.
11 *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385.
12 *Re Matheson Brothers Ltd* (1884) 27 Ch D 225.
13 *Re: Commercial Bank of South Australia* (1886) 33 Ch D 174.
14 Sections 221 and 225, Insolvency Act 1986 (United Kingdom).
15 Ibid., section 426.
16 *Re BCCI International (Overseas) Ltd* [1988] 1 WLR 708.
17 *Re BCCI* [1993] BCC 787.
18 *Re Dallhold Estates (UK) Pty Ltd* [1992] BCC 394 (administration); *Re Television Trade Rentals Ltd* [2002] EWHC 211 (corporate voluntary arrangements).
19 *Re African Farms Ltd* [1906] TLR 373.
20 *Bank of Western Australia v Henderson (No 3)* [2011] FMCA 840 (obiter).
21 *Re Founding Partners Global Fund Ltd (No 2)* [2011] SC (Bda) 19 Com.
22 *Re Lancelot Investors Fund Ltd* (2008) (unreported), cited in S. Dickson, "The Quick March of Modified Universalism: Rubin v Eurofinance SA" (Mourant Ozannes Briefing, June 2010).
23 *Fairfield Sentry Ltd (In Liquidation) & Anor v Citco Bank Nederland NV & Ors* [2012] IEHC 81.
24 *Re Montrow International Ltd* 2007 JLR Note 40.
25 *Williams v Simpson Civ 2010-419-1174* (12 October 2010) (High Court, Hamilton).
26 *Rubin & Anor v Eurofinance SA & Ors* [2010] EWCA Civ 895; *New Cap Reinsurance Corp Ltd & Anor v Grant & Ors* [2011] EWCA Civ 971.
27 *Re Phoenix Kapitaldienst GmbH, Schmitt v Deichmann & Ors* [2012] EWHC 62 (Ch) (*"Re Phoenix"*).
28 *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation)* [2012] IESC 12; *Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others* [2012] UKSC 46 ("Rubin").
29 *HSBC Bank v Tambrook Jersey Limited* [2013] EWCA Civ 576 (22 May 2013).
30 Ibid., at paragraph 39.
31 *Picard and Anor v Primeo Fund (In Official Liquidation)* (unreported) (14 January 2013).
32 Re Saad Investments Company Ltd (In Official Liquidation) and Re Singularis Holdings Ltd (In Official Liquidation) [2013] SC Bda 28 Com (15 April 2013).
33 Ibid., reported as: [2013] CA (Bda) 7 Civ (18 November 2013).
34 Judgment in CICA 1/2013 and 2/2013 Appeals delivered on 16 April 2014.

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