NEWS RELEASE

Saad Privy Council Judgments Handed Down

PricewaterhouseCoopers v. Saad Investments Company Limited [2014] UKPC 35

Singularis Holdings Limited v. PricewaterhouseCoopers [2014] UKPC 36

The Privy Council have this morning handed down judgments in the two long-awaited outstanding Saad appeals.

PricewaterhouseCoopers has succeeded on each of the appeals - as Appellants in the first appeal ("the SICL Appeal") and as Respondents in the second appeal ("the Singularis Appeal").

The Singularis Appeal

The concept of modified universalism is still alive. Common law assistance remains, but only to provide relief that is both available in the office-holder's own (foreign) country and as a matter of the (domestic) common law of the country in which he seeks assistance.

Very unusually 5 separate judgments are delivered by each of the members of the Board in this appeal. There are clear divisions between the Judges. The following high level summary should allow clients to make their way through this 162 paragraph set of judgments.

The Board unanimously concluded that common law assistance in cross-border insolvencies continues to exist (as does the concept of "modified universalism"), and that it extends to whatever can be provided as a matter of common law in the country that receives the request (Bermuda) [Judgment, para 19].

The Board also unanimously concluded that this concept does not extend to assistance by way of the use of statutory provisions that would be available in the receiving court as if it were a domestic insolvency (*Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of*

Navigator Holdings Plc [2007] 1 AC 508 is overruled on this point; *Al Sabah v Grupo Torras SA* [2005] 2 AC 333 is approved; the orders made in the cases of *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61 and the first instance decision in the Cayman Islands *Picard v Primeo Fund*, January 14, 2013 are wrong).

The Board was troubled by the fact that the JOLs were seeking relief in Bermuda (provision of information in audit working papers) that was not available in the Cayman Islands (which provides only for the provision of documents belonging to the insolvent company). The Board therefore unanimously concluded that the Bermudian court should not have granted that which the Cayman court could not itself have granted. The appeal was lost because of this issue.

However the Board is divided on whether investigatory powers such as those under s.195 are available at common law (and therefore can be provided by way of assistance to a foreign insolvency office-holder where it equates to the powers of that foreign office-holder in his own home jurisdiction).

The majority (Lords Sumption, Clarke, and Collins) hold that

(A) There is such a common law power and that therefore, in an appropriate case where the requesting court also had the relevant powers, assistance could be provided by way of allowing these investigatory powers to be used.

(B) The common law power is the power for an office-holder to extract information in written or oral form which is necessary for the administration of a foreign winding up and/or to identify and locate assets of the company [Judgment, paras 25 (Lord Sumption), 33 (Lord Collins), 112 (Lord Clarke)].

(C) *In re Impex Services Worldwide Ltd* [2004] BPIR 564 is approved (in result, although not in reasoning) [Judgment, para 24]

The minority (Lords Mance and Neuberger)

(A) would have preferred not to determine the question of whether there was any such common law power, but if they were so required would conclude that there was no such power.

(B) Lord Mance is very firm on this point (Judgment, paras 130-142).

(C) Lord Neuberger is less firm in his conclusion, but sides with Lord Mance.

As a result, foreign office-holders can seek common law assistance by way of the provision of information from any party who has that information, as long as those office-holders have the relevant statutory provisions in their own jurisdiction.
Two members of the Board also express views that working papers held by auditors are in fact properly regarded as property belonging to the companies under the law of the Cayman Islands (Judgment paras 30 and 41).

The SICL Appeal

Strangers cannot generally get rid of winding-up orders, but they can if the orders obtained against them are the sole reason for the liquidation and if they can show that there is no jurisdiction for the winding-up order to have been made.

The SICL Appeal raises issues as to the limited circumstances in which a recipient of the Bermudian equivalent of section 236 Insolvency Act 1986 - section 195 of the Companies Act 1981 ("s.195") - can collaterally attack a winding-up order and/or when such a person should be made a party to the winding-up petition before the winding-up order is made and/or stay the winding-up order after it has been made.

The Board, in a single unanimous judgment given by Lord Neuberger, holds that while a court will not normally entertain submissions from strangers to a winding-up on the issue whether a winding up order should or should not have been made, there are exceptions to that principle.
In particular, a stranger should be able to stay a winding-up order in circumstances where [Judgment, para 31]

(a) it is well arguable that there was no jurisdiction for such an order to be made (as the Privy Council determined was the case in the SICL Appeal) [Judgment, para 32]; and
(b) where the party who is a stranger to the order (i.e. not a company, the liquidators, the Official Receiver, or any creditor or contributory) is not merely a target but the sole direct target of the winding up order [Judgment, paras 33 and 37].

In the case of SICL, the Board seems to envisage that it was for the Liquidators to apply or be directed to stay their own winding up order and/or for the court to make the stay order of its own motion [Judgment, para 43].

It is clear that the Board envisages [Judgment para 36] that any court who is asked to stay a winding up order by a stranger will generally be very reluctant to let a stranger become a party, but there will be exceptional circumstances where that is possible. Merely being a party whose rights will be detrimentally affected as a result of the winding-up order is not sufficient.

Moreover, a court may also refuse a stay if it is too late to grant such a stay [Judgment para 44], such as because the winding-up has proceeded too far.

The Board also concluded that even if it had not been possible to stay the winding up, or to grant PwC leave out of time to appeal against the winding-up order, the Board would have acceded to the application to set aside the s. 195 order on the basis that it would be breach of natural justice if they remained bound by that order.

The Board seems to envisage that in circumstances where a winding-up order is directed to obtaining relief from one party, and that party is a stranger to the winding-up, the stranger should nevertheless be given notice of the winding-up petition, and permitted to appear on it. There is no discussion in the judgment of the effect of advertisement of the winding-up petition, and why that would not have been sufficient notice. The point remains open.

GABRIEL MOSS QC, FELICITY TOUBE QC, AND STEPHEN ROBINS ALL APPEARED FOR THE JOLS

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