

**ASSISTING FOREIGN INSOLVENCY
PRACTITIONERS IN CROSS-BORDER
INSOLVENCY: SOME FOREIGN INSIGHTS
INTO SOUTH AFRICAN LAW**

*Singularis Holdings Ltd v
PricewaterhouseCoopers (Bermuda)*
[2014] UKPC 36 (10 November 2014),
[2015] 2 WLR 971

1 Introduction

The related companies Saad Investments Company Limited and Singularis Holdings Ltd were registered in the Cayman Islands and audited by PricewaterhouseCoopers ("PwC"). When the Grand Court of the Cayman Islands wound them up, it ordered PwC, as a person relevantly connected to them, to deliver or transfer to their joint official liquidators ("JOLs") any property or documents belonging to those companies (s 103 of the Companies Law). The reason that the JOLs pursued PwC was that the Saad group had withdrawn property to Saudi Arabia (see the subsequent explanation by Chief Justice Smellie of the Cayman Islands in his recent paper, "Forum Shopping Is Bad; Choice of Forum Is Good? The Investment Fund Perspective" at the 11th INSOL/UNCITRAL/World Bank Judicial Colloquium, San Francisco (21–22 March 2015) <https://www.judicial.ky/wp-content/uploads/publications/papers/2015-04-21-ChiefJusticesPresentationatSanFranciscoINSOLJudicialColloquium.pdf> (accessed 2015-09-18) 24 fn 35).

The JOLs in *Singularis* were not satisfied with what they had received from PwC under this order. They thought that Singularis should have had even more property, which they sought information about from PwC's working papers (par 6). For this purpose, the JOLs considered section 195 of the Companies Act 59 of 1981 in Bermuda, where the relevant branch office of PwC was registered. This more promising provision applied if a provisional liquidator had been appointed, or a liquidation order made in Bermuda. The Bermudian court might then summon

"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 [deemed] capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company" (s 195(1)).

These officers or persons might be interrogated (s 195(2)) and required to "produce any books or papers in [their] custody or power relating to the

company" (s 195(3)). (S 195 corresponds to s 236 of the Insolvency Act 1986 in the United Kingdom ("Limitations on 'Modified Universalism' in Cross-Border Insolvency Assistance Considered" (2014) 366 *Co LN* 7), and in some respects may be compared with section 417 of the Companies Act 61 of 1973 in South Africa, as in, for example, subsections (1), (2) and (3).)

Kawaley CJ issued an order in the Supreme Court of Bermuda, recognising the Cayman court's appointment of the JOLs. He also "exercised a common law power 'by analogy with the statutory powers contained in section 195'" (*Singularis* par 6). PwC and a named officer had to produce the documents that the court could have ordered them to produce under section 195. PwC also had to make its staff or agents available to answer questions. The JOLs could even serve papers on a named PwC partner, or any other partner outside Bermuda. (Kawaley CJ, dismissed arguments for setting aside his *ex parte* orders (*Re Saad Investments Co Ltd and Singularis Holdings Ltd* [2013] Bda LR 28) ("Saad").)

The Court of Appeal for Bermuda overturned his decision (*PwC v Saad Investments Company Ltd* [2013] Bda LR 82), and the JOLs appealed to the Judicial Committee of the Privy Council.

PwC argued that only it owned its working papers (*Singularis* par 30). Auditors are "notoriously insistent" that their clients do not. They fear professional negligence claims if their working papers are scrutinised (see the explanation by Lord Mance in his "Jurisdiction and Justiciability", the Fifth Annual Judicial Distinguished Guest Lecture, Cayman Islands (31 March 2015) <https://www.supremecourt.uk/docs/speech-150331.pdf> (accessed 2015-09-18) par 22).

2 The two issues in *Singularis*

The *Singularis* Board gave five judgments on two issues. The Board members divided three to two on the first. The majority (Lords Sumption and Clarke JJSC, and Lord Collins) held that the Bermudian court, unable to wind up overseas companies, had a common-law power to assist the Cayman winding-up by ordering the production of the required information. Its statutory power of doing so applied only if *Singularis* were wound up in Bermuda.

On the second issue, the whole Board (thus including Lord Mance JSC, and Lord Neuberger PSC) agreed that the Bermudian court should not exercise this power because the Cayman court could not grant a similar order. Lords Mance and Neuberger went even further. On the first issue, they held that this common-law power did not exist. The Board's answer to the second issue rendered the views on the first one *obiter dicta* (Lord Mance par 147; Lord Neuberger par 151). The opinions are still important guides to contemporary thought by the highest judges of the United Kingdom on cross-border insolvency matters. The Judicial Committee of the Privy Council also remains the apex court of appeal for, among other courts, those of "many current and former Commonwealth countries, as well as the United Kingdom's overseas territories, crown dependencies, and military sovereign base areas" ("The Role of the JCPC" Judicial Committee of the Privy

Council, <https://www.jcpc.uk/about/role-of-the-jcpc.html> (accessed 2015-09-18); for a map, see “The Jurisdiction of the Judicial Committee of the Privy Council” https://www.jcpc.uk/docs/jcpc_jurisdiction_map.pdf (accessed 2015-09-18)).

The Board in *Singularis* mentioned various authorities, including some South African cases. The two mainly discussed were *Re African Farms* 1906 TS 373 (“*African Farms*”) and *Moolman v Builders & Developers (Pty) Ltd (in Provisional Liquidation): Jooste Intervening* (1990 (1) SA 954 (A)) (“*Moolman*”). This case comment will deal more with the reasoning as to the South African decisions, approach and methods with respect to cross-border insolvency law. At stake were the questions of recognition and assistance. The difference between these two ideas in cross-border insolvency law has been strikingly summarised by Smith and Armshaw (“Focus on Cross-border: What Remains of the Golden Thread?” *Pinsent Masons Restructuring 2015* http://www.pinsentmasons.com/PDF/pageturner/RestructuringBusinessMagazine/Spring_2015/index.html#15 (accessed 2015-09-18) 13 14):

“[Co-operation] between States [...] includes two key elements: (1) recognition; and (2) assistance. The first of these, recognition, is conceptually more straightforward (i.e. you say ‘tomayto’, I say ‘tomahto’, but I recognise your alternative pronunciation of the word). The trickier aspect is ‘assistance’, with a critical question in cross-border insolvency proceedings being ‘to what extent should courts in one jurisdiction assist courts in another jurisdiction?’” (original emphasis).

3 The reasons for the Board’s decision

3.1 Lord Sumption’s majority judgment

Lord Sumption gave the leading judgment. Lord Clarke agreed with his main points.

English common law filled the statutory gaps in English cross-border insolvency law (par 9). United Kingdom courts could wind up overseas companies (s 221 of the Insolvency Act 1986). Bermudian courts could not. Lord Sumption then described the English law of ancillary liquidations (par 10).

In *Singularis*, the Bermudian court had no jurisdiction for an ancillary winding-up (par 11). Its power to assist a foreign winding-up hinged on the help sought from it. Liquidations had four aspects:

- collective execution upon the debtor’s assets,
- determination of creditors’ rights,
- impeachable dispositions, and
- powers for gathering assets.

The last, the procedural powers, helped liquidators find the company’s assets or ascertain its obligations. The Bermudian court exercised these powers under section 195. The English court applied statutory powers to collect the property in English ancillary liquidations.

Winding-up orders withdrew assets from creditors' individual execution. By comity in private international law, a court could recognise that company property vested in an agent or office-holder "appointed or recognised under the law of incorporation" (par 12). Under common law, this principle governed an insolvent's English movables, which passed to the insolvency representative under the insolvent's domiciliary law. This representative could also be appointed to receive rents and profits from English immovables (Dicey, Morris and Collins *The Conflict of Laws* 15ed (2012) Vol 2 Rules 216, 217).

African Farms seemed the first common-law decision on the stay where there was no power to wind up the company. If the local court ordered this stay, it also prevented creditors from executing upon local assets. In *African Farms*, an English company in an English winding-up had many Transvaal assets, but not enough members for the court to liquidate it under the statute as a company. (The court could wind up a company "if the number of members [had] diminished to less than twenty-five" (s 2(d) of the Law on the Liquidation of Companies 1 of 1894 (Barber, MacFadyen and Findlay (trans) *The Statute Law of the Transvaal* (1901) 458; *African Farms* 376–377). However, as the case headnote tells, the problem in *African Farms* was that the company had never had the required number of members.)

Lord Sumption quoted and summarised Innes CJ's judgment in the Transvaal Supreme Court. In summary: private international law allowed recognising the English liquidator as the company's local representative. He could dispose of the local assets as though within the English court's jurisdiction. The Transvaal court might still set conditions protecting local creditors or recognising local law. Recognising the foreign liquidator "carries with it the active assistance of the Court" (*African Farms* 377); otherwise, a costly mêlée of local creditors' execution upon the property would follow. The argument that the court was helping the English liquidator indirectly when it could not indirectly help him, conflicted with the principle of recognising his power over company property (*African Farms* 378–380). There was a better view: Did local rules prevent recognising the foreign liquidation? Did this conflict with local legal policy? Was it unfair to local creditors or objectionable for other reasons? (*African Farms* 381–382.) Equity and convenience required recognising the foreign liquidator, but he still had to recognise every local creditor's right to prove claims before the Transvaal Master. *African Farms* order 1(d) stated that the acceptance or rejection of these claims, the company's liability for them as far as its Transvaal assets went, and whether there were questions of mortgage or preference over these assets, were all to be "regulated by the laws of this colony as if the company had been placed in liquidation here" (*African Farms* 384). The Transvaal court had stayed the local secured creditor's judgment against the company.

Lord Sumption summarised the importance of *African Farms*. Private international law justified recognising the English liquidator's dispositive power over the Transvaal assets. Further, "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 the Transvaal court, like its English counterpart, could exercise inherent powers of staying the

enforcement of its judgments. “But the decision is nevertheless a significant one”, went on Lord Sumption, “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” (*Singularis* par 14). The judgment creditor’s “accrued and absolute right” was removed; it was replaced by “having his debt written down to a figure consistent with the rateable distribution of assets in the Transvaal” (*Singularis* par 14). Thus, the court altered the rights of the company and its creditors. For this purpose, the court relied only on its inherent power to help the company’s affairs to be wound up properly under a foreign liquidation order. Lord Sumption also referred to Smith J’s ruling (*African Farms* 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”.

Lord Hoffmann relied on *African Farms* in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* ([2007] 1 AC 508) (“*Cambridge Gas*”). The principle of universality formed part of English cross-border insolvency and aspired to create the results of deciding the case in one insolvency jurisdiction. It underlay *African Farms*. In *Cambridge Gas*, it authorised and obliged the Manx court to assist the United States reorganisation. The aim was to distribute all the company’s assets similarly as far as possible. The principle, Lord Hoffmann continued,

“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 [*African Farms Ltd* 377], in which an English company with assets in the Transvaal had been voluntarily wound up in England, ‘recognition [...] carries with it the active assistance of the court’” (par 20).

A court could probably not apply foreign insolvency provisions that did not form part of its local law (par 22). But it

“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”.

Lord Sumption (*Singularis* par 15) held that *Cambridge Gas* supported three propositions:

- 1 The principle of modified universalism exists. Thus, the court “has a common law power to assist foreign winding-up proceedings so far as it properly can”.
- 2 This assistance “includes doing whatever [the local court] could properly have done in a domestic insolvency, subject to its own law and public policy”.
- 3 By implication, “this power is itself the source of [the local court’s] jurisdiction over those affected, and [...] the absence of jurisdiction *in rem*”

[thus, as to rights over property] or *in personam* [thus, as to rights against persons] according to ordinary common law principles is irrelevant”.

Lord Hoffmann later discussed propositions 1 and 2 (*In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 (“*HIH*”)). In private international law, the insolvency of individuals or juristic persons “should be unitary and universal” (par 6). The unitary insolvency proceedings in the insolvent’s domicile should be recognised everywhere and govern the assets. Modified universalism – Prof Jay Westbrook’s phrase – acknowledged practical limitations on the universality principle (par 7). The principle in the cases, Lord Hoffmann held, had formed a “golden thread running through English cross-border insolvency law since the 18th century” (par 30). As far as justice and United Kingdom public policy allowed, English courts cooperated with their counterparts in the country of the main winding-up, to distribute all the company’s assets under one distribution system.

Cambridge Gas formed the outer limit of English courts’ common-law assistance of foreign liquidations (*Singularis* par 18). The authority of that decision had since been challenged. Its proposition 3 had been held to be incorrect (*Rubin v Eurofinance SA* [2013] 1 AC 236, by a majority (“*Rubin*”); and Moss and Fletcher disagree: “A Saad Affair” 2015 28(4) *Insolv Int* 49 50 fn 2). The Manx court had jurisdiction over the Manx company and by virtue of the subject matter of the foreign insolvency proceedings. Still, Lord Hoffmann did not specify the requirements for courts to assist proceedings at common law.

Part of *Cambridge Gas* proposition 2, Lord Sumption held, concerned what the court could properly do under its insolvency proceedings. But this part conflicted with *Al Sabah v Grupo Torras SA* ([2005] 2 AC 333 (“*Al Sabah*”)). *Al Sabah* predated *Cambridge Gas*. Lord Mance, dissenting in *Singularis*, agreed with Lords Sumption and Collins that propositions 2 and 3 were insupportable (par 134). (However, Moss and Fletcher consider the relevant *Al Sabah* reasoning superficial (2015 28(4) *Insolv Int* 50 fn 4).)

Proposition 1 – modified universalism – remained (*Singularis* par 19; *HIH*; and *Rubin*). Lord Sumption quoted Lord Collins’s *Rubin* judgment (par 29–33). The principle of modified universalism provided courts with a common-law power to recognise and help foreign insolvency office-holders in cross-border matters. The principle had been variously stated. Innes CJ’s *African Farms* ruling about “active assistance” was one. So, too, was Hoffmann J’s, that the court “will do its utmost” to cooperate with a foreign court and not impede its proper administration of the company (*Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 117). Commercial necessity prompted judges to co-operate while they waited for an international convention (*Credit Suisse Fides Trust v Cuoghi* [1998] QB 818 827 per Millett LJ). Comity respecting foreign courts’ jurisdiction should not hinder a court’s giving “whatever assistance it properly can” as to assets or persons in its jurisdiction (*Credit Suisse Fides Trust v Cuoghi supra* 827 per Millett LJ). Examples of helping the foreign court of domicile or registration were listed; they included “orders for examination in support of the foreign proceedings” (*Rubin* par 31; and *Singularis* par 18). Lord Collins also mentioned the stay of the proceedings; *African Farms* appeared in the series of six supporting cases on this point (*Rubin* par 33; and *Singularis* par 18).

Modified universalism, Lord Sumption continued, was restricted by domestic law and policy; the court's scope was limited by its "own statutory and common law powers" (*Singularis* par 19, applied by the Supreme Court of Ireland in *In the matter of Sean Dunne (a Bankrupt)* [2015] IESC 42 (15 May 2015) <http://www.bailii.org/ie/cases/IESC/2015/S42.html> (accessed 2015-09-18) par 57–58 per Laffoy J; and by the High Court of Hong Kong in *African Minerals Ltd v Madison Pacific Trust Ltd* [2015] HKCFI 645 (16 April 2015) <http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkcfi/2015/645.html> (accessed 2015-09-18) par 11 per Harris J, noted in Tait "The Train Now Departing: Insolvency and Cross-Border Recognition Reform – Hong Kong's Missed Opportunity?" 2015 4 *CRI* 143).

If statutory powers did not exist, common-law powers applied. They could be developed as appropriate, but the extent thereof could not be answered in a complete proposition: it depended on the power that the court was requested to apply. The present power was to order a person on Bermuda to produce information — a power that the liquidators needed for their usual obligation to find and take possession of company property (*Singularis* par 21). This power differed from the statutory power of compelling evidence from a person; courts had warned that they had no inherent power to compel evidence for use in foreign proceedings. Courts were not so reluctant to develop proper remedies to require information, but there had to be "a sufficiently compelling legal policy" to do so (*Singularis* par 21).

The House of Lords had taken this step in *Norwich Pharmacal Co v Customs and Excise Commissioners* ([1974] AC 133) ("*Norwich Pharmacal*"). (Lord Kilbrandon (205) had mentioned *Colonial Government v Tatham* (1902) 23 NLR 153 158 per Beaumont AJ as authority that the court was obliged "to make an order necessary to the administration of justice" in those circumstances.)

However, the *Singularis* facts fell outside the scope of *Norwich Pharmacal*. That decision still showed that a common-law power could be developed to order the production of information needed "to give effect to a recognised legal principle" (*Singularis* par 23). In *Singularis*, there was an analogous power to give effect to the common-law principle of modified universalism. It was in the public interest that the court of incorporation could wind up the company's affairs internationally, although its jurisdiction had territorial limits. Courts had often recognised giving proper help as both a right and duty. In *Singularis*, the Bermudian court had recognised the liquidators, who needed information for their professional obligations. "Their acknowledged right to take possession of the company's worldwide assets", Lord Sumption held (*Singularis* par 23), "is of little use without the ability to identify and locate them, if necessary with the assistance of the court". Probably they could gather this information only by means of this order. The common-law restraints on compelling the evidence did not apply. Rounding off this part of his judgment, Lord Sumption held (*Singularis* par 23):

"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."

Lord Sumption's views are consistent with some of Hefer JA's view in *Moolman* 960–961 on why the Transkei liquidator sought recognition from the South African court. It is also to be noted that, without this recognition, the property would be distributed where it happened to be situated. Then the "race to grab [it] is to the swiftest, and the best informed, best resourced or best lawyered" (*Stichting Shell Pensioenfonds v Krys* [2015] AC 616 par 24 per Lords Sumption and Toulson JJSC; followed in the Court of Appeal in *Erste Group Bank AG London Branch v J "VMZ Red October" & Ors* [2015] EWCA Civ 379 (17 April 2015) <http://www.bailii.org/ew/cases/EWCA/Civ/2015/379.html> (accessed 2015-09-18) par 53 per Gloster LJ; and in the Chancery Division in *JSC Bank of Moscow v Kekhman* [2015] 1 WLR 3737 par 127 per Morgan J).

Moss and Fletcher criticise the focus on the winding-up discussion (2015 28(4) *Insolv Int* 50 fn 7 about *Singularis* par 23). This focus leaves uncertainty over much-needed judicial help for business rescue before insolvency.

Two courts had given common-law assistance by ordering the production of information (par 24). In *Moolman*, the company had been registered and later wound up in the Transkei. That area was then legally a foreign country. The liquidator sought an order for his recognition and the examination of people in South Africa to find company assets. Local winding-up was impossible. (The foreign company had no South African place of business; it was not an external company that could be wound up under the Companies Act 61 of 1973: see the definition of "external company" in section 1 of that statute; *Moolman* 959. And its only property within the South African court's jurisdiction might be "a possible claim in respect of these payments or other property that may be discovered as a result of the enquiry" (*Moolman* 960).) The Appellate Division decided that "a power to make such an order [for examining people in South Africa] at common law was within the principle of [*African Farms*]" (*Singularis* par 24).

The second case was decided on the Isle of Man. The court order had been issued for examining persons on that island (*In re Impex Services Worldwide Ltd* [2004] BPIR 564 ("*Impex*").

Lord Sumption held (par 24):

"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."

There was a power to assist foreign liquidators by requiring third parties to produce information to find company assets (par 25), but it should be authorised by local law before courts could grant it to foreign liquidators. Unlimited creation of such powers had to be avoided. This power of ordering the production of information had restrictions:

- 1 It assisted foreign office-holders of insolvency or similar jurisdiction. It did not help those in a voluntary winding-up, which was a private arrangement conducted independently of the court.
- 2 It assisted foreign courts to overcome territorial limits on their powers to wind up a company internationally. It would not help foreign office-holders to do what they could not do under their law of appointment.
- 3 It was only for what those office-holders needed to do.
- 4 It was restricted by the assisting court's domestic law and policy (*African Farms*; *HIH*; *Rubin*). In *Singularis*, this was Bermuda. The power did not apply if the information could be compelled in other ways. It could not be used to gather information for use in litigation. It did not apply if the liquidators had to follow forensic or statutory provisions to collect evidence abroad; then they had to follow the required process like everyone else.
- 5 Before the power could be exercised, the applicant must pay the innocent third party's reasonable costs of complying with the court order.

Kawaley CJ could not order service of his order beyond Bermuda (par 26). He could only order PwC on Bermuda to comply with the order and reasonably seek compliance from others. Section 195 did not necessarily exclude a non-statutory power to assist insolvency courts (par 28). A common-law power would not necessarily weaken this section. Still, Bermudian courts could not help Cayman courts to overcome Cayman statutory limits on Cayman courts' powers (par 29). The JOLs' application to the Bermudian courts for this help was rejected as forum shopping.

3.2 Lord Collins's majority judgment

Lord Collins also dismissed the JOLs' appeal. The majority argued that the Bermudian court could exercise a common-law power like the statutory ones that those courts could have exercised in a Bermudian insolvency case, but that did not expressly apply in a cross-border case (par 32). Lord Collins gave the following reasons (par 38). At common law, a court recognised and helped foreign insolvency proceedings mainly through its existing powers. These might justify extension or development through the court's usual common-law methods. But 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". If statutory powers did not apply, they could not be applied by analogy as though the foreign insolvency case were a local matter.

Lord Collins summarised legislation to order the examination of persons (par 39–50). Common-law powers of ordering this examination would seldom be discussed in an English case. Foreign insolvency proceedings could still be assisted (*Rubin* par 29). Under this principle, courts could apply or extend their common-law or statutory powers. Thus, they had stayed judgments or the enforcement of proceedings (*Singularis* pars 51–54). But *African Farms* had had "too much [...] read into it". It had been first referred to in England in argument in *In re Bank of Credit and Commerce International SA (No 10)* ([1997] Ch 213 219). It had not been cited in the

standard books on company law – *Buckley, Gore-Browne, and Palmer*, and *Williams on Bankruptcy* – or in Fletcher (*Insolvency in Private International Law* 2ed (2005)). It had been cited “in passing” in Forsyth’s (*Private International Law: The Modern Roman-Dutch Law* 5ed (2012) 456), and mentioned with approval by the way in the Supreme Court of Appeal (*Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA); [1998] 2 All SA 479 (A)).

(*African Farms* has been cited by the courts of Australia, Bermuda, the Cayman Islands, Ireland, Jersey, New Zealand and the United Kingdom, Omar “Judicial Co-operation in International Insolvency – Swings and Roundabouts” 22 August 2014. It is also mentioned often by Smart *Cross-Border Insolvency* 2ed (1998) 85, 86, 183, 186, 212, 223 and 393.)

In *Singularis*, Lord Collins stated the only other feature of *African Farms* that he considered relevant. Questions of mortgage or preference were to be controlled by Transvaal law as if the company had been wound up in the Transvaal. He remarked (par 56):

“[It] is not stated how that was to be achieved, but it is significant that Innes CJ said, at p 382: ‘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’. 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.”

Lord Collins criticised Kawaley CJ’s approach in directly applying section 195 to the present facts by analogy (par 61). This judicial creation of law was impermissible. Courts might develop the common law interstitially (see, eg, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 378 per Lord Goff). Lord Sumption was developing the law in the present case (*Singularis* par 69). (Thus, it seems that the analogical application of s 195 in *Singularis* did not qualify as interstitial development of the correct kind.)

However, Lord Collins rejected the JOLs’ “very much more radical” argument that a statute should be applied by analogy: that even though its wording did not apply, it should be applied “as if” it did (par 78). This view reminded Lord Collins of what used to be meant by “the equity of a statute” (par 79). Today the phrase only meant the interpretation of a statute “by reference to its purpose or the mischief which it was designed to cure” (*Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73 88). Its previous meaning had been “relegated to the limbo of legal antiquities” (Lloyd “The Equity of a Statute” 1909 58 *U Pa LR* 76). This was that, as Coke CJ had stated,

“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, par 21 (1628); and Lloyd 1909 58 *U Pa LR* 79).

To explain the idea, Lord Collins (par 81) relied on the words of Burrows:

“Under that approach the courts regarded themselves as free to enlarge a statute so as to apply it to situations that were not covered by the words of the statute but were regarded by the courts as within its spirit and analogous”

(“The Relationship between Common Law and Statute in the Law of Obligations” 2012 128 *LQR* 232 241–242; and Atiyah “Common Law and Statute Law” 1985 48 *MLR* 1 7–8).

This notion, doubted in the 1700s, had vanished by the early 1800s. Since then, courts “were no longer able in effect to exercise a direct legislative function” (Lord Collins in *Singularis* par 81).

Section 195 expressly governed Bermudian companies. The JOLs argued that it should be applied to foreign companies as though they were Bermudian. However, this contention was “wrong in principle”. It also ignored the “established relationship between the judiciary and the legislature” (Lord Collins par 82–83).

Cambridge Gas did not support applying the Bermudian statute analogously. Lord Hoffmann had held that the Manx court should assist by “doing whatever it could” in a local insolvency. Recognising the foreign office-holders would “give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum” (*Cambridge Gas* par 22; and *Singularis* par 90). Those office-holders “*could have achieved*” the objectives of the United States Chapter 11 plan through a Manx scheme of arrangement (s 152 of the Companies Act 1931; and *Singularis* par 92, Lord Collins’s emphasis). Lord Hoffmann “had 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” (*Singularis* par 92). In *Singularis*, Lord Collins explained why not. The Manx statute required meetings and resolutions to approve these schemes of arrangement. The analogous application of the statute was possible only if the statute stated how to relax those procedures (par 93). It did not. The relevant portions of Lord Hoffmann’s judgment were thus incorrect. So, too, were the cases relying on them: *In re Phoenix Kapitaldienst GmbH* ([2013] Ch 61), *Picard v Primeo Fund* Grand Court of the Cayman Islands (Financial Services Division) (unreported 2013-01-14 Cause no: FSD 275 OF 2010-AJJ Jones J), and Kawaley CJ’s *Singularis* decision.

The JOLs’ argument also conflicted with Lord Walker’s *Al Sabah* ruling (par 35; and *Singularis* par 104). In that case, Lord Walker had held that the Cayman Grand Court lacked “inherent jurisdiction to exercise the extraordinary powers conferred by [section 107 of the Cayman Bankruptcy Law] in circumstances *not falling within the terms of that section*” (*Singularis* par 106, Lord Collins’s emphasis). This ruling was preferable to Lord Hoffmann’s in *Cambridge Gas* on this point (par 107). (Lord Collins did not refer to *Moolman*. One infers that he rejected some of its reasoning, for he considered the analogical application of statute “unsustainable” (*Singularis* par 143 per Lord Mance).)

3.3 Lord Mance’s minority judgment

In part of his judgment, Lord Mance discussed the argument that the JOLs would find it useful to examine PwC, its officers, and its documents (par 128ff). The power sought here was broader and more stringent than the one in *Norwich Pharmacal*. This one applied to any person, even if not the

company's office-holders or agents. People would have to produce information and answer questions if this power did not infringe domestic law or policy (par 130). The purpose would be to find assets and overcome difficulties that were created by the territorial limits on the international winding-up of a company (par 131).

In discussing the scope of this power, Lord Mance mentioned *African Farms*. This case had formed the basis for advancing the principle of modified universalism in English law over the previous 20 years (par 132). Under this principle, a domestic court recognised the foreign liquidator's power to dispose of assets and prevented the local disposition or seizure of these assets in conflict with the foreign winding-up. In *African Farms*, there had been no power to wind up the company locally. The advance in this case "went a step further", Lord Mance held, such as the previous cooperation in *In re Matheson Bros Ltd* ((1884) LR 27 Ch D 225). There the local court did have the power to wind up the company. (Note that the Transvaal court's power of winding-up a foreign company had already been confirmed in *Donaldson v British South African Asphalte and Manufacturing Co Ltd* 1905 TS 753. The company in *Donaldson* had enough members. But the court still rejected a local winding-up as inconvenient.)

Modified universalism, Lord Mance continued, might also justify remitting local assets to a foreign liquidator (*Singularis* par 133), under a statutory power to do so, even if the foreign order of preference differed from the English one. Further rulings in *HIH* on a common-law power were *obiter dicta*.

Lord Mance discussed (par 134) proposition 1 in *Cambridge Gas*. This was merely that the "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 *Al Sabah* (par 35), Lord Walker had mentioned the Cayman court's possible "limited inherent power" to assist the Bahamian liquidation. However, he had explained the restrictions on this assistance. It did not allow the Cayman court to impeach a disposition "modelled on" Cayman legislation that applied to a Cayman winding-up, when that Cayman statute did not expressly relate to a Bahamian winding-up.

Lord Sumption in *Singularis* had said that the principle of modified universalism, thus restricted, could support "(or would be 'an empty formula' without) the assumption or exercise" of such a common-law power. Lord Mance disagreed (par 135). To recognise this power was "a step leap" from recognising the right to identifiable property that fell within the scope of the principle of modified universalism.

The alleged power had considerable implications. Lord Mance explained (par 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."

To grant this power to foreign liquidators in a compulsory liquidation seemed unwarranted, a special dispensation not enjoyed by many others such as creditors and litigants. It was not clear why this power should be limited to foreign insolvencies. It might also be sought, although it did not exist in local insolvencies, and even in non-insolvency matters. These attempts might be encouraged by Lord Sumption's view that courts could create new remedies for requiring information if a well-justified policy seemed to require this.

Lord Mance held that remedies to compel production of information were restricted, protecting claims based on property rights or provable wrongdoing (par 137), claims that were not relevant to the JOLs' arguments here (par 138). Lord Mance disagreed with Lord Sumption's distinction between information and evidence, and between details of the company's property and the company's affairs (par 141–142). He also noted that the JOLs' sifting through the material might be weighing professional negligence claims against PwC.

Lord Mance considered that the JOLs had no "substantial authority" for the proposed common-law power (par 143). "The two first instance authorities cited by Lord Sumption", he held, "offer the weakest of encouragement for the novel jurisdiction now proposed". The first case was *Moolman*. (This was a decision by the Appellate Division, as the Supreme Court of Appeal was then named. It was not a decision at first instance. In fact, the decision at first instance had gone against the Transkei liquidator and the Transkei commissioner. For the local division had declined to recognise these appointments with a view to examining three named people in South Africa about payments to them shortly before the company's winding-up (*Ex parte Moolman NO: In re Builders and Developers (Pty) Ltd (in Provisional Liquidation) (Jooste Intervening)* 1989 (4) SA 253 (SE)). The views of the court *a quo* were closer to those of Lord Mance in *Singularis* in that it was held that the foreign insolvency representative could by comity retrieve local assets but that "there is no basis for affording him other powers or functions which he may have within the area of jurisdiction of the country in which he was appointed" (262). Compare also the argument of counsel for Jooste in the appeal case (*Moolman* 960), which was rejected by that court.)

Lord Mance held (par 143) that the *Moolman* (appeal) court had regarded

"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 [of [1989] ZASCA 171 <http://www.saflii.org/za/cases/ZASCA/1989/171.html> (accessed 2015-09-18)]. That I agree with Lord Sumption and Lord Collins [in *Singularis*] is not a sustainable approach".

(It is submitted that this summary of the *Moolman* appeal judgment omits Hefer JA's, further reasons why comity and convenience justified assisting the appellant liquidator (*Moolman* 961).)

The second case that Lord Mance mentioned in *Singularis* (par 144) was *Impex*. Lord Mance criticised the unrestricted scope of the power recognised by Deemster Doyle, and his willingness to grant a court order regarding Manx information, documentation and evidence. (*Singularis* has restricted

this judge's approach to cross-border matters. See Killip "Insolvency Update: Has the Privy Council Turned the Isle of Man Chief Justice into a Timorous Soul?" 10 February 2015 <http://www.dq.im/news/insolvency-update-has-the-privy-council-turned-the-isle-of-mans-chief-justice-into-a-timorous-soul> (accessed 2015-09-18). Caution is also noticeable in *Re Petroplus Finance 2 Ltd* [2014] Bda LR 107 par 11, where Kawaley CJ, following *Singularis*, held that an existing committee of inspection had no legal authority to authorise liquidators to exercise powers as a properly constituted committee of inspection could, because this step would amount to the court's legislating from the bench.)

Lord Mance was not convinced (*Singularis* par 145) by the case citations in *Rubin* par 33. For counsel and the Board in *Rubin* had not analysed the "differences between them, or between situations where identifiable assets were in issue and other situations". Lord Mance also mentioned that Lord Sumption declined to accept "all of the reasoning" in *Moolman* and *Impex*, especially the notion of the analogical application of statutory powers (par 146).

All this left the scope of the proposed common-law power uncertain (par 147). It was unwise to develop the current common-law categories — the possession of the company's property, the commission of wrongdoing, or the innocent involvement in another's wrongdoing. The general power now sought went beyond what was needed, allowable or proper.

3 4 Lord Neuberger's dissenting judgment

Lord Neuberger held that as the Board members had all said no to the second issue, it was unnecessary to decide whether the common-law power existed. He was reluctant to venture a view on this, but if he had to do so, he would agree with Lord Mance (par 151–156). As it had proved difficult for the highest courts to give clear and consistent advice on liquidators' non-statutory powers, a decision on a "relatively minimalist basis" was preferable to a wide statement of a power that "could lead to all sorts of problems and uncertainties" (par 155). Among Lord Neuberger's concerns were that restricting this power to foreign liquidators seemed unfair if the power were not also conferred on others running solvent companies being wound up on the just and equitable ground (par 158), and that the restriction was also unfair to voluntary liquidations and administration. Further, the application of this power required drawing fine distinctions more typical of a statute than judge-made law (pars 159–160). Making law in this way also seemed an unjustifiable assumption of power by the court in cross-border insolvency law, a field provided for in domestic statute and international convention (par 161).

4 Further comments

The common-law principle of modified universalism continues in the United Kingdom, Bermuda and the Cayman Islands. However, the *Rubin-Singularis* version is regarded as "more threadbare" than the *Cambridge Gas-HIH* one (see, eg, Smith and Armshaw <http://www.pinsentmasons.com/PDF/page>

turner/RestructuringBusinessMagazine/Spring_2015/index.html#15 15; and Isaacs and Shaw “The Slender Thread of Modified Universalism after *Singularis*” 2015 2 JIBFL 74 76). It is the “bones of modified universalism” (Arnold “Anti-Suit Injunctions to Protect the Insolvency Process” 2015 28(2) *Insolv Int* 17 20). *Rubin* and *Singularis* were “setbacks” for foreign office-holders. Lord Neuberger even compared the *Cambridge Gas-HIH* version with the Cheshire Cat, saying that its “deceptively benevolent smile still appears to linger” (par 157), and was relied on as the basis of the power sought in *Singularis*.

Impeachment of dispositions under this common law of cross-border insolvency has been narrowed (Milman “Facilitating Recovery and Avoidance Claims by Insolvency Office-holders: New Directions?” 2015 Co LN 1 4).

The *Singularis* development of common-law cross-border insolvency has restricted application (Hertz “Busy Last Year, Busy This Year?” 2015 28(2) *Insolv Int* 31 32). Foreign courts “cannot do whatever could have been done in the domestic court”. Nor can they help attain what local courts cannot.

It is noteworthy that the English voluntary winding-up in *African Farms* would not have satisfied Lord Sumption’s first restriction on the *Singularis* principle of assisting a foreign liquidator (see the passage quoted from Lord Hoffmann’s *Cambridge Gas* judgment). Lord Sumption does not seem to have considered and agreed with Innes CJ’s, judgment (378–379), on the recognition and assistance of an English voluntary winding-up under the law of the Cape, Natal and the Transvaal. In addition, Lord Sumption described a voluntary winding-up as “essentially a private arrangement”. This view is considered incomprehensible (Arnold 2015 28(2) *Insolv Int* 20), “an unfortunate error” (Moss and Fletcher 2015 28(4) *Insolv Int* 51 fn 8). The court may still supervise this “formal statutory procedure”, and the law regulates the insolvency practitioner like the liquidator in a compulsory winding-up. Even the comparable section 417 of the Companies Act 1973 in South Africa may be applied to a creditors’ voluntary winding-up converted into a winding-up by the court (s 346(1)(e)), or if the court is approached for permission to hold an inquiry (*Michelin Tyre Co (South Africa) (Pty) Ltd v Janse van Rensburg* 2002 (5) SA 239 (SCA)).

In *Saad*, Kawaley CJ, pointed out that Lord Collins had approved Innes CJ’s *African Farms* ruling about “active assistance” and mentioned *Impex* as “a case of judicial assistance in the traditional sense” (*Rubin* par 33; and *Saad* par 33). It is submitted that, if Lord Collins’s terse reference in *Rubin* par 31 to “orders for examination in support of the foreign proceedings” is read on its own, these words could be interpreted as in effect covering the facts of *Moolman*. On this reading, the authority of *Rubin* authority may thus be added to *Moolman* and *Impex* mentioned by Lord Mance (*Singularis* par 143).

An important feature of *Singularis* is the discussion of the point that in *African Farms* and *Moolman* the local court was prepared to assist the foreign liquidator who did not meet the requirements of the local statute. In dealing with the direct application of section 195 to the facts, Kawaley CJ, remarked that the full bench’s final order in *African Farms* “was clearly premised on the application of the local insolvency statute” (*Saad* par 59).

Innes CJ, had also “expressly rejected the notion that foreign laws could not be recognised, or given effect to because local law was not identical” (par 62). And by referring to Smith J’s, findings on recognising and enforcing rights acquired under foreign law, Kawaley CJ, held that this recognition was warranted by analogy with recognising foreign bankruptcy orders and judgments in general (par 64). This led him eventually to find that the local court in the present case had been “domesticating” the foreign appointment order, thus declaring that the foreign liquidator had the status that he would have in the primary winding-up under private international law rules, and that this liquidator’s “main function of seeking recognition [...] was to enable [him] to act as a liquidator within the jurisdiction of the assisting court” (par 67 (original emphasis)). And so the recognition activated the general Bermudian law “and its statutory insolvency regime” in so far as the insolvency representative or those the recognition order affected might rely on it, while not infringing the purpose of the statute or local public policy (par 68). Kawaley CJ, was conscious of PwC’s argument against legislating from the bench, but he still queried whether it could prevent the flexible common-law recognition and assistance of foreign liquidators in *African Farms*, as generally approved in *Cambridge Gas* and *Rubin* (Saad par 71). Local insolvency statute law could be applied in assisting a foreign liquidator at common law under the established private international law rule that procedure and remedies were determined according to the law of the court hearing the matter (the *lex fori*). This determined “what property of the defendant is available to satisfy the judgment and in what order” (Rule 17 in Dicey and Morris (Collins gen ed) *The Conflict of Laws* 12ed (1993) 171–172). Kawaley CJ, thought (Saad par 72) that

“perhaps the proper question to ask is not whether the local statute can be deployed in aid of the foreign liquidator (i.e., at his request), but whether or not once a foreign liquidator is recognised that local statutory insolvency regime is potentially engaged depending on the precise nature and implications of the form of assistance which is sought?”

also that in *African Farms*

“[in] essence, the court applied local law in defining the scope of relief which the foreign liquidator could obtain in compliance with the applicable conflict of law rule”.

It is submitted that, although Lord Collins held that *African Farms* did not support the analogous application of the Transvaal law, it should be noted that order 1(d) expressly applied the Transvaal law to the facts, even though the company did not qualify to be wound up as a company under the Transvaal statute. The wording of this order itself is the authority that the terms of the statute were applied as if there were a winding-up under the Law on the Liquidation of Companies 1894. This becomes clear from the wording of the statute. Thus, for example, section 14 required the liquidators of a company to draw up a statement-and-balance sheet of the company’s estate, including the proceeds of all sales and debts thus far recovered, and an inventory of all goods and effects still unsold. The liquidators also had to compile a plan of distribution of the estate effects, stating, first, “such creditors as according to law [were] preferent in the order of their legal preference and, secondly, the concurrent creditors and the balance that

[remained] over for division among them” (Barber, MacFadyen and Findlay *Statute Law* 461). Objections to the approval of the accounts, and objections to the distribution plan, were governed by the Insolvency Ordinance Law 21 of 1880 (s 16–17 of the Law on the Liquidation of Companies 1894). It is submitted that this order 1(d) still reflected the application of the statutory provisions as if they applied the facts of the case, even though the facts fell outside the express wording of the statute. (Compare the remark by Moss and Fletcher 2015 28(4) *Insolv Int* 53, on the common-law power and the provisions of s 236 of the Insolvency Act 1986.) So the words “as if” already formed part of the court order of the full bench of this court and thus the conclusion of the reasoning of the court.

The application of the law, including the statute law, on an “as if” basis is clear from the order in *Moolman*. The passage from subparagraph (d) of the rule *nisi* in *Moolman* to which the members of the Board in *Singularis* referred with disapproval, did contain the wording that the various rights under the Insolvency Act 24 of 1936, read with the Companies Act 1973 concerning different aspects “shall, until this order is amended, *mutatis mutandis*, exist in relation to the said administration as if the said Acts applied thereto, pursuant to a provisional winding-up order granted by this Court [the South-Eastern Cape Local Division] on 8 October 1987” (see *Moolman* 957–958, read with 962). *Moolman* concerned the winding-up of a company. A similarly worded order was granted in *Ex parte Steyn* (1979 (2) SA 309 (O) 311–312), applying the Insolvency Act 1936 to the relevant administration *mutatis mutandis* as if the Act applied in terms of a sequestration order, granted by the Orange Free State court on 14 December 1978.

One benefit of *Singularis* for South African lawyers is the comprehension and confirmation that in *African Farms* and *Moolman*, the statutory provisions were applied to the facts as if a local winding-up order had been granted, even though no such order had in fact been granted or could be granted, by the assisting court. It is to the advantage of South African law and to those foreign representatives who seek assistance from the South African courts that this application of the statute by analogy still forms a recognised part of the approach to cross-border insolvency law. For, by contrast, in those courts that follow *Singularis*, as Isaacs and Shaw remark (76) in regard to the disapproval of the “as if” approach, the “most potent weapon available to the court to assist at common law has thus been removed”. It is submitted that this feature of the law of cross-border insolvency in South African law thus provides an illustration of the expansive interpretation of the Insolvency Act 1936 and the Companies Act 1973, in that they are thus applied by analogy, even where on a strict interpretation of the statute, they may not apply to the facts of the case.

South African courts may therefore avoid making the mistake identified by Moss and Fletcher (2015 28(4) *Insolv Int* 54) in *Singularis* of ignoring precedent since *African Farms* that

“supported a general discretion to assist foreign insolvency proceedings either ‘as if’ they were domestic insolvency proceedings or by analogy to them. That is the only basis on which effective assistance can actually be given. It is already used by the [Cross-Border Insolvency Regulations 2006 (SI 2006/1030) in the United Kingdom and the UNCITRAL Model Law on Cross-

border Insolvency 1997] and is therefore a familiar aspect of the current 'best practice' approach to the application of the principle of modified universalism".

The United Kingdom parliamentary approval of this approach, Moss and Fletcher continue, thus runs counter to Lord Collins's concern that the analogical application of the statute "as if" the insolvency were local, would unconstitutionally blur the distinction between judges and legislators.

Furthermore, Moss and Fletcher explain that, in some instances, forum shopping may be a good thing, benefiting the general body of creditors (2015 28(4) *Insolv Int* 52, citing Advocate General Colomer's opinions in *Staubitz-Schreiber* (C-1/04) [2006] ECR I-701; [2006] BCC 639; and *Seagon v Deko Marty Belgium NV* (C-339/07) [2009] 1 WLR 2168, that European Union "law combats opportunistic and fraudulent choices of jurisdiction and not 'forum shopping' per se"). In *Singularis*, the JOLs sought help from the court, where PwC was registered, and so "it is difficult to see", say Moss and Fletcher (2015 28(4) *Insolv Int* 52), "how it is improper forum shopping to go to a defendant's home state and seek precisely the documents and information available from the defendant in its own home state under its own law". (In this respect, a comparison may be drawn with Hefer JA's, observation on the respondents' position under local law in *Moolman* 961.) Further, it is observed that Lord Sumption's principle allows only the more restricted form of assistance as between the requesting court and the requested court. Moss and Fletcher object that it does not make sense to give "the foreign liquidator the worst of both worlds and the party with the needed information the best of both worlds" (2015 28(4) *Insolv Int* 51). The position is different in South African law, where the foreign liquidators in *African Farms* and *Moolman* were provided with assistance that was not available to them under local statute.

The important information from Chief Justice Smellie in his recent paper is that the *Singularis* matter could have been handled more effectively, via another route. The chief justice explained how (<https://www.judicial.ky/wp-content/uploads/publications/papers/2015-04-21-ChiefJusticesPresentationatSanFranciscoINSOLJudicialColloquium.pdf> 26 fn 37):

"While an exactly comparable power to require the former auditors [PwC] to surrender their working papers was not available to the Cayman Court, a statutory power to require them to answer interrogatories and to attend with their working papers before the court to answer questions exists but appears not to have been explained to the Bermuda Court (nor therefore to the Privy Council). Had the liquidators sought a letter of request from the Cayman Court to the Bermuda Court (instead of relying upon the general powers given at the time of their appointment to apply to foreign courts) the Cayman statutory power would likely have been explained in the letter of request and the outcome may well have been different."

The power to apply to the Cayman court to question the auditors was set out in section 103(3)(a), read with section 103(5)(a)–(c) of the Cayman Companies Law (see now the 2013 Revision). And section 103(7) stated the court's jurisdiction to make an order against a non-resident and "to issue a letter of request for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person resident outside the jurisdiction".

This guidance from the Chief Justice of the Cayman Islands shows how letters of request from court to court in different countries may still have a useful role to play in cross-border insolvency law. It underscores how important it is for South African lawyers who seek to unearth property abroad to proceed by way of letters of request from the South African court (which should be persuaded to follow the more relaxed Cape approach of *Gardener v Walters NNO: In re Ex parte Walters NNO* 2002 (5) SA 796 (C) 810–811 rather than the stringent Free State approach of *Ex parte Wessels and Venter NNO: In re Pyke-Nott's Insolvent Estate* 1996 (2) SA 677 (O) 680–681), and also to rely as far as possible on any available statute, statutory powers, and statutory machinery in the relevant foreign country or countries, rather than being left to the narrow common-law confines of the *Singularis* principle in those countries where this decision is of binding or even persuasive authority. So, for example, in the United Kingdom, South African lawyers may rely on section 426 of the Insolvency Act 1986 since South Africa is a relevant country (Cooperation of Insolvency Courts (Designation of Relevant Countries) Order 1996 SI 1996/253 Sched art 2; compare Lord Collins in *Singularis* par 47–48; and *England v Smith* [2001] Ch 419 (CA)). Alternatively, they may rely on the Cross-Border Insolvency Regulations 2006, the United Kingdom's version of the UNCITRAL Model Law on Cross-Border Insolvency.

In the Cayman Islands, there are provisions for the registration of overseas companies (Part IX of the Companies Law (2013 Revision)). There are also provisions for international cooperation (Part XVII). Thus, if a foreign representative of a debtor (defined as “a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established” (s 240) applies to the Cayman court, it may make an order ancillary to a foreign bankruptcy proceeding (including a proceeding to reorganise or rehabilitate the debtor) (s 241 read with s 240 svv “foreign bankruptcy proceeding”). Such a representative is “a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding” (s 240 svv “foreign representative”). The relief that may be granted in the ancillary order is for the recognition of that representative, the injunction of legal proceedings against the debtor, the stay of judgments, the examination of persons with information on the debtor's business affairs, or the production of documents to the representative, and the turnover of the debtor's property to the representative (s 241(1)(a)–(e)). The order for examination and production under section 241(1)(d) may be made only against the debtor or a relevant person under section 103. In exercising its discretion to grant an ancillary order, the court is to be

“guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with –

- (a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
- (b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
- (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

-
- (d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;
 - (e) the recognition and enforcement of security interests created by the debtor;
 - (f) the non-enforcement of foreign taxes, fines and penalties; and
 - (g) comity" (s 242(1)).

If the company is an overseas company registered under Part IX, the court must also consider winding-up its local branch (s 242(2)).

If the Cayman-registered company or overseas company is in a foreign bankruptcy proceeding, details thereof must be filed with the Registrar of Companies and published in the *Gazette* (s 243(1)). The relevant notice must be filed by the liquidator, or else its directors within 14 days of the proceeding commencing (s 243(2)). Failure to do so is an offence punishable by a \$10 000 fine (s 243(3)).

When South African lawyers apply to the South African court for letters of request to the foreign court or courts, it is important that the comprehensiveness of the provisions and machinery of the South African companies legislation and insolvency law should be set out clearly in the letters of request. This step will go some way to convincing the requested court that South African law is not so narrow that, on the *Singularis* principle at common law, the South African court could not grant an order equivalent to the order that the requested court could grant.

Alastair Smith
University of South Africa, Pretoria (UNISA)