IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 157 OF 2017 (NSJ)

IN THE MATTER OF CHINA AGROTECH HOLDINGS LIMITED

AND IN THE MATTER OF A REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE IN RESPECT OF WINDING UP PROCEEDINGS PENDING IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

JUDGMENT

Appearance: **For the Liquidators: Ms Clare Stanley QC with Shaun Maloney of Ogier**

Before: **The Hon. Justice Segal**

Heard: **25 August 2017**

Judgment: **19 September 2017**

Headnote

Application for recognition and assistance at common law by foreign liquidators – Hong Kong liquidators of Cayman company seeking an order from the Cayman Court permitting them to apply in Cayman for a Cayman scheme to be approved and sanctioned in parallel with a Hong Kong scheme – approach of the Court to requests for assistance at common law by a liquidator appointed in a place other than the country of incorporation of the company concerned

The application, the relief sought and a summary of the orders to be made

1. I have before me an ex parte summons (the ***Summons***) issued by the Hong Kong liquidators of a Cayman company, China Agrotech Holdings Limited (the ***Company***). In the Summons the Hong Kong liquidators seek orders from this Court giving them certain powers and the authority to act on behalf of the Company for the limited

purpose of presenting a petition for a scheme of arrangement between the Company and its creditors in Cayman as part of a corporate rescue of the Company involving a parallel scheme of arrangement with creditors to be filed in the High Court of the Hong Kong Administrative Region (the ***Hong Kong Court***) and a restructuring of the Company's capital with shareholder approval.

2. The Summons was supported by two affirmations made by Chan So Fun (***Mr Chan***), a solicitor in Hong Kong in the firm of solicitors advising the Hong Kong liquidators (Michael Li & Co), two affidavits made by David Yen Ching Wai (one of the Hong Kong liquidators and a managing director of Ernst & Young Transactions Limited) one affirmation made by Stephen Liu Yiu Keung (the other Hong Kong liquidator and also a managing director of Ernst & Young Transactions Limited) and one affidavit made by David Andrew Freeman (a paralegal with Ogier, the firm of attorneys acting for the Liquidators). David Yen Ching Wai and Stephen Liu Yiu Keung are referred to as the ***Liquidators***. As I have said, this was an ex parte summons and so no notice has yet been given to the Company's directors, shareholders or creditors.

3. The Summons was issued pursuant to a letter of request dated 19 July 2017 from the Hong Kong Court addressed to this Court, which was issued pursuant to an order of Mr Justice Harris (the ***Letter of Request***). The Letter of Request sets out the orders which this Court is requested to make. I shall explain and discuss the precise terms of the proposed orders shortly.

4. For the reasons explained below, I have concluded that I can and should permit the Liquidators to apply in the name and on behalf of the Company for and promote a parallel scheme in Cayman and that I should take steps that will ensure that proceedings commenced against the Company pending the consideration and sanctioning of the scheme can be adjourned or stayed in order to allow the scheme process to be completed. However, I consider that the order to be made should be in a different form from and grant relief in a different manner from that detailed in and set out in the Letter of Request (although the order will be in accordance with and respond to the Letter of Request which invited this Court to give such further or other relief by way of cross-border judicial assistance at common law as this Court considers just and convenient). I also consider that the Liquidators should only be permitted to apply for an order convening the scheme meeting(s) after the Company's directors, shareholders and creditors have been notified of the Summons and given an

opportunity to file objections or submissions and be heard by this Court. If no such objections or submissions are filed, and if no-one notifies the Liquidators of their intention to appear and be heard, the Liquidators may proceed to file the Company's petition for an order convening the scheme meeting(s) without the need for a further hearing.

The background to the Summons

5. The Company has various significant connections with Hong Kong. In particular its shares have been listed on the Main Board of the Hong Kong Stock Exchange (***HKSE***) since 14 January 2002. However since 18 September 2014 the Company's shares have been suspended from trading. Furthermore the corporate business of the Company has been administered from Hong Kong and the Company was registered under part XI of the former Companies Ordinance on 4 November 1999.

6. On 11 November 2014 a creditor of the Company presented a winding up petition on the ground that the Company was insolvent and unable to pay its debts. On 17 August 2015 the Hong Kong Court made a winding up order (the ***Winding up Order***) and appointed the Liquidators.

7. Since their appointment the Liquidators have considered what action to take in order to maximise recoveries for and protect the interests of the Company's creditors. They have concluded that the best option available involves giving effect to a resumption proposal and reorganisation of the Company. The Company, with Fine Era Limited, (the ***Vendor***), which is a BVI company, submitted a resumption proposal to the HKSE on 24 August 2016. The purpose of the resumption proposal is to permit the Company to satisfy the HKSE's conditions for allowing the Company's shares to be re-listed, to inject into the Company an active and profitable business and sufficient funds to permit the Company to make a payment to its creditors and for working capital and the payment of the fees involved in the process.

8. The resumption proposal involves an agreement between the Company and the Vendor with various terms and steps. Under the agreement the Company will purchase from the Vendor for a consideration of HK$400,000,000 the entire equity interest in Yu Ming Investment Management Limited (***Yu Ming***). Yu Ming is a licenced corporation carrying on various regulated activities including dealing in

securities, advising on securities and asset management. Following the acquisition by the Company of the equity interests in Yu Ming there will be a capital reorganisation of the share capital of the Company (comprising a capital reduction, share consolidation and increase in the Company's authorised share capital) so as to facilitate the issue of new shares in the Company under a placing and open offer. The placing will raise funds of approximately HK$462,222,000 which will be used for the partial settlement of the consideration payable by the Company for the acquisition of the equity interests in Yu Ming and also to fund a settlement to be offered to the Company's creditors under the proposed schemes of arrangement. Further funds of approximately HK$78,137,000 will also be raised under the proposed open offer. The Company will transfer HK$80,000,000 from the placing to the proposed schemes of arrangement for distribution to the Company's creditors in settlement of their debts. In addition the Vendor will provide a cash advance to the Company and additional funding to finance fees.

9. In order to give effect to the resumption proposal and to satisfy the HKSE's resumption conditions the Liquidators will apply on behalf of the Company to the Hong Kong Court for the approval and sanctioning of a scheme of arrangement and will also apply for the permanent stay of the Hong Kong winding up upon the successful implementation of the scheme. In addition to the Hong Kong scheme the Liquidators wish to promote a Cayman scheme. After consulting legal advisers in both Hong Kong and Cayman the Liquidators concluded that it was necessary for an inter-conditional scheme to be implemented in the Company's place of incorporation that is the Cayman Islands, in parallel with the proposed Hong Kong scheme.

10. The Liquidators also concluded that it would not be possible or appropriate in the present case for a winding up petition to be presented in Cayman in respect of the Company and for an application to be made in Cayman for the appointment of provisional liquidators who would then promote the Cayman scheme. Such an approach has, of course, been taken in a number of other cases in the past - in which a company subject to a foreign insolvency proceeding and proposing to implement a corporate reorganisation or rescue has, following the presentation of a winding up petition, applied for the appointment of a provisional liquidator under section 104 (3) of the Companies Law (2016 Revision) (the ***Companies Law***)) so that the provisional liquidator, working in conjunction with the foreign representative, could apply under section 86(1) of the Companies Law on behalf of the Company for the convening of

meetings of creditors to approve and the sanction by the Court of a Cayman scheme (with the benefit of the statutory stay and moratorium). The Liquidators took advice from Richard de Lacy QC (who sadly died recently and to whom I should like to pay tribute as a fine Cayman and English lawyer and a true gentleman). Based on this advice they concluded that there were various uncertainties that made it undesirable to seek to present a winding up petition in Cayman, particularly if an alternative option was available. Mr de Lacy had expressed a concern that before the Company's directors could present a winding up petition they would need to obtain a special resolution from the Company's shareholders, which would not only be time consuming and costly but would create difficulties for a listed company the trading of whose shares had been suspended (although I note that it does appear that the Company's articles of association give the directors the power to petition without shareholder approval). Mr de Lacy also noted that it was unclear whether the directors would be treated by this Court as having the power and authority to present a winding up petition following the appointment of the Liquidators. He had therefore recommended that the Liquidators apply to the Hong Kong Court for the issue of a letter of request to this Court in which the Hong Kong Court would ask this Court to make orders in a suitable form that would allow the Liquidators to promote the proposed scheme in Cayman.

The Letter of Request

11. The Liquidators, as I have noted, did apply to the Hong Kong Court for the issue of a letter of request and Mr Justice Harris ordered that a letter of request be issued. The Letter of Request was issued on 19 July 2017. The following points emerge from the Letter of Request:

(a). the Letter of Request recited the appointment of the Liquidators and that:

"the Liquidators have demonstrated to the satisfaction of this Court that it is necessary and desirable for the purposes of implementing the rescue and restructuring of the Company for the benefit of the Company's creditors and shareholders and that it is in the interest of justice to assist the Liquidators in exercising all the powers, duties and discretions afforded to them by the [winding up order] (and applicable law); and that it is just and convenient that [the Letter of Request] be issued."

(b). The Letter of Request requested this Court *"pursuant to its inherent jurisdiction and all other powers vested in it, to assist and act in aid of the*

Hong Kong court" in the winding up proceedings in respect of the Company by making the orders requested.

(c). The orders requested were as follows:

"*1.* *Making an order if [this Court] thinks fit that the Liquidators ... be recognised by [this Court] and be treated in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by [this Court], including recognition of the powers and authority of the Liquidators to act on behalf of the Company, amongst other things:*

(1) *to secure the alteration [of] or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;*

(2). *to pay a class or classes of creditors in full;*

(3). *to make a compromise or arrangement with-*

(a). *creditors or persons claiming to be creditors;*
(b). *persons having or alleging themselves to her of any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company, or for which the company may be rendered liable.*

(4). *to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the Company and –*

(a). *a contributory;*
(b). *an alleged contributory; or*
(c). *any other debtor or person apprehending liability to the Company.*

(5). *to bring or defend any action or other legal proceedings in the name and on behalf of the Company;*

(6). *to sell the real and personal property and things in action of the Company by public auction or private contract with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;*

(7). *to do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal;*

(8). *to appoint an agent to do any business that the Liquidator is unable to do in person; and*

(9). *to employ legal advisers to assist the Liquidators in performing the Liquidators' duties.*

2. *If thought fit, making such further or other Orders as may be required in accordance with such recognition and, in particular, an Order having the*

same or substantially the same effect as section 186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) [Ordinance] (CAP 32)) that section 97 of the Cayman Islands Companies Law (2016 Revision) shall apply to the Company so that no action or proceeding shall be proceeded with or commenced against the Company within the jurisdiction of [this Court] except by leave of [this Court] and subject to such terms as [this Court] may impose;

3. *Giving such further or other relief or assistance by way of cross – border judicial assistance at common law as [this Court]may think just and convenient; and*

4. *The Liquidators [to] have liberty to apply for further relief to [this Court].*"

The Summons and the draft order

12. The Summons seeks orders in similar terms as follows:

"*1. That the [order of the Hong Kong court dated 17 August 2015 appointing the Liquidators][the Appointment Order]and [the Liquidators]be recognised by this Court such that the Appointment Order be treated in all respects in the same manner as if the Appointment Order had been made and [the Liquidators] had been appointed as the joint and several provisional liquidators of the Company by this Court, including recognition of the powers and authority of [the Liquidators] to act on behalf of the Company, including, inter alia;*

a. to alter or otherwise deal with the capital structure of the Company in furtherance of the proposed rescue and restructuring;

b. to pay a class or classes of creditors in full;

c. to make a compromise or arrangement with-

i. creditors or persons claiming to be creditors;
ii. persons having or alleging themselves to her of any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the Company, or for which the Company may be rendered liable.

d. to compromise, on such terms as are agreed calls and liabilities to calls, debts, and liabilities capable of resulting in debts, and claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the Company and –

1. a contributory;
2. an alleged contributory; or
3. any other debtor or person apprehending liability to the Company.

e. to bring or defend any action or other legal proceedings in the name and on behalf of the Company;

f. to sell the real and personal property and things in action of the Company by public auction or private contract with power to transfer the whole of the property and things in action to any person or company, or to sell them in parcels;

g. to do all acts and execute, in the name and on behalf of the Company, all deeds, receipts and other documents, and for that purpose use, when necessary, the Company's seal;

h. to appoint an agent to do any business that the Liquidator is unable to do in person; and

i. to employ legal advisers to assist the Liquidators in performing the Liquidators' duties.

2. [That in accordance with such recognition as set out in paragraph 1 above and for the avoidance of doubt, that] section 97 of the Companies Law (2016 Revision) shall apply to the Company so that no action or proceedings shall be proceeded with or commenced against the Company within the jurisdiction of this Court except by leave of this Court and subject to such terms as this Court may impose.

3. That the [Liquidators] shall have liberty to apply to this Court in respect of any matter concerning the Company and arising during the period of the appointment of the [Liquidators] as Joint Provisional Liquidators of the Company and by doing all such things as may be necessary to assist the [Liquidators] (or one or more of them) in connection with their appointment as the joint and several provisional liquidators of the Company."

13. The draft order filed by the Liquidators sets out the orders sought in the Summons in the same form, save that the words in square brackets at the beginning of paragraph 2 were omitted.

The Liquidators' submissions

14. The submissions of Ms Stanley QC for the Liquidators can be summarised as follows:

(a). the Court has an inherent jurisdiction (at common law) to recognise the powers given (and to grant assistance) to a foreign liquidator appointed by an order of a competent court and to send and receive letters of request relating to the recognition of such court appointed liquidators (citing in support, in relation to letters of request, *In the Matter of Basis Yield Alpha Fund (Master)* [2008] CILR 50 at [51] – [56]).

(b). the common law jurisdiction to recognise (and assist) foreign insolvency officeholders appointed in the country of incorporation of the company is well

established in Cayman – see, for example, in relation to the recognition of a receiver appointed by a foreign court in the company's place of incorporation *Kinderkin v Player* [1984] CILR 63 (CA) at pp. 82-83 and also *Basis Yield* (supra) at [46] (Ms Stanley notes that the Cayman legislature has, in Part XVII of the Companies Law, also codified and extended the Court's powers in relation to foreign representatives appointed in the country of incorporation).

(c). but the non-statutory jurisdiction is not limited to foreign insolvency officeholders, including liquidators, appointed by a court in the country of incorporation of the relevant company. The Court has jurisdiction to recognise and grant assistance to liquidators appointed by other courts in certain circumstances.

(d). such jurisdiction can and should be exercised:

(i). at least where the evidence establishes that there will not be, or it that it is unlikely that there will be, a winding up in the country of incorporation;

(ii). probably also in any case in which the relief sought by the foreign liquidator would be available to a Cayman official liquidator if appointed and there is no reason why, having regard to the interests of the company's creditors and members and applicable policy considerations, the foreign liquidator should be required to commence or procure the commencement of a domestic winding up; and

(iii). where the company concerned has submitted to the jurisdiction of the relevant foreign court.

(e). as regards (d)(i), in the present case the evidence demonstrates that it is unlikely that any application will be made for a Cayman winding up. Accordingly, the basis for exercising the jurisdiction to recognise and assist on the first ground is established. The Court should exercise the jurisdiction because the Company has the right under the Companies Law to apply to the Court and commence the scheme approval process and since the Liquidators

are acting on behalf of the Company, their action is in accordance with the statutory power and Cayman law; it is manifestly in the interests of all the Company's stakeholders to permit the Liquidators to proceed with the Cayman scheme and granting the relief sought involves the Court co-operating, in accordance with the principle of comity, with the Hong Kong Court and the liquidators it has appointed (as the only proceeding commenced and to be commenced in relation to the Company and a Court with which the Company has substantial and significant connections) in circumstances where there are no policy or other reasons which require a local winding up or which would require and justify refusing the relief sought by the Liquidators.

(f). as regards (d)(ii), a local liquidator would be able to petition the Court to convene meetings of creditors to vote on the scheme but a local winding up is unnecessary as it would involve unnecessary expense and no additional benefits to creditors and members (unless, of course, a Cayman winding up is necessary in order for there to be a Cayman scheme).

(g). a Cayman winding up is unlikely because none of those with standing to present a winding up petition are able or willing to do so. As David Yen Ching Wai stated in his second affidavit, the Company's directors (those directors who have not resigned) have been unwilling to contact and cooperate with the Liquidators and appear unwilling to exercise any residual power which the directors might retain to act on behalf of the Company and present a petition. Indeed, it was arguable that the directors could not exercise any such power (at least without the consent of the Liquidators) following the making of the Winding up Order. Furthermore, it was unlikely that the shareholders would wish or be prepared to present a petition. In addition, the Company's creditors (many of whom had already participated and filed proofs in the Hong Kong liquidation) also have not indicated any intention to present a petition for or wish to have a Cayman winding up. The Winding up Order was made over two years ago and no creditor had sought a Cayman winding up since then.

(h). a Cayman winding up is unnecessary because it has already been determined that the resumption proposal is in the best interests of the Company's creditors and shareholders and a Cayman winding up is not needed to

implement that proposal or to protect the interests of creditors or other stakeholders (the resumption proposal will not require a distribution by the Liquidators to creditors and will involve a stay of the Hong Kong liquidation so that there will be no risk of any differences between the rules regulating distributions or avoidance actions in Hong Kong and Cayman giving rise to differences of outcomes for creditors or members). The Liquidators with the support of the Hong Kong Court have concluded that they should give effect to the resumption proposal and exit from the Hong Kong liquidation without the need for a Cayman winding up by obtaining the approval of creditors to and the sanction of the Hong Kong and Cayman courts for the schemes (and to a capital reduction and reorganisation).

(i). as regards (d)(iii), since the Company submitted to the jurisdiction of the Hong Kong Court by registering as an overseas company in Hong Kong, this Court should recognise and give effect to the Winding up Order, at least the powers of the Liquidators thereunder or resulting therefrom to act on behalf of the Company (including the power to act on behalf of the Company for the purpose of presenting a petition under section 86(1) of the Companies Law for an order convening a meeting of creditors and for the sanctioning of a scheme of arrangement in respect of the Company).

(j). the Company registered under Part XI of the former Companies Ordinance (Cap. 32) on 4 November 1999 (Part XI has now been superseded by Part 16 of the Companies Ordinance, Chapter 622 to which the Company is now subject). Part XI (and Part 16) relate to overseas companies that is companies incorporated outside Hong Kong, which have established a place of business in Hong Kong. According to Mr Chan (see paragraph 9 of his second affirmation):

"*by registering under Part XI of the former Companies Ordinance (Cap. 32), the Company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong Kong (the Rules), compliance with Part XI means that the Company is "within the jurisdiction" and can therefore be served with a winding up petition in accordance with Order 10, rr.1 - 5 of the Rules, ... and sections 326(1) and (2) and section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014),...*"

15. Ms Stanley relied on a number of textbooks and cases in support of her submission that the Court had jurisdiction to and could recognise the appointment and powers of a liquidator appointed by a court in a jurisdiction other than the place of incorporation. In particular she noted and relied on a judgment of Kawaley J in the Supreme Court of Bermuda (in 2008) in a case which was based on similar facts and circumstances to the present case in which the learned judge had permitted a Hong Kong liquidator appointed in respect of a Bermudian company to summon a meeting of creditors to consider a scheme of arrangement in Bermuda. She also noted and relied in particular on an unreported judgment of this Court (in 2010), delivered by the Chief Justice, involving a provisional liquidator appointed in Hong Kong in respect of Cayman company in which the Chief Justice made orders recognising the provisional liquidator's powers to alter and deal with the capital structure of the company and staying proceedings against the company.

16. Ms Stanley's submissions on the grounds I have identified in paragraph 13(d)(i) and (ii) above can be summarised as follows :

(a). Ms Stanley referred to the discussion in *Dicey, Morris & Collins on the Conflict of Laws, (15th Ed)* and submitted that the starting point in the analysis was Rule 179 (at 30R-100) which is in the following terms:

> *"...the authority of a liquidator appointed under the law of the place of incorporation is recognised in England."*

(b). but, Ms Stanley pointed out, in the commentary on Rule 179 Dicey, Morris & Collins amplify their analysis and suggest that the non-statutory jurisdiction to recognise and assist may extend beyond liquidators appointed in the place of incorporation. The commentary suggests that recognition may be permissible where the appointment is made in (under the law of) the country where the company concerned carries on business or, where there is no likelihood of a liquidation in the country of incorporation, in another country. The relevant parts of the commentary are as follows:

> ***"30-102***
>
> *The effect of a foreign winding-up order in England has seldom been before the courts. Rule 179 is however justified because the law of the place of incorporation determines who is entitled to act on behalf of a corporation. If under that law a liquidator is appointed to act then his authority should be recognised here.*

30-103

Rule 179 should not, however, be construed, in the light of existing authorities, as stating the only circumstances in which an English court will recognise the authority of a liquidator appointed under foreign law. It merely states the position which has been established to date. First, and generally, in determining whether to exercise its jurisdiction to wind up a foreign corporation, we have seen that the English court will consider whether there is any other jurisdiction which is more appropriate for the winding up and it is possible that a more appropriate jurisdiction might be in a country other than the place of incorporation. This does not suggest that in the admittedly different context of recognition that such recognition should only be accorded to an appointment under the law of the place of incorporation. More particularly, it has been suggested that an appointment made in a country other than the place of incorporation may be recognised in England if it is recognised under the law of the place of incorporation of the company. More speculatively it may also be possible that an appointment made under the law of the country where the company carries on business will, in appropriate circumstances, be similarly recognised.

30-104

Recognition of a liquidator's authority may be sought by reference to an appointment made in the exercise of a foreign jurisdiction similar to that conferred on the English courts in regard to companies incorporated outside the United Kingdom. The protagonist of recognition in such a case could urge that "it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves." However, even if an appeal to comity has any force in this context (which is doubtful), it has been rejected in the context of company insolvency, though it is possible that the liquidator's authority would be recognised as extending to those affairs of the company which are local to the country where the appointment was made. Where there is no likelihood of a liquidation in the country of incorporation it may be possible that the liquidator's authority may be held to extend beyond those affairs. This treatment of the argument based on comity is defensible because where there is a liquidation in the country of incorporation and the English courts exercise their own jurisdiction to make an order, they seem concerned to ensure that the liquidator should not go beyond dealing with the company's English affairs without special direction. Such concern is not shown where there is no likelihood of liquidation in the country of incorporation." [Underlining added]

(c). Ms Stanley noted that in *Rubin v Eurofinance* [2013] 1 A.C. 236 (UK Supreme Court) (***Rubin***) Lord Collins had referred to Rule 179 and said (at [13]) that:

"*the general rule is that the English court recognises at common law only the authority of a liquidator appointed under the law of the place of incorporation: Dicey , 15th ed, para 30R-100. That is in contrast to the modern approach in the primary international and regional instruments, the EC Insolvency Regulation on Insolvency Proceedings (Council Regulation (EC) No 1346/2000) ("the EC Insolvency Regulation") and the Model Law, which is that the jurisdiction with international competence is that of the country of the centre of main interests of the debtor (an expression not without its own difficulties).*" [underlining added]

However, she submitted, this statement was not inconsistent with the commentary set out above since a general rule need not be, and should not be treated as, the exclusive rule (I also note Lord Collins comment at [31] that "*The common law assistance cases ... [had] involved cases in which the foreign court was a court of competent jurisdiction in the sense that the .. company was incorporated there.*")

(d). Ms Stanley also noted that in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 (House of Lords) Lord Hoffmann (at [31]) had indicated (obiter) that a test other than the place of incorporation test might be more appropriate for determining whether the foreign court was competent for recognition purposes:

> "*I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings (Council Regulation (EC) No 1346/2000 of 29 May 2000) uses the concept of the 'centre of a debtor's main interests' as a test, with a presumption that it is the place where the registered office is situated: see article 3.1 . That may be more appropriate.*"

While Lord Collins in *Rubin* had referred to this passage (at [122]) and refused (at [129]) to change the settled law on the recognition and enforcement of foreign judgments by formulating a judge-made, common law, rule which would recognise judgments in foreign insolvency proceedings where the foreign court conducting the insolvency proceeding was to be regarded as being competent by reason of the connections between the court and company concerned (such as the country where the insolvent entity has its centre of interests or the country with which the judgment debtor has some other sufficient or substantial connection), his judgment and analysis did not affect the this part of Lord Hoffmann's judgment or the cogency of the comments he had made as they relate to the scope of the common law jurisdiction to recognise foreign liquidators.

(e). Ms Stanley noted that another leading English law textbook dealing with cross-border insolvency also supported the view that recognition should be granted to a liquidator appointed by a court outside the place of incorporation in a case where there was no likelihood of a liquidation being commenced in

the country of incorporation. In paragraphs 6.81 - 6.83 of chapter 6 of Sheldon (and others), *Cross-Border Insolvency* (fourth edition, 2015, Bloomsbury) (written by Tom Smith QC) the point is made as follows.

> *"if the English rules on recognition were restricted to the place of incorporation and an insolvency proceeding has not or even cannot there occur, then no foreign insolvency whatsoever could be recognised. Plainly this would be most unsatisfactory. Accordingly, it is suggested that recognition is possible 'where there is no likelihood of a liquidation in the country of incorporation.'*

(f). Ms Stanley, as I have mentioned, relied on the judgment of Kawaley J in Bermuda in *In re Dickson Group Holdings Limited* [2008] Bda LR 34. The decision in *Dickson Group* and Ms Stanley's submissions based on the decision can be summarised as follows:

(i). in this case, Dickson Group Holdings Limited was a company incorporated in Bermuda in respect of whom a winding up order had been made in Hong Kong. Although the company had been incorporated in Bermuda no business activities took place there but instead the main focus of the company's business was Hong Kong and the People's Republic of China. The liquidators wished to promote a scheme of arrangement which would restructure the company's affairs and leave it in a solvent position. They had decided that there was no need for a winding up in Bermuda but there was a need for a Bermudian scheme as well as a scheme in Hong Kong. Accordingly a summons was issued by the company acting by the Hong Kong liquidators under section 99 of the Bermuda Companies Act 1981 for leave to summons a meeting of creditors to consider the scheme.

(ii). the liquidators did not separately and explicitly seek an order recognising their appointment and powers under the Hong Kong winding up order but Kawaley J considered that recognition was required. The learned judge considered recognition to be necessary even though the company's directors had "*remained in place for Bermuda law purposes and ... had passed a resolution supporting the .. application.*" While the directors might, from a Bermudian perspective, retain powers to bind the company, the scheme and the

application were in substance controlled by the liquidators and therefore it would be artificial to proceed on the basis that the company was effectively acting, in making the application, just by its directors (an argument which Kawaley J labelled "*a Temple point*"!) and grant the company leave to summon a meeting of creditors without deciding that it was permissible and appropriate to recognise the liquidators' appointment and powers to act on behalf of the company.

(iii). counsel for the liquidators argued that there was an exception to the requirement that the foreign liquidator be appointed in the place of incorporation, in a case in which there was no likelihood of a winding up taking place there and that this was such a case. After noting that:

> "*It seemed to be unprecedented, however, for this Court to recognise and enforce insolvency orders of a foreign court in respect of a Bermudian company in circumstances where (a) no parallel insolvency proceedings have been commenced in Bermuda, and (b) the Bermudian company has not only been placed into a restructuring proceedings abroad, but has been placed into "full-blown" liquidation in what amount to primary (as opposed to ancillary) proceedings abroad.*"

Kawaley J referred to the commentary on rule 179 in Dicey, Morris and Collins which I have set out above (although in 2008 Lord Collins was yet to be recorded as a co-author and the textbook was referred to as Dicey and Morris, and was in its twelfth edition, with rule 179 being rule 160), to a passage in the second edition (2005) of Philip Wood's *Principles of International Insolvency* (in which Mr Wood had said that there was a disadvantage to recognising only a liquidation in the country of incorporation as many companies were incorporated in one jurisdiction but carried on their principal place of business elsewhere so that it would seem odd to refuse to recognise a liquidation where the main assets are located) and to a passage in Professor Ian Fletcher's *Insolvency in Private International Law* (2007) in which Professor Fletcher stated that where there were no winding up proceedings in the place of incorporation insolvency proceedings taking place in

another jurisdiction might be considered to be the most appropriate way to wind up the company.

(iv). after referring to the "*high judicial authority*" and the analysis of the court's "*common law discretion*" in the judgment of Lord Hoffmann in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2007] 1 AC 508 (***Cambridge Gas***) Kawaley J concluded (at [19]) that:

> *"All of this learning suggests the following principles which I adopt: (a) the fact that this Court would in similar circumstances entertain primary winding-up proceedings in respect of a foreign company is an important factor in deciding whether or not to recognize a foreign principal winding-up proceeding in relation to a local company which is not being wound-up at all its own domicile; and (b) the main practical consideration is whether or not a foreign primary proceeding is the most convenient means of winding-up the company's affairs, having regard to all relevant commercial and/or public policy concerns in the case at hand. These two broad considerations must in my judgment be applied having regard to two fundamental principles of insolvency law: (a) the universalist principle under which all reasonable efforts ought normally to be made to subject a company's liquidation to a single coherent regime so that all creditors share rateably, irrespective of the accidental location of creditors outside the jurisdiction of the primary liquidation court; and (b) the presumption that most creditors dealing with the company before it became insolvent would reasonably have contemplated that their rights in any insolvency would be dealt with in accordance with the law of the company's place of incorporation, irrespective of the accidental location of assets outside of that jurisdiction. The application of all of these guiding principles will vary depending on the facts of the specific case."*

(v). Kawaley J noted that since it was no longer intended to wind up the company (the winding up was to be stayed and the company rescued) it was unnecessary to consider in depth the circumstances in which a Bermudian court would decline to recognise a foreign winding up proceeding in respect of a Bermudian company (and insist on a local Bermudian liquidation). He stated however (at [24]) that there should not be an expectation that the court in Bermuda would rubber stamp and always give recognition to such foreign proceedings. In any liquidation of substance it will be impossible for the place of incorporation to be ignored, because for example, absent a local winding up creditors not subject to limitation constraints could apply for a local winding up after and

despite the foreign winding up, the directors remain in office and there may be local reputational, regulatory and policy reasons requiring a local proceeding.

(vi). the learned judge in exercising his discretion concluded as follows:

> "*34. When the commercial realities are looked at in isolation from the legal formalities, the Hong Kong Joint Liquidators in promoting parallel schemes of arrangement in Hong Kong and Bermuda are in essence requesting this Court to assist the Hong Kong Court to restructure the Company. It is impossible on the facts to identify any or any cogent reasons why this assistance may properly be declined.*
>
> *35. The aim of the Scheme, most directly, is to eliminate the Company's existing unsecured debt. But this debt restructuring will only become operative if the Restructuring Agreement in relation to the Company's share capital become effective, outside of the Scheme. Under the latter arrangements, an Investor will acquire most of the Company's shares. The purchase monies will fund the creditors' Scheme claims. The Company will be returned to solvency, its shares will be re-listed and the Hong Kong winding-up proceedings will be permanently stayed. As Ms. Fraser rightly submitted, the foreign winding-up order will (if the scheme is implemented) fall away, and no question of the need for a winding-up in Bermuda will arise.*
>
> *36. This Court is being invited to assist the Hong Kong Court through implementing a parallel scheme of arrangement in Bermuda in circumstances where (a) the Company was registered as an overseas company in Hong Kong where its principal business and the majority of its assets are clearly located, (b) the estate is apparently not a large one and (c) there is no suggestion of any prejudice to local interests. In these circumstances there is no apparent reason why this Court should decline to assist the Hong Kong Joint Liquidators merely because no winding-up proceedings have been started here. As I observed in the context of parallel receivership proceedings:*
>
> > "*In the present case, with its centre of gravity clearly more in Hong Kong than Bermuda, this Court has, in my view rightly, been content to accord a leading role as regards assessment of costs and otherwise to the High Court of Hong Kong. In cases where Bermuda-based office holders subject to the primary supervisory jurisdiction of this Court were involved, this jurisdiction would logically expect to play a larger role.*"
>
> *37. At the end of the day this Court was not asked to recognize a foreign winding-up order which purported to wind-up, for all purposes, the business of a Bermuda- incorporated company.*"

(g). Ms Stanley noted and accepted that Kawaley J's approach had been based on and followed the analysis of Lord Hoffmann in *Cambridge Gas* and that his

judgment had been delivered before the decision of the Supreme Court in *Rubin* and the important decision of the Privy Council (sitting on appeal from Bermuda) in *Singularis v PricewaterhouseCoopers* [2015] AC 1675 (***Singularis***). Both decisions had (as is well known amongst insolvency layers and practitioners) included comments critical of Lord Hoffmann's approach and reasoning (in *Singularis* Lord Sumption had at [18] noted that *Cambridge Gas* had "*[marked] the furthest that the common law courts [had] gone in developing the common law powers of the court to assist foreign [liquidators and had] proved to be a controversial decision.*"). However, Ms Stanley submitted that none of the criticisms and dicta declaring that *Cambridge Gas* was (at least in part) wrongly decided meant that Kawaley J's decision was wrong and should not be followed. The challenge to *Cambridge Gas* affected the decision in so far as it held that a foreign insolvency judgment could be recognised and enforced at common law even when the normal common law rules did not permit this and that the court could by way of common law assistance order that foreign liquidators could rely on and exercise rights under local statutes that did not otherwise apply (by acting as if a local statutory insolvency or restructuring procedure had been commenced and the related statutory powers had been available and applied). But Kawaley J had relied on neither of these aspects, nor on any of the other aspects of *Cambridge Gas* judgment that had been criticised in *Rubin* and *Singularis*.

(h). Ms Stanley also relied, as I have mentioned, on the 2010 decision of the Chief Justice in *In the Matter of FU JI Food and Catering Services Holdings Limited* (FSD Cause No. 222 of 2010). She pointed out that this is another pre-*Rubin* and *Singularis* case. The judgment is not reported but the Chief Justice gave a helpful summary of the facts and his decision in an article he published in the Beijing Law Review (*A Cayman Islands perspective on trans-border insolvencies and Bankruptcies: the case for judicial co-operation* Beijing Law Review, 2011, 2, 145-154). The following is the relevant section in the Chief Justice's article:

> "*The Matter of FU JI Food and Catering Services Holdings Limited (FSD Cause No: 222 of 2010, Grand Court of the Cayman Islands) involved an unusual request for judicial assistance from the High Court of Hong Kong to the Grand Court.*
>
> *Fu Ji Food and Catering Services, is a Cayman Islands holding company which has subsidiaries operating a substantial business in the People's Republic of China (PRC). The group's underlying business interests—prin- cipally in food production,*

restaurants and related services—experienced massive strain in 2009 and the trading of the company's shares on the Hong Kong Stock Exchange (HKSE) was suspended.

As the company was also registered in Hong Kong, the High Court there was persuaded to place it into provisional liquidation to allow for its capital restructuring, an eminently attainable objective, given the substantial underlying value of the company and the then active in- terest of potential buyers.

This objective would not have been realised, however, if, despite its provisional liquidation in Hong Kong, creditors remained able to petition for the winding up of the company in the Cayman Islands, the place of its incorporation and domicile, or remained able otherwise to sue the company for recovery of indebtedness before the Cayman Courts.

The company therefore needed the protection of a stay of proceedings by the Cayman Courts and the ability of its provisional liquidators (the JPLs) to act for the company in the Cayman Islands. Hence the request from the High Court of Hong Kong.

The Grand Court first noted the existence of its inherent jurisdiction at common law to send or receive letters of request for judicial assistance.

Recognising and accepting that the objectives of the restructuring involved the protection of the interests of all the creditors of the company and its subsidiaries, as well as the interests of the company itself (in being allowed to resume listing and trading on the HKSE and so to be divested as a going concern), the request of the High Court was regarded as justified. In granting the request, the Grand Court accepted that, although it was asked to act in aid of the provisional liquidation order of a foreign court over a Cayman Islands company, doing so in the circumstances presented no public policy objections but complied with the need to ensure the protection of the legitimate interests of all stakeholders in keeping with the principle of universality. The following further dicta from Cambridge Gas was noted and applied:

> *"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 (para 22, page 518)."*

In accepting the request, the Grand Court also accepted that the company (Fu Ji Food Ltd) had a real and substantial connection to Hong Kong, being the jurisdiction from which its underlying business interests in the PRC were administered and in which its financing and working capital were raised. The restructuring was aimed at restoring the company to the HKSE and, with the new investor, to enable it to carry on its business in Hong Kong, where the provisional liquidation would close without a winding up.

It was ordered that the JPLs and their Appointment Order be recognized in all respects as if appointed and made by the Grand Court, including, in particular, the power and authority of the JPLs to alter or otherwise deal with the capital structure of Fu Ji Food in accordance with the terms of the Appointment Order.

It was further ordered, therefore, that section 97 of the Cayman Islands Companies Law shall apply in relation to the company so that no action or proceeding shall be commenced or proceeded with against the company within the jurisdiction of the Grand Court except by leave of that court and subject to such terms as it may impose. It was additionally ordered that the JPLs have liberty to apply to the Grand

Court in respect of any matter concerning the company and arising during the period of the JLPs' appointment.

Difficulties in deciding whether to accede to foreign insolvency proceedings may, however, arise when there are compelling reasons for winding up in the Cayman Islands or where there are already insolvency proceedings underway before the Cayman Courts involving the same company or involving related companies. These difficulties are likely to be addressed on the case-by-case basis, although the emergent principles of private international law, as recognised in Article 29 of the UNCITRAL Model Law, would maintain the pre-eminence of local insolvency proceedings over foreign proceedings."

(i). Ms Stanley also relied on the recent decision of Aedit Abdullah JC sitting in the High Court of Singapore in *Re Opti-Medix Ltd (in liquidation)* [2016] SGHC 108 in which the Singapore Court recognised a Japanese liquidation of BVI companies. This is a post-*Rubin* case.

(i). the case involved two BVI companies in respect of which bankruptcy orders had been made by the Tokyo District Court. The companies had assets (in the form of funds credited to bank accounts) in Singapore and the Japanese trustee wanted to exercise his powers under the Japanese bankruptcy orders to deal with, collect in and remit to Japan the funds in the bank accounts. For this purpose he sought an order recognising his appointment and for the appointment of a foreign bankruptcy trustee by the Singapore court. The trustee also gave an undertaking to pay all preferential debts and other debts in Singapore before remitting any funds out of Singapore.

(ii). the Japanese trustee argued that since there were no competing claims by liquidators from different jurisdictions, the Singapore court should recognise his appointment (no prejudice would be suffered as there were only three Singapore creditors, the notes issued by the company had only been sold only in Japan, any debts in Singapore were incurred only for administrative services and notice of the liquidation had also been advertised in Singapore, and no one had contacted the trustee's solicitors). Accordingly, the trustee submitted that his appointment should be recognised even though he was not a liquidator appointed in the place of incorporation of the companies because there was no likelihood of

insolvency proceedings in the BVI. He relied in particular on Rule 179 and the commentary thereto in *Dicey. Morris and Collins* (at that date Rule 166 of the fourteenth edition of 2006) and Tom Smith QC's chapter in *Cross Border Insolvency* (in particular paragraph 6.81 cited above).

(iii). the learned judge granted the relief sought. He noted that the Singapore court had in the past recognised foreign liquidators (citing *Re Lee Wah Bank Ltd* (1926) 2 Malal's Cases 81, which appears to be a case involving the recognition of a liquidator appointed in a jurisdiction other than the country of incorporation); referred to and agreed with Lord Hoffmann's statements in paragraph 31 of *HIH* (cited above) and noted Lord Collins' conclusion (at paragraphs [129] and [130] in his judgment in *Rubin* that it was not open to the courts to introduce a new basis for recognition of foreign judgments by reference to the connection between the judgment creditor and the jurisdiction in which the foreign insolvency proceedings had been commenced in respect of it) and cited and agreed with the following passage from paragraph 6.80 of *Cross Border Insolvency*:

> *".. there is a measure of authority that the law of the place of incorporation does not occupy an exclusive position: other foreign insolvency proceedings may also be grated recognition in the English Court. However, the issues which arise in light of the comments of Lord Collins in Rubin are first, whether the existing authorities do provide sufficient support for a test of recognition based on factors other than the place of incorporation; and secondly, whether there is any ability for the common law to develop in this area without legislative intervention.*
>
> *As to the first issue, it is suggested that Lord Collins in Rubin may well have overstated the extent to which the existing common law authorities give an exclusive role to the place of incorporation in determining whether foreign insolvency proceedings should be recognised. As to the second issue, it is difficult to see why the common law could not develop a broader test based on the concept of 'centre of main interests' as envisaged by Lord Hoffmann in HIH."*

(iv). so Aedit Abdullah JC concluded that he was able to recognise the Japanese trustee even though not appointed in the BVI and was

prepared to use, as the test for determining whether the Japanese court was competent for these purposes, the centre of main interests test (which he held was satisfied since Japan was essentially the sole place in which actual business was carried on). He noted (at [18]) that:

> "*A consequence of a greater sensitivity to Universalist notions in insolvency is a greater readiness to go beyond traditional bases for recognising foreign insolvency proceedings. As the winding-up of a company by the court of the place of incorporation accords with legal logic, there may be a natural tendency to regard a liquidator appointed by that court as having primacy or legitimacy. However, the place of incorporation may be an accident of many factors, and may be far removed from the actual place of business. The approach of identifying the COMI has much to commend it as a matter of practicality. The COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there.*"

(v). but he also considered that it was also possible to justify the recognition of the Japanese trustee on other "*practical grounds*." He said (at [26]) that:

> "*Aside from a common law COMI test, the recognition of the Tokyo order could also be justified on practical grounds. Where the interests of the forum are not adversely affected by a foreign order, the courts should lean towards recognition. This approach could be justified on the bases of not only comity but also of business practicality. In the present case, the interests of Singapore creditors were protected by the undertaking.. and there was no competing jurisdiction interested in the winding-up of the Companies. On the other hand, the jurisdiction which had the greatest interest, Japan, had moved in favour of liquidation. To hinder the orderly dissolution of the Companies in this situation would serve no purpose. The decisions in both Re Lee Wah Bank and Re Russo-Asiatic Bank could perhaps be explained on this practical basis.*"

(j). Ms Stanley also noted that Mr Justice Harris in the Hong Kong Court in *Joint Administrators of African Minerals Limited v Madison Pacific Trust Limited* (HCMP 865/2015) had been prepared to assume without deciding that the Hong Kong Court could in principle recognise liquidators or (administrators) appointed in a jurisdiction other than the place of incorporation (although he noted that the point was open to argument citing Millet J in *Re International Tin Council* [1987] Ch 419 at 447-447 and Lord Collins in *Rubin*). She also *referred* to the various cases discussed in paragraphs 6.68 to 6.80 of chapter 6 of *Cross-Border Insolvency*, 4th ed., 2015 under the sub-heading "*place of*

incorporation not exclusive" in which courts had recognised the effect of a liquidation taking place in a jurisdiction other than that of the place of incorporation. She referred in particular to the following cases:

(i). *Queensland Mercantile and Agency v Australasian Investment Co Ltd* [1888] 15 R 935, a decision of the Court of Session (Inner House) involving liquidations both in the place of incorporation and another jurisdiction. The case related to a Queensland incorporated company which was being wound up in Queensland, but there was also a subsequent (ancillary) winding up order made in England. In the course of the English proceedings the English court made an order staying proceedings in Scotland against the Company. The effect of this order was considered by the Court of Session in Scotland, who gave effect to the English order and thus recognised a liquidation other than that under the law of the place of incorporation.

(ii). *BCCI (Overseas) Ltd v BCCI (Overseas) Ltd (Macau Branch)* [1997] HKLRD 304, a decision of the Hong Kong Court. BCCI (Overseas) Ltd was incorporated in Cayman and had opened a branch in Macau. The officers of the Macau branch placed funds from the branch on deposit with a Hong Kong bank. Subsequently the company was put into liquidation pursuant to an order of this Court and then the branch was ordered to be liquidated out of court pursuant to an order of the Governor of Macau. Under the law of Macau the assets recovered by the Macau liquidator would be ring-fenced. Both the Cayman liquidator and the Macau liquidator claimed the funds held on deposit in Hong Kong. The Hong Kong Court allowed the Macau liquidator, as the representative of creditors entitled to prove in the Macau liquidation, to be a party to the proceedings in Hong Kong and to that extent the Macau liquidation was recognised but the rights to the funds on deposit in Hong Kong were governed by Hong Kong law as the *lex situs*. The Hong Kong Court ordered the funds to be paid to the Cayman liquidator.

(iii). *Re Lee Wah Bank Ltd* (1926) 2 Malal's Cases 81, a decision (as was noted in *Re Opti-Medix Ltd (in liquidation)*) of the High Court of

Singapore. Here a Hong Kong bank had a branch in Saigon. The branch had an account in Singapore at a time when winding up proceedings were commenced in Hong Kong and Saigon. The Hong Kong liquidator and the Saigon liquidator both claimed the money. The Singapore court held that either liquidator could give a good receipt for the money and that the court had a discretion to direct payment to either liquidator.

(iv). I note that it is stated at paragraph 6.74 of *Cross-Border Insolvency* with reference to *BCCI (Overseas) Ltd v BCCI (Overseas) Ltd (Macau Branch)* and *Re Lee Wah Bank Ltd* that: "*Although the results in both these cases are by no means surprising, the important point to note is that the liquidator of the relevant branch was recognised: the courts did not take the approach that, because there was a liquidation in the place of incorporation, that in itself automatically put an end to any dispute.*"

(v). *Re Stewart & Matthews Ltd* (1916) 10 WWR 154, a Canadian case. In this case a company incorporated in Manitoba carried on all of its business in Minnesota. The company petitioned the bankruptcy court in Minnesota and a trustee in bankruptcy was appointed. Subsequently a winding up order was made in Manitoba. On an application supported by the majority of the company's creditors, the Canadian court stayed the Manitoban winding up in favour of the US bankruptcy. In paragraph 6.78 of *Cross-Border Insolvency* it is suggested that: "*... it can only be that the court of the domicile of the company was prepared to grant recognition to the foreign (American) liquidation; otherwise, Canadian assets would not have been transferred to America.*"

(k). finally Ms Stanley drew to my attention a Scottish case in which Lord Tyre in the Court of Session (Outer House) refused to grant relief in support of a foreign liquidation taking place outside the country of incorporation of the company concerned. The case is *Re Hooley* [2016] B.C.C. 826. Ms Stanley pointed out that since Lord Tyre's judgement contained certain dicta that,

and because his decision, might be considered to be inconsistent with her submissions she considered it necessary to refer the Court to the case:

(i). As Ms Stanley explained the case involved three Scottish companies. One of the companies (T Ltd) was placed into insolvent winding-up by the Indian court. In 2012 an administration order was made by the Scottish Court in relation to T Ltd. The administrators agreed and entered into contracts for the sale of T Ltd's underlying assets to Hooley Ltd (the petitioner), and then Hooley Limited, having paid the purchase consideration, sought a declaration from the Scottish Court as to its rights under the agreement and that that the agreements were valid and enforceable and that the administrators had been entitled to enter into the agreements (without the need for the Scottish court's approval). The respondent to the petition was a creditor of T Ltd. It objected to the order sought and argued that "*the court should refrain from hindering the Indian winding up by making any order which appeared to confirm the effectiveness of the exercise by the administrator of any power regarding assets in India or governed by Indian law.*"

(ii). The administrator's response was summarised by Lord Tyre as follows:

> *"it was not suggested on behalf of Hooley that this court should not apply the principle of modified universalism as defined by Lord Sumption in Singularis (above). The principle was, however subject to domestic law and public policy, and the court could only act within the limits of its own statutory and common law powers. Most importantly, its purpose was to assist a court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction. The principle could not be applied to winding-up proceedings in a country other than the place of incorporation. That indeed would hinder universalism. The Scottish courts could recognise and assist ancillary windings up (i.e. winding-up processes taking place other than in a court in the place of incorporation), but they did not and could not defer to such ancillary windings up."*

(iii). Lord Tyre accepted the administrators submissions and granted the declarations sought (confirming that the administrators had been authorised and entitled to sell and refusing to require the Scottish administrators to refrain from exercising their powers so as to avoid

any interference with the Indian insolvency proceeding). Lord Tyre said as follows:

> *"35. The principle of modified universalism has not, to date, been the subject of examination by a Scottish court. For present purposes it is sufficient for me to say that nothing was placed before me that might indicate that it should not be recognised. There is nothing new in a Scottish court lending assistance to foreign winding-up proceedings: see e.g. Queensland Mercantile and Agency Co Ltd v Australasian Investment Co Ltd (1888) 15 R. 935 . The same case demonstrates that Scots law has long recognised that there may be a principal liquidation in the country of the company's incorporation and an ancillary liquidation in another jurisdiction. In my opinion, however, Hooley is well founded in its submission that the principle of modified universalism has not been recognised by the Supreme Court or the Privy Council as applying beyond the situation where winding-up proceedings are taking place in the jurisdiction in which the company is incorporated."* [underlining added]

(iv). Ms Stanley submitted that *Hooley* was distinguishable from the present case, in particular because Lord Tyre was required to deal with a very different type of fact pattern. *Hooley* involved an asserted inconsistency or conflict (asserted by a creditor rather than the foreign liquidator or foreign court) between a domestic (Scottish) insolvency proceeding (taking place in the country of incorporation of the companies concerned) and the foreign liquidation and an application for relief that challenged and sought to limit the powers of the Scottish officeholder. In stark contrast, in the instant case there is no conflict and no question of subordinating the Cayman Court (or its officeholder) to the Hong Kong Court; rather, the Court is being asked to recognise the Hong Kong orders with a view to promoting a single co-ordinated process via parallel schemes of arrangement.

17. Ms Stanley's arguments as to the ground I have identified in paragraph 13(d)(iii), based on the Company's submission to the jurisdiction of the Hong Kong Court, can be summarised as follows:

(a). in the circumstances of this case, the Company has submitted to the jurisdiction of the Hong Kong Court, and it could not be heard to say that it was not bound by the winding-up order and the order appointing the Liquidators

(including the Liquidators' powers to act on behalf of the Company for the purpose of applying for orders under section 86(1) of the Companies Law).

(b). the analysis set out in paragraph 6.68 of *Cross-Border Insolvency* correctly summarised the applicable law. Paragraph 6.68 states as follows:

> *"However, the Privy Council in Cambridge Gas had plainly proceeded on the basis that submission would be sufficient, and it is suggested that there is no reason for regarding this part of the reasoning has having been overruled by Rubin. Accordingly, where a corporation invokes the insolvency jurisdiction of a foreign court, or otherwise validly submits thereto, the proceedings may be accorded recognition by the English court."*

(c). as is stated in paragraph 6.84 of *Cross-Border Insolvency* it is clearly established as a matter of personal bankruptcy law that foreign proceedings may be recognised if the debtor submitted to the jurisdiction of the foreign court. Ms Stanley relied on *In re Davidson's Settlement Trusts* (1873) LR 15 Eq 383. This case involved the bankruptcy in Queensland of Walter Davidson based on his own petition and the subsequent application to the English court by the official assignee appointed in Queensland for an order that he be entitled to withdraw and remit to Australia funds held in court in England for Mr Davidson (representing funds settled on Mr Davidson by his deceased father). After Mr Davidson had presented his own bankruptcy petition to the Queensland court, he had died intestate leaving a widow and his widow was appointed to represent Mr Davidson's estate and she opposed the official assignee's application. Ms Stanley referred me to the following passage from the judgment of Lord Justice James (at page 385):

> *"Whether the domicil of the insolvent was English or colonial, for the purpose of trading or otherwise, is immaterial. It seems to me that the proceedings under the insolvency in Queensland cannot be disputed by the representative of the insolvent who became an insolvent upon his own petition, who voluntarily submitted himself to the Insolvency Court in the colony and in whose lifetime debts were proved in the insolvency to a much larger amount than the sum in Court will provide for. It is clear that neither the insolvent's representative nor his next of kin can have any legal right to anything until after the payment of all his debts and any surplus here is only in the imagination ..."*

(d). Lord Hoffmann in *Cambridge Gas* had (at [19]) referred to *In re Davidson's Settlement Trusts* and confirmed the principle on which the decision was based as follows:

"The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English movables vest automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in Solomons v Ross , or in which he submitted to the jurisdiction: In re Davidson's Settlement Trusts .. It may be that the criteria for recognition should be wider, but that question does not arise in this case. Submission to the jurisdiction is enough. In the case of immovable property belonging to a foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property.[underlining added].

(e). the effect of a submission should, in principle, be the same in the case of a corporate insolvency as in the case of a personal bankruptcy (although, as is acknowledged in paragraph 6.84 of *Cross-Border Insolvency ".. submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon*"). The only material difference between bankruptcy and corporate insolvency is that there is no need for a vesting order in the latter because the foreign assets of the company remain in the company, whereas in the case of a trustee in bankruptcy those assets need formally to be vested in him. Ms Stanley submitted that this difference does not, and should not, lead to different rules for recognition.

(f). submission by the company to the jurisdiction of the foreign court prevented anyone claiming through the company from challenging or denying the foreign liquidators' powers to act on behalf of the company, which powers were granted by or resulted from (in a case in which the powers were granted by a foreign statute following the making of) the foreign court's order.

(g). Ms Stanley noted that in *Cambridge Gas* the issue of submission had arisen but the discussion in that case related to submission not by the company but by a shareholder, who was treated as a third party. In *Cambridge Gas* the issue was whether the New York Bankruptcy Court's confirmation order in the chapter 11 proceedings relating to Navigator Holdings plc (***Navigator***), a Manx corporation, pursuant to which the shares in Navigator held by Cambridge Gas Transport Corporation (***Cambridge Gas***), a Cayman company, were to be transferred to Navigator's chapter 11 creditors' committee was to be recognised. In these circumstances, there was, for the purpose of deciding whether the common law rules for recognising and enforcing foreign judgments applied, an issue as to how to characterise the

Bankruptcy Court's confirmation order (as well, of course, as to whether these common law rules applied differently to judgments obtained in the course of bankruptcy and insolvency proceedings). Was it an *in personam* order against Cambridge Gas (as shareholder) so that Cambridge Gas must have submitted to the chapter 11 proceedings for it to be bound or was it to be characterised in some other way which avoided the need to find a submission by Cambridge Gas? If the confirmation order was to be treated as an *in personam* order against Cambridge Gas under the ordinary common law rules regulating the recognition of foreign judgments Cambridge Gas would have had had to submit. It had not directly done so and had not participated directly in the chapter 11 proceedings (but its parent company had done so, perhaps on its instructions) and therefore the deemster in the High Court of the Isle of Man concluded that Cambridge Gas had not submitted. His decision on this point was not appealed. But it seems that Lord Hoffmann thought this result surprising (see [10] of his judgment presumably because he thought, on the facts, that Cambridge Gas' involvement in the chapter 11 proceedings albeit indirect was on the evidence sufficient to give rise to a submission). In any event, submitted Ms Stanley, *Cambridge Gas* did not involve a decision on or analysis of the effect of a submission by the company on the recognition of the powers of a foreign liquidator to act on behalf of the company (and of other corporate organs, such as the board of directors, to act on the company's behalf). Furthermore, Ms Stanley submitted that there was nothing in the Supreme Court's judgment in *Rubin* that was inconsistent with or undermined the validity of the proposition that where the company submitted to the foreign court the powers of the foreign liquidator to act for the company would be recognised.

(h). further, even though in the present case the Hong Kong winding up had not been commenced by a petition presented by the Company, the Company's registration under Part XI of the former Companies Ordinance (Cap. 32) was sufficient to constitute a submission to any order made by the Hong Kong Court, including the Winding up Order. Ms Stanely relied on the statement made by Mr Chan in his second affirmation, which I have quoted above, as to the effect of the registration as a matter of Hong Kong law. Ms Stanley did not appear (nor on the evidence did it appear possible for the Liquidators) to rely on participation by the Company's directors or shareholders in the Hong

Kong liquidation which should be treated and sufficient to amount to a submission to those proceedings.

Discussion and decision – the issues to be decided

18. It seems to me that the following four main issues arise:

(a). does the Court have jurisdiction or the power to grant the relief sought by the Liquidators in the present circumstances (the ***Jurisdiction or Power Issue***)?

(b). if it does have jurisdiction or the power, should the Court make an order and exercise the jurisdiction or power in the present circumstances (the ***Exercise of Discretion Issue***)?

(c). assuming the Court is otherwise able and willing to grant the relief sought, should the Court do so without notice being, and before notice is, given of the Summons to the Company's directors, shareholders and creditors (the ***Notice Issue***)?

(d). what form of relief should the Court grant and order should the Court make (the ***Nature of the Relief Issue***)?

The Jurisdiction or Power Issue

19. The first question is whether the Court is able to grant the relief sought in the present circumstances. There are three sub-issues:

(a). what is the juridical nature and scope of the Court's non-statutory jurisdiction to recognise and assist foreign court-appointed liquidators?

(b). what is the relief being sought by the Liquidators?

(c). is that relief within the scope of the Court's jurisdiction or powers?

20. The juridical nature and scope of the Court's non-statutory jurisdiction to recognise and assist foreign court-appointed liquidators has, as is well known, been the subject of much judicial comment and academic and practitioner commentary and has generated a voluminous body of secondary literature, in particular since the decisions in *Rubin* and *Singularis*. Some, but not all, of the decisions and only a small proportion (thankfully) of the literature have been cited to me on this application and I will confine my comments (with limited exceptions) to the materials which have been cited to me.

21. It seems to me that the most recent, detailed and significant analysis of the juridical nature and basis of the non-statutory jurisdiction to recognise and assist is to be found in the majority judgments in *Singularis*, in particular the judgment of Lord Sumption. For this reason, this seems to me the proper place to start any discussion of this jurisdiction.

22. Before considering the decision and approach taken in *Singularis* I should make two preliminary points. First, as I have noted, in Cayman we have a statutory jurisdiction to recognise and assist foreign representatives under Part XVII of the Companies Law. This statutory jurisdiction is only available where the foreign representative is appointed in the place of incorporation (see the definition of "debtor" in section 240 which states that "debtor" for the purposes of the definition of a foreign representative – a liquidator appointed in respect of a debtor – means a foreign corporation or other foreign legal entity subject to a bankruptcy proceeding in the country in which is incorporated or established – "established" in this context appears only to be the equivalent of the place of incorporations in cases of, and is to be applied to, other foreign entities and not foreign corporations). But the statutory jurisdiction has not pre-empted or removed the non-statutory, common law based, jurisdiction. This was the view of Jones J in *Picard and Bernard L Madoff Investment Securities LLC (in liquidation) v Primeo Fund (in liquidation)* [2013] (1) CILR 164 *per* Jones J at paragraph 13 where the learned judge said as follows:

> "*..Part XVII [of the Companies Law] supplements and partially codifies the common law. It does not abolish the common law rules which continue to exist alongside the new statutory provision.*"

This seems to me to be correct. Secondly, *Singularis* is, as I have noted, a decision of the Privy Council (on appeal from Bermuda). Ms Stanley did not address the question as to the extent to which this Court should follow *Singularis* but for the purpose of

this application I intend to treat the decision and analysis as authoritative albeit not technically binding on me.

23. The analysis in *Singularis* (as well as in *Rubin*) used a particular terminology to describe the jurisdiction that the court was exercising – there are repeated references to common law *powers* to be applied having regard to common law *principles*. The following extracts from the core parts of Lord Sumption's judgment illustrate the use of this terminology and his analysis of the basis, nature and scope of the jurisdiction:

> "*10. The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent company. The power was founded partly on statute and partly on the practice of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations.....*
>
> *11. The question of what if any power the court has to assist a foreign liquidation without conducting an ancillary liquidation of its own, must depend on the nature of the assistance sort. Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First the proceedings are a 'is mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established' is, to use the expression of Lord Hoffmann in Cambridge Gas.... Inherent in this function of a winding up is the statutory trust of the company's assets ... and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction..... Fourth it brings into play procedural powers generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities.*
>
> *12. .... even without a winding up, the court could, on ordinary principles of private international law have recognised as a matter of comity the vesting of the company's assets in an agent or officeholder appointed or recognised under the law of incorporation. For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English movable assets of a foreign bankrupt which had transferred to an officeholder in an insolvency proceeding in the law of his domicile. Moreover, while the same rule did not apply to immovable property the court would ordinarily appoint the foreign officeholder a receiver of the rents and profits: see Dicey, Morris & Collins, the Conflict of Laws, 15th ed., (2012), volume 2, rules 216 and 217. ....*
>
> *19. .. In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise...*

23. ... *The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can.....*"

25. *In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation in In re African Farms Ltd [1906] TS 373 and in HIH [2008] 1 WLR 852 and Rubin [2013] 1 AC 236 , that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in Norwich Pharmacal [1974] AC 133 and R (Omar) v Secretary of State for Foreign and Commonwealth Affairs [2013] 1 All ER 161; [2014] QB 112 (at both levels) shows, common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency. Finally, as with other powers of compulsion exercisable against an innocent third party, its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance.*" [underlining added]

24. In *Singularis* Lord Collins also referred to the court's common law *power*:

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

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

54. *Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay proceedings or the enforcement of judgments. Several of these cases were mentioned in Rubin v Eurofinance SA [2013] 1 AC 236 , para 33. They include (subject to what is said below) In re African Farms Ltd [1906] TS 373 , where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in Turners & Growers Exporters Ltd v The Ship "Cornelis Verolme" [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and Banque Indosuez SA v Ferromet Resources Inc [1993] BCLC 112 , where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: Modern Terminals (Berth 5) Ltd v States Steamship Co [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in CCIC Finance Ltd v Guangdong International Trust & Investment Corpn [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency)...*

58. *A second group of cases is where the statutory powers of the court have been used in aid of foreign insolvencies. The best known example is the use of the long-standing power to wind up foreign companies which are being wound up (or even have been dissolved) in the country of incorporation.*" [underlining added]

25. Lord Collins also used the power terminology in *Rubin* and summarised the position in this way:

"29. *Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign officeholders in insolvencies with an international element.*" [underlining added]

26. It seems to me that, based on these statements concerning the nature and scope of the non-statutory jurisdiction to assist, the following points can me made:

(a). the *court* is to be treated as having a *power* to recognise and grant assistance to foreign proceedings and liquidators (at least where those proceedings are commenced in and the liquidators are appointed by a court). This is a power of the court. If the circumstances justify its use, and subject to the limitations on its use, the power can be exercised by making suitable orders for the purpose of enabling the foreign court and its officeholders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of its powers. This is the purpose for which the power can be exercised.

(b). the court's power as so described is in substance a non-statutory jurisdiction which is based on and justified by the public interests identified by Lord

Sumption. In deciding whether and how to exercise the power the court has regard to and applies the approach which has been labelled the *principle* of modified universalism. This term is a convenient shorthand for the approach that the court takes when exercising the power which recognises both the purpose for which the power is to be exercised (to allow a foreign liquidator appointed by a competent court to conduct the liquidation across borders despite the territorial limitations to which his powers are otherwise subject) and also the applicable limitations which apply to the power or condition or qualify its exercise. (I would, for myself, note that there appears to be an unhelpful tendency in the writings of some commentators to mischaracterise the status and effect of this guiding and flexible principle by elevating it into a rigid rule of law that independently generates rights and remedies and is to be treated, and applied, as if it were a doctrine in metaphysics or theology).

(c). suitable orders include any order which the court can make in the circumstances based on and by applying the applicable domestic substantive or procedural law (including orders in the exercise of its case management powers with respect to proceedings before it). The court is using and relying on its domestic law to fashion and find a form of relief for the foreign liquidator that achieves the purpose for which the power can be exercised. But the domestic substantive or procedural law must be applicable to the particular case before the court. Accordingly, the court cannot grant relief by making an order which can only be made in reliance on a domestic statutory power which, by its terms, does not apply in the circumstances - for example by making an order which could only be made if a domestic scheme of arrangement had been applied for and approved where no such scheme can be or has been applied for. Nor can the court make an order that grants relief to the foreign liquidator which depends on there being a domestic law right which does not in the circumstances exist - for example, in the view of both the majority and the minority in *Singularis*, the court cannot order that an auditor subject to the *in personam* jurisdiction of the court provide information to the foreign liquidator when the auditor is not subject to a domestic law duty or obligation in the circumstances to provide it and when there is no right under domestic law for a party in the position of the foreign liquidator to such information. It is an interesting question, which I do not need to resolve on this application, whether the Privy Council created – or

recognised - a special common law right or remedy enforceable by the Cayman liquidators which responded to and arose out of the liquidators' need to have the information sought or whether the Board was merely recognising a right, which was analogous to the *Norwich Pharmacal* right or remedy, available to any litigant in a similar position (of course the Board refused to grant the relief sought because the Cayman liquidators were said – or perhaps more accurately on the case as argued, assumed - not to have the power under Cayman law to obtain the relevant information from the auditors, although one wonders why, if the common law of Bermuda recognised their entitlement to the information, or the Bermudian court's power to make an order requiring the information to be provided, such an entitlement or power was not available under Cayman law and in this Court).

(d). the court must in each case start by considering the nature and form of relief sought by the foreign liquidator. This can take a number of different forms and the legal analysis varies depending on the nature of the relief sought. Sometimes, the foreign liquidator is asking the requested court only to apply its rules of private international law so as to permit the foreign liquidator to act in the name and on behalf of the company and to deal with its assets and rights. There may well be no need to rely on or exercise the common law power in this case. Sometimes, the foreign liquidator is asking the requested court just to exercise its case management powers in proceedings before it by adjourning or staying those proceedings or the execution of a domestic judgment arising therefrom. The exercise of such case management powers can be said to involve an exercise of the common law power. Sometimes the foreign liquidator will seek to bring proceedings in the requested court based on a domestic statutory or common law cause of action available either to the foreign liquidator or the company. Where he only needs to establish his capacity and powers, as a matter of private international law, to bring the proceedings in the name of the company, there will be no need to rely on the common law power. Where the cause of action is vested in the foreign liquidator or he is seeking additional relief in reliance on his powers as liquidator then the common law power to recognise and grant assistance to the foreign liquidator comes into play.

(e). where the foreign liquidator is appointed in the country of incorporation of the company concerned, the domestic private international law of the requested court will apply so that the liquidator is treated as being entitled to act for and on behalf of the company. To that extent he will be entitled to recognition of his powers. As I have pointed out, the principles of domestic private international law produce that result. Therefore technically the foreign liquidator does not need to rely on, and this result does not depend on the exercise of, the common law power (at least when the foreign liquidator is only taking action in the name of and on behalf of the company and those seeking to challenge the foreign liquidator's action are claiming through the company). However, when the foreign liquidator is not appointed in the country of incorporation, he cannot rely on this rule of private international law and instead must invoke the common law power in order to be permitted to act on behalf of the company.

(f). the limitations on the common law power (both as to its scope and the circumstances in which it will be exercised) are those described by Lord Sumption and those I have set out above.

27. In the present case the Liquidators wish to be able to promote a Cayman scheme and in particular to apply to the Court for an order under section 86(1) of the Companies Law convening a meeting of creditors. Section 86(1) states that:

> "*Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them the Court may, on the application of the company or of any creditor or member of the company or where the company is being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members as the case may be to be summonsed in such manner as the Court directs.*" [underlining added].

28. Accordingly, the Liquidators can apply if they are able or permitted to act for and on behalf of the Company. Two main questions therefore arise. First, are the Liquidators able – are they treated under Cayman private international law as being entitled – to act on behalf of the Company (and therefore able to cause the Company to make an application under section 86(1) of the Companies Law)? If not, can and should the Court exercise its power to recognise and assist so as to permit them to do so, and if so how?

The position under private international law rules where the foreign liquidator is not appointed in the place of incorporation

29. As regards the first question, the answer is no:

(a). because the Liquidators are not appointed in the Company's country of incorporation they are not, as a matter of Cayman private international law, treated as being empowered to act on behalf of the Company. As Professor Briggs notes in *Private International Law in the English Courts* (OUP, 2014) at paragraphs 10.15, 10.16 and 10.22:

> "*A corporation is an artificial creation, a legal person. The question whether, and with what powers, a body corporate has been created can only be determined by the law under which its creation took place, which for the common law rules of private international law means the lex incorporationis. Likewise, the question who is empowered to act on behalf of the corporation, and in what circumstances, is a matter for the lex incorporationis to specify.... Likewise the question of who is entitled to sue in the company's name ... is almost inevitably a matter for the lex incorporationis ..*"

(b). under Cayman law, having regard to the Company's constitution and the Companies Law, the corporate organs entitled to act on behalf of the Company are the Company's directors and shareholders. The Winding up Order without more does not, as a matter of Cayman law, prevent these corporate organs from having the authority to act for and bind the Company. The Winding up Order is not, as an order of a foreign court, of itself binding or enforceable in Cayman (see *Felixstowe Dock Co v U.S. Lines Inc.* [1989] 1 Q.B. 360 at 375). Of course, before taking any action the directors would need to consider the effect (both legal and practical) of the Winding up Order and would be unlikely to act, and are likely to be advised not to act, without the consent of the Liquidators, certainly where they are subject to the *in personam* jurisdiction of the Hong Kong Court and save in a case where there some proper justification for not acting as directed by the Liquidators.

(c). it was no doubt the Hong Kong liquidators' lack of authority, as a matter of Bermudian private international law, which resulted in the directors in the *In re Dickson Group Holdings Limited* case remaining in place for Bermuda law purposes and passing a resolution supporting the Hong Kong liquidators' application for leave to summon a meeting of creditors. This meant that under the law of incorporation, a corporate organ recognised as having authority to

act for the company and to authorise the company to apply for an order to convene a meeting of creditors, had approved and authorised the issue of the summons. At the very least, this was a prudent belt and braces approach (the application in the *Dickson Group Holdings Limited* case had been issued by and in the name of the company). This step has not been taken in the present case because, as the second affidavit of David Yen Ching Wai makes clear, despite the Liquidators' best efforts the directors are not cooperating and have failed to respond to the Liquidators' efforts to contact them (it appears that one director has been disqualified from acting while others have resigned – including the two Hong Kong based directors - or indicated that they intend to resign from the board).

The Exercise of Discretion Issue

30. As regards the second question:

(a). it seems to me that the power to recognise and assist arises and applies even in a case where the foreign liquidator has been appointed in a place other than the country of incorporation. It is true that, as I have explained, the private international law rule which requires recognition of the power of a foreign liquidator appointed in the country of incorporation to act for the company does not apply. But, in light of the nature and scope of the power to recognise and assist, as I have explained it above, I see no reason for concluding that the power is wholly unavailable and cannot be used just because the foreign liquidator has been appointed in a place which is not the country of incorporation.

(b). the significance and impact of the appointment being made in the country of incorporation was also discussed in *Stichting Shell Pensioenfonds v Krys* [2015] AC 616 (***Stichting Shell***), another important and recent decision of the Privy Council (sitting on appeal from the Eastern Caribbean Court of Appeal in a case involving the BVI). In that case the advice of the Board was given in a judgment of Lord Sumption and Lord Toulson. They commented (at [14]) as follows:

"In the British Virgin Islands, as in England, the making of an order to wind up a company divests it of the beneficial ownership of its assets, and subjects them to a statutory trust for their distribution in accordance with the rules of distribution provided for by statute... In the case of a winding up of a BVI company in the BVI, this applies not just to assets located within the jurisdiction of the winding up court but all assets worldwide.... It reflects the ordinary principle of private international law that only the jurisdiction of a person's domicile can effect a universal succession to its assets. They will fall to be distributed in the BVI liquidation ..." [underlining added]

(c). this confirms that at least one of the important reasons why an appointment in the place of incorporation is significant is because it brings with it the effects under private international law that I have already mentioned. Liquidators appointed by a court in the place of incorporation can take advantage of these rules of private international law (which are applied in many jurisdictions), and therefore in practice expect to be able to conduct the liquidation and be effective, and act for the company, in multiple jurisdictions.

(d). I also note that there are some highly respected commentators who suggest that the powers of a liquidator appointed in a country other than the place of incorporation should be limited to dealing with the assets of and acting on behalf of the company in that territory and not beyond it. For example, Professor Ian Fletcher says the following in the latest and recent edition of *The Law of Insolvency* (fifth edition, 2017, Sweet & Maxwell) at paragraph 30-057:

"...A liquidator appointed under the law of the company's place of incorporation will be recognised at English law as having authority to wind up the company and to represented in legal proceedings brought either against or on behalf of the company provided that such representative authority is conferred upon him by the law governing his appointment. Conversely, there is no reported incidence of recognition having been accorded in England to a liquidator appointed under the law of some other jurisdiction than that in which the company underwent incorporation. With respect to liquidations of this kind, the inference which most readily suggests itself is that, the effects of such a liquidation being regarded as of necessity, confined to the territorial limits of the jurisdiction in which the winding up is taking place, the liquidators capacity to act on the company's behalf and to deal with its assets must be deemed to be similarly restricted so as to be limited to property situated within the jurisdiction of the foreign court.

(e). but it seems to me that the inapplicability of the rules of private international law that treat a foreign liquidator appointed in the country of incorporation as having proper authority to act for and to bind the company or as effecting in

substance a universal succession to the company's assets does not preclude the Court exercising its non-statutory power to assist a foreign liquidator appointed outside the place of incorporation where the conditions for the exercise of that power are satisfied. The power is capable of having a wider application that these rules of private international law so that the power can be exercised even when the rules of private international law do not apply to require recognition of the foreign liquidator's powers or status.

(f). it seems to me that in the present case the conditions for the exercise of that power are in principle satisfied for the following reasons:

(i). it seems to me that the relief that the Liquidators need and should be granted is an order authorising them to make an application under section 86(1) of the Companies Law and to consent to the proposed scheme on the Company's behalf.

(ii). the Liquidators wish (as Ms Stanley confirmed during the hearing) simply to be able to promote a parallel scheme of arrangement and to prevent any proceedings in Cayman being litigated in a manner that would disrupt or interfere with the scheme process. This can be achieved by the Court making an order in the terms I have just mentioned and by making a direction to the effect that any proceedings commenced or any winding up petition presented against the Company be assigned to me (so that I can ensure that appropriate case management orders are made to stay or adjourn such proceedings pending the completion of the scheme process save in exceptional circumstances which would justify a different approach).

(iii). in the present case the Court is in substance dealing with a governance question, namely whether to permit the Liquidators to act on behalf of the Company in presenting an application under section 86(1) of the Companies Law and in consenting to the proposed scheme on behalf of the Company. The issue is who should be entitled to act and bring proceedings for a scheme on behalf of the Company (in the context of a corporate rescue or reorganisation - albeit not one that involves all creditors being paid in full). No issues

arise involving competing claims by creditors which would result in different levels of recovery or returns depending on whether the Liquidators were granted the relief they seek. It appears that currently the Company's board and its directors are unable or unwilling to act and (while the directors could I assume act, and support or authorise the making by the Company of an application under section 86(1), with the consent of the Liquidators they) have shown no sign that they will take any steps to support or oppose the Liquidators' plans or this application. It also appears that it would be impracticable and prejudicial to the interests of all stakeholders to delay matters by seeking shareholder approval for the Liquidators' application (although as I explain below I think that it is important, to ensure that there really is no objection and to give all those affected an opportunity to be heard, to give notice to the directors and shareholders of the Liquidators' plan to promote a parallel scheme in Cayman, the Summons and the order that I make on this application).

(iv). it also appears to be the case that there is no likelihood of an application being made for a winding up order in Cayman. The Winding up Order was made on 9 February 2015. As David Yen Ching Wai explains in his Second Affidavit, creditors have participated in the Hong Kong liquidation and 39 proofs of debt have been lodged. If creditors considered it to be in their interests to have a Cayman winding up they be expected to have made that clear and either applied in Hong Kong for permission or taken steps in Cayman to present a petition in Cayman. They have not done so in over two and a half years and it appears from the evidence filed in support of the Summons that creditors are aware of and not objecting to the proposed schemes of arrangement (although, once again as I explain below, I think it important to ensure that creditors are given proper notice of the Liquidators' plan to promote a parallel scheme in Cayman, the Summons and the order that I make on this application).

(v). it is clear on the evidence that the Company has substantial contacts with Hong Kong. As I have already noted, the Company's shares have been listed and are to be relisted on the Main Board of the

HKSE; the corporate business of the Company has been administered from Hong Kong (with all the directors having addresses in Hong Kong or the PRC); the Company was registered under part XI of the former Hong Kong Companies Ordinance on 4 November 1999; virtually all the Company's shareholders have addresses in Hong Kong (the Company's largest registered shareholder, HKSCC Nominees Limited, which owns and operates the Hong Kong Central Clearing and Settlement System (***CCASS***), held as at 17 August 99.02% of the Company's shares and all CCASS participants were registered with Hong Kong addresses) and 2.7% of the value of all proofs of debt lodged in the Hong Kong liquidation have been filed by persons located in Hong Kong and 74.9% of proofs have been lodged by persons located in the PRC.

(vi). there appears on the evidence to be no need for or reason why creditors or members would benefit by a Cayman winding up or from a provisional liquidator being appointed in Cayman. The Liquidators consider that a Cayman liquidation or provisional liquidation would just incur additional cost and result in unnecessary delays and there is no risk of prejudice to stakeholders in not having such a proceeding. This, on the evidence, seems right to me.

(vii). this is also not a case in which there are any local reputational, regulatory and policy reasons requiring a local proceeding. I agree with, and wholeheartedly endorse, the approach explained and the caveats identified by Kawaley J at paragraph 24 of his judgment in *Dickson Group*. In appropriate cases the requested court may have to refuse to grant assistance and the relief sought by a foreign liquidator where a local liquidation or provisional liquidation is needed (and I also note that the Chief Justice made the same point in his summary of his judgment in *FU JI Food* and expressed the same reservations, commenting that there may be cases in which there are *"compelling reasons"* for a Cayman winding up).

(g). therefore in the present case the Hong Kong liquidation is the only proceeding which has or is likely to be commenced in respect of the Company and is

taking place in a jurisdiction with which the Company has substantial connections. I note that the Company's centre of main interests, as that term is used in the EU Insolvency Regulation or the UNCITRAL Model Law, is probably in Hong Kong and that seems to me be a consideration of considerable weight to be taken into account when deciding whether the foreign, non-place of incorporation, liquidation should be treated as competent and justifying assistance, although I do not consider it to be determinative. There is therefore a foreign liquidation taking place in a jurisdiction which should be treated as competent, no other insolvency proceeding in prospect and a proper need (endorsed and supported by a well-respected foreign court) for the foreign liquidator to be able to exercise his powers to represent the Company in the local court and jurisdiction in order to be able effectively to conduct and achieve the purposes of the liquidation in the interests of creditors and other stakeholders. It seems to me that in these circumstances the purpose for which the power to recognise and assist may be exercised is fully engaged so as to justify the exercise of the power (and the authorities relied on by Ms Stanley support its exercise in the present case).

(h). none of the limitations which Lord Sumption identified apply in the present case to prevent the exercise of the power to recognise and assist the Liquidators. They have a power as a matter of Hong Kong law to act for and on behalf of the Company and to promote schemes of arrangement. Furthermore, while the Liquidators wish to use and rely on the statutory jurisdiction to apply for a Cayman scheme (under section 86(1)) that jurisdiction (and the applicable statutory provision) is available in the circumstances. Section 86(1) permits an application to be made by the Company and the Liquidators can be authorised by the Court to make such an application on the Company's behalf. This does not involve the heresy or impermissible exercise of the common law power identified by Lord Collins in *Singularis* (see [78]-[83]) in which the Court applies legislation which otherwise does not apply "as if" it applied. Provided that the Liquidators can properly make an application in the Company's name and are authorised to do so on the Company's behalf, the statutory jurisdiction to apply for an order convening a meeting of creditors may be invoked in accordance with its terms. It seems to me that the Court may without the need to rely on a statutory power not otherwise available and in a manner that is in accordance

with domestic law make an order against and in respect of a Cayman company authorising a foreign liquidator to make such an application and giving him powers to act on behalf of the Company for that purpose.

(i). in my view *In re Dickson Group Holdings Limited* was correctly decided and I see myself as following in general terms the approach taken in that case by Kawaley J, although I have sought to update and modify the analysis of the common law power and how it is to be applied to reflect the judgments in *Rubin* and *Singularis*. I also consider that I can rely on and am following the approach of the Chief Justice in *FU JI Food* subject to a similar updating of and adjustment to the analysis of the common law power (and consequently to the form and nature of the relief to be granted to the foreign liquidator). I also agree with the result in *Re Opti-Medix Ltd (in liquidation)* although I have sought to provide a different and more detailed analysis of the common law power. I agree with Ms Stanley that the result and reasoning of Lord Tyre in *Hooley* is not inconsistent with the approach I have adopted or the Liquidators' application. It is hardly surprising that a Scottish court would refuse to interfere with a sale agreed and entered into by Scottish administrators (whom it had appointed) on a post-transaction application made by a creditor rather than the foreign liquidator and without a request of the Indian court. The present case is very different and presents wholly different issues. I also regard the commentary in both Dicey, Morris & Collins and *Cross-Border Insolvency* to be helpful and broadly correct and take comfort from the various cases cited in those texts and by Ms Stanley in which courts, in admittedly different contexts, have been prepared to recognise and assist foreign liquidators appointed outside the country of incorporation.

The submission to jurisdiction point

31. Ms Stanley, as I have noted, also argues that submission by the company to the jurisdiction of the foreign court in which the winding up order is made and the foreign liquidator is appointed is a separate ground which justifies the requested court recognising (and indeed requires the requested court to recognise) the powers of the foreign liquidator to act on behalf of the company and that the Company has submitted to the jurisdiction of the Hong Kong Court in the present case.

32. It seems to me that two main issues arise:

(a). is submission a sufficient and separate basis for recognition of the foreign liquidator's powers to act for the company?

(b). if so, what constitutes submission for these purposes – in particular is registration as an oversea company sufficient or is it necessary that the company applies for the commencement of (or actively participates in) the foreign liquidation?

33. As regards the first issue, I would make the following comments, subject to the caveat that my views are preliminary since, as the textbooks cited to me make clear, the issue has not been the subject of a full consideration by any previous decision and this has been an *ex parte* application in which the counter-arguments have not been aired and tested:

(a). in my view submission can in principle be sufficient for certain purposes:

(b). at paragraph 6.84 of *Cross-Border Insolvency* Mr Smith notes, prior to reaching the conclusion relied on by Ms Stanley and quoted above, that there is no clear authority on the effect on a foreign liquidator's application for recognition or assistance of a submission by the company to the jurisdiction of the foreign court:

> "*In the case of bankruptcy, it is clearly established that foreign proceedings may be recognised in England if the debtor submitted to the jurisdiction of the foreign court. However, submission by a corporation to the insolvency jurisdiction of a foreign court has been only lightly touched upon.*"

(c). but it does appear that (in addition to Lord Hoffmann in *Cambridge Gas* in the passage referring to *In re Davidson's Settlement Trusts* relied on by Ms Stanley and quoted above) both Lord Collins and Lord Mance in *Rubin* accepted, or perhaps assumed, that submission by a corporate debtor (as well as an individual bankrupt) would be sufficient.

(i). in *Rubin*, when discussing *Cambridge Gas*, Lord Collins said (at [46]) as follows:

> "*The first sense is the jurisdiction of the US Bankruptcy Court in relation to the Chapter 11 proceedings themselves. The entity which was in Chapter 11 was Navigator. The English courts exercise a wider jurisdiction in bankruptcy and (especially) in winding up than they recognise in foreign courts. At common law, the foreign court which is recognised as having jurisdiction in personal bankruptcy is the court of the bankrupt's domicile or the court to which the bankrupt submitted (Dicey , 15th ed, vol 2, para 31R-059) and the foreign court with corresponding jurisdiction over corporations is the court of the place of incorporation: Dicey,15th ed, vol 2, para 30R-100). Under United States law the US Bankruptcy Court has jurisdiction over a "debtor", and such a debtor must reside or have a domicile or place of business, or property in the United States. From the standpoint of English law, the US Bankruptcy Court had international jurisdiction because although Navigator was not incorporated in the United States, it had submitted to the jurisdiction by initiating the proceedings.*" [underlining added].

(ii). the second underlined passage is quoted and relied on by Ms Stanley. I think that the first quoted passage is also worth noting. (I also think that Ms Stanley is right to say that there is nothing in the subsequent criticisms of Lord Hoffmann's analysis or the result in *Cambridge Gas* which prevents a court concluding that a submission by a company would be a sufficient ground for recognising the foreign liquidator's powers to act for the company. The significance of submission has been highlighted and strengthened by the Board's judgment in *Stichting Shell*. Furthermore, there is an argument that the result in *Cambridge Gas* can be justified on the basis of there having been a submission – the submission by Navigator having been sufficient to constitute a submission by its shareholders, at least to the extent of preventing them challenging the orders of the foreign court: see Briggs, *Judicial assistance still in need of judicial assistance* [2015] LMCLQ 179.)

(iii). Lord Mance said the following in his dissenting judgment in *Rubin* (at [189]):

> "*Lord Clarke ...takes a different view from Lord Collins, but does not define either the circumstances in which a foreign court should, under English private international law rules, be recognised as having "jurisdiction to entertain" bankruptcy proceedings or, if one were (wrongly in my view) to*

treat the whole area as one of discretion, the factors which might make it either unjust or contrary to public policy to recognise an avoidance order made in such foreign proceedings:... The scope of the jurisdiction to entertain bankruptcy proceedings which English private international law will recognise a foreign court as having is described in Dicey (in para 31-064 in the 14th and 15th editions) as a "vexed and controversial" question. But it would include situations in which the bankrupt or insolvent company had simply submitted to the foreign bankruptcy jurisdiction. On Lord Clarke JSC's analysis, in such a case (of which Rubin v Eurofinance is an example), it would be irrelevant that the debtor under the avoidance order had not submitted, and was not on any other basis subject, to the foreign jurisdiction. It would be enough that the judgment debtor had had the chance of appearing and defending before the foreign court. For the reasons given by Lord Collins, I do not accept that this is the common law. [underlining added]

(iv). the personal bankruptcy rule in Dicey, Morris & Collins to which Lord Mance was referring to (Rule 31R-059) states that:

"(2)..... t*he English courts will recognise that the courts of any other foreign country have jurisdiction over a debtor if –*

(a) he was domiciled in that country at the time of the presentation of the petition or

(b) he submitted to the jurisdiction of its courts whether by himself presenting the petition or by appearing in the proceedings."

Paragraph 31-064 states as follows:

"*Clause (2) of the Rule .... must be regarded as somewhat speculative because the question is a vexed and controversial one which English courts have had few opportunities of considering. It was at one time supposed that English courts would recognise the bankruptcy jurisdiction of a foreign court only if the debtor was domiciled in the foreign country. But it has since become clear that they will also do so if the debtor submitted to the jurisdiction of the foreign court whether by presenting the petition himself or by appealing against the adjudication or by appearing in the proceedings at some stage either personally or by his counsel or solicitor.*"

(v). Dicey, Morris & Collins refers to and relies on *In re Davidson's Settlement Trusts* to support the proposition that the presentation by the personal debtor of his own petition will be sufficient. They also refer to *Re Anderson* [1911] 1 KB 896 at 902. In this case a debtor, whose domicile was English and who was entitled to a reversionary interest in personalty (a fund) in England, was adjudicated bankrupt in New Zealand on a creditor's petition. Subsequently, he was adjudicated bankrupt in England. The reversionary interest, which by

an oversight was not disclosed in the New Zealand bankruptcy, was discovered by the trustee in bankruptcy in England and he at once gave notice of his title to the trustees of the fund and argued that he was entitled to it as against the New Zealand trustee. Phillimore J held that New Zealand trustee was entitled, as against the trustee in bankruptcy in England, to the reversionary interest. The record in the New Zealand proceedings showed that though not a consenting party, he was a party by his solicitor to the adjudication in bankruptcy and had recognised the adjudication by applying some time afterwards for his discharge and obtaining it. Phillimore J said:

> "*Therefore, I think, upon principle and authority, that the adjudication in New Zealand, being a valid adjudication according to the law of New Zealand, passed the right to movable property of the bankrupt in any country to his official assignee in bankruptcy in New Zealand. If he had not been a party to the adjudication, if it had been made against him in his absence, other considerations might very well have applied; but he certainly was a party to the adjudication, though he did not invoke it, as in In re Davidson's Settlement Trusts and In re Lawson's Trusts. Therefore I think that the adjudication passed, as against him and, therefore, as against anybody claiming under or through him, his personal property wherever situate*" [underlining added]

(vi). it seems to me that Ms Stanley is right to say that, at least as regards the issue of whether anyone other than the foreign liquidator should be recognised and treated as having the right and power to act on behalf of the company, there is no principled basis for distinguishing between the effect of submission by an individual and a corporate debtor. As Phillimore J says it is the fact that the debtor has become and made itself a party to the foreign proceedings that is key and affects anyone claiming under or through the debtor. The fact that under personal bankruptcy law there is a vesting and transfer of title in the debtor's property to the trustee is of no consequence in this context. The vesting or transfer of property outside the foreign jurisdiction is not recognised as a matter of the private international law of the requested court. In a corporate context, if the company has submitted to the foreign court and the insolvency proceedings by applying for the appointment of the liquidator or participating in the foreign insolvency proceedings its board or shareholders cannot be heard to deny the effects of the appointment (in a case where the

company presents its own petition or application in the foreign court) requested by the company and (in any case in which the company through its proper officers has participated in the foreign liquidation or otherwise acted so as to give rise to a submission) the consequences, as regards corporate authority and the power to act on behalf of the company, that follow from the appointment and the foreign court's order.

34. As regards the second question, I would make the following comments (which once again must also be subject to a caveat to the effect that I express here only preliminary views since not only were the arguments not tested on an *inter partes* hearing but the evidence of Hong Kong law was not detailed and limited and Ms Stanley did not explore the issue or relevant authorities in any depth):

(a). as I have noted, the Liquidators rely on the Company's registration under Part XI of the former Companies Ordinance as establishing its submission to the jurisdiction of the Hong Kong Court generally and in particular with respect to the Hong Kong winding up proceedings. As I have already noted Mr Chan in paragraph 9 of his second affirmation says as follows:

> "*by registering under Part XI of the former Companies Ordinance (Cap. 32), the Company submits to the jurisdiction of Hong Kong Court. As a matter of Cap 4A of the Rules of the High Court of Hong Kong (the Rules), compliance with Part XI means that the Company is "within the jurisdiction" and can therefore be served with a winding up petition in accordance with Order 10, rr.1 - 5 of the Rules, ... and sections 326(1) and (2) and section 327 of the Companies (Winding Up Miscellaneous Provisions) Ordinance (Cap 32) (which took effect on 3 March 2014),...*"

(b). Part XI applies to an oversea company which has established a place of business in Hong Kong (see section 332). In common with similar English statutory and procedural rules, Part XI and the Rules (as defined in Mr Chan's second affirmation) permit service to be effected in Hong Kong on the oversea company either by service addressed to any person in Hong Kong whose name has been delivered to the Registrar as being authorised to accept service or where the oversea company makes default in filing these details by service at any place of business established by the oversea company in Hong Kong or if the company no longer has a place of business in Hong Kong by sending the document to the company's principal place of business in its

place of incorporation or to any place in Hong Kong at which the company had a place of business within the previous three years (see section 338).

(c). the question arises as to the legal effect of these provisions and as to whether they result in mere registration constituting a submission for the purposes of recognition of the foreign liquidator's powers.

(d). as regards what is required for there to be a submission I note that in their judgment in *Stichting Shell* Lord Sumption and Lord Toulson (at [31]) comment that:

> "*A submission may consist in any procedural step consistent only with acceptance of the rules under which the court operates. These rules may expose the party submitting to consequences which extend well beyond the matters with which the relevant procedural step was concerned, as when the commencement of proceedings is followed by a counterclaim. In the present case the defendant lodged a proof*"

The company must by some voluntarily act accept that it is subject to and bound by the jurisdiction of the foreign court pursuant to which the order in question is made. Registration *prima facie* appears to be a voluntary act by which the oversea company concerned allows itself to become subject to the foreign court's jurisdiction and to accept that such jurisdiction may be taken and assumed by service of process on the company's appointed authorised representative. If the applicable rules regulating the effect of registration provide for and permit service of a winding up petition as well as originating process relating to ordinary civil litigation then it should follow that there is also a voluntary acceptance of the foreign court's winding up jurisdiction.

(e). however the difficulty I have is that it appears to be arguable that registration by an oversea company of particulars (of a person authorised to accept service), when required only where the oversea company has established a base of business in the foreign jurisdiction, is to be treated as permitting the foreign court to take and assume jurisdiction by reason of the company's presence in the foreign jurisdiction rather than its submission. Furthermore, the analysis of the legal effect of the registration gives rise to questions of construction of the relevant foreign legislation and requires proper evidence of foreign law (which is not available on this application) and appears, at least

by reference to the English authorities of which I am aware (but which were not cited to me or the subject of submissions by Ms Stanley) to raise difficult issues which may be contested and would require further submissions before I would be prepared to form a view.

(f). in paragraph 9.13 of Professor Richard Fentiman's *International Commercial Litigation* (second edition, 2015, OUP) he says as follows:

> *"It has been said that a foreign company having a branch in England submits to the jurisdiction merely by complying with its Companies Act obligation to file an address for service (citing Employers Liability Assurance Corp v Sedgwick, Collins &Co [1927] AC 95, 104, 107, 114 (HL)). In such cases,, however, the basis for jurisdiction is the defendants presence in England. By providing an address for service the company is merely ensuring that service may be effected easily. This is confirmed by the rule that such a company may be served at its place of business even if it has provided no address."*

(g). so Professor Fentiman considers that registration of particulars by an oversea company does not permit the court of the place where the registration is made to take jurisdiction because the oversea company has submitted generally to the jurisdiction of the foreign court. It is presence through the place of business that is the operative factor. Having a presence or place of business in the country of the foreign court is, of course, in the current context insufficient and is different from submitting to the jurisdiction of the foreign court, which is what is required (I also note that Dicey, Morris & Collins state that the statutory and procedural rules relating to oversea companies are "*exclusively concerned with service*" and therefore are perhaps of limited significance and effect - see paragraph 11-117).

(h). it does appear, however, that the judgments in *Employers Liability Assurance Corp v Sedgwick, Collins &Co* were based on the proposition that the foreign company concerned had submitted to the jurisdiction of the English courts. In that case, as Sir John May noted in the Court of Appeal in *Rome v Punjab National Bank (No 2)* [1989] 1 WLR 1211 at 1218:

> *"The judgment debtor was a Russian company which had carried on business in London before the 1914–1918 war and had registered a Mr. Collins as its agent to accept service. After 1917 the company's business and assets were transferred to the Soviet government under the revolutionary legislation. In 1923 a writ was served on Mr. Collins, and, in default of appearance, judgment was signed against the defendants despite Mr. Collins' protest that the company had ceased to exist. In both tribunals the validity of the service was challenged, but having found that the*

company continued to exist both the Court of Appeal and the House of Lords held that the Russian company, by filing Mr. Collins' name and address, had submitted voluntarily to the jurisdiction of the English courts and that so long as his name remained on the register, service on him was good service." [underlining added]

(i). in *Rome v Punjab National Bank (No 2)* the Court of Appeal held that that on a true construction of the relevant provisions of the Companies Act 1985 (section 695(1)) a writ was sufficiently served on an oversea company if addressed to a person whose name and address had been delivered to the registrar of companies and left at or sent by post to that address, notwithstanding that the company had ceased to carry on business in Great Britain, that the persons so named were no longer resident there, and that those facts had been notified to the registrar under the 1985 Act. The decision is not referred to by Professor Fentiman and does, as it seems to me, suggest that the basis for jurisdiction in cases involving oversea companies is not presence (or at least presence alone) in the foreign jurisdiction.

(j). furthermore, I note that the Hong Kong Ordinance in terms provides for service on the oversea company even if it no longer has a place of business in Hong Kong. This suggests that the existence of a place of business is not the key factor or the only relevant basis on which the Hong Kong Court is to be treated as taking jurisdiction.

(k). it seems to me that the basis on which jurisdiction over the oversea company is taken is properly to be treated as statutory and therefore whether registration gives rise to and is to be characterised for present purposes as a submission to the foreign jurisdiction is in part a question of statutory construction and in part a question as to whether as a matter of Cayman law the effects of the foreign statute are to be treated as sufficient to amount to a submission.

(l). my provisional view is that they are but, as I have said, there are doubts and issues which require evidence of foreign law and fuller consideration and I therefore do not wish on this application to express a firm view. I would also wish to consider carefully whether if registration can be treated as a submission it constitutes a submission for the purpose a liquidation taking place in that jurisdiction. I note that Lord Mance in the passage from *Rubin*

quoted above referred to the need for there to be a submission to "*the foreign bankruptcy jurisdiction*" and it seems to me to be arguable that what is required is that the company apply for the commencement of the foreign liquidation or that its directors or shareholders (or other proper representatives) authorise participation in the foreign liquidation. As I have noted neither of these conditions is satisfied in the present case.

(m). accordingly, where the position is not settled and there has only been a limited opportunity for the citation of authority or argument, I do not consider that I am in a position to form a concluded view on this issue. I am reassured by the fact that in this case, in view of the conclusion I have reached regarding the availability of and the justifications for the exercise of the common law power, I am able to grant the relief sought by the Liquidators without the need to determine that the Company has submitted to the insolvency jurisdiction of the Hong Kong Court.

The Notice Issue

35. As I have noted above, there is a further issue which needs to be considered. This is whether I should grant the relief sought by the Liquidators before notice has been given to the Company's directors shareholders and creditors. The Summons has been applied for on an *ex parte* basis and while notice of the resumption proposal and the Liquidators' plans to promote parallel schemes of arrangement in Hong Kong and Cayman has been given and details notified to shareholders and creditors the directors, shareholders and creditors have not seen the Summons or the evidence in support and have not been given an opportunity to notify the Liquidators of any objections or views or to make submissions or appear on the Summons,

36. In a case such as the present one, where I am proposing to exercise the common law power on the basis and assumption that no application for a Cayman winding up will be made; that the Company's directors and shareholders have not sought and do not intend to exercise any residual powers and rights which they may have to act on behalf of the Company and that the relief sought by the Liquidators is demonstrably in the interests of all stakeholders, it seems to me to be important that the directors shareholders and creditors are notified of the Summons specifically and given an

opportunity to notify the Liquidators and the Court of any objections, to make submissions and to apply to the Court should they wish to do so.

37. It would be open to me to direct the Liquidators to give notice of the Summons before making the order sought and to require a further hearing if any objections are received or to give the directors, shareholders or creditors an opportunity to appear and make submissions. However, this seems to me to be unnecessary. Instead I propose to make an order in the form discussed below which will authorise the Liquidators to apply under section 86 (1) of the Companies Law and to petition the Court for an order convening the meetings required in connection with the proposed scheme but which will also require the Liquidators to notify, by a suitable means and within an appropriate timescale, the directors, shareholders and creditors of the Summons and to make available copies of the Summons and evidence in support to any such person who wishes to receive a copy before the Liquidators make any such application. This will ensure that the directors, shareholders and creditors are given adequate notice of the Summons and an opportunity to object or to make an application to this Court before the Liquidators proceed to petition the Court for an order convening the scheme meetings. If there are any objections or submissions or if any such person wishes to be heard a further hearing of the Summons will be listed in order to consider such objections or submissions and hear any person who wishes to appear and the Court can then decide how to proceed. If however no such objections, submissions or notices of an intention to appear are received before the time to be specified in the order then the Liquidators will be authorised and permitted to proceed thereafter to apply to the Court for an order convening the scheme meetings. This will balance the need to ensure that anyone wishing to raise an objection has the opportunity to do so before the Liquidators proceed with the scheme without unduly delaying the scheme process by requiring a further hearing which may be unnecessary.

The Nature of Relief Issue

38. The Letter of Request and the draft order provided by the Liquidators, as I have explained, sought an order which would recognise the Liquidators and treat them "*in all respects in the same manner as if they had been appointed as joint and several provisional liquidators by this Court ..*" The order would then recognise the powers

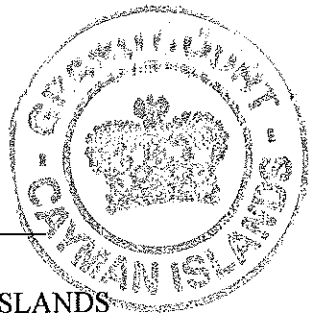
and authority of the Liquidators to act on behalf of the Company generally and also for the various purposes set out in the Letter of Request and draft order.

39. The Letter of Request and the draft order also sought an that section 97 of the Companies Law shall apply to the Company (and which would have the same or substantially the same effect as section 186 of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance) so that no action or proceeding shall be proceeded with or commenced against the Company within the jurisdiction of this Court except by leave of this Court and subject to such terms as this court may impact.

40. It seems to me that the Court is unable, in the exercise of the common law power, to make either of these orders. Granting relief which is only available to provisional liquidators appointed by this Court in circumstances when no such provisional liquidators have been appointed, and granting relief "as if" provisional liquidators had been appointed seems to me to be precisely what Lord Collins in *Rubin* and *Singularis* had said was impermissible. The same applies to an order that would declare that section 97 applies to the Company in circumstances where that section does and cannot so apply in the absence of a provisional liquidator being appointed by this Court. It seems that the Letter of Request and the draft order were drafted so as to reflect the form of order made by the Chief Justice in the *FUJI Food* case.

41. However it seems to me that the objective of the Liquidators can properly be achieved by an order in a different form. I have already outlined above the form of order that I have in mind. The Liquidators wish and need to be able to apply to this Court for an order convening the scheme meetings, to make such other applications as are required in connection with and to promote the proposed Cayman scheme and to consent to such scheme on behalf of the Company. This objective can be achieved by an order which authorises the Liquidators to take this action. Furthermore, relief having the same effect as section 97 of the Companies Law can be achieved by a direction that requires all proceedings commenced or to be commenced (including proceedings for injunctive relief or to execute a judgment) against the Company be allocated to and heard by me. This order will ensure that any action taken by creditors or shareholders will become before me and will allow me to make suitable case management orders for adjournments or stays to allow the scheme to proceed (unless there are exceptional circumstances that justify the commencement or continuation of proceedings).

42. Ms Stanley indicated at the hearing that this approach would be acceptable to the Liquidators. Accordingly I shall make an order in these terms the precise form of which is to be proposed by Ms Stanley and approved by me.



THE HONOURABLE JUSTICE SEGAL
JUDGE OF THE GRAND COURT, CAYMAN ISLANDS