Privy Council Decisions in Singlaris and SAAD Clarify the Ability of Officeholders to Obtain the Assistance of Foreign Courts and the Rights of a "Stranger" to a Liquidation to Challenge the Winding up Order

On 10 November 2014, the Privy Council gave its judgments holding (by the majority of the Board) that there are powers at common law which permit a court to give assistance to a foreign court in insolvency proceedings by ordering the production of documents, but only to the extent that that same power exists in the foreign jurisdiction. It was also found (unanimously) that a winding up order would not be granted in relation to an overseas company if that company did not come strictly within the statutory definition of an entity which may be wound up. Further (also unanimously), where the sole purpose of the winding up application was to target a third party within the jurisdiction, notwithstanding the fact that the court will normally not entertain submissions from "strangers" to the winding up and the third party did not strictly come within the statutory classes of those entities having standing to contest such an application, jurisdiction exists in exceptional circumstances to grant standing – if only on the grounds of natural justice.

Background

Saad Investments Company Limited [1] ("**Saad**") and Singularis Holdings Limited [2] ("**Singularis**") are related companies which were both incorporated in the Cayman Islands and which were both ordered to be wound up by the Grand Court of the Cayman Islands. PricewaterhouseCoopers ("**PwC**"), based in Bermuda, was the auditor for both Saad and Singularis. The liquidators for the companies wanted to obtain documents in PwC's possession in relation to its audits of the companies.

The liquidators of Saad applied for and obtained a winding up order in the Supreme Court of Bermuda and, in turn, an order pursuant to section 195 of the *Companies Act 1981* (Bermuda) seeking the disclosure of information in PwC's possession.

The liquidators of Singularis sought and obtained recognition from the Supreme Court of Bermuda of the Cayman liquidation. The Bermuda court in turn issued an order, based on its "common law power" to assist the Cayman liquidation, requiring PwC to produce information (namely, the working papers in relation to the audits, which it appears were agreed not to be property of Singularis) which otherwise would not have been disclosed under section 195 of Bermuda's *Companies Act 1981* or the equivalent statutory provision in the Cayman Islands (section 103 of the Cayman Islands *Companies Law*).

PwC resisted the orders made in both cases and appealed to the Bermuda Court of Appeal. The Court of Appeal rejected PwC's appeal and upheld the Saad decision (in relation to which PwC had argued that the Supreme Court of Bermuda had no jurisdiction to order the winding up of Saad because Saad was an overseas company which did not carry on business in the jurisdiction and thus did not come within the statutory definition required to establish jurisdiction under Bermuda law). The Court of Appeal allowed PwC's appeal and set aside the Singularis decision (in relation to which PwC had argued that the Supreme Court of Bermuda could not assist the Cayman liquidation by ordering production of information which could not have been ordered by the Cayman court itself).

Further appeals of the decisions were brought to the Privy Council.

Privy Council

The Saad Appeal

The Privy Council's decision in the Saad appeal was unanimous. The Board held that the Supreme Court of Bermuda did not have jurisdiction to order a winding up of Saad because the jurisdiction was wholly statutory in nature and Saad did not fall within the statutory definition of a "company" necessary to establish jurisdiction under Bermuda law. The liquidators' submission that Saad's ownership of shares in a company incorporated in Bermuda was sufficient to bring Saad within the definition of "company" was not accepted by the Board.

On a collateral issue, the liquidators had argued that PwC had no standing in relation to the winding up order because PwC did not fall within any of the statutory classes of persons entitled to appear in relation to applications for winding up orders. The Board rejected this submission based on the extraordinary circumstances of the case. It found that PwC had standing to contest the winding up even though it was technically a "stranger" to the proceeding. The exception applied by the Board was based upon the fact that the entire winding up proceeding was focused on PwC because PwC's books and records relating to its audits of Saad were the sole target of the exercise. Accordingly, the Board found that it was just and equitable to permit PwC to have standing to challenge the winding up order and that, if it was held otherwise, it would be a breach of natural justice to deny PwC the ability to argue that the court lacked jurisdiction in the proceedings in which PwC was the target.

The Singularis Appeal

The Privy Council's decision in the Singularis appeal was not unanimous and was delivered by the members of the Board in five separate judgments.

The majority of the Board held that there is a common law power to assist a foreign court in insolvency proceedings and that the principle of "modified universalism" is available to assist a foreign winding up proceeding *so far as the court properly can*. The limits on a court's ability to assist the foreign proceeding are established by local law, public policy and the limits of the court's own statutory and common law powers. Accordingly, when a compelling legal policy calls for it, in the absence of a specific statutory power (in this case, to compel production of information) the court has the common law power to overcome the statutory shortfall.

In reaching that conclusion, the majority of the Board concluded that the power was available to assist the

officers of the court in the foreign proceeding and to overcome the problems imposed by the territorial limits of the original court's jurisdiction in relation to a winding up proceeding which involved issues extending beyond that court's territorial jurisdiction. Importantly, this power will be applied to permit the performance of officers' functions and will not extend to relief which the officers do not have under the laws by which they were appointed. Further, common law powers of this kind are not to be used as a means to obtain material for use in litigation – in relation to which other rules and powers will apply.

In this case, the majority of the Board found that the production of materials sought was not available under Cayman law because the Cayman court would have been limited to ordering production of materials belonging to Singularis. In this case it was apparently accepted that the audit working papers were not owned by Singularis, although Lord Sumption and Lord Collins "*express[ed] 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*". Accordingly, the majority of the Board declined to exercise the common law powers of the court in favour of the liquidators and the appeal was dismissed.

Comment and Cautions

It is noteworthy that the Board's approach in Saad was to apply a strict interpretation of the Bermuda statute regarding whether a "company" may be wound up in Bermuda, whilst at the same time being flexible in granting standing to PwC, as a stranger to the liquidation, to contest jurisdiction. However, given that PwC was clearly the target of the entire exercise, it is hard to argue that the Board's efforts to find a way for PwC to appear in the proceedings were anything other than equitable.

Of significant note for practitioners is the Board's comment regarding the circumstances of the case and PwC's submissions regarding jurisdiction to make the winding up order. The Board noted that, had it been perceived, as it should have been, that the Bermuda court was without jurisdiction to make the original order, the liquidators, as officers of the court, should have applied for a stay of the winding up order. Alternatively, and in the absence of such a step by the liquidators, the Bermuda court should have required the liquidators to apply for a stay. The point is that liquidators and other insolvency practitioners must be mindful of their role as officers of the court and take action to stay orders made in circumstances where it would appear that the order was made without jurisdiction – particularly if there are no good reasons for a stay not to be ordered.

The Singularis decision highlights the limitations of liquidators' statutory investigatory powers under section 103 of the Cayman Islands' *Companies* Law, which, when enacted in 2009, put Cayman's statutory regime out of kilter with insolvency regimes in many other Commonwealth jurisdictions. First, under section 103 it is only possible to obtain documents *belonging* to the company in liquidation, rather than any documents *relating to the company's affairs*. Second, orders for disclosure under section 103 may only be made against "relevant persons", as opposed to *anyone* who might have information relating to the company. The definition of "relevant persons" is quite proscribed and does not include, for example, the company's former lawyers or auditors (unless the auditors can be brought within the definition of "relevant persons" because they constitute officers of the company as a matter of construction of the company's Articles).

These statutory restrictions are creating serious practical difficulties for Cayman liquidators in their efforts to

reconstitute the state of the company's knowledge. If the information and documentation are located in a Commonwealth jurisdiction where the statutory powers of examination and production are not so restrictive as section 103, one potential solution would be to commence an ancillary liquidation, as opposed to merely seeking recognition, in the foreign jurisdictions [3]. It seems fairly clear from the Board's decision in Singularis that the full suite of local statutory remedies would be available to the liquidators in an ancillary liquidation, irrespective of whether those remedies are available in the original jurisdiction. Such an approach, if available, could thus provide a solution to the type of problems encountered by the liquidators in the Singularis case.

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[1] PricewaterhouseCoopers v Saad Investment Co Ltd [2014] JCPC 35
[2] Singularis Holdings Limited v PricewaterhouseCoopers [2014] JCPC36
[3] Whether an ancillary liquidation of an overseas company can be opened will depend on the law of the ancillary jurisdiction. In England, for example, at least one of three core requirements identified in, for example, Drax Holdings Ltd [2004] 1 BCLC 10, must be met, namely:
a) a sufficient connection with the jurisdiction – not necessarily requiring that assets be present within the jurisdiction;
b) a reasonable possibility that the winding up order would benefit those applying for it; or
c) the English Court being able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

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