

**CICA 1/2013 and 2/2013
(FSD: 275/2010-AJJ)**

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT
FINANCIAL SERVICES DIVISION**

BEFORE

**The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Rt Hon Sir Anthony Campbell, Justice of Appeal**

BETWEEN

**(1) IRVING H PICARD
(Trustee for the liquidation of Bernard L Madoff Investment Securities LLC)
(2) BERNARD L MADOFF INVESTMENT SECURITIES LLC
(in Securities Investment Protection Act liquidation)**

Plaintiffs

**Appellants in Appeal CICA 1/2013
Respondents to Appeal CICA 2/2013**

-and-

PRIMEO FUND (in official liquidation)

Defendant

**Respondent to Appeal CICA 1/2013
Appellant in Appeal 2/2013**

Mr Gabriel Moss QC with **Mr Stephen Robins** instructed by **John Harris** of Higgs & Johnson appeared for Irving H Picard (Trustee in the liquidation of Bernard L Madoff Investment Securities LLC) and Bernard L Madoff Investment Securities LLC (in Securities Protection Act liquidation), the Appellants in Appeal CICA 1/2013 and the Respondents to Appeal CICA 2/2013

Mr Michael Crystal QC with **Mr Peter Hayden** and **Mr Nicholas Fox** of Maurant Ozannes appeared for Primeo Fund, the Respondent to Appeal CICA 1/2013 and the Appellant in Appeal CICA 2/2013

Hearing: 7 and 8 November 2013

Delivered: 16 April 2014

INTERIM JUDGMENT

Sir John Chadwick, President:

1. These are an appeal and a cross-appeal from the determination of Justice Andrew Jones, in an order made on 14 January 2013, of preliminary issues raised by the parties in proceedings brought by the Trustee for the liquidation of Bernard L Madoff Investment Securities LLC (the "Trustee") and Bernard L Madoff Investment Securities LLC (in Securities Investment Protection Act liquidation) against Primeo Fund (in official liquidation) (the "Fund").

The underlying facts

2. Bernard L Madoff Investment Securities LLC ("BLMIS") is a limited liability company incorporated under the laws of New York. At all material times it was owned and controlled by Bernard L Madoff. On 15 December 2008 the Securities Investor Protection Corporation ("SIPC") filed an application in the District Court for the commencement of liquidation proceedings in respect of BLMIS. On the same day the judge of that Court made an order appointing Irving H Picard as trustee in the liquidation of BLMIS; and transferred the case to the United States Bankruptcy Court for the Southern District of New York.
3. Primeo Fund was incorporated in the Cayman Islands on 18 November 1993 and commenced business as an open ended investment fund, under the Mutual Funds Law, on 1 January 1994. The Fund operated at least two sub-funds, Primeo Select and Primeo Executive. Primeo Select invested exclusively, or almost exclusively, with BLMIS. Primeo Executive invested in Primeo Select; and in two other funds, Alpha Prime Fund Limited ("Alpha") and Herald USA Segregated Portfolio One Fund, the single portfolio in Herald Fund SPC ("Herald"). Alpha and Herald invested exclusively with BLMIS. Following a restructuring on 25 April 2007, Primeo Select exchanged all its direct investments with BLMIS for shares in Herald. Thereafter Primeo Select and Primeo Executive invested exclusively in Alpha and Herald; and so, indirectly, in BLMIS. On 23 January 2009 Primeo Fund resolved to be wound up voluntarily. James Cleaver and Richard Fogerty, insolvency practitioners, were appointed as joint voluntary liquidators of the Fund. On 8 April 2009 the Grand Court made an order that the voluntary liquidation should continue under the supervision of the Court; and Mr Cleaver and Mr Fogerty were appointed Joint Official Liquidators.
4. On 5 February 2010 Justice Jones made an order under section 241(1)(a) of the Companies Law (the "Recognition Order") recognizing the right of the Trustee to act

in this jurisdiction on behalf of BLMIS. On 9 December 2010 the Trustee commenced these proceedings in the Grand Court seeking to recover some US\$145 million which, it is said, the Fund had received from BLMIS prior to June 2007 (“Direct Transfers”) and any further funds received by the Fund from BLMIS through intermediary feeder funds (Alpha and Herald) following the restructuring (“Indirect Transfers”).

The Trustee’s claims in these proceedings

5. The statement of claim in these proceedings advances, on behalf of customers and creditors of BLMIS, transaction avoidance claims under two principal heads (so far as now material):

(1) Claims founded on transaction avoidance provisions of United States bankruptcy law; including, in particular (a) immediate transferee claims under section 548 of the U.S. Bankruptcy Code (two-year fraudulent transfers), (b) transferee claims under the New York Debtor and Creditor Law and other applicable law (six-year fraudulent transfers), (c) subsequent transferee claims to recover payments avoided under section 547 and 550 of the U.S. Bankruptcy Code (90-day preference payments) and (d) subsequent transferee claims to recover payments avoided under sections 548 and 550 of the U.S. Bankruptcy Code (two-year fraudulent transfers). These claims are pleaded in section VI of the statement of claim.

(2) Claims founded on section 145 of the Companies Law (or on equivalent common law rules) to set aside, as preferences, transfers in the total sum of US\$588 million or thereabouts which were made within six months immediately preceding the commencement of the liquidation (“the six-month payments”). Those claims, which are made in reliance on section 241 of the Companies Law and/or the common law, are set out in section X of the statement of claim.

The preliminary issues

6. On 19 January 2011 the judge ordered preliminary issues of law to be tried. Those preliminary issues included, so far as material on these appeals:

(1) Whether the Court has jurisdiction to apply transaction avoidance provisions under U.S. insolvency law under section 241 and/or section 242 of the Companies and/or at common law (“Preliminary Issue 1”) .

(2) Whether the Court has jurisdiction to apply transaction avoidance provisions of Cayman Islands insolvency law in aid of a foreign insolvency proceeding as a matter of common law or under sections 241 and 242 of the Companies Law (“Preliminary Issue 2”).

7. The judge determined the first of those issues against the Trustee. In his order of 14 January 2013 he declared, on Preliminary Issue 1, that the Grand Court was not able to apply U.S. insolvency law under section 241 and/or section 242 of the Companies Law or at common law. Accordingly, he ordered that section VI of the Statement of Claim be struck out as disclosing no reasonable cause of action.
8. The judge determined the second of those issues against the Fund. In his order of 14 January 2013 he declared, on Preliminary Issue 2, (i) that the Grand Court did have jurisdiction at common law to apply avoidance provisions of Cayman Islands insolvency law in aid of a foreign insolvency proceedings, irrespective of whether the Grand Court would have jurisdiction under section 91 of the Companies Law to make a winding up order in respect of the foreign company in question; but (ii) that the Grand Court did not have jurisdiction under sections 241 and 242 of the Companies Law to apply avoidance provisions of Cayman Islands insolvency law in aid of a foreign insolvency proceeding.

These appeals

9. The Trustee filed Notice of Appeal on 25 January 2013 (under reference CICA 1/2013) seeking orders declaring (i), on Preliminary Issue 1, that the Court in this jurisdiction is able to apply U.S. Bankruptcy Law under sections 241 and 242 of the Companies Law and (ii), on Preliminary Issue 2, that the Court has jurisdiction under sections 241 and 242 of the Companies Law to apply avoidance provisions of Cayman Islands’ insolvency law in aid of a foreign insolvency proceeding. The Trustee’s Memorandum of Grounds of Appeal was filed on 9 August 2013.
10. The Fund also filed Notice of Appeal on 25 January 2013 (under reference CICA 2/2013). By that Notice the Fund sought orders declaring, on Preliminary issue 2, (i) that the Court does not have jurisdiction at common law to apply avoidance provisions of Cayman Islands’ insolvency law in aid of a foreign insolvency proceeding, or, in the alternative, (ii) that the Court does have jurisdiction at common

law to apply avoidance provisions of Cayman Islands' insolvency law in aid of a foreign insolvency proceeding provided that the Court would have jurisdiction under section 91 of the Companies Law to make a winding up order in respect of the foreign company in question. The Fund's Memorandum of Grounds of Appeal was filed on 29 August 2013. On 11 September 2013 the Trustee filed a Respondents' Notice.

11. When the appeal and cross appeal came before this Court for hearing on 7 and 8 November 2013 it was common ground that there were three issues for determination:
 - (1) Whether the Court has jurisdiction under sections 241 and 242 of the Companies Law to apply transaction avoidance provisions of foreign insolvency law (and, in particular, provisions of U.S. Bankruptcy Law) in aid of foreign insolvency proceedings.
 - (2) Whether the Court has jurisdiction under sections 241 and 242 of the Companies Law to apply transaction avoidance provisions in Cayman Islands' insolvency legislation in aid of foreign insolvency proceedings.
 - (3) Whether the Court has jurisdiction at common law to apply transaction avoidance provisions in Cayman Islands' insolvency law in aid of a foreign insolvency proceeding; or, in the alternative, whether the Court has such jurisdiction but only in a case where it would have jurisdiction under section 91 of the Companies Law to make a winding up order in respect of the foreign company in question.
12. The oral arguments on the third of those issues were not completed in November 2013. It was necessary to adjourn the hearing for further argument. Further, the Court was informed, correctly, that an issue central to that third issue - whether observations by Lord Hoffman in *Cambridge Gas v Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 should be followed in the light of the subsequent comments of Lord Collins of Mapesbury in *Rubin v Eurofinance SA* [2012] UKSC 46 – was before the Court of Appeal in Bermuda and judgment was awaited. That judgment has subsequently been handed down, and (we understand) is the subject of an appeal shortly to be heard by the Judicial Committee of the Privy Council. In those circumstances this Court was invited to hand down an Interim Judgment which addresses only the first two issues.

Sections 241 and 242 of the Companies Law

13. Before addressing those issues it is convenient to set out the provisions of sections 241 and 242 of the Companies Law (2012 Revision). Those sections are found in Part XVII of the Law (International Co-operation). They should be read with section 240:

“240 In this Part –

‘debtor’ means a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established;

‘foreign bankruptcy proceeding’ includes proceedings for the purpose of reorganizing or rehabilitation an insolvent debtor; and

‘foreign representative’ means a trustee, liquidator or other official appointed in respect of a debtor for the purpose of a foreign bankruptcy proceeding.

241 (1) Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of-

- (a) recognizing the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;
- (b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- (c) staying the enforcement of any judgment against a debtor;
- (d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and
- (e) ordering a turnover to a foreign representative of any property belonging to a debtor.

(2) An ancillary order may only be made under subsection (1)(d) against-

- (a) the debtor itself; or
- (b) a person who was or is a relevant person as defined in section 103(1).

242 (1) In determining whether to make an ancillary order under section 241, the Court shall 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
- (e) comity.

(2) In the case of a debtor which is registered under Part IX, the Court shall not make an ancillary order under section 241 without also considering whether it should make a winding up order under Part V in respect of its local branch."

14. At paragraph 10 of his Ruling on Preliminary Submissions the judge set out the legislative history which led to the introduction into the laws of the Cayman Islands on 1 March 2009, by the Companies (Amendment) Law 2007, of the provisions now contained in Part XVII of the Companies Law (2012 Revision). He went on, at paragraph 13, to make some general observations about those provisions. He said this:

"First, Part XVII supplements and partially codifies the common law. It does not abolish the common law rules which continue to exist alongside the new statutory provision. Second, the statutory provision reflects the traditional English common law rule that this Court will recognize only the authority of a liquidator or trustee appointed under the law of the country of incorporation. (*Dicey, Morris & Collins, The Conflict of Laws*, 14th Ed. Para.30R-097). This contrasts with the approach reflected in the UNCITRAL Model Law which recognizes the courts of the country in which an insolvent company has its "centre of main interest" as being competent to exercise bankruptcy jurisdiction, which is not necessarily the country in which the company is incorporated. The Cayman Islands legislature chose not to adopt this model. This Court has no jurisdiction to provide judicial assistance under section 241 upon the application of a foreign representative of an insolvent company appointed by a court in any country other than the country of its incorporation. Third, the Recognition Order which I made under section 241(1)(a) has two related consequences. It constitutes recognition that the Trustee is the only person entitled to act as agent on behalf of BLMIS for the purpose of enforcing in this jurisdiction any cause of action belonging to the company. It also determined that the New York court is competent to exercise bankruptcy jurisdiction in respect of BLMIS and that the Trustee, as its appointed officeholder, is therefore entitled to seek the assistance of this Court pursuant to section 241 and/or at common law."

And he went on to say this (*ibid*):

"What I have to decide in this case is whether the scope of the assistance available to the Trustee, whether under section 241 or at common law, enables him to pursue transaction avoidance claims against Primeo and, if so, whether this Court should apply the substantive foreign law applicable in the New

York bankruptcy proceeding or the domestic law which would be applicable if a winding up order had been made against BLMIS in this jurisdiction.”

The judge’s approach to the jurisdiction conferred by sections 241 and 242 of the Companies Law

15. The judge found it convenient to address, first, the question whether the Court has jurisdiction under sections 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign insolvency proceedings; before addressing the question whether (if such jurisdiction was established) the applicable provisions were those of the foreign insolvency law or the law of the Cayman Islands.
16. He began to address the question whether the Court has jurisdiction to under sections 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign insolvency proceedings at paragraph 14 of his Ruling. After setting out the rival contentions advanced on behalf of the Fund (by Mr Michael Crystal QC) and the Trustee (by Mr Robin Dicker QC) he held that, on its true construction, section 241(1) was an exhaustive list of the Court’s statutory powers to grant ancillary relief in aid of foreign bankruptcy proceedings. In rejecting the submission of Mr Dicker on this point – that section 241(1) conferred a single, general, power to make orders ancillary to a foreign bankruptcy proceeding; and that paragraphs (a) to (e) merely described various purposes for which that single, general, power might be exercised – the judge said this:

“I do not accept this argument. It seems to me that paragraphs (a) to (e) describe *both* powers and the purposes for which they may be exercised. For example, the effect of paragraph (c) is that the Court may make an order staying the enforcement of any judgment against a debtor. It seems to me that the draftsman is identifying a power (in this case the power to make an order or injunction which is negative in effect) and describing the particular purpose for which it may be exercised (that is, to prevent enforcement of a judgment against an insolvent debtor). Paragraph (d) identifies a power to make an order or injunction which is mandatory in effect. It also describes the purpose for which it may be exercised, in this case requiring persons to give evidence and/or produce documents.”
17. The judge then turned to the question whether, on its true construction, paragraph (e) of section 241(1) - which provides that the Court may order “a turnover” to a foreign representative of any property belonging to a debtor – conferred a “power to make orders setting aside antecedent transactions and ordering the repayment of money to

the debtor”. After referring to “the obvious point” that a power to set aside antecedent transactions is an essential feature of any personal or corporate insolvency regime”, the judge observed (at paragraph 15 of his Ruling) that:

“... it would not have been surprising if the Legislature had included within section 241(1) a power to make orders for the purpose of setting aside preferential payments or the fraudulent dispositions of property comprised in a debtor’s estate. On the other hand, if this had been the Legislature’s intention, I think it is surprising that it is not stated expressly.”

18. The judge was invited by counsel for the Trustee to have regard to the legislative history as an aid to the construction of Part XVII of the Companies Law. He accepted that it was open to the Court to have regard to the Law Reform Commission’s Report *Review of the Corporate Insolvency Law and Recommendations for the Amendment of Part V of the Companies Law* dated 12 April 2006 (to which he had, himself, been a party) for the purpose of identifying the statutory objective and the mischief at which the provisions in Part XVII were directed. After setting out two of the points made in the executive summary – that:

- There is currently a considerable degree of cross-border co-operation in respect of insolvency matters, but the basis upon which this co-operation is afforded depends largely upon judicial practice.

and that:

- The Commission therefore recommends that the law relating to international co-operation in respect of insolvency matters be codified and included in a new Part [XVII] of the Companies Law.”

the judge went on to say this (at paragraph 16 of his Ruling):

“The Commission was clearly recommending “codification” rather than reform. The mischief appears to have been the absence of “black letter law”. The report itself is a very high level summary which does not contain any real analysis of the issues which must have been considered by the Commission. Section 17.3 merely recommends that this Court be given a statutory power to make ancillary orders and states that “The powers are set out in a proposed Part [XVII] of the Companies Law and are based upon the corresponding provisions of the United States Bankruptcy Code with which local practitioners are very familiar’. It does not even identify the “corresponding provisions.”

19. The judge accepted, also, that it would be open to the Court to have regard to what was said by the Attorney-General when introducing the Companies (Amendment) Bill to the Legislative Assembly for the purpose of identifying its legislative objective if

satisfied that the criteria described by the rule in *Pepper v Hart* [1993] AC 593 were met. But he went on to say this (*ibid*):

“Even if I did think that Part XVII of the Law, or any part of it, is ambiguous or obscure (which I do not), what the Attorney-General actually said in the Legislative Assembly would be of no real assistance. He merely said, ‘The powers set out in Part [XVII] are based upon the corresponding provisions of the United States Bankruptcy Code with which local practitioners are familiar.’ He said nothing more. He was merely repeating the statement in the Commission’s report without any explanation whatsoever.”

20. Nevertheless, the judge accepted, at paragraph 17 of his Ruling, that it was “reasonably apparent” from the language of sections 241 and 242 of the 2007 Amendment Law that the legislative draftsman must have paid some regard to section 304 of the US Bankruptcy Code, “notwithstanding that it had been repealed long before the bill was published”. He said this (at paragraph 17 of his Ruling):

“It seems to me that he looked to section 304 only because he was not intending to enact provisions based upon the UNCITRAL Model Law as was done by the United States in October 2005 (Chapter 15 of the Bankruptcy Code) and by the United Kingdom in April 2006 (the Cross-Border Insolvency Regulations). The obvious alternative model to which the Legislature might have looked for guidance is that reflected in section 426 of the UK Insolvency Act 1986. A key feature of this model is that the court is empowered to give assistance only in connection with insolvency proceedings pending in “designated countries”. The designated countries are limited to the British Overseas Territories and certain Commonwealth countries whose corporate insolvency laws are similar to or based directly upon the English law. The United States is not one of them. Rather than adopt this model, which would have depended upon the Governor in Cabinet to designate the countries whose courts could be assisted, the Legislature decided to give the Court a discretionary power to provide assistance provided that (a) the foreign bankruptcy proceeding is capable of recognition in accordance with the traditional common law rules and (b) the substantive law of the foreign proceeding is consistent with Cayman Islands policy objectives relating to the matters set out in section 242(1), including just treatment of all creditors, preferential or fraudulent dispositions and the recognition of security interests. Even if the foreign proceeding is recognized, as it has been in this case, this Court could still decline to provide assistance if the order sought by the Trustee would likely produce or contribute to an economic result which is inconsistent with the policy objectives of the Cayman Islands corporate insolvency law.”

That, in the judge’s view, was the extent to which it could be said that the Cayman Islands Legislature had had regard to a model reflected in section 304 of the U.S. Bankruptcy Code; which, as he pointed out, had been repealed and replaced with Chapter 15 by the time that the 2007 Amendment Law was enacted.

21. But the judge went on to address the submission, advanced on behalf of the Trustee, that, to the extent that the language of sections 241 and 242 of the Companies Law is the same or similar to that used in section 304 of the U.S. Bankruptcy Code, the Court should construe and apply the Cayman Islands law in the same way as the U.S. courts had construed and applied the U.S. legislation.
22. The judge observed that Mr Dicker (counsel for the Trustee) had relied upon the decision of Judge Buschman in *Re Metzeler*, 78 B.R. 674 (Bankr. SDNY 1987) as an authoritative statement of the way in which the U.S. courts had interpreted and applied section 304 of the U.S. Bankruptcy Code. The judge explained (at paragraph 18 of his Ruling) that that case concerned an ancillary petition filed in the New York Court by Mr. Friedrich Metzeler, who had been appointed by a German court as trustee of an insolvent German company. He said this:

“He [Mr Metzeler] sought an order for the recovery of \$508,952 as a preferential and fraudulent transfer. One of several issues was whether the trustee could rely upon the US law or was limited to reliance upon the German Bankruptcy Act. It was held that the US court would apply the foreign law. In the course of his judgment Buschman J referred to a decision of the US Supreme Court in *United States –v- Whiting Pools Inc*, 462 U.S. 198 FN10 and said –

‘To be sure, this analysis depends in large part on the *Whiting Pools* analysis that estate property includes property recoverable under § 547 and § 548, and we have held above that the voidability powers of a foreign representative and the nature of the foreign estate must be tested by foreign law. In this, there is no inconsistency. The term “property of the estate” employed in § 109(a) is to be construed according to the definition adopted in *Whiting Pools*. Although, *Whiting Pools* refers to transfer avoidable under §§ 547 and 548, our task is to construe § 304. That Congress provided for turnover actions in § 1410(b) is sufficient indication of its expectation that the concept applies to similar avoidance actions based on foreign law in light of the policies sought to be achieved. It thus seems clear that Congress intended that foreign preference and fraudulent transfer actions seeking to recover property located here are a sufficient basis on which to ground a § 304 petition and we so hold.’

23. The judge went on (*ibid*) to say this:

“It is clear that the expression “property of the estate” includes property recoverable under the avoidable transfer provisions and that the expression “turnover of the property of such estate” (as used in section 304) includes actions (referred to as “turnover actions”) to set aside antecedent preferential payments and fraudulent dispositions. Mr Dicker focuses on the use of the word “turnover” in section 241 and invites me give it an American meaning.

In my view, this is not an approach which I am entitled to adopt for two reasons. First, for the reasons which I have explained, there is no sufficient basis upon which I can properly infer that the Legislature intended that words and expressions used in Part XVII should be given the technical meanings which would likely be ascribed to them if those words had been used by the United States Congress in a statute relating to the same general subject-matter. I think that the Legislature merely looked to (the then repealed) section 304 of the US Bankruptcy Code as a general model which was thought to be more appropriate than the model reflected in section 426 of the UK Insolvency Act. Second, I should avoid falling into the error of focusing unduly on the single word “turnover” and failing to pay proper regard to the provision as a whole. Section 241(1)(e) empowers the Court to order “the turnover to a foreign representative of any property of the debtor”. Property of the debtor means property of the company, which is not the same thing as “property of the estate”.

24. He explained the “conceptual difference” between the “property of the debtor” and the “property of the estate” – which, he said, was perfectly clear and well understood by insolvency practitioners – in the next paragraph of his Ruling (paragraph 19):

“The expression ‘property of the debtor’ means the assets which are the property of a company at the time of the commencement of the liquidation and the property representing it, including rights of action which might have been pursued by the company itself prior to the liquidation. This contrasts with ‘property of the estate’ which means the assets available for distribution to the creditors in a company’s liquidation, including the rights of action which are available only to the official liquidator as a result of a winding up order having been made. An official liquidator’s right to pursue preference claims and the recoveries made are part of the ‘property of the estate’ available for distribution to creditors but not part of the ‘property of the debtor’ within the meaning of section 241(1)(e).”

And he went on to express the view that what the draftsman had in mind, when using the phrase “property of the debtor” in paragraph (e) of section 241(1), was a situation of the kind which arose in *Re Reserve International Liquidity Fund Ltd (In Liquidation)* (unreported, 1 April 2010). As he explained (*ibid*):

“[That] case concerned a company incorporated in the British Virgin Islands which carried on business as a money market daily liquidity fund. It got into financial difficulty as a result of the credit crunch in September 2008. Its directors believed that these difficulties could be overcome and resisted any form of liquidation or reorganization proceeding, but an unpaid creditor succeeded in persuading the High Court in the British Virgin Islands to make an order for its compulsory liquidation and the appointment of official liquidators. The company had \$10 million on deposit with each of the Cayman Islands branches of two well known banks. The official liquidators gave instructions for these funds to be transferred to an account in Tortola under their control. The company’s directors refused to recognize the liquidators’

authority and instructed the banks to transfer the funds to an account in New York which would be under their own control. This Court made an order under section 241(1)(a) recognizing the BVI official liquidators as the persons entitled to give instructions to the banks on behalf of the company.”

The facts in that case illustrated, the judge said, what is meant by “ordering the turnover to a foreign representative of property belong to the debtor”. It related to property belonging to a company prior to the commencement of its insolvent liquidation and did not include property which is recoverable only by an office holder pursuant to the transaction avoidance provisions of the applicable bankruptcy law. He went on to say that that interpretation was consistent, also, with the fact that Part XVII of the Companies Law provides foreign representatives with a simple procedural mechanism for obtaining various different kinds of ancillary relief in a single proceeding. Transaction avoidance and preference claims may give rise to complex legal and factual disputes which are best resolved in an action commenced by writ.

25. It followed, in the judge’s view, that the Trustee had no statutory right under section 241 of the Companies Law to pursue an action against the Fund for recovery of the Six Month Payments; or, it seems, any other pre-insolvency transfers.
26. The judge then turned to consider the question whether (if, contrary to his view, such statutory jurisdiction was established) the applicable provisions were those of foreign insolvency law or the law of the Cayman Islands. As he put it (at paragraph 20 of his Ruling) “I shall nevertheless go on to consider whether the foreign or domestic law would be the substantive law applicable in the event that it is subsequently held that the Trustee is entitled to pursue his claim under section 241.” He concluded (at paragraph 26 of his Ruling) that “if, and to the extent that, the Trustee is entitled to proceed under section 241 at all, on its true construction I think that section 241 requires the application of Cayman Islands law”.
27. In reaching that conclusion the judge addressed six submissions advanced on behalf of the Trustee in support of the contention that, if section 241 of the Companies Law applied, it would enable the Trustee to assert transaction avoidance claims based upon the United States law. Those submissions may be summarized as follows:
 - (1) That the concept of making “orders ancillary to a foreign bankruptcy proceeding” implies that the focus is on the foreign proceeding and the foreign law. The word “ancillary” means “subservient, subordinate and ministering to something else”.

- (2) That as a matter of principle the application of the foreign substantive law to transaction avoidance and preference claims is the logical choice because this is the law applicable to the distribution regime. It is said to be illogical to “mix and match” by applying the domestic law to avoidance issues when the distribution regime is governed by a foreign law.
- (3) That the application of foreign law is consistent with the reference in section 242(1)(c) to the “prevention of preferential or fraudulent dispositions of property comprised in a debtor’s estate”.
- (4) That the application of foreign law would be consistent with the reference in section 242(1)(c) to property comprised in the “debtor’s estate”. The exercise of this Court’s jurisdiction to make orders ancillary to a foreign bankruptcy proceeding does not result in the establishment of a separate parallel liquidation proceeding in this jurisdiction. Nor does it result in the creation of a separate local estate on a territorial basis. It follows that the “debtor’s estate” referred to in sub-section (1)(c) must mean the estate as defined and constituted under the foreign law.
- (5) That the reference to “comity” in Section 242(1) demands the application of foreign law.
- (6) That the legislative history of Part XVII of the Companies Law points to the conclusion that the Legislature must have intended this Court to apply the foreign substantive law when deciding whether to make ancillary orders under section 241 (with the exception of orders for evidence under section 241(1)(d) which can only be made against a “relevant person” as defined by Cayman Islands law).

28. The judge was not persuaded by those submissions, or any of them. As to the first - that the concept of making “orders ancillary to a foreign bankruptcy proceeding” implies that the focus is on the foreign proceeding and the foreign law – he said this (at paragraph 20 of his Ruling):

“... section 241 should be interpreted in the light of the amendments made to Part V and enacted at the same time. As I have already observed, section 91(1)(d) expressly empowers this Court to make winding up orders in respect of foreign companies and section 242(2) mandates that it must consider doing so before deciding to make any ancillary order if the company in question is registered under Part IX of the Companies Law. In these circumstances the Cayman Islands liquidation would be regarded as ‘ancillary’ to the foreign liquidation, but it is perfectly clear that a local liquidation proceeding can only be conducted in accordance with Part V of the Companies Law. I think that

Mr. Dicker is attempting to read too much into the use of the word ‘ancillary’”.

29. The judge accepted the apparent illogicality of applying the domestic law to avoidance issues when the distribution regime is governed by a foreign law. But he pointed out that that was the result at common law; and expressed the view that “if the Legislature intended to change the common law it would have said so expressly”.
30. The judge accepted that the reference in section 242(1)(c) of the Companies Law to the “prevention of preferential or fraudulent dispositions of property comprised in a debtor’s estate” was to dispositions taking place before the commencement of the foreign bankruptcy proceeding; and that it required that Part V of the Companies Law would be applied as if a local liquidation proceeding had commenced in respect of BLMIS on 15 December 2008, with the result that the “suspect period” was calculated back from this date. But he held that that requirement did not point to the conclusion that sections 241 and 242 of the Companies Law required the application of the foreign substantive law.
31. As to the fourth submission - that the application of foreign law would be consistent with the reference to in section 242(1)(c) of the Companies Law to property comprised in the “debtor’s estate” – the judge pointed out that he had already held that “the debtor’s estate” meant the property available for distribution to creditors including the proceeds of preference claims. He went on (at paragraph 22 of his Ruling) to say this:

“The exercise of this Court’s jurisdiction to make orders ancillary to a foreign bankruptcy proceeding does not result in the establishment of a separate parallel liquidation proceeding in this jurisdiction. Nor does it result in the creation of a separate local estate on a territorial basis. It follows that the “debtor’s estate” referred to in sub-section (1)(c) must mean the estate as defined and constituted under the foreign law. However, the purpose of an ancillary order is not to ensure the constitution of an estate in accordance with the foreign law in question. Its purpose is the more general one of assisting the foreign court to achieve an economic and expeditious administration of the estate in a manner consistent with Cayman Islands policy objectives in respect of the matters reflected in section 242(1). However, laws relating to the avoidance of antecedent transactions vary significantly from country to country and it could be said that mandating the application of a myriad of foreign laws would actually be *inconsistent* with this general objective.”

32. The judge referred to the concept of “comity” as explained by this Court in *HSH Cayman II GP Ltd –v- ABN Amro Bank NV* 2010 (1) CILR 375, adopting terms used by the US Supreme Court in *Hilton –v- Guyot* (1895) 159 US 113:

“Comity is the recognition which one nation allows within its territory to the legislative, executive and/or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons under the protection of its laws”.

He went on to say this (at paragraph 23 of his Ruling):

“What this means in the present context is that the courts of two countries can be expected to seek and grant assistance in corporate insolvency proceedings for the purpose of achieving commonly held policy objectives, notwithstanding that the application of their own laws to any given set of factual circumstances would not necessarily produce exactly the same or even a similar economic result. Both the US Bankruptcy Code and Part V of the Cayman Islands Companies Law recognize the need to set aside antecedent transactions in certain circumstances in order to achieve the policy objective of treating an insolvent company’s creditors equally, but the actual rules of law are materially different. In principle, comity enables this Court to lend its assistance to the New York proceeding notwithstanding that the application of the foreign versus the domestic law could produce materially different economic results. Adherence to the concept of comity does not necessarily mean that the New York court should be expected to apply Cayman Islands law or that the Cayman Islands court should be expected to apply United States law in any given set of circumstances. For these reasons I do not think that the requirement to have regard to comity implies that the Legislature intended applications for ancillary relief under section 241 to be governed by foreign law. The application of Cayman Islands law is entirely consistent with an adherence to comity.”

33. As to the sixth submission - that the legislative history of Part XVII, to which he had already referred, pointed to the conclusion that the Legislature must have intended this Court to apply the foreign substantive law when deciding whether to make ancillary orders under section 241 of the Companies Law – the judge acknowledged that Mr Dicker relied on the observations of Judge Buschman in *Re Metzeler* (supra) that “a foreign representative may assert under section 304 [of the U.S. Bankruptcy Code] only those avoiding powers vested in him by the law applicable to the foreign estate”.

But he went on (at paragraph 24 of his Ruling) to say this:

“For the reasons which I have already given, the fact that the US courts interpreted section 304 in this way does not lead me to infer that the Legislature intended this Court to interpret section 241 in the same way. If the Legislature had intended to abolish the common law rule (which applies the domestic law), it would have said so expressly.”

34. The judge referred, also, to the submission, advanced on behalf of the Trustee, that it was implicit in section 241(2)(b) of the Companies Law that, upon its true construction, the whole of section 241 required the application of the substantive foreign law. In rejecting that submission the judge said this (at paragraph 25 of his Ruling):”

“Sub-section (2)(b) says that an order for evidence can only be made against someone who is a “relevant person” within the meaning of section 103(1) of the Companies Law. This amounts to an express requirement to apply the substantive domestic law for this purpose, thereby implying, according to Mr. Dicker, that foreign law must be applicable in all other respects otherwise sub-section (2)(b) would have been unnecessary. The difficulty with this argument is that it suggests an intention to “mix and match” the application of both domestic and foreign law, which the Legislature is inherently unlikely to have intended. For example, this approach might lead to the conclusion that this Court must apply section 103(1) of the Companies Law for the purpose of identifying the target of an order for production of documents and at the same time apply the foreign law, rather than section 103(3)(b), for the purpose of defining the subject matter of the order. This is inherently unlikely. I think that the purpose of section 241(2)(b) is merely to emphasize that orders for evidence and production of documents will only be made against those whom the law regards as ‘insiders’”.

35. The judge concluded his consideration of the question whether (if, contrary to his view, statutory jurisdiction under sections 241 and 242 of the Companies Law was established) the applicable provisions were those of foreign insolvency law or the law of the Cayman Islands with the observation:

“This Court’s common law jurisdiction to provide assistance in respect of foreign corporate insolvency proceedings (whatever its scope) depends upon the application of the domestic law. If the Legislature had intended this rule to be abolished by the enactment of Part XVII, it would have said so expressly”.

The first and second issues for determination on these appeals

36. As I have said, the judge found it convenient to address, first, the question whether the Court has jurisdiction under sections 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign insolvency proceedings; before addressing the question whether (if such jurisdiction was established) the applicable provisions were those of the foreign insolvency law or the law of the Cayman Islands. I think he was right to take that course; and I shall do the same.

37. The Trustee places reliance on the provisions of section 304 of the U.S. Bankruptcy Code. It is necessary to have those provisions in mind:

“[304] (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial the court may:

- (1) enjoin the commencement or continuation of
 - (A) any action against (i) a debtor with respect to property involved in such foreign proceeding; or (ii) such property; or
 - (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
- (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
- (3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best ensure an economical and expeditious administration of such estate, consistent with:

- (1) just treatment of all holders of claims against or interests in such estate;
- (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
- (3) prevention of preferential or fraudulent dispositions of property of such estate;
- (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
- (5) comity; and
- (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.”

Section 304 of the Bankruptcy Code must be read with the definitions in section [101]:

“[101] In this title . . .

(13) “debtor” means person or municipality concerning which a case under this title has been commenced;

...

(23) “foreign proceeding” means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor’s domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization;

...

(24) “foreign representative” means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding . . .”

38. I start, therefore, with the question: does the Court have jurisdiction under sections 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign bankruptcy proceedings?

Does the Court have jurisdiction under sections 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign bankruptcy proceedings?

39. The Trustee contends that the Court does have such jurisdiction under those statutory provisions. The grounds upon which that contention is advanced are set out in the Trustee's Memorandum of Grounds of Appeal filed on 9 August 2013. They are developed in a skeleton argument filed on 24 September 2013, in a supplemental skeleton argument filed on 30 October 2013 and in oral submissions to the Court. They may, I think, fairly be summarized as follows:

- (1) It is said that the judge erred in holding that sub-paragraphs (a) to (e) of section 241(1) constitute an exhaustive list of the Court's powers; and that the Court's powers under section 241 are therefore cut down (or limited) by sub-paragraphs (a) to (e) of sub-section (1). It is said that the judge ought to have held that section 241(1) confers a wide power on the Court to make "orders ancillary to a foreign bankruptcy proceeding" for the purposes identified in sub-paragraphs (a) to (e) of sub-section (1); and that the power to make "orders ancillary to a foreign bankruptcy proceeding" enables the Court to make orders which are necessary to the achievement of the purposes described in sub-paragraphs (a) to (e).
- (2) It is said that the judge erred in holding that section 241 of the Companies Law is to be construed in a fundamentally different way from section 304 of the U.S. Bankruptcy Code, on which it is based. It is said that, although the judge accepted (i) that section 241 of the Companies Law is based on section 304 of the U.S. Bankruptcy Code, (ii) that section 304 of the U.S. Bankruptcy Code conferred jurisdiction on the U.S. courts to apply foreign insolvency law in respect of the reversal of antecedent transactions, (iii) that the Attorney-General explained to the Legislative Assembly that section 241 of the Companies Law contains "powers... based upon the corresponding provisions of the United States Bankruptcy Code", and (iv) that the Law Reform Commission's report described the proposed provision as being "based upon the corresponding provisions of the United States Bankruptcy Code with which local practitioners are very familiar", he failed to

appreciate that section 241 of the Companies Law must be construed in a manner consistent with section 304 of the U.S. Bankruptcy Code.

- (3) In particular, it is said that the judge erred in failing to attach sufficient weight to the fact that section 241 of the Companies Law adopts, without modification, a number of established technical terms of U.S. insolvency law, including the term “turnover” in section 241(1)(e). It is said that “turnover” is a word defined by the Supreme Court of the United States to include claims to avoid antecedent transactions, such as preferences. It is said that the deliberate use of language from section 304 of the US Bankruptcy Code “with which local practitioners are very familiar” meant that the new legislation (now in Part XVII of the Companies Law) would, in some respects, have material differences from the pre-existing common law and that these differences would be evident to local practitioners familiar with section 304 of the U.S. Bankruptcy Code.
- (4) Further, it is said that the judge erred in construing a provision and language taken from the U.S. Bankruptcy Code by reference to English statute and case law, which had not been used as the source or model for section 241 of the Companies Law. It is said that he ought to have held that the expression “property belonging to a debtor” in the turnover provision, section 241(1)(e), has the same meaning as “the property of such estate” in the equivalent turnover provision in section 304(2) of the US Bankruptcy Code.
- (5) In particular, it is said that the judge erred In holding that the reference to “property of the debtor” in section 241(1)(e) of the Companies Law is unconnected with the reconstitution of the debtor’s estate through the avoidance of antecedent transactions; and in holding that property which is recovered through the reversal of antecedent transactions will not be “property of the debtor” within the meaning of section 241(1)(e). It is said that the judge erred in holding that the Companies Law draws a distinction between “property of the debtor” and “property of the estate”; and that assets recovered through transaction avoidance claims would form part of the “property of the estate” but would not form part of the “property of the debtor”. It is said that he ought to have held that the Companies Law uses these terms interchangeably; and that “property belonging to a debtor” in section 246(1)(e) has the same meaning as “property comprised in the debtor’s estate” in section 242(1)(c).

(6) Further, it is said that the judge ought to have held that section 242(1)(c) of the Companies Law makes clear that sections 241 and 242 are concerned with the reversal of preferential and fraudulent dispositions; that assets recovered through the avoidance of antecedent transactions will be “property of the debtor” within section 241(1)(e); and that, accordingly, the Court’s power to make ancillary orders includes the power to make orders for the avoidance of antecedent transactions.

40. The submissions advanced on behalf of the Fund in relation to the question whether the Court has jurisdiction under sections 241 and 242 to apply transaction avoidance provisions (whether of foreign law or domestic law) were set out in its skeleton argument dated 25 September 2013 and were developed in oral argument. Those submissions may be summarized as follows:

- (1) Part XVII of the Companies Law, of which sections 241 and 242 form part, sets out a means by which the Court in this jurisdiction can provide assistance to the representative of a foreign company which is the subject of an insolvency proceeding in the place of its incorporation. The limitation of Part XVII to a foreign proceeding under the law of the place of incorporation reflects the common law rule that the Court will recognise only the authority of a liquidator or trustee appointed under the law of the place of incorporation.
- (2) The power to apply transaction avoidance provisions (whether domestic or foreign) in support of a foreign insolvency proceeding is not included in paragraphs (a) to (e) of section 241(1) of the Companies Law as one of the forms of relief which the Court may grant in aid of a foreign bankruptcy: the relief which may be granted does not include the setting aside of dispositions of the debtor’s property or the application of avoidance provisions, whether under the law of the Cayman Islands or under foreign law. In particular (i) paragraphs (a) to (e) are intended as an exhaustive statement of the forms of relief that may be granted and (ii) there is also no residual power equivalent to “other appropriate relief” (compare paragraph (b)(3) of section 304 of the US Bankruptcy Code). There is no basis for construing section 241(1) as conferring on the Grand Court an entirely general power to make any order which can be said to be ancillary to a foreign bankruptcy proceeding provided that the making of such order is a

necessary precursor to the achievement of any of the purposes specified in subparagraphs (a) to (e).

- (3) Section 242(1)(c) of the Companies Law provides no assistance for the Trustee's contentions. Notwithstanding that that section requires that, in determining whether to make an ancillary order under section 241, the Court shall be guided by matters which will best ensure an economic and expeditious administration of the debtor's estate consistent with, *inter alia*, "the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate", it does not extend the powers to make ancillary orders under section 241. The powers conferred on the Grand Court are set out in section 241: section 242 merely sets out matters relevant to the exercise of the discretion as to whether or not to exercise those powers. Further, it does not follow from section 242(1)(c) that section 241 is concerned with the reversal of antecedent transactions. Section 242(1)(c) refers to the prevention of preferential or fraudulent dispositions rather than their reversal. Moreover, the objective of the prevention of such dispositions may be achieved by exercise of those powers which are granted under section 241(1): in that (i) the grant of relief under section 241(1)(a) recognizing the title of the foreign officeholder to the debtor's property and the turn over of that property to the officeholder under section 241(e) and (ii) the making of other ancillary orders may prevent a fraudulent or preferential disposition (by facilitating proceedings for relief in the foreign bankruptcy court or any other appropriate foreign court or by ordering, the delivery up of documents or an examination under section 241(1)(d)).
- (4) The Trustee's reliance on subsection 241(1)(e) - which permits the Court to order "the turnover to a foreign representative of any property belonging to a debtor" - is misplaced, because based on a *non sequitur*. It does not follow that, in empowering the Court to turn over the debtor's property to a foreign officeholder, the legislature has necessarily empowered the Court also to apply avoidance provisions in order to recover assets. Had the legislature intended to confer on the Court power to apply avoidance provisions in support of a foreign insolvency it would have done so in express terms. The natural construction of section 241(1)(e) is that it permits a remission of assets to a foreign insolvency proceeding in the same way as is possible at common law.

(5) Section 241(1)(e) of the Companies Law applies only to the “property belonging to the debtor”. This does not include the proceeds of avoidance claims. There is a clear and long standing distinction under English law between the property of the debtor and statutory causes of action vested in an officeholder, the proceeds of which form part of the insolvent estate. In support of that proposition the Fund cited *In Re MC Bacon Ltd (No 2)* [1991] Ch 127, *Re Ayala Holdings Ltd (No. 2)* [1996] 1 BCLC 467 and *Re Oasis Merchandising Services Ltd* [1998] Ch 170 CA 467. The Companies Law adopts the same approach: section 145 applies only after the commencement of a winding up: following the reasoning in *Oasis*, the right of action in respect of a voidable preference and the fruits of such an action are not property of the company. Although section 140(1) of the Companies Law provides that “the property of the company shall be applied in satisfaction of its liabilities *pari passu*”; that does not assist the Trustee’s argument. In the context of section 140(1), “the property of the company” includes the proceeds of avoidance actions which have become part of the estate, which therefore fall to be distributed rateably amongst the creditors of the company. But it does not follow that the different term “property belonging to the debtor” in the different context of section 241(1)(e) bears the same meaning. The different language used in section 242(1)(e) shows that the term “property belonging to the debtor” was intended to bear a different meaning to the term “property of the company” in section 140(1). In particular, the word “belonging” shows that section 241(1)(e) identifies the relevant property by reference to the debtor’s ownership of that property: the same is not true of section 140(1) which does not use the word “belonging”.

41. It is, I think, common ground that the question whether the Court has jurisdiction under sections 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign bankruptcy proceedings turns on the true construction of those statutory provisions. That is to be determined in accordance with the principles of statutory construction applicable in this jurisdiction. Having set out the contentions of the parties at some length, I can state my own conclusions on this question shortly.
42. First, I think that the judge was correct to hold that section 241 of the Companies Law does not confer a general power on the Court to make such orders ancillary to a

foreign bankruptcy proceedings as it thinks fit. The power conferred by section 241 is to be exercised only for one or more of the purposes described in paragraphs (a) to (e) of subsection (1). The relevant question, therefore, is whether a power to make transaction avoidance orders - that is to say, orders setting aside pre-insolvency (or pre-liquidation) transactions on the grounds that they are fraudulent or preferential (in the sense understood by insolvency practitioners) – is a power which is exercisable for one or more of those purposes. There is no power “to order other appropriate relief” (contrast section 304(b)(3) of the U.S. Bankruptcy Code).

43. Second, section 242(1)(c) of the Companies Law – which requires that, in determining whether to make an ancillary order under section 241 the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor’s estate, consistent with “. . . the prevention of preferential or fraudulent dispositions of property comprised in the debtor’s estate” – is, I think, a clear indication that it was intended by the legislature that, in exercising the powers conferred by section 241(1), the Court would have regard to the need, in the context of the foreign bankruptcy proceeding, to avoid preferential or fraudulent dispositions. I accept that section 242(1)(c) does not add to the purposes for which orders ancillary to a foreign bankruptcy proceeding may be made under section 241(1) of the Law; but it does point to the conclusion that the legislature contemplated that orders made for those purposes would include orders which had the effect of preventing preferential or fraudulent dispositions of property comprised in the debtor’s estate.

44. Third, I am not persuaded that section 242(1)(c) of the Companies Law was included amongst “the matters which will best assure an economic and expeditious administration of the debtor’s estate” solely as a guide to the exercise of the power to make orders ancillary to a foreign bankruptcy proceeding for the purposes described in paragraphs (a) (recognizing the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor) or (d) (requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative) of section 241(1). The better view, as it seems to me, is that section 242(1)(c) was also included as a guide to the exercise of the power to make orders ancillary to a foreign bankruptcy proceeding for the purpose

described in paragraph (e) of section 241(1) (ordering the turnover to a foreign representative of any property belonging to a debtor).

45. Fourth, that – as it seems to me – invites the question: can it properly be said that the making of a transaction avoidance order in aid of a foreign bankruptcy proceeding is the making of an order “ancillary to a foreign bankruptcy proceeding for the purposes of – (e) ordering the turnover to a foreign representative of any property belonging to a debtor”? In my view the answer to that question is “Yes”. 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.
46. Fifth, so understood, the reference to “property belonging to a debtor” in paragraph (e) of section 241(1) – rather than to “property comprised in the debtor’s estate” (the expression used in section 242(1)(c)) - gives rise to no difficulty. The avoidance of “preferential or fraudulent dispositions of property comprised in the debtor’s estate” has the effect of restoring the property to the debtor; so enabling an order to be made for the turnover to the foreign representative of “property belonging to a debtor” in the strict sense. Properly understood, as it seems to me, the distinction between the reference to “property comprised in the debtor’s estate” in section 242(1)(c) - and to “the debtor’s estate” elsewhere in section 242(1) – and the reference to “property belonging to a debtor” in section 241(1)(e) is appropriate.
47. Sixth, while recognizing the likelihood that the legislative draftsman drew on the provisions of section 304 of the U.S. Bankruptcy Code in the course of settling the provisions which became Sections 241 and 242 of the Companies Law – in that the word “turnover” in section 241(1)(e) is likely to have been taken from section 304(b)(2); and the provisions in section 242(1) follow closely the provisions in section 304(c) of the Bankruptcy Code, I do not think it appropriate to construe sections 241 and 242 of the Companies Law by reference to the U.S. Bankruptcy Code. I think that the judge was right to reject that approach for the reason which he gave. I reach my conclusion on the basis of what I take to be the true construction of sections 241 and 242 in accordance with the law of the Cayman Islands.

48. Accordingly, I would hold that the Court does have jurisdiction under sections 241 and 242 of the Companies Law to apply any transaction avoidance provisions in aid of foreign bankruptcy proceedings.

49. I turn, now, to the question whether, if the Court does have jurisdiction under sections 241 and 242 to apply transaction avoidance provisions in aid of foreign bankruptcy proceedings, the applicable provisions were those of the foreign insolvency law or the law of the Cayman Islands.

Are the applicable provisions those of the foreign insolvency law or the law of the Cayman Islands?

50. The Trustee contends that the applicable provisions are those of the foreign insolvency law: in the present case, the law of the United States. Again, the grounds upon which that contention is advanced are set out in the Trustee's Memorandum of Grounds of Appeal and developed in the skeleton arguments filed on his behalf and in oral submissions to the Court. They may be summarized as follows:

- (1) It is said that the judge erred in holding that the Court's statutory power to make orders which are ancillary to foreign bankruptcy proceedings does not require or imply the application of the law which governs the conduct of those proceedings. It is said that, although the judge accepted (i) that the commencement of foreign bankruptcy proceedings will give rise to a bankruptcy estate, (ii) that the parameters of that estate will be governed by the applicable foreign bankruptcy law, (iii) that the administration of that estate will involve the reversal of antecedent transactions (such as preferences and fraudulent transfers) in accordance with the applicable provisions of the foreign insolvency law and (iv) that the application of that foreign insolvency law to the reversal of such transactions will be an essential part of the conduct of the bankruptcy proceedings, he erred in failing to draw the correct conclusion: he ought to have held that the Court's jurisdiction to make orders which are ancillary to the foreign bankruptcy proceedings requires (or at least permits) the application of the foreign bankruptcy law which governs the conduct of those proceedings and the parameters of the bankruptcy estate.
- (2) In particular, it is said that, since the boundaries of the foreign bankruptcy estate will always be governed by the relevant foreign insolvency law, the judge ought to

have held that section 242(1)(c) of the Companies Law requires or implies the choice (or at least the ability to choose) and/or application of (or at least the ability to apply) the foreign insolvency law which governs the reconstitution of the relevant “estate”.

- (3) Further, it is said that the judge erred in holding that the reference to “comity” in section 242(1) of the Companies Law does not require or imply the choice and/or application of the foreign insolvency law. It is said that, although he recognized that comity is “the recognition which one nation allows within its territory to the legislative . . . acts of another nation”, the judge failed to appreciate that, in the context of transaction avoidance claims in cross-border insolvencies, the “legislative acts” which must, should, or at least can be recognised within the Cayman Islands are the foreign transaction avoidance laws which apply to the relevant foreign insolvency proceedings. It is said that he ought to have held that the reference to “comity” in section 242(1) requires or implies the choice (or at least the ability to choose) and/or application of (or at least the ability to apply) the foreign insolvency law to transaction avoidance claims.
- (4) It is said that the judge erred in holding that section 241(2)(b) of the Companies Law does not show that section 241 as a whole requires the application of substantive foreign law. It is said that the judge ought to have recognized that, if the relief available under section 241(1) were always governed by Cayman insolvency law, the qualification in section 241(2)(b) would not be necessary, because the limit imposed by section 103(1) of the Companies Law would always apply in any event; that section 241(2)(b) is necessary only if (as the Trustee contends) section 241 requires (or at least permits) the Court to grant relief in accordance with substantive foreign insolvency law; that section 242(2)(b) serves to impose a limit on the relief which might otherwise be available under substantive foreign insolvency law; and that section 241(2)(b) is a clear indication that section 241 as a whole requires (or at least permits) the application of foreign insolvency law.
- (5) It is said that the judge erred in failing to interpret section 241 of the Companies Law in accordance with the principle of “modified universalism” as applied to section 304 of the US Bankruptcy Code in *Maxwell Commc’n. Corp. v. Barclays Bank (In re Maxwell Commc’n. Corp.)*, 170 B.R. 800 (Bankr. S.D.N.Y. 1994); and as applied to English common law in *Rubin v Eurofinance SA* [2012] UKSC

46 and cases cited therein. It is said that “modified universalism” requires that in general all avoidance actions relating to an estate should be governed by the same law, being the law of the relevant insolvency proceeding.

- (6) In particular, it is said that the judge erred in failing to interpret section 241 of the Companies Law in accordance with the principles of fairness, equity and equality; which (it is said) require that all creditors who are in a similar position should be treated alike and, in particular, require that the same substantive law should apply to all preference claims in relation to a particular insolvency proceeding. It is said that the judge failed to take account of section 242(1)(a) of the Companies Law, which expressly requires the Court to achieve “the just treatment of all holders of claims against or interests in a debtor’s estate wherever they may be domiciled”. Such “just treatment”, it is said, cannot be achieved unless all creditors (wherever they may be domiciled) are bound by the same rules as to the adjustment of preferential transfers; because the adjustment of preferential transfers are an important part of the foreign insolvency law’s system of distribution and an essential mechanism for ensuring *pari passu* treatment of creditors in the relevant insolvency proceeding.

51. In the alternative, it is said that the judge should have held that section 241 of the Companies Law confers a power to apply Cayman Islands insolvency law, which reinforces the common law position.

52. The Fund contends that there is no proper basis for an argument that, in enacting what became Part XVII of the Companies Law, the legislature intended a radical departure from the common law; by conferring on the Court a power to apply foreign law avoidance provisions in support of a foreign insolvency. Its submissions in support of that contention may be summarized as follows:

- (1) The power to apply substantive provisions of foreign law would be so significant a power to confer on a court that, if that had been the intention of the legislature, it would have been conferred in express terms (compare section 426 of the United Kingdom Insolvency Act 1986). The forms of relief set out in sections 241(a) to (e) of the Companies Law do not require the application of foreign law; and cannot be said to mandate the application of foreign law by implication.

- (2) The premise underlying the Trustee's submission that the avoidance laws of the relevant foreign jurisdiction form an essential part of the foreign insolvency proceeding is that if the Court is empowered to recognise a foreign insolvency proceeding and to make orders ancillary to that proceeding then it must necessarily be empowered to recognize and give effect to the avoidance provisions relating to that insolvency. The premise is flawed. Section 241 of the Companies Law does not empower the Court to recognise a foreign insolvency proceeding; rather, it empowers the Court to grant specific forms of relief (which are available under Cayman law) as orders ancillary to that proceeding.
- (3) The Trustee's reliance on the reference to "comity" in section 242(1)(g) of the Companies Law is misplaced. Comity is not a sufficient basis for giving effect to a foreign law or for the recognition of a foreign judgment. In support of that proposition the Fund cited *Schibsby v Wetenholz* (1870) LR 6 QB 155, 159; and *Adams v Cape Industries plc* [1990] 1 Ch 433, 513. It is possible for the Court to give effect to the need to have regard to comity by granting one of the forms of relief set out in section 241(1)(a) to (e) without applying foreign law.
- (4) The Trustee's submission that the cross-reference in section 241(2)(b) of the Companies Law to section 103(1) would be redundant (because it is part of the insolvency law of the Cayman Islands) unless sections 241 and 242 are construed as requiring (or at least permitting) the application of foreign law – because, it is said, if the relief available under section 241(1) were governed exclusively by Cayman insolvency law, the qualification in section 241(2)(b) would not be necessary - is not well-founded. Section 241(1)(d) provides a power to make an order for examination and discovery: the limit in section 241(2) is necessary to make clear that the power conferred by section 241(1)(d) is no wider than the power contained in section 103.
- (5) The Trustee can obtain no assistance from the "principle of modified universalism". The concept of universalism is that bankruptcy (whether personal or corporate) should be unitary and universal; so that there should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and which applies universally to all the bankrupt's assets. But that is an aspiration; not a reality. Full universalism can be attained only by international treaty. The aspiration is no basis, as a matter of law, for founding any jurisdiction in a court to apply a foreign system of law.

- (6) General concepts of fairness, equity and equality are no foundation for a finding that the legislature has conferred power on courts in its jurisdiction to apply the laws of another legal system.
- (7) The Trustee's contention that the Cayman statute should simply be construed in the same way as section 304 in the U.S. Bankruptcy Code is not well founded. Although there may be similarities in expression in section 304 and section 241 of the Companies Law – such that it is possible to speculate that the legislative draftsman may have used the language of section 304 as a model for section 241 of the Companies Law - it does not follow that the legislature intended that all the U.S. jurisprudence relating to section 304 was to be imported into Cayman law and was to inform the construction of section 241. The starting point is that section 241 is to be construed as part of the Companies Law. The Trustee is unable to point to any materials, admissible in accordance with normal principles of statutory construction, which can be said to evidence any intention on the part of the legislature to import the U.S. law principles relating to section 304 into Cayman law. Further, there is an important difference between section 241 of the Companies Law and section 304 of the U.S. Bankruptcy Code. The critical provision in section 304 which led the United States court to find jurisdiction to apply foreign law was the express power conferred to order any “other appropriate relief”: that power has not been included in section 241(1).

53. This question, whether the applicable provisions are those of foreign law or the law of the Cayman Islands, also turns on the true construction of the provisions in sections 241 and 242 of the Companies Law. As I have said, earlier in this judgment, I do not think it appropriate to construe those sections by reference to the U.S. Bankruptcy Code; or, I may add, by reference to decisions in the U.S. Courts.

54. I acknowledge, as did the judge, the apparent illogicality of applying domestic law to transaction avoidance issues when the distribution regime is governed by a foreign law. But, like the judge, I take the view that that would represent so radical a departure from the common law, that, had the legislature intended that result, it could have been expected to say so in clear terms. It did not do so, either in clear terms, or at all. Further, to hold that it was intended that the Court should apply foreign law in cases in which the debtor company was not registered under Part IX of the Companies

Law would give rise to an anomalous distinction in a case in which the Court, acting in accordance with the direction in section 242(2), made a winding up order under Part V.

55. Accordingly I would hold that the Court does not have power, pursuant to sections 241 and 242 of the Companies Law, to apply the avoidance provisions of foreign insolvency law.

The first issue for determination on these appeals: whether the Court has jurisdiction under sections 241 and 242 of the Companies Law to apply transaction avoidance provisions of foreign insolvency law (and, in particular, provisions of U.S. Bankruptcy Law) in aid of foreign insolvency proceedings.

56. As I have said, this issue is raised by the Trustee in his Notice of Appeal, filed on 25 January 2013 under reference CICA 1/2013. The Trustee contends that the judge was wrong to hold, in answer to Preliminary Issue 1, that that the Court was not able to apply U.S. insolvency law under section 241 and/or section 242 of the Companies Law. It is said that he should have held that the Court has such jurisdiction; and, in particular, that it has jurisdiction under those sections 241 to apply substantive provisions of foreign insolvency law for the purpose of reversing antecedent transactions such as preferences and fraudulent transfers.

57. For the reasons which I have set out. I think that the judge was right to hold as he did. I would answer this issue in the negative: the Court has no jurisdiction under sections 241 and 242 of the Companies Law to apply transaction avoidance provisions of foreign insolvency law (and, in particular, provisions of U.S. Bankruptcy Law) in aid of foreign insolvency proceedings.

The second issue for determination on these appeals: whether the Court has jurisdiction under sections 241 and 242 of the Companies Law to apply transaction avoidance provisions in Cayman Islands' insolvency legislation in aid of foreign insolvency proceedings.

58. The Trustee's Notice of Appeal, filed on 25 January 2013 (under reference CICA 1/2013), seeks an order declaring, on Preliminary Issue 2, that the Court has jurisdiction under sections 241 and 242 of the Companies Law to apply avoidance provisions of Cayman Islands' insolvency law in aid of a foreign insolvency proceeding.

59. For the reasons which I have set out, I think that the judge was wrong to hold as he did. I would answer this issue in the affirmative: the Court does have jurisdiction under sections 241 and 242 of the Companies Law to apply transaction avoidance provisions of Cayman Islands insolvency law in aid of a foreign insolvency proceeding.

Elliott Mottley Justice of Appeal

I agree.

Anthony Campbell Justice of Appeal

I also agree