

BERMUDA COURT OF APPEAL

PriceWaterhouseCoopers -v- Saad Investments Company Limited and Singularis Holdings Limited [2013] CA (Bda) 7 Civ (18 November 2013)

CIVIL APPEAL - WINDING-UP - JURISDICTION - ASSISTANCE TO FOREIGN LIQUIDATORS - PRODUCTION OF DOCUMENTS

The Court of Appeal for Bermuda (Zacca P, Auld JA and Bell AJA) delivered an important judgment about the jurisdiction of the Bermuda court to assist foreign liquidators by ordering the production of documents by persons in Bermuda.

The interplay or conflict between the decisions of the Privy Council and the UK Supreme Court in *Cambridge Gas -v- Navigator* [2007] 1 AC 508, *Rubin -v- Eurofinance* [2012] UKSC 46 and *Al Sabah v- Grupo Torras* [2005] 2 AC 333 has been a source of great debate and litigation in the world of cross-border insolvency. The Bermuda Court of Appeal has provided clarity as to the common law position (at least in Bermuda) but less clarity in relation to the scope and control of statutory parallel insolvency procedures.

In summary the position is: (1) The Bermuda court has no jurisdiction at common law to make a production order in aid of a foreign liquidation against persons in Bermuda; and (2) PwC was unable to challenge the exercise by the Bermuda court of its statutory power to make ancillary winding up orders in aid of a foreign liquidation. Once the Bermuda Court has made a winding up order, the Court can then make production orders against persons in Bermuda ancillary to that winding up order.

PriceWaterhouseCoopers (PwC) is a Bermuda exempted partnership with its registered office in Bermuda. It is a different legal entity to the PriceWaterhouseCoopers Bermuda auditing firm. Through its Dubai branch, PwC Bermuda audited two Cayman companies, Saad Investments Company Limited ("SICL") and Singularis Holdings Ltd. ("SHL"). PwC did not have any office or other physical presence in Cayman. The Cayman

Court ordered the compulsory winding up of SICL and SHL, and Joint Provisional Liquidators were appointed in Cayman in 2009. Production Orders were made against PwC as former auditors in Cayman that were eventually complied with. The Cayman orders did not and could not require PwC to produce its own working papers (merely documents that were the property of SICL and SHL).

In 2012, some three years after the Cayman winding up orders, the JPLs obtained an ancillary winding up order in Bermuda against SICL. They subsequently obtained, *ex-parte*, orders against PwC: (1) under Section 195 of the *Companies Act* requiring the production of extensive documentation relating to SICL, including the auditor's working papers and (2) at common law against both SICL and SHL requiring the production of substantially the same extensive documentation. PwC challenged the making of these orders, and was unsuccessful at first instance before Kawaley CJ. PwC appealed to the Bermuda Court of Appeal. The Court of Appeal unanimously held that there is no common law power to order production of documents equivalent to the statutory powers contained in Section 195 of the *Companies Act* in circumstances not falling within the terms of that section. In other words, absent a Bermuda winding up order, there could be no reliance on the terms of Section 195 or a common law equivalent power. The doctrine of modified universalism as espoused by Lord Hoffman in *Cambridge Gas -v- Navigator Holdings* [2007] 1 AC 508 provides no basis in Bermuda for a common law power equivalent to the statutory power in circumstances where the statute is inapplicable.

By a majority, however, the Court of Appeal also held that since a winding up order had been made against SICL in Bermuda, the powers under Section 195 were available to the court and a production order could be made. The decision of the Bermuda Court of Appeal in *PwC Bermuda -v- Kingate Global Fund Ltd* [2011] Bda LR 32 was binding on the Court of Appeal and provided that PwC could not challenge jurisdiction of the Court to make the production order because that would amount to a collateral attack on the Bermuda winding up order. PwC had no standing to challenge the making of the Bermuda winding up order. The dissenting judgment of Sir Robin Auld JA contains a powerful critique of the existing law and holds that PwC is able to challenge the making of the Section 195 production order.

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