First Caribbean Region Judicial Colloquium on Insolvency

6th November 2013

Keynote Speech

1. My first visit to the Caribbean was last June when I came to Grand Cayman to try various issues in the liquidation of Sphinx. On my return in July I received an invitation from the Chief Justice to come back to speak at this Colloquium. I have frequently asked myself what qualifications I have to do so. It is true that I have given judgments in a number of cases relevant to the issues of cross-border insolvency both at first instance and in the Court of Appeal, in particular:

Hughes v Hannover Re Insurance Co [1997] 1 BCLC 497

Re:Latreefers Inc (No.2) [2001] 2 BCLC 116

England v Smith [2001] Ch 419

Re: HIH Casualty and General Insurance Ltd [2006] EWCA Civ 732; HL [2008] UKHL 21

Re Stanford International Bank Ltd [2010] EWCA 137

Byers v Yacht Bull Corporation [2010] EWHC (ch.) 133

2. But that experience must be considered in the light of the comments of various contributors to the standard work on the subject, namely Sheldon on Cross-Border Insolvency 3rd Ed 2012. Thus, my reasoning in **England v Smith** is described as 'difficult', 'starts from an unexamined proposition' [para 4.31] and 'does not accord with' my own reasoning in the earlier case of **Hannover Re** [para 4.32]. In relation to **Hannover Re** it is 'unfortunate' that the Court of Appeal did not give certain guidance [para 4.78]. I make no criticisms – the author is probably correct. But I make no apologies either –the common law develops from differences in approach dictated by different facts and issues.

3. But, if judges are at the mercy of text book writers, there is no doubt that text book writers are at the mercy of judges. Thus, Mr Sheldon's excellent work to which I have referred was published in January 2012. It stated the law as it was understood to be as at 31st October 2011. In doing so it referred, inevitably and frequently, to the decision of the Privy Council delivered by Lord Hoffmann in **Cambridge Gas Transportation Corpn v Unsecured Creditors of Navigator Holdings** [2007] 1 AC 508 and the references to that decision in **Re:HIH** [2008] 1 WLR 852.

4. May I remind you what that decision was. The Board, of which not only Lord Hoffmann but also Lord Bingham was a member, concluded that an order of the court in New York should be recognised and enforced in the Isle of Man without further process. That order was to the effect that the shares in a company incorporated in the Isle of Man called Navigator and registered in the name of a company incorporated in the Cayman Islands called Cambridge Gas should vest in a Committee for Unsecured Creditors of Cambridge Gas created by a scheme of arrangement approved by the court in New York under Chapter 11. The appellant contended that this was wrong as the order of the New York court was neither an order in rem nor an order in personam so that, there having been no relevant submission to the jurisdiction, the rules of private international law precluded its recognition or enforcement.

5. The Privy Council accepted that that was the normal rule and that orders in bankruptcy proceedings did not fall into either category. The Privy Council went on to hold (para 21) that the principles of the universality of insolvency:

> "are sufficient to confer upon the Manx court jurisdiction to assist the Committee of Creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan."

6. This proposition was referred to again by Lord Hoffmann in **Re HIH.** That was an appeal from me! We had been referred to the decision of the Privy Council in **Cambridge Gas** after the hearing before us had concluded. We did not deal with it as the argument had focussed on the terms of s.426 Insolvency Act 1986. But on appeal, under the title **McGrath v Riddell**[2008] UKHL 21, Lord Hoffmann, without referring to the decision in **Cambridge Gas**, stated

> "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal."

7. This proposition and more derived from the decision of the Privy Council in **Cambridge Gas** are the foundation of at least 50 paragraphs in Mr Sheldon's excellent book. Only nine months after its publication the Supreme Court gave judgment in **Rubin v Eurofinance SA** [2012] UKSC 46. In that case the court in New York had set aside various unfair preferences against parties who had not appeared. It

was submitted that those orders were to be recognised and enforced by the court in England without further process. Reliance was, of course, placed on the decision in **Cambridge Gas**. But the Supreme Court was having none of it. It determined by a majority, led by Lord Collins, the editor of Dicey & Morris for a number of years, that, and I quote:

> (1) "the dicta in **Cambridge Gas** and **HIH** do not justify the result which the Court of Appeal reached [in Rubin]" (para 128).
>
> (2) "Cambridge Gas was wrongly decided" (para 132).
>
> (3) "the Model Law is not designed to provide for the reciprocal enforcement of judgments" (para 144).

These conclusions require the complete rewriting of at least the 50 paragraphs in Mr Sheldon's book to which I have referred; I suspect a good deal more; hence my observation that textbook writers are at the mercy of judges too!

8. Whilst one may have sympathy for the authors where does all this leave Insolvency Practitioners and more particularly judges in basically common law courts? There is a host of questions. First, should one have regard to any of these conflicting decisions and if so which? Second, what is the ambit of the conflict? Third, how is any certainty to be achieved? I do not profess to have the answer to any

of them. In any event the answer may differ depending on which common law jurisdiction is concerned.

9. For example, a judge sitting in England would be bound to follow **Rubin.** But what is a judge sitting in either the Caribbean Court of Justice or a court from which the final appeal is to the Privy Council to do? The Caribbean Supreme Court may just make its own decision; but if so in which sense. Is the judge in the court from which the final appeal is to the Privy Council bound to follow **Cambridge Gas**? After all in a subsequent case the Privy Council may or may not adhere to its own decision in **Cambridge Gas.** In any of those events should the first instance judge make any assumptions and, if so, which? The position of a judge in the Caribbean Court of Justice or any other court from which an appeal does not lie to the Privy Council in England may be easier in the sense that he is not, I understand, bound by any precedent but more difficult in the sense that he may be called on to decide which of those two decisions is correct.

10. Then, again, the issue in **Cambridge Gas** was relatively limited, namely whether the order of the New York court vesting the shares in Navigator, a company incorporated in the Isle of Man, in the creditors representatives in New York was effective in the Isle of Man. The Privy Council said yes. The

Supreme Court in **Rubin** said no, but in doing so it appears to have disapproved the extent or effect of the principle of modified universalism espoused by Lord Hoffmann and others. Can the decision in **Rubin** be accepted without those wider consequences? One thing is clear; a colloquium like this is an ideal forum in which to discuss these and other similar problems.

11. Just before I left the UK I was alerted to the decisions earlier this year of Jones J in the Grand Court in **Bernard L.Madoff Investment Services** and of the Bermudan High Court in **Saad Investments.** Unfortunately I have not been able to obtain a copy of the judgments in either. As I understand it in each of them the decision of the Supreme Court in **Rubin** was restrictively construed so as to permit the court to assist a US liquidator to pursue avoidance claims in their respective jurisdictions by applying US law. That assistance was given under the Common Law, not some local statutory provision, by reference to the modified universalism to which Lord Hoffmann referred in **Cambridge Gas.** I understand that appeals are pending in both cases. As an irrelevant sideswipe I would observe that neither Lords Hoffmann and Bingham would be available to sit on the appeals to the Privy Council. And the eligibility of Lord Collins to sit depends on whether it comes on before his 75th birthday in May 2016. As this is a private

session I would comment that if I had to bet on the outcome I would put my money on the Privy Council treating **Rubin** as a decision to the effect that if the foreign judgement is not recognisable as such the fact that it was given in insolvency proceedings in which the defendant did not appear will not make it so. We shall see!

12. May I now venture into more controversial waters; is such discussion enough? Problems arising from cross-border insolvency give rise to delay and expense to the ultimate detriment of the creditors. Should we not in the context of the problems exposed by the decision of the Supreme Court in **Rubin** also consider whether the procedures by which cross border insolvency issues are resolved are capable of improvement? For that purpose I must briefly describe what they are in England, I cannot speak for other jurisdictions.

13. In England the available remedies are:

    (1) The Insolvency Regulation;

    (2) S.426 Insolvency Act 1986; and

    (3) The Common Law.

    (4) UNCITRAL Model Law;

Each has its limitations.

14. Thus the Insolvency Regulation was imposed by means of a Directive of the European Commission with effect from 1st June 2002. It introduced a uniform set of conflict of law rules to determine jurisdiction and mutual recognition as between Member States but the law then to be applied is that of the Member State having jurisdiction. It does not seek to establish uniform principles of substantive insolvency law and, in any event, is limited in its application to the European Union. It has little, if any, relevance to cross-border insolvencies centred on the Caribbean.

15. The second remedy available in England and Wales is s.426 Insolvency Act 1986. It enables mutual assistance between courts in both personal and corporate insolvencies. The court in England may assist courts having insolvency jurisdiction elsewhere. But the 'elsewhere' is limited to courts of territories or countries designated by the Secretary of State under s.426(11)(b). As at October 2011 some 21 territories or countries had been so designated. They include, so far as relevant:

Anguilla,
The Bahamas,
Bermuda,
Cayman Islands,
Turks and Caicos Islands,
The Virgin Islands.

But do not include, for example,

Barbados

Belize

Guyana

Jamaica

Surinam

Trinidad and Tobago

Do you know why?

16. The third is the common law. As Richard Sheldon states in his book

> "The extent of assistance which an English Court might provide at common law has generated heated debate."

And that was written before the decisions of the Supreme Court in **Rubin,** of Jones J in **BLMIS** and of the Bermudan Court in **Saad Investments**! The debate arises from the same cases as before. Thus in **Cambridge Gas** the Privy Council suggested that the English Court could provide assistance at common law in cases to which s.426 did not apply. That was in 2006; but in 2008 in **Re HIH** the House of Lords split 2.5 v 2.5 on that question. What then is the effect of the decision of the Supreme Court in **Rubin?** Will the decisions in **BLMIS** and of the Bermudan Court in **Saad Investments** survive the appeal process?

17. The existence of the jurisdiction of the court to grant assistance at common law was unequivocally

recognised by Lord Collins in paragraph 29. In paragraph 31 he gave various examples of such common law assistance. In paragraph 93 and following he appears to accept that avoidance proceedings in insolvency may also be recognised by way of common law of assistance but in paragraph 115 and following denies recognition to any consequent orders. His conclusion that recognition of foreign judgments must be restricted to those reflected in the conventional rule set out in Dicey sets a limit to the jurisdiction of the court in England to grant assistance at common law to foreign office-holders. I would suggest that the key to his reasoning is to be found in paragraph 128, namely the desirability of reciprocity. Since then we have had the decisions in **BLMIS** and **Saad Investments**. To say that the decisions of the appellate courts are eagerly awaited would be and understatement.

18. But, that is why I have left the UNCITRAL Model Law on Cross Border Insolvency to the last. It has been implemented in the UK by the Cross-Border Insolvency Regulations 2006. It takes effect subject to the provisions of the Insolvency Regulation in cases where the latter applies. It contains extensive powers, see article 21 and following, enabling the grant of assistance in insolvency matters by the court of one state to the court of another. Whilst they do not go so far as to provide

for the recognition per se of foreign insolvency orders, see **Rubin** para 143, I would have thought that they could achieve the same outcome though by two or more steps rather than the one suggested in **Cambridge Gas.** I shall return to that possibility later.

19. As at October 2012 The UNCITRAL Model Law on Cross Border Insolvency had been adopted by 20 states including Australia, Canada, Japan, Mexico, New Zealand, South Africa and United States of America. Only one state from the Caribbean has done so, namely the British Virgin Islands. Why is this? Do

Anguilla,
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Belize
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Surinam
Trinidad and Tobago

have comparable provisions in their domestic law? If so are those provisions mutually consistent and workable? Is there scope here for further harmonisation? This, I suggest, is the second broad topic which would merit discussion at this Colloquium.

20. The problems to which cross border insolvencies give rise stem from the fact that each court having jurisdiction over an insolvent debtor under its own laws claims to be entitled to deal with all assets, and all creditors wherever they are. If it did not it would fail to achieve its purpose. This inevitably creates problems where the insolvent debtor carried on business in two or more jurisdictions. By what criterion is priority to be given to one jurisdiction over the other or others? The answer given by the UNCITRAL Model Law (and similar provisions are to be found in the Insolvency Regulation) is to confer priority on the courts of the state in which the debtor "has the centre of its main interests". Ranked second are those states in which the debtor has "an establishment". Whilst "establishment" is defined in article 2(e) "centre of main interests" is not. Instead article 16(3) provides that it shall be presumed to be the registered office or habitual residence of the debtor unless the contrary is proved.

21. The content of the criterion of 'centre of main interests' in the context of the Insolvency Regulation was elaborated in the Virgos-Schmidt Report and by the ECJ in **Eurofood** and **Interedil.** In the context of the UNCITRAL Model Law it has been further elucidated in a revised guide to the UNCITRAL

Model Law adopted by UN Commission on International Trade on 18th July 2013. Am I alone in finding the phrase difficult to apply in modern circumstances of cross border electronic trade in financial instruments? The problem arises from the concept of a single centre of one or more main interests. It is not hard to imagine a company with a registered office at an address of convenience in state A with separate but equal businesses in states B, C and D. If none of those separate businesses can be recognised as the company's main interest then the centre of main interests will be in state A notwithstanding that that state has less connection with the company than any of B, C or D. It seems to me that the tie-breaker of A is the refuge of last resort and confers priority on the courts of the state least suitable for that purpose.

22. It is true that the presumption for which Article 16(c) provides produces certainty, but at what cost? If the court of State A has to ascertain whether there is a centre of main interests in States B, C or D so as to rebut the presumption would it not be more consistent with economic reality to determine with which of States B, C or D the company has the closest connection whether or not it is the centre of its main interests? It may be that the criterion of 'centre of main interests' is too engrained in the

Insolvency Regulation and UNCITRAL to accommodate any change. But is it not worth considering?

23. As I understand it, there are two basic principles underlying the Model Law. The first is to avoid duplication by the ready recognition of the office holders and orders appointed and made by overseas courts. The second is to encourage and facilitate co-operation between those office-holders and courts. The first is incomplete in that **Rubin** shows that a default judgment which is neither **in rem** nor **in personam** will not be recognised in England even if made in insolvency proceedings. But may that defect not be cured by the operation of the second principle? Articles 25 and 26 direct the court in England to co-operate "to the maximum extent possible" with foreign courts or foreign representatives. The forms of co-operation enumerated in Article 27 are not exhaustive. Why, I ask rhetorically, cannot the court in England give effect, on an application for that purpose by the foreign representative, to the foreign insolvency judgment by way of co-operation with the foreign court. In that event the problems exposed by the judgment in **Rubin** can be avoided. I suggest that the obligation to co-operate can be given much wider effect than has been achieved so far.

24. Basically co-operation may be formal or informal. In the first category are cases such as **Hughes v Hannover Re**, **England v Smith** and **Re: HIH.** In such cases a formal application is made to the court for a specific order. The court hears full argument and decides the issue. Articles 25 to 27 envisage a more informal process where the judge in one jurisdiction communicates directly with the judge in another. In my 6 years as a Chancery judge and a further 12 as the Chancellor of the High Court I can only remember one such occasion. That related to Lehmans and issues arising from a particular note issue. I received a letter from Judge Peck; but as my judgment was under appeal there was nothing more I could do. Before coming out, I asked Briggs LJ and David Richards J for their experiences. Neither had been involved in the sort of informal co-operation I am considering. The only exception of which I am aware is BCCI. In that case there was direct communication between my predecessor and the liquidator in Luxembourg or Cayman; but I do not know what about. The fact is that in England, and I expect most common law jurisdictions, that sort of co-operation occurs between the liquidators or receivers. As such co-operation is, by definition, informal it would be interesting to learn of your experiences. Should there not be a greater attempt at co-operation; if so how?

25. I trust that these somewhat random thoughts will provoke further discussion in our proceedings over the course of today and hereafter. No doubt there are other matters of concern to you or some of you. Periodic colloquia, such as this, are very helpful in elucidating the problems and identifying potential solution. Finally, I would like to thank INSOL for promoting and the Chief Justice of the Cayman Islands for hosting this colloquium. I see that it is entitled the first. I have no doubt that it will prove to be a valuable occasion. I hope it will be the first of many. I look forward to hearing your views on some of the issues I have mentioned and others of concern.