IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 193 OF 2019 (IKJ)

IN THE MATTER OF RICHARD PAUL JOSEPH PELLETIER, A DEBTOR

AND IN THE MATTER OF THE BANKRUPTCY LAW (1997 REVISION)

IN COURT

Appearances:	Mr Colin McKie QC, Ms Allegra Crawford of Maples and Calder for the Petitioner Pacer Construction Holdings Corporation ("Pacer"/ "Petitioner") Mr Tom Lowe QC of counsel and Mr Guy Dilliway-Parry and Mr David Lewis-Hall of Priestleys for the Debtor
Before:	**The Hon. Justice Kawaley**
Heard:	**12 February 2020**
Draft Judgment Circulated:	**16 March 2020**
Judgment Delivered:	**20 March 2020**

HEADNOTE

Bankruptcy petition-status of petitioner as "creditor"-jurisdiction-whether requirements of residence met-whether acts of bankruptcy committed-whether service requirements meet minimum requirements of justice under Bill of Rights and/or at common law-filling gaps in Bankruptcy Rules-Bankruptcy Law (1997 Revision)-Grand Court (Bankruptcy) Rules 1977 (as amended)-Grand Court Law, section 18(2)

Background

1. On May 16, 2019, Pacer obtained a judgment against the Debtor based on this Court's recognition of an arbitral award in the enforceable amount of Can$23,928,767 (the "Judgment"). On August 20, 2019, Pacer applied to issue a bankruptcy notice which was issued by the Clerk on September 6, 2019 (the "Bankruptcy Notice"). The Bankruptcy Notice was served on the Debtor in mid-September, 2019 by, *inter alia*:

   (a) registered mail in the Cayman Islands (September 16, 2019); and

   (b) two of his email addresses (September 17, 2019).

2. The Petition herein seeking an Order that the Debtor be adjudicated bankrupt was presented to this Court on September 30, 2019. By Notice of Hearing dated October 7, 2019, the Listing Officer fixed the hearing for the first return date of the Petition on November 8, 2019. The Petition and supporting affidavits and Notice of Hearing was served by email on the Debtor on October 21, 2019. Although his Canadian attorney Mr Czechowskyj (of Miles Davison LLP) had previously indicated that he had no instructions to accept service, he was also emailed the same documents as well.

3. On November 8, 2019, the Debtor did not appear and the Court made a provisional order for bankruptcy (the "Provisional Order") under section 29 of the Bankruptcy Law (the "Law"). The Clerk of the Court was appointed as Provisional Trustee in Bankruptcy, *ex officio*, pursuant to section 13(1) of the Law; Ms Margot McInnis and Mr Hugh Dickson were appointed as her agents under the same statutory provision. Directions were also given for the service of the Petition, Amended Petition and notice of a further hearing on November 21, 2019 by various means, including the same means described above which were deployed in relation to the Bankruptcy Notice. The Petition, Amended Petition and Notice of Hearing were duly served.

4. On November 21, 2019, the Debtor failed to appear to show cause against the Provisional Bankruptcy Order. An Order was made warning that the Provisional Bankruptcy Order would be made absolute if the Debtor failed to file his Statement of Affairs on or before December 5, 2019, and convening a general meeting of creditors on January 9, 2020. Only Pacer attended the meeting which resolved that an

adjudication of bankruptcy should be made. The Petition was thereafter fixed for hearing on February 12, 2020.

5. In the event, the Debtor instructed counsel only two days before the hearing and opposed the Petition on the following grounds:

(a) the statutory scheme for service (section 28) and provisional bankruptcy (section 29) was unconstitutional because it breached fundamental fair hearing rights and was generally inconsistent with minimum common law standards of fairness. The Court should consider affording the Debtor's counsel an opportunity to fortify this argument which had only been addressed in outline form;

(b) the Debtor had not been validly served within the jurisdiction because he was not at the material time within the jurisdiction and no application for leave to serve him abroad had been made and/or because the statutory scheme failed to provide a legal mechanism for obtaining leave for service abroad;

(c) the Court had no jurisdiction over the Debtor because he was not "resident" in the Cayman Islands as required by section 2 of the Law;

(d) no acts of bankruptcy were committed in the jurisdiction as required by section 14 of the Law;

(e) Canada was arguably the more appropriate bankruptcy forum so the Court should decline to make an Order Absolute at this stage. [The Judgment was based on a Canadian arbitration award, the creditor and Debtor were both domiciled in Canada, and the impugned transactions all took place there].

6. The factual commercial grounds for granting an Order Absolute, and the standing of Pacer as a creditor, were not in dispute. The following potentially jurisdictionally relevant local connecting factors were also not in dispute:

(a) the Debtor is the beneficiary of a Cayman Islands trust, the Pelletier STAR Trust (the Trust"), which indirectly currently owns a 'Seafire Residence' which has been used as a family residence and which the Debtor still has access to;

(b) the Debtor has bank accounts with a local branch of Butterfield Bank which show recent activity;

(c) the Debtor signed a Declaration (used in certain Californian proceedings) in the Cayman Islands as recently as August 14, 2019.

(d) the Debtor had a Cayman Islands Permanent Residence Certificate.

Legal findings: the constitutionality of the statutory scheme

Key statutory provisions

7. The first of two impugned statutory provisions in the Law provides as follows:

> "*28. It shall not be necessary to serve a petition or any notice thereof on the debtor.*"

8. The second impugned provision reads:

> "*29. As soon as may be after the presentation of a petition, the Court, if satisfied by ex parte evidence or otherwise in the case of a creditor's petition of the petitioning creditor's debt and of the act or of one of the acts of bankruptcy alleged, shall make on the petition an order, in this Law referred to as a 'provisional order', that the affairs of the debtor shall be wound up and his property administered under the law of bankruptcy.*"

9. In purely abstract terms, it is clear that both provisions, read in isolation, appear on their face to <u>potentially</u> conflict with the common law rules of natural justice and/or the constitutionally protected fair hearing rights enshrined in section 7(1) of the Bill of Rights contained in the Cayman Islands Constitution Order-in-Council 2009 (as amended). Section 7(1) provides:

> "*7.—(1) Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.*"

10. However other provisions of the Law and the Grand Court (Bankruptcy) Rules (the "Rules") provide important wider context. Firstly, section 29 must be read in conjunction with the next two sections, which provide as follows:

"30. Where a provisional order is made on a creditor's petition, a copy of the order shall be served on the debtor in the prescribed manner, together with a notice that within a specified number of days the debtor may show cause why the provisional order should be revoked.

31. If the debtor, within the time appointed, shows to the satisfaction of the Court that either the proof of the petitioning creditor's debt, or of the act of bankruptcy, is insufficient and if upon such showing no other sufficient petitioning creditor's debt or act of bankruptcy is proved, or if any ground is shown to exist which would render the making of a provisional order inequitable, the Court shall revoke the provisional order and, unless it sees good cause to the contrary, shall order costs to be paid to the debtor."

11. The Rules pertinently provide as follows:

"16. On hearing the petition the Court may –

(a) dismiss it; or

(b) adjourn it; or

(c) make a provisional order under section 29.

17. A provisional order on a creditor's petition and the notice referred to in section 30 shall be served personally on the debtor or as the Court may direct.

18. (1) A debtor may show cause against a provisional order by filing a notice in the Registry indicating the statements in the petition he disputes and serving a copy thereof on the petitioning creditor three days before the hearing...

19. On appearance of a debtor to show cause why a provisional order should be revoked, the petitioning creditor's debt, the trading and the act of bankruptcy or such of those matters as the debtor disputes shall be proved again and the Court may, in its discretion confirm or revoke the order or give the debtor further time to oppose the order...

24. All applications to the Court shall, unless otherwise provided, be by way of motion supported by affidavit, upon hearing which the Court shall make such order therein as shall be just; but in cases in which any other party or parties than the applicant are to be affected by such order, no such order shall (except upon application for interim orders and injunctions which may be

made by the Judge in Chambers) be made save upon the consent of such person or persons duly shown to the Court; or upon proof that notice of the intended motion and copy of the affidavit in support thereof has been served upon the party or parties to be affected thereby four clear days at least before the day named in such notice as the day when the motion is to be made:

Provided that the Court may, if it shall think fit, in any case where the party or parties to be affected by the order, or any of them, shall not have been duly served with the notice of the motion for such order, make an order calling upon the party or parties to be affected thereby to show cause, at a day to be named by the Court, why such order should not be made...

26. Personal service of notices of motion shall be served by delivering to the parties copies of the notice and personal service of rules or orders shall be served by delivering to the parties sealed copies of the rule or order, the intervention of the Bailiff not being required in either case..."

12. In summary:

    (a) although section 28 of the Law provides that service of a petition is not "*necessary*", the Rules confer a broad to discretion as to disposing of a petition when it is heard (rule 16). And rule 24 ("*Practice*") establishes a general rule that no adverse orders should be made without prior service of the relevant application;

    (b) although section 29 of the Law permits an ex parte provisional bankruptcy order to be made (and appears to <u>require</u> the Court to make a provisional order if a *prima facie* case is made out), section 31 as read with rules 17-19 require personal service of the provisional order and afford the debtor a right to apply to set it aside.

13. On the face of the statutory scheme, it is also at first blush clear that there is no requirement for leave to be obtained to serve a debtor abroad. The Law does not require leave or prescribe the grounds upon which leave can be granted. Nor do the Rules. It is common ground that Grand Court Rules ("GCR") Order 11 does not apply to proceedings under the Law. GCR Order 1 rule 2 provides as follows:

"*(4) Except for Orders 3 (Time), 4 (Assignment, Transfer and Consolidation of Proceedings), 5 (Mode of Beginning Proceedings), 38 Part II (Writs of Subpoena), 39 (Evidence by Deposition), 62 (Costs), 67 (Change of Attorney),*

45-51 (Enforcement) and 52 (Committal) these Rules shall not apply to any proceedings which are -

(a) governed by the Matrimonial Causes Rules (2005 Revision),

(b) governed by the Grand Court (Bankruptcy) Rules 1977, as amended,

(c) governed by the Companies Winding Up Rules 2008; or

(d) on appeal from civil proceedings in the Summary Court."[emphasis added]

14. However, GCR Order 1 rule 2 (5) also provides as follows:

"*(5) Notwithstanding the provisions of paragraphs (2) to (4) of this rule –*

...

(c) except in the case of petitions in proceedings governed by the Matrimonial Causes Rules (2005 Revision), every originating process or other document required to be served by these Rules or any other rules in connection with any civil proceedings shall be served in accordance with Orders 10 and 65." [emphasis added]

15. GCR Order 10 provides that petitions must be served personally, but only applies "*subject to the provision of any Law*" (rule 1(5)). Order 65, *inter alia*, prescribes how personal service is to be effected (where personal service is required) and provides for substituted service.

16. Finally mention should be made of section 167 of the Law, which gives statutory force to a commercially-driven, pragmatic and substantial merits-based principle which is often merely reflected in companies winding-up rules based on or derived from the English Companies Winding-Up Rules 1949 and/or successor procedural codes[1]. Section 167 of the Law provides:

[1] The Insolvency Rules 2016 (UK) now provide:

"*167. Proceedings under this Law shall not be invalidated by any irregularity, unless the Court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such Court.*"

The Debtor's submissions on section 28 of the Law and the general invalidity of service

17. The '*Skeleton Argument for Richard Pelletier*' sets out the following pertinent submissions in support of the attack on the constitutionality of section 28:

> "*4. Under the Bankruptcy Law a bankruptcy petition and any notice need not be served on the debtor (see Section 28). That provision is fundamentally unfair and unconstitutional. It is elementary that a person who is affected by being made bankrupt should be served with proceedings: this is a necessary part of the right to a fair hearing in the determination of rights.*
>
> *(1) 'It has always been, and remains, a fundamental rule of English procedure and jurisdiction that a defendant may be served with originating process within the jurisdiction only if he is present in the jurisdiction at the time of service, or deemed service' Lawrence Collins J in Chellaram v Chellaram (No 2) [2002] 3 All ER 17 para 47.*
>
> *(2) Formal service has a fundamentally important effect on fair trial rights (see Dicey Rule 29 15th ed 11-003 and e.g. the explanation in Henderson v Novo Bank [2017] 4 WLR 75).*
>
> *5. Those advising Pacer clearly appreciated that this was unfair and invented a form ad hoc service of the Petition which was not sanctioned by any rule…*"

18. This submission combined two points. Firstly, section 28 was unconstitutional because it did not require service at all. Secondly, service could not be validly effected within the jurisdiction on a person who was at the relevant time outside of the jurisdiction. In oral argument, Mr Lowe QC referred to *Hickling-v-Baker* [2007]

"*12.64. No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.*"

EWCA Civ 287. This case held that applying for a committal order against a bankrupt did not contravene the debtor's rights to be protected from arbitrary arrest under Article 5(1)(b) of the European Convention on Human Rights. The holding relied upon was that the usual rule is that notice should be given.

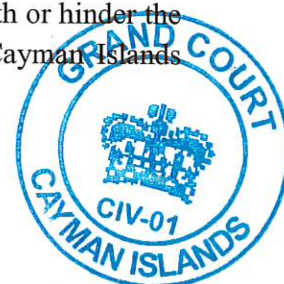
19. Mr McKie QC replied most significantly that section 28 of the Law did not prohibit service of the Petition and Bankruptcy Notice. As regards service requirements, he contended that GCR Orders 10 and 65 applied to service of the Petition. To the extent that any lacuna existed in the Rules, he relied upon section 18 of the Grand Court Law. This section provides, so far as is material for present purposes, as follows:

> *"(2) In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case."*

20. As regards the Bankruptcy Notice, he submitted that the Rules did not prescribe the mode of service and that the question was whether the Court should apply the (a) English practice under the revoked Bankruptcy Rules 1952 (which provided for service of a notice in the same way as a petition), or (b) the Insolvency Rules 1986 (which replaced the 1952 Rules), under which there was no exact equivalent of a bankruptcy notice. The Petitioner's fall-back position was that it was entitled on November 8, 2019 to seek retrospective permission for substituted service under GCR Order 65 and, in any event, adequate attempts had been made to bring the Bankruptcy Notice to the Debtor's attention in any event.

Findings: the constitutionality of section 28

21. In my judgment the complaint that section 28 of the Law is unconstitutional may fairly be summarily dismissed without the need to afford the Debtor an opportunity to advance further arguments on the point. The section merely provides that service of a petition and bankruptcy notice is not "*necessary*". The section could only be held to be unconstitutional on its face if it was self-evident that any instance of proceeding on a petition or notice without prior service would materially interfere with or hinder the enjoyment of the fair hearing rights protected by section 7 of the Cayman Islands



Constitution. Even giving the provisions of section 7(1) a "*broad and purposive*"[2] reading, I find it impossible to construe section 28 in such a way. Considering at this stage the implications for a petition, it is possible to envisage various circumstances in which no prejudice may flow to a debtor from not being served with a petition. A creditor could present a petition and not serve it pending, *inter alia*:

(a) negotiations with the debtor;

(b) pursuit of a provisional bankruptcy; and/or

(c) consultations with other creditors.

22. It is easy to envisage circumstances in which the application of section 28 (e.g. by a petitioner obtaining an order absolute without notice) would potentially contravene the debtor's section 7(1) rights. But that would not mean that section 28 was unconstitutional on its face. Section 28 does not by its terms purport to confer on petitioning creditors an automatic right to obtain a final bankruptcy adjudication without notice to the debtor. If it did, the section would quite arguably be unconstitutional. In my judgment section 28 can be construed, read in conjunction with section 167 of the Law, as providing that "formal" service is not essential provided that no substantial injustice occurs. Such a meaning would be entirely consistent with section 7(1) and is a more straightforward construction to place on the provision.

23. Even if I am wrong in this primary finding, the Law is a pre-2009 Cayman Islands Constitution Order "*existing law*". Section 5 of the Constitution Order provides as follows:

> "*(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

[2] *Minister of Home Affairs-v-Fisher* [1980] AC 319

24. If I were required to find that section 28 of the Law contravened section 7 of the Constitution by conferring an automatic right to obtain a final bankruptcy order without serving the debtor, I would pursuant to section 5(1) of the Constitution Order construe section 25 "*with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*"

Findings: the constitutionality of the provisional bankruptcy scheme

25. The provisional bankruptcy regime is governed by not simply section 29 of the Law, which permits a creditor to apply ex parte for interim relief. It is also governed by sections 30 and 31, which entitle a debtor to apply to discharge the ex parte order and confer a generously broad discretion on the Court to set aside an "inequitable" provisional order.

26. I summarily reject the complaint that these provisions contravene the fair hearing protections guaranteed by section 7(1) of the Bill of Rights. I consider the question of the procedural requirements for service of the Bankruptcy Notice in relation to the acts of bankruptcy point below.

Summary of findings on constitutional complaints

27. I find the constitutional complaints raised by the Debtor are not seriously arguable and that there is no justification for affording his counsel an opportunity to further elaborate on the arguments advanced.

Findings: validity of service on the Debtor within the jurisdiction when he was out of the jurisdiction

28. Mr Lowe QC relied on the following dictum of Laurence Collins J (as he then was) in *Chellaram-v-Chellaram* [2002] EWHC 632 (Ch):

> "*47. In my judgment there are two separate reasons why Sham has not been validly served. First, the claimants have not adduced any evidence which casts doubt on Sham's evidence that the address in St John's Wood is used only occasionally by him on the rare occasions when he visits London. In these circumstances there is no evidence that it ever was a "residence" and it*

therefore cannot be his "last known residence." Secondly it has always been, and remains, a fundamental rule of English procedure and jurisdiction that a defendant may be served with originating process within the jurisdiction only if he is present in the jurisdiction at the time of service, or deemed service. Barclays Bank of Swaziland Ltd v. Hahn is simply an illustration of this principle (as is another case, not cited in argument, Cadogan Properties Ltd v. Mount Eden Land Ltd [2000] I.L. Pr 722, in which the Court of Appeal held that if the defendant is outside England, an order for substituted service in England could not be obtained unless permission to serve proceedings out of the jurisdiction had been obtained)." [emphasis added]

29. The first limb of this passage will be considered below when considering the jurisdictional requirements of the Law. It describes a fact pattern quite similar to that of the present case. But the second limb states a principle which also has obvious potential relevance to the present case where service was purportedly carried out on the Debtor within the jurisdiction when he was actually abroad. Although Lawrence Collins J refers to "*a fundamental rule of English procedure and jurisdiction that a defendant may be served with originating process within the jurisdiction only if he is present in the jurisdiction at the time of service*", it is firstly important to note that he does so in the context of deciding whether jurisdiction over the respondent existed under the Lugano Convention as read with the CPR in relation to matrimonial proceedings:

"*20. The English court can only have jurisdiction in relation to defendants domiciled outside countries or territories to which the 1968 Convention (or the Lugano Convention) applies if (a) they submit to the jurisdiction (which none has); or (b) they have been validly served within the jurisdiction (as the claimants allege Sham has been); or (c) they fall within one of the heads of CPR 6.20 pursuant to which permission to serve a defendant outside the jurisdiction may be obtained.*"

30. Accordingly, the *dictum* relied upon by the Debtor as supporting a finding that no valid service took place because he was purportedly served within the jurisdiction when he was in fact abroad is only persuasive to the extent that (a) the statutory regime of the Law, (b) the content of the applicable procedural rules, and (c) the factual matrix are analogous to the legal framework under consideration. Assuming that (a) and (b) are resolved in the Debtor's favour the factual matrix in the present case is materially different to that of *Chellaram*. In this case, at the November 8, 2019 ex parte hearing, the Petitioner expressly sought retrospective permission to carry out

substituted service to cover the eventuality that service within the jurisdiction could not validly be effected: '*Skeleton Argument of the Petitioner for Hearing on 8 November 2019 Application for Provisional Bankruptcy Order*', paragraphs 85-90. Evidence was placed before the Court which suggested that the Debtor was keen to evade service and would be difficult to locate to effect personal service either within or without the jurisdiction.

31. If I was required to decide whether standard personal service within the jurisdiction could only validly take place under the Law and the Rules when Mr Pelletier was within the jurisdiction, I would in part accept the submission of Mr Lowe QC that this is indeed the usual requirement, but I would also find that it is not a "*fundamental*" requirement. I would further confirm the conclusion I reached at the November 8, 2019 ex parte hearing that GCR Order 65 applies to proceedings under the Law. As the Petitioner's counsel submitted at that hearing, Smellie J (as he then was) directed substituted service on a debtor who was outside the jurisdiction in *Re Kruger* [1997 CILR 424].

32. In my judgment effecting personal service of a petition or bankruptcy notice on a debtor within the jurisdiction is not a "fundamental" requirement in the Cayman Islands bankruptcy context, any more than it has been in the British insolvency context under the 2016 Insolvency Rules and predecessor corporate insolvency provisions going back to 1949 (if not beyond). Firstly, section 28 of the Law expressly states that service of these documents is not "*necessary*". And, secondly, as noted above, section 167 of the Law provides that no proceedings under the Law will be invalidated by reason of any irregularity "*unless the Court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such Court.*"

33. The Debtor did not have the temerity to suggest that the multifarious means deployed to bring the Provisional Bankruptcy Order and the Petition to his attention had even failed, let alone that failing to serve him personally in the Cayman Islands caused "*substantial injustice*". So even if personal service was defective and substituted service was not justified, I would still be bound to find that no invalidity flowed from any irregularities which occurred in all the circumstances of the present case.

34. The availability of substituted service does not necessarily suffice to dispose of the further argument advanced in oral submissions that the statutory scheme offended fundamental legal principles because it provides no mechanism for obtaining leave to

serve out of the jurisdiction. Mr Lowe QC relied on authority which he contended supported the proposition that the absence of a statutory mechanism for obtaining leave to serve out made it legally impossible to validly serve a debtor abroad. In *In re Tucker (a Bankrupt)* [1990] 1 Ch. 148, Dillon LJ (Browne-Wilkinson V-C and Lloyd LJ concurring) actually held at (pages 158D-F, H, 159F):

> "*I look, therefore, to see what section 25(1) is about, and I see that it is about summoning people to appear before an English court to be examined on oath and to produce documents. I note that the general practice in international law is that the courts of a country only have power to summon before them persons who accept service or are present within the territory of that country when served with the appropriate process. There are exceptions under R.S.C., Ord. 11, but even under those rules no general power has been conferred to serve process on British subjects resident abroad. Moreover, the English Court has never had any general power to serve a subpoena duces tecum out of the jurisdiction on a British subject resident outside the United Kingdom, so as to compel him to come and give evidence in an English court...*
>
> *Finally, and to my mind conclusively, by section 25(6) the court is given a power...to order the examination out of England of 'any person who if in England would be liable to be brought before it under this section'. This wording carries inevitably, in my judgment, the connation that if the person is not in England he is not liable to be brought before the English court under the section...*
>
> *If that is the correct construction of section 25(1) in its context in the Act of 1914, then the jurisdiction of the court under the subsection cannot have been extended by the amendment of rule 86 in 1962, and the orders for service of...out of the jurisdiction must have been bad.*"

35. This authority, in my judgment, establishes a more limited principle. If a statutory process is not by its terms intended to be applied to a person abroad, a rule permitting leave to serve out may not validly be exercised in relation to the statutory process defined in the primary legislation in question. No authority was cited by the Debtor's counsel which supported the broader proposition that a bankruptcy petition or notice cannot be served abroad. Nothing in *In re Tucker (a Bankrupt)* [1990] 1 Ch. 148 supports this broader proposition.

36. The general rule reflected in GCR Order 11 is undoubtedly based on ancient public international law notions of territorial sovereignty. It is an incursion on the

sovereignty of the State in which service is to be effected for a judicial command from a foreign sovereign to be issued within another sovereign's realm. The rule was reflected in the old English practice of granting leave to serve a "notice of writ" or other originating process rather than the writ itself overseas. Not only has that principle been diluted in modern times; GCR Order 11 rule 5(1) now permits service of the writ itself in the same way as within the jurisdiction under GCR Order 10. A nod is given to the territorial sovereignty principle by rule 5(2), which provides as follows:

> "*(2) Nothing in this rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.*"

37. However, the most important principle to extract from the GCR Order 11 service out scheme is that it expressly contemplates that in certain proceedings leave to serve out may not be required in relation to originating process. Order 11 rule 9 critically provides:

> "*(2) Service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the Court, but leave shall not be required for such service in any proceedings in which the writ, originating summons, motion or petition may by these Rules or under any Law be served without leave.*" [emphasis added]

38. In the course of the hearing the Debtor's counsel accepted that process commenced to enforce an arbitration award need not be served abroad. The source of this express exemption appears to me to be GCR Order 73 rule 7[3], but it is limited to Cayman Islands arbitration proceedings. A second example within the GCR themselves of a dispensation from the need for leave to serve process overseas is provided by Order 102, which provides:

[3] Counsel in commenting on a draft of this Judgment doubted whether this rule should be read in this way.

"*16. Any originating summons, originating motion or petition issued pursuant to rule 2, 3 or 4 may be served out of the jurisdiction upon any shareholder, director or creditor of the company concerned without the leave of the Court.*"

39. Accordingly, I reject the submission that the Law and the Rules contravene fundamental legal policy principles of general application by failing to require that leave be obtained from the Court for serving a petition abroad and/or by failing to provide a leave mechanism. The key question is not, in any event, whether the Rules authorise service of a document abroad. That is to allow the tail to wag the dog. The issue is whether the Law, properly construed, either:

    (a) prohibits service of originating process or other documents abroad and/or does not contemplate overseas service at all; or

    (b) expressly or by necessary implication requires leave to be obtained before serving process or other documents abroad.

40. The English Insolvency Rules 2016 (Schedule 4) applies the CPR service regime relating to claim forms to bankruptcy petitions (but not winding-up petitions). Rule 12.12 of the Insolvency Rules 1986 provided: "*A bankruptcy petition, may, with leave of the court, be served outside England and Wales in such manner as the court may direct.*" The old English Bankruptcy Rules 1952, like the Rules, did not (when initially enacted at least) deal with service out of the jurisdiction but did provide for substituted service. The modern English rules confirm that personal bankruptcy jurisdiction is assumed to extend to debtors who are at the date of service resident abroad. The jurisdictional requirements for filing a creditor's petition under the Insolvency Act 1986 are, as will be seen when the residence requirement is considered below, not dissimilar to those under the Law. They cover a debtor who has in the preceding three years "*been ordinarily resident, or has had a place of residence, in England and Wales*" (section 265(b)(i)).

41. Accordingly, I have little difficulty in finding that the Law does confer jurisdiction over otherwise qualifying debtors who can only be <u>personally</u> served abroad. After all, acts of bankruptcy under the Law include a debtor who has "*with intent to defeat or delay his creditors…remained out of the Islands*" (section 14(c)). It remains to consider the legal consequences of the supposed absence of any rule regulating obtaining permission for service abroad. I find as follows:

(a) substituted service was available and was granted under GCR Order 65 rule 4 in factual circumstances which did not give rise to the need for service abroad in any event;

(b) the absence of any power to grant leave to serve out would not in any event invalidate service as the Law contemplates service abroad; and/or

(c) if there is a gap in the Rules as regards leave to serve out, and service out did occur, the English practice under the current Insolvency Rules would fill it (for the reasons elaborated upon below when considering the acts of bankruptcy). The failure of the Petitioner to seek prior (or retrospective) leave to serve out would be a mere irregularity, because no injustice flowed from it (section 167 of the Law).

42. Mr Lowe QC helpfully placed the Privy Council's most recent pronouncements on how to approach an apparent gap in procedural rules in relation to leave to serve a defendant abroad: *AWH Fund Ltd. (in Compulsory Liquidation)-v-ZCM (Bermuda) Ltd.* [2019] UKPC 37. Without being determinative of any issue in the present case, it does illustrate that this jurisdiction does not stand alone in terms of having bankruptcy rules which do not explicitly deal with leave to serve out. The issue before the Court was helpfully defined by Lady Arden (delivering the advice of the Judicial Committee) as follows:

> "*1. The appeal concerns the question whether there is a jurisdictional gateway available for the service out of the jurisdiction of the claims of the liquidator of the respondent ("AWH") in these proceedings and, if so, whether the claims satisfy the merits threshold for an order by the court for such service. The liquidator seeks orders that payments to the appellant, ZCM Asset Holding Company (Bermuda) Ltd ("ZCM"), be declared void as undue or fraudulent preferences pursuant to section 160 of the International Business Companies Act 2000 ("IBCA") of The Bahamas and that such payments be repaid to him. The Court of Appeal held in the liquidator's favour but ZCM now appeals their decision to the Board. For the reasons set out in this judgment, the Board concludes that it should humbly advise Her Majesty that this appeal should be dismissed.*"

43. The most valuable guidance provided by the decision which I have sought to follow in terms of my general approach is provided in another clear and concise paragraph in which Lady Arden concluded as follows:

> "*42. Moreover, in circumstances such as these, the absence of a power in custom-made rules applying to winding up of an IBC cannot be taken as an indication that the courts could not find an appropriate power elsewhere. On the contrary, where an IBC is in liquidation in The Bahamas, it is proper for its courts to rely on other sources of jurisdiction to entertain in appropriate cases proceedings to enforce a claim vested in the liquidator under section 160 to have a transaction declared void. It is desirable that such claims should be heard by them in the interests of ensuring that the purposes of the winding up are fully achieved.*"

44. The ultimate finding on the question of which rules applied was summarised by Lady Arden as follows:

> "*56. It follows that it is unnecessary to identify a jurisdictional gateway under Ord 11 rule 1 as in Masri and Roberts for the liquidator's claim that the payment of redemption proceeds to ZCM was a fraudulent preference. It is also unnecessary to show, for instance, a jurisdictional gateway for the consequential claim for repayment of monies, as was required in Rousou's Trustee v Rousou (above). Unlike the WUR, the Bankruptcy Rules 1914 in force in England and Wales at the time of the action in Rousou did not contain a 'gap filling' provision (ie the Rules of the Supreme Court applied only if incorporated into the Rules, and rules as to service out of the jurisdiction were not so incorporated). Accordingly the trustee in bankruptcy could not use the equivalent of Ord 11 rule 8(4). He had to commence his proceedings for repayment against the foreign respondent in an action begun by writ. (By the time In re Jogia (para 21 above) was decided, the Bankruptcy Rules had been amended to permit service out of the jurisdiction where permitted by Rules of the Supreme Court 1965, Ord 11.)*"

45. In the present case, as in *AWH Fund Ltd.,* there is also a "*gap-filling provision*", as a result of which my primary finding is that the English CPR rules apply by virtue of the Insolvency Rules 2016 (section 18(2) of the Grand Court Law, considered below). Even if the English Bankruptcy Rules in force when the Law was enacted in 1964

should fill the gap, those rules conferred jurisdiction to grant leave to serve out by 1955 (*AWH Fund Ltd.,* at paragraph 21). Had the Petitioner been required to seek leave to serve out (and not been entitled to substituted service within the jurisdiction, as I have primarily found), it would have been able to establish the standard requirements of (a) a real prospect of successfully establishing that it was a creditor and that at least one act of bankruptcy had been committed, (b) a good arguable case that the claim qualified for permission, and (c) that the Cayman Islands was the appropriate forum.

Findings on jurisdiction: the residence requirement

The respective submissions

46. The Debtor advanced the following two submissions, the first of which was uncontroversial and the second of which was disputed:

> "*13. Furthermore, Mr Pelletier can only be made bankrupt in the Cayman Islands at all if he is a debtor (defined as a person 'ordinarily resident' or had a 'place of residence' in the Cayman Islands see Section 2 of the Bankruptcy Law)). He must be a debtor at the time of the bankruptcy petition, at the time of the Provisional Order and at the time of Order Absolute (see Sections 14, 29, 31, 33 and 34 of the Bankruptcy Law all of which refer to 'the debtor'). This is a jurisdictional requirement for an Order Absolute.*
>
> *14. The evidence of both Mr and Mrs Pelletier is that they were no longer ordinarily resident in the Cayman Islands after 2017. The Seafire Residence was not owned by them but by PDP Corp owned by the STAR Trust. The apartment was never occupied by them as a 'residence'. A 'vacation home' or postal address is not a residence. Nor is this resolved by the fact that Mr. Pellettier owned no "other" home: he owned no homes himself, or by an address given in a will or a postal address. The Pelletiers returned only for vacations. Mr Pelletier also returned to wind up certain matters and retrieve belongings as he explains in his affidavit. This being a jurisdictional fact requires a Court to evaluate all the facts and try that question (see Section 7 of the Bankruptcy Law).*"

47. The Petitioner's counsel submitted as follows in its '*Petitioner's Skeleton Argument for Hearing of Amended Petition 12 February 2020*':

"25 The Law does not define 'ordinarily resided' or 'place of residence', and there is no reported case considering the proper meaning of the words. Regard should therefore be had to the same or similar terms used in the Jamaican Bankruptcy Law 1880 (the 'Jamaica Bankruptcy Law', from which the Law is derived) or, failing which, comparable English statutes.

26 As far as counsel has been able to determine, there is no reported Jamaican case considering the proper meaning of those words.

27 The definition of 'debtor' in the older English bankruptcy statutes includes a person who '... has ordinarily resided, or had a dwelling house ..., in England ...'. It now includes a person who "... has been ordinarily resident , or has a place of residence in, England and Wales, ...'

28 In England it is clear that the meaning of 'ordinarily resided' in the 1883 Act and 1914 Act show that it is a question of fact and degree – i.e. not a legal term of art – whether someone ordinarily resides or has a place of residence in a particular jurisdiction. The later cases under the 1986 Act consider that nothing turns on the change of the term to 'ordinarily resident'. The meaning of 'place of residence' in the 1986 Act is taken as equivalent to the former terms 'dwelling-house'.

29 Re Khan, summarises factors that have emerged from previous English cases that are relevant to the question of whether a debtor is ordinarily resident in England.

(1) The expression is not to be treated as a term of art in a legal sense (Skjevesland paragraph 13).

(2) Ordinary residence is a question of fact and degree (Norris page 113, Bright 204, Skjevesland paragraph 20).

(3) Such residence must have a degree of permanence; the person concerned must intend to and actually reside for a substantial period of time; casual visits will not suffice (Skjevesland paragraph 32). (I pause at this point respectfully to question the relevance of intention, but the learned judge does mention it.) It must be of some duration: two or three days do not suffice (Bright). A period of 92 days in a year was held to be sufficient in Skjevesland (see paragraphs 18 and 19; cf. Stojevic26 paragraph).

(4) "[G]eneral staying at an hotel" is probably not sufficient to amount to residence for the statutory purpose, although the court did not express a definite opinion on the point; but where a person has "exclusive use of

lodgings and pays for them he does reside" (Norris, 114). Constant movement from, say, one boarding house to another would not suffice (Brauch).

(5) A person may have more than one usual residence (Skjevesland paragraphs 33 and 34) and may even be ordinarily resident in more than one country (Skjevesland paragraph 38).

(6) It is not necessary to be able to specify the places at which the debtor is said to have
ordinarily resided, although inability to do so may be a circumstance which tells against ordinary residence (Brauch page 333).

(7) Ordinary residence does not necessarily require the person residing to be the landlord or tenant under any lease or tenancy agreement (Skjevesland paragraphs 10 and 13).

(8) Ordinarily residing may include residing with family members (Skjevesland paragraph 12). It is fair to note also, however, the use of the word "exclusive" in some of the authorities, ...

(9) Care is needed as to the weight to be attached to documentary evidence such as parking permits and letterheads, but documentary evidence does have a role to play especially if it gives an address for official purposes, e.g. for a firearms certificate or as an address for service (Skjevesland paragraphs 40 ff.).

(10) Having access to a key kept at premises is "not without significance" (Skjevesland paragraph 45).

(11) The purpose of a visit or visits to the jurisdiction may be relevant (Bright).

(12) It is important to distinguish between using a residence as such and using it to carry on corporate activity (Stojevic paragraph 53 ff.).

(13) Being capable of being telephoned at premises may be a factor (Brauch).

(14) The cumulative effect of the evidence, which I take to mean both the oral and documentary evidence, is important (Skjevesland paragraph 47).

30 And further with respect to a place of residence:

(1) Having a place of residence is a de facto situation rather than a matter of legal right (Skjevesland paragraph 50 and the passage from Brauch there cited). So a licensee may have [a] place of residence (Brauch 334).

(2) A moral claim to premises may be sufficient (Skjevesland paragraph 52).

(3) The person concerned may well have to phone to make arrangements to occupy because others use the premises as well as him but this is no obstacle to a finding of having a place of residence (Skjevesland paragraph 53).

(4) It is possible to have a dwelling house without being in occupation in the relevant period (Brauch, 335) but the greater the occupation the more likely the finding; but not perhaps if the relevant property has been abandoned (Nordenfelt and Brauch, 335).

(5) Living in a place with one's family as a tenant in rooms makes those rooms a dwelling house (Hecquard 74).

31 The evidence relating to Mr Pelletier's ordinary residence and place of residence in the Cayman Islands is set out in DiMarco's affidavit at [44] to [47]. Ms MacInnis' third affidavit at [6] to [11] includes further evidence of Mr Pelletier's status under the Immigration Law as a permanent resident in the Cayman Islands since 13 July 2015, which status is unchanged…"

The key statutory provisions

48. The Law defines the term "*debtor*" and the qualifying jurisdictional connections in section 2 as follows:

> "*'debtor' includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him –*
>
> *(a) was personally present in the Islands;*
>
> *(b) ordinarily resided or had a place of residence in the Islands;*

> (c) *was carrying on business in the Islands, personally or by means of an agent or manager; or*
>
> (d) *was a member of a firm or partnership which carried on business in the Islands…*"

49. The key jurisdictional test is whether the debtor had a qualifying connection with the Cayman Islands "*at the time when any act of bankruptcy was done or suffered by him*".

Findings on residence

50. The two acts of bankruptcy relied upon are the Debtor's alleged (and factually undisputed) (1) failing to comply with a bankruptcy notice served no later than September 19, 2019 and (2) declaring himself unable to meet his liabilities. Reliance in the latter regard is placed on formal statements of assets and liabilities signed before notaries in Montreux, Switzerland ("June Statement") and San Diego, California ("July Statement"). So the relevant time period spans from May to September 2019 for determining whether or not the relevant residential connection exists.

51. The Debtor cannot dispute that, at all material times, he had a Permanent Residence Certificate ("PRC") and had access to a home in Grand Cayman. The Petitioner did not evidentially challenge the fact that the only residence the Debtor had access to was used only occasionally as a holiday home and that since 2017 the Debtor had not been in a factual sense ordinarily resident in the Cayman Islands. The critical question in dispute is whether the Debtor has a sufficient residential connection for the purposes of section 2 of the Law by virtue of the fact that, *inter alia*, at the material time:

> (a) he had access to a holiday home owned by a trust of which he is a beneficiary within the jurisdiction;
>
> (b) he had the legal right to permanently reside here;
>
> (c) he had assets here, including personal effects and bank accounts; and
>
> (d) he used his Cayman address as his residential address in the June and July Statements.

52. In my judgment the evidence that the Debtor had a "*place of residence*" in the requisite legal and factual sense is compelling. It is not necessary to decide whether or not he was also ordinarily resident here. The statutory definition of "*debtor*" is a non-exhaustive one and clearly expressed in broad terms, consistent with the fact that the bankruptcy jurisdiction is designed to provide effective relief to creditors of any debtor who has assets within the jurisdiction. The jurisdiction created by section 2 of the Law is clearly broader than domicile or even ordinary residence, because it explicitly encompasses "*carrying on business in the Islands, personally or by means of an agent or manager*". It is analogous to section 91 of the Companies Law (2020 Revision), which confers jurisdiction to wind-up:

> "*(d) a foreign company which-*
>
> *(i)* *has property located in the Islands;*
>
> (ii) *is carrying on business in the Islands…*"

53. Mr Lowe QC relied on the observation of Slade LJ in *Adams-v-Cape Industries Plc* [1990] 1 Ch. 433 at 518A-B that, unless a foreign defendant has submitted to the jurisdiction, jurisdiction over him "*depends on the physical presence of the defendant in the country concerned at the time of suit*". This statement was made in the context of considering whether a foreign judgment could be enforced in England under common law principles; it did not involve the construction of statutory jurisdictional provisions in a bankruptcy act.

54. The central commercial objects and purposes of bankruptcy law, reflected in part in the fact that it is an act of bankruptcy to leave the jurisdiction or remain abroad with a view to defeating creditors (section 14(c)), is to provide a mechanism for administering the assets of bankrupts for the benefit of their creditors. The jurisdictional net of the Law is clearly intentionally cast very wide. It makes no sense to construe the residential requirements of section 2 of the Law in a way which facilitates evasion of the Law by debtors who when being pursued by creditors seek to minimize or sever their local jurisdictional ties.

Findings: qualifying acts of bankruptcy

<u>Key statutory provisions</u>

55. Section 14 of the Law provides in salient part as follows:

> "*14. A single creditor or two or more creditors, if the debt owing to such single creditor or the aggregate amount of debts owing to such several creditors from any debtor amounts to not less than forty dollars, may present a bankruptcy petition to the Court against a debtor, alleging as the grounds of the petition any one or more of the following acts or defaults, in this Law deemed to be and included under the expression 'acts of bankruptcy'-*
>
> *(a) that the debtor has, <u>in the Islands or elsewhere</u>, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally, or has executed any other instrument whereby his property is made available for general distribution amongst his creditors;*
> *(b) that the debtor has, <u>in the Islands or elsewhere</u>, made a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof;*
> *(c) that the debtor has, with intent to defeat or delay his creditors, departed out of the Islands, being out of the Islands remained out of the Islands, departed from his dwelling-house, otherwise absented himself, begun to keep house or begun to sell his stock-in-trade at an under-value;*
> *(d) that the debtor has, <u>by any act</u>, declared himself unable to meet his engagements;*
> *(e) that the debtor has presented a bankruptcy petition against himself;*
> *(f) that execution issued in the Islands against the debtor on any legal process for the obtaining payment of any sum of money has been levied by seizure and sale of his goods, or enforced by delivery of his goods;*
> *(g) that the creditor presenting the petition has served on the debtor a summons in an action in the Grand Court wherein the creditor claims payment of a liquidated sum of not less than forty dollars, <u>and has also served on the debtor in the Islands in the prescribed manner</u>, at or at any time after the date of the service of the summons, a bankruptcy notice in writing, in the prescribed form, requiring him to pay the amount endorsed upon such summons, and the debtor has not, within seven days after the service of such notice, paid the amount due to the creditor, or secured or compounded for the same to the satisfaction of the creditor:*
> *Provided that no bankruptcy petition shall be presented on this ground unless the creditor has obtained final judgment in the action for not less than forty dollars within three months from the service of the summons;*
> *(h) that the creditor presenting the petition has obtained final judgment against the debtor in an action in the Grand Court for not less than forty*

dollars, and has served on the debtor in the Islands a bankruptcy notice in writing, in the prescribed manner and form, requiring him to pay the amount for which such judgment has been obtained, and the debtor has not, within seven days after the service of notice, paid such amount, or secured or compounded for the same to the satisfaction of the creditor;

(i) that the creditor presenting the petition, having a demand against the debtor of not less than forty dollars upon a negotiable security for money upon which the debtor was primarily liable, and upon which payment was at least fourteen days overdue, served on the debtor in the Islands a bankruptcy notice in writing, in the prescribed manner and form, requiring him to pay the amount of such debt and that the debtor has not, within seven days after the service of such notice, paid such amount or secured or compounded for the same to the satisfaction of the creditor;

(j) that the debtor has, <u>in the Islands or elsewhere</u>*, made any conveyance or transfer of his property or any part thereof, or created any charge thereon, which would under any law relating to bankruptcy, be void as a fraudulent preference if he were adjudged bankrupt;*

(k) that the debtor has, in the Gazette and in a newspaper circulated in the Islands, given notice of his intention to convey, assign or transfer his stock-in-trade, debts or things in action relating to his business to any other person; and that the creditor presenting the petition, having a demand against the debtor of a liquidated sum of not less than forty dollars, has served on the debtor in the Islands a bankruptcy notice in writing, in the prescribed manner and form, requiring him to pay the amount of such debt, and that the debtor has not, within seven days after the service of such notice, paid such amount or secured or compounded for the same to the satisfaction of the creditor; or

(l) that the debtor has paid money to or given or delivered any satisfaction or security for the debt of a petitioning creditor, or any part thereof, after such creditor has presented a bankruptcy petition against him…" [emphasis added]

56. The section is reproduced so fully because reliance was placed on the drafting approach to the section as a whole for the Debtor's central proposition that the acts of bankruptcy relied upon could not be committed abroad. The proviso to section 14 sets out additional requirements for presenting a petition (e.g. the act of bankruptcy must be committed within 6 months preceding the presentation of the petition and the creditor's claim must be for a liquidated sum) which were not controversial in the present case.

<u>The respective submissions</u>

57. In the Petitioner's Skeleton for the November 8, 2019 hearing it was submitted that:

(a) the Debtor had committed an act of bankruptcy "*on 26 September 2019, upon expiration of the seven-day period for compliance with the Bankruptcy Notice*" (paragraph 57);

(b) "*in…San Diego, California, in the United States, Mr Pelletier declared himself unable to meet his engagements, by making a sworn statement of his assets and liabilities, which showed that his liabilities outweighed his assets…Section 14(d) of the Bankruptcy Law is in the same terms as s. 8(4) of the Bankruptcy Law of 1879 (Jamaica), which was considered in Re Hannan. The Supreme Court of Jamaica referred with approval to previous authority for the proposition that '... a declaration by a debtor that he is unable to meet his engagements coupled with an act, or a series of acts, evidencing his inability is a sufficient act within the meaning of the Law.' The Court found that the debtor had brought himself within that principle, and committed an act of bankruptcy within s. 8(4) of the Bankruptcy Law of 1879 (Jamaica), in light of declarations he had made at different times and to different persons, and the statement of debts and liabilities made out by the debtor and handed by him to the petitioning creditor's attorney..*" (paragraphs 58-59);

(c) it was accepted that the second act of bankruptcy was committed outside of the jurisdiction. There was no direct authority for the proposition that section 14(d) applied only to acts within the jurisdiction. Although in *Re Kruger* [1997 CILR 424] "*Smellie J noted that the act of bankruptcy '... was committed within the jurisdiction as required by s. 14(8) of the Law'*", this was strictly *obiter* (paragraph 62). It was argued that the authority relied upon for this *obiter dictum* did not support the proposition that the act of bankruptcy had to be committed within the jurisdiction.

58. In the Skeleton Argument for Richard Pelletier, the Debtor challenged the entire validity of the bankruptcy notice regime, a challenge which I have rejected above. The jurisdictional dimension of the first act of bankruptcy relied upon (the bankruptcy notice, section 14(g)) was not addressed as a freestanding issue. As regards the second act of bankruptcy, the following argument was advanced:

> "*9. The Petitioner cannot rely upon the alternate grounds put forward under section 14(d), as the acts of bankruptcy alleged in the amended Petition are expressly stated to have taken place outside of the jurisdiction. Considering the clear wording at section 14(a) and (b) (where the act of bankruptcy can expressly be 'in the Islands or elsewhere'), it is submitted that an act of bankruptcy under section 14(d) must, by necessary implication and as a matter of statutory construction, take place within the jurisdiction.*"

59. This was an argument which could not be rejected summarily, especially after Mr Lowe QC elaborated upon it in oral argument. Putting aside the general question of whether or not it was legally possible to serve a debtor abroad without leave (which I have resolved in favour of the Petitioner), section 14(g) defines the act of bankruptcy of failing to respond to a bankruptcy notice in a way which requires service of the notice within the jurisdiction. So the validity of service needs to be revisited through the lens of section 14(g).

Findings: whether the acts of bankruptcy relied upon by the Petitioner were legally made out

60. Section 14 (g) provides as follows:

> "*(g) that the creditor presenting the petition has served on the debtor a summons in an action in the Grand Court wherein the creditor claims payment of a liquidated sum of not less than forty dollars, <u>and has also served on the debtor in the Islands in the prescribed manner</u>, at or at any time after the date of the service of the summons, a bankruptcy notice in writing, in the prescribed form, requiring him to pay the amount endorsed upon such summons, and the debtor has not, within seven days after the service of such notice, paid the amount due to the creditor, or secured or compounded for the same to the satisfaction of the creditor…*" [emphasis added]

61. Mr McKie QC submitted that the Rules are silent as to how such documents are to be served and that the lacuna must be filled by reference to comparable English procedural rules. I accept this submission. The Rules do not prescribe how bankruptcy notices are to be served but do prescribe the form of bankruptcy notices, which by necessary implication are required to be served. Counsel referred to section 18(2) of the Grand Court Law:

> "*(2) In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case.*"

62. The first question is whether this requires regard to be had to current English practice, on the basis that statutes are normally to be construed as "always speaking" or by reference to a date linked with the enactment of the Law and/or the Rules. The Petitioner's counsel relied upon the latter construction. There is no equivalent to a bankruptcy notice in the English personal bankruptcy rules made under the Insolvency Act 1986, which were in force when the Bankruptcy Law was revised in 1997. Mr McKie submitted that the best analogy was a statutory demand under the 1986 England and Wales Insolvency Rules ("IR-EW-1986"). The relevant service rule provides as follows:

> "***6.3.***—*(1) Rule 6.11 in Chapter 2 below has effect as regards service of the statutory demand, and proof of that service by affidavit to be filed with a bankruptcy petition.*
>
> *(2) The creditor is, by virtue of the Rules, under an obligation to do all that is reasonable for the purpose of bringing the statutory demand to the debtor's attention and, if practicable in the particular circumstances, to cause personal service of the demand to be effected.*
>
> *(3) Where the statutory demand is for payment of a sum due under a judgment or order of any court and the creditor knows, or believes with reasonable cause—*
>
> *(a) that the debtor has absconded or is keeping out of the way with a view to avoiding service, and*
>
> *(b) there is no real prospect of the sum due being recovered by execution or other process, the demand may be advertised in one or more newspapers; and the time limited for compliance with the demand runs from the date of the advertisement's appearance or (as the case may be) its first appearance.*"

63. What I believe (based on my own researches) to be the current English practice is found in the Insolvency Rules 2016 ("IR-EW-2016"). The relevant rule is more simply expressed but in substance reflects the same core service requirements as the IR-EW-1986 bankruptcy notice service rule:

> "***Service of statutory demand***

10.2. A creditor must do all that is reasonable to bring the statutory demand to the debtor's attention and, if practicable in the particular circumstances, serve the demand personally."

64. The Law was originally enacted in 1964 so reference was also made, I initially felt more appropriately, to the English Bankruptcy Rules 1952 ("BR-EW-1952") which were seemingly in force when the Law was enacted in 1964 and when the Rules were enacted in 1977. Rule 141 of the BR-EW-1952 provided for a bankruptcy notice to be served in the same way as a petition; namely personal service or substituted service (rules 153-154). No coherent basis was advanced for determining which English rules should be used to fill the *lacuna* in the Rules as regards service of bankruptcy notices. It seems convenient to follow the BR-EW-1952 because they are based on a statutory regime which also has bankruptcy notices, but in other respects those rules are quite different. It seems an odd approach to applying English practice to fill local *lacunae* to be required to trawl through an array of procedural codes and select those historic or current rules which most resemble the matter left out of the local Rules.

65. In my judgment the difficulty in identifying a principled basis on which to choose anything other than the current rules of English practice supports the view that section 18(2) of the Law should (in the present context at least) be given an "*always speaking construction*". That is to say, because there is no reason in the present case to believe that the Rules as a composite procedural code are closely modelled on any particular corresponding English procedural code (whether it be the BR-EW-1952 or the IR-EW-1986), section 18 (2) of the Grand Court Law should be construed as intended to apply to "*the practice and procedure in similar matters in the High Court in England [from time to time] shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case.*" The provision simply requires the application of practice in "similar" matters; not "the same" or "corresponding" matters. This basic rule of construction was explained by Lord Steyn in *Turkington and Others v. Times Newspapers Limited (Northern Ireland)* [2000] UKHL 57 as follows:

"*Unless they reveal a contrary intention all statutes are to be interpreted as "always speaking statutes". This principle was stated and explained in Reg. v. Ireland: [1998] AC 147, at 158 D-G. There are at least two strands covered by this principle. The first is that courts must interpret and apply a statute to the world as it exists today. That is the basis of the decision in Ireland where "bodily harm" in a Victorian statute was held to cover psychiatric injury. Equally important is the second strand, namely that the statute must be interpreted in the light of the legal system as it exists today. In the classic work*

of Sir Rupert Cross (Statutory Interpretation, 3rd ed. (1995), pp. 51-52) the position is explained as follows:

'The somewhat quaint statement that a statute is 'always speaking' appears to have originated in Lord Thring's exhortations to drafters concerning the use of the word 'shall': 'An Act of Parliament should be deemed to be always speaking and therefore the present or past tense should be adopted, and "shall" should be used as an imperative only, not as a future'. But the proposition that an Act is always speaking is often taken to mean that a statutory provision has to be considered first and foremost as a norm of the current legal system, whence it takes its force, rather than just as a product of an historically defined Parliamentary assembly. It has a legal existence independently of the historical contingencies of its promulgation, and accordingly should be interpreted in the light of its place within the system of legal norms currently in force. Such an approach takes account of the viewpoint of the ordinary legal interpreter of today, who expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required'".

66. Accordingly, I find that the governing English rule of practice is the rule that is currently applicable to the service of statutory demands. Such demands are "similar" to bankruptcy notices under the Law and Rules. A creditor's petition may be presented on the grounds that, *inter alia*, the debtor "*appears to be unable to pay a debt*"; if a statutory demand is served on the debtor and not paid (or secured) within three weeks, as a matter of law the debtor "*appears to be unable to pay a debt*" (Insolvency Act 1986, sections 267- 268). Failing to meet the demand contained in a bankruptcy notice constitutes an act of bankruptcy under section 14(g) of the Law, and is a ground for a creditor presenting a bankruptcy petition. There can be little doubt that the Petitioner has complied with the applicable service rule in relation to the Bankruptcy Notice and has done "*all that is reasonable to bring the* [Bankruptcy Notice] *statutory to the debtor's attention*".

67. In my judgment two provisions of the Law are ultimately pivotal for the purposes of determining whether the Petitioner can rely upon non-compliance with the Bankruptcy Notice as an act of bankruptcy under section 14(g):

(1) service must be effected in the Islands (section 14(g)); and

(2) irregularities do not invalidate any steps taken in the proceedings unless substantial injustice is caused (section 167).

68. In my judgment the combined effect of these two provisions, read with GCR Order 65 rule 4 and/or rule 10.2 of the IR-EW-2016 (and/or either of the predecessor provisions under the BR-EW-1952 and the IR-EW-1986) is as follows. The Debtor is unable to challenge the validity of service of the Bankruptcy Notice on him within the jurisdiction by the various forms of service retrospectively approved by this Court. No substantial injustice was caused by any irregularity which occurred. My primary finding is that personal service was not required so no need for substituted service in the strict sense arose. But if it did arise, GCR Order 65 provides so far as is relevant for present purposes as follows:

"***Substituted service (O.65, r.4)***

4. (1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document.

(2) An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.

(3) Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.

Ordinary service: how effected (O.65, r.5)

5. (1) Service of any document, not being a document which by virtue of any provision of these Rules is required to be served personally, may be effected -

- *(a)* *by leaving the document at the proper address of the person to be served;*
- *(b)* *by post;*
- *(c)* *by facsimile, in accordance with paragraph (2); or*
- (d) *in such other manner as the Court may direct.*"

69. If the Bankruptcy Notice is characterised as a document which had to be served personally, then substituted service was permissible under GCR Order 65 rule 4. If the Notice is considered to be a document which did not have to be served personally, then service was possible under Order 65 rule 5 (a), (b) and (d). Although service by fax alone was not possible in compliance with GCR Order 65 rule 4(2) (because the Debtor's Canadian attorney did not agree to accept service on his client's behalf), the combination of service at two local addresses and sending faxes to the Debtor and his Canadian attorney must have been within the ambit of Order 65 rule 5 (1) (d).

70. Accordingly, I find that the act of bankruptcy of failing to respond to the Bankruptcy Notice under section 14(g) of the Law can validly be relied upon by the Petitioner.

71. Two factors potentially weigh in favour of the Debtor's submission that section 14(d) of the Law requires the declaration to take place within the jurisdiction. Firstly, the *obiter dicta* of Smellie CJ in *Re Kruger;* and, secondly, the fact that section 14(d) does not explicitly apply to overseas acts.

72. *Re Kruger* was a case where the act of bankruptcy relied upon was failing to comply with a bankruptcy notice which was admittedly served on the debtor in the Cayman Islands under section 14(g) of the Law. Section 14(g) expressly requires service to be within the jurisdiction. So, as Mr McKie QC rightly pointed out, the observations made did not apply to section 14(d) at all. In my judgment a fair reading of Smellie J's observations do not elevate them to the level of even *obiter dicta* as to the meaning of section 14(d). He merely cited general judicial pronouncements about the need for acts of bankruptcy committed by foreigners to be committed within the jurisdiction of the English courts. That was a principle which Mr Lowe QC endorsed. Accordingly, it is necessary to review the cases cited to see what learning can be gleaned about the construction question at hand. In summary:

(a) *Cooke-v-Charles Vogeler Company* [1901] A.C. 102: the act of bankruptcy relied upon under section 4(a) of the Bankruptcy Act 1883 corresponded to section 14 (a) of the Law (execution of a deed of assignment). The House of Lords held that "*in the case of a foreigner that act of bankruptcy must be committed in this country or be an act*

intended to operate according to the law of this country" (per Lord Davey at page 112);

(b) *Cooke* was followed by the Court of Appeal in *In re Debtors* [1936] Ch 622;

(c) in *Theophile-v-The Solicitor-General* [1950] A.C. 186, the need to reconsider the *Cooke* line of cases did not arise. Those cases concerned the execution of a deed of assignment abroad; *Theophile* concerned remaining abroad. Lord Porter (delivering the leading judgment) appeared to doubt rather than confirm the earlier decisions. He expressly rejected the submission (set out at page 188) that the term "debtor" should be strictly construed, stating (at page 200):

> "*…it is clear that residence is only one of four alternative requisites which constitute a debtor within the meaning of the Act: residence may be a factor which brings him in that class, but it is not a necessary element. Whatever limitation may formerly have been put on the meaning of the word 'debtor', a wider sense has now been given to it: it includes not only persons who were in the past subject to the English bankruptcy law, but a new class consisting of persons who are not British subjects or domiciled in this country but carried on business in England at the time when the act of bankruptcy was committed.*"

73. Mr McKie QC relied upon another old English decision dealing with yet another category of act of bankruptcy, giving notice of an intention to suspend payment of debts. One report of *Ex Parte Oastler; In re Friedlander* (1884) 13 QBD 471 at 472 record the Registrar as holding that because the alleged act of bankruptcy had been committed in Paris, the Court had a discretion as to whether or not to make a receiving order. The argument before the Court of Appeal centred on whether an oral statement was sufficiently formal come within the statutory definition in question. Section 4(1) of the 1883 Act provided that a debtor commits an act of bankruptcy:

> "*(h) If the Debtor gives notice to his creditors that he has suspended, or that he is about to suspend, payment of his debts.*"

74. Another report of the same case ((1884) 54 NS 23) described the decision as being to rescind the receiving order "*on the ground that this particular act of bankruptcy must be committed in England*" (page 24). The submissions summarised on the same page

suggest that the fact that the declaration was made abroad was not a fundamental impediment to a receiving order being made. None of three judgments mention the extra-jurisdictional factor at all, in relation to a statutory provision which did <u>not</u> contain the express words "*in England or elsewhere*". Nor was it suggested that the declaration had to be intended to take effect under English law. Lindley LJ, concurring with Baggallay LJ and Cotton LJ ((1884) 13 QBD 471 at 475) opined as follows:

> "*The first question is, what is the meaning of a debtor's 'giving notice' that he has suspended, or is about to suspend, payment of his debts? I think it does not mean mere casual talk; it must be something formal and deliberate, something done by the debtor with a consciousness that he is 'giving notice', and intended to be understood in that sense. An act of bankruptcy is a serious matter. I am of opinion that what was done in the present case did not amount to a 'giving notice' within the Act. If it was a notice at all, it was only a notice that the debtor might have to pay his creditors a composition; not a notice that he had suspended, or was about to suspend, payment of his debts.*"

75. What then are the territorial and substantive requirements of the following act of bankruptcy upon which the Petitioner relies? The key statutory words are:

> "*(d) that the debtor has, <u>by any act</u>, declared himself unable to meet his engagements*". [emphasis added]

76. The argument that the territorial scope of the various acts of bankruptcy defined in section 14 of the Law can simply be determined by reference to whether the sub-paragraph in question explicitly states "*in the Islands or elsewhere*" is an attractive one. However, it does not withstand careful scrutiny. *Cooke-v-Charles Vogeler Company* [1901] A.C. 102 involved a provision which stated "*in England or elsewhere*", but the Court still superimposed on top of that language a requirement, seemingly based on somewhat nebulous conflict of laws principles. *Ex Parte Oastler; In re Friedlander* (1884) 13 QBD 471 involved a statutory provision similar to section 14(d) which did <u>not</u> contain the "*in England or elsewhere*" imprimatur, yet the Court of Appeal saw no difficulty with the fact that the relevant declaration had been made in Paris. The drafting scheme of section 14 of the Law may be summarised as follows:

(a) where the act of bankruptcy is of a legal transactional nature (involving disposing of assets), the Law expressly provides that it can be committed in or outside the jurisdiction (sub-paragraphs (a), (b), (j));

(b) where the act of bankruptcy involves legal or factual steps which can only be taken within the jurisdiction, this is usually self-evident (sub-paragraphs (e), (f), (g), (h), (i), (k)). However, it is not always necessary that the debtor himself be physically present (e.g. sub-paragraph (e), (f), (k)); and

(c) in one case it is obvious that the act can only be committed abroad (remaining abroad, sub-paragraph (c));

(d) in a minority of cases it is not obvious that the relevant quintessentially factual acts, raising no identifiable conflict of law or other legal policy concerns, are only intended to qualify as acts of bankruptcy if performed by the debtor within the jurisdiction. These are:

(1) subparagraph (d) (declaring himself unable to meet his engagements); and

(2) sub-paragraph (l) (making a payment to the petitioning creditor post-petition).

77. In my judgment, there is no justifiable basis for construing section 14(d) as restricted to declarations of insolvency made within the jurisdiction. The words "*by any act*" are inconsistent with such a territorial restriction. Construing the statute as "always speaking", judicial notice can be taken of the notorious fact that the Cayman Islands has in recent years been a business and residential base for global citizens who often conduct their Cayman-based business and personal affairs from overseas. In my judgment the starting assumption must be that a general statement of inability to meet debts made a resident of the Cayman Islands while abroad ought to qualify as an act of bankruptcy under section 14(d) of the Law. It is impossible to identify any rational legislative purpose which would be achieved by giving effect to a territorially restrictive interpretation. If there is a principle that overseas legal dealings with a debtor's assets do not qualify as acts of bankruptcy unless the relevant transactions are intended to have effect under Cayman Islands law, which I need not decide, any such principle would not be engaged by a declaration of a debtor's inability to meet his "*engagements*" (i.e. liabilities).

78. It is far easier to conclude that the declaration relied on by the Petitioner met the requisite standards of clarity and formality. The Petitioner submitted:

> *"39 Section 14(d) of the Law is in the same terms as s. 8(4) of the Bankruptcy Law of 1879 (Jamaica). There is no equivalent act of bankruptcy in the English statutes.*
>
> *40 The Full Court of the Supreme Court (Jamaica) – acting on appeal – has considered the meaning of s. 8(4). In Re Jones, Herbert & Co the Court stated that the terms of the section, '... were designed to prevent a creditor seizing on any loose vague statement of insolvency made without consideration and misunderstood perhaps by the reporter and making it the foundation of a petition ..." (quoted with approval by the Full Court in Re Hannan)*
> *41 In the former case, at the time of the debtor's declaration he dictated to the petitioning creditors a statement of his liabilities and assets – even correcting an error in the petitioner's note, and this was held to be sufficient.*
> *42 In the latter case, the debtor made out a statement of debts and liabilities and handed it to the petitioning creditor's attorney. This statement contained a proposal to pay five shillings in the pound in full satisfaction of all demands, and this statement was renewed in a further letter. The statement was sufficient.*
> *43 In this case, Mr Pelletier twice stated his assets and liabilities with considerable care and formality. The first was made before a Swiss notary; the second sworn before a Californian notary. In both cases his statements were for Pacer's use in proceedings against Mr Pelletier and they were delivered to Pacer for that purpose."*

79. I accept this submission which did not appear to me to be seriously challenged.

80. Accordingly, I find that the Petitioner was entitled to rely on the second and third as well as the first act of bankruptcy upon which the Petition is based.

Findings: should the Court exercise its discretion to decline to make an Order Absolute on forum non conveniens grounds?

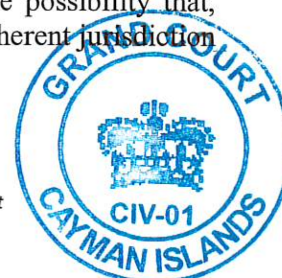
81. The following submissions were advanced on *forum non conveniens* in the Debtor's Skeleton:

"15. The Court has a discretion whether to make an Order Absolute (see Section 33 of the Bankruptcy Law – "the Court may..."). The Court also has express power to stay, adjourn or dismiss a Petition. This is a discretionary power which enables the Court to consider whether there is a more appropriate lex concursus or place where the bankruptcy should be held (see Re Robinson (1883) 22 Ch D 816). In modern times the Court should look at this as a forum conveniens issue (see Sheldon Cross-Border Insolvency 4th ed p381-4 and see factors pp391ff)

16. Here the debtor is domiciled in Canada. The creditor is domiciled in Canada. The bankruptcy debt arose in Canada, following a lengthy Arbitration process carried out in Canada. There are no creditors based in the Cayman Islands. There is on foot a Canadian bankruptcy. There is perfectly viable bankruptcy process in Canada. There are no assets here – the only assets are claims for avoidance. However, all the transfers of assets that are being attacked were made in Canada and only one of those assets is in the Cayman Islands."

82. Mr Lowe QC was, understandably, only able to urge the Court to consider the Debtor's convenience and/or commercial interests in inviting the Court to allow his client to commence primary bankruptcy proceedings in Canada. I accept that the concerns articulated about the inconvenience of dealing the Cayman-based Agents are genuinely felt. But in the overall context of the present case these concerns were lacking in relevancy. As I observed in the course of the hearing, in the context of insolvency, the best interests of the Debtor's creditors prevailed. The Petitioner appeared to be the main creditor and no competing creditors were contending that the primary bankruptcy proceeding should take place in another forum. As sole creditor at the Creditors' Meeting held on January 9, 2020, Pacer has already resolved that "*that adjudication of bankruptcy be made*" pursuant to section 44(b) of the Law.

83. The Petitioner has elected to seek an adjudication of bankruptcy in this forum where assets clearly exist and by way of enforcement of the Judgment granted by this Court. Since the commencement of these proceedings, the Debtor has apparently (on December 2, 2019) applied to revoke his PRC status here. He filed evidence to this effect in opposing the Agents' application for recognition of these proceedings before the courts of Alberta, Canada. The Alberta Court has now recognised the present proceedings as a "*foreign main proceeding*". It would be incongruous in the extreme for this Court to cast doubt on its own competency as the most appropriate forum when that status has been acknowledged by a court in the forum which the Debtor contends is the more convenient one. This does not exclude the possibility that, should circumstances materially change in the future, the Court's inherent jurisdiction to stay the present proceedings cannot be invoked.

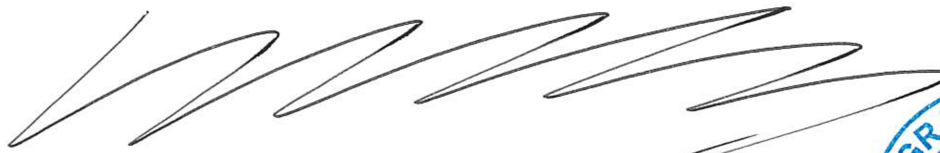


Summary of findings

84. The Debtor has failed to make out any grounds for revoking the Provisional Bankruptcy Order made on November 8, 2019 and continued on November 21, 2019. For the above reasons the Petitioner has established its entitlement to be granted an Order Absolute. Section 47 of the Law provides as follows:

> "47. If no meeting is held, no resolution is come to or if the resolution is that adjudication of bankruptcy be made or it is shown to the satisfaction of the Court that there is no reasonable probability of the confirmation of deed of arrangement and that delay will not be for the benefit of the creditors, the Court shall make an absolute order or bankruptcy against the debtor."

85. Subject to hearing counsel if required, the Petitioner is granted an Order substantially in terms of the Draft Order annexed to its Skeleton for the February 12, 2020 hearing.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT