

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 FINANCIAL SERVICES DIVISION

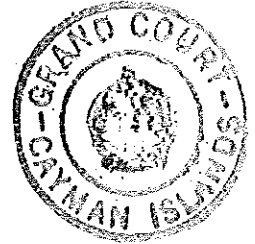
3 CAUSE NO: FSD 275 OF 2010-AJJ

4 The Hon. Mr. Justice Andrew Jones  
5 In Open Court, 15<sup>th</sup> – 17<sup>th</sup> October 2012 and  
6 14<sup>th</sup> January 2013

7  
8 BETWEEN:

9  
10 (1) IRVING H PICARD  
11 (AS TRUSTEE FOR THE LIQUIDATION OF THE  
12 BUSINESS OF BERNARD L. MADOFF  
13 INVESTMENT SECURITIES LLC) (IN SECURITIES  
14 INVESTOR PROTECTOR ACT LIQUIDATION)

15  
16 (2) BERNARD L. MADOFF INVESTMENT  
17 SECURITIES LLC (IN SECURITIES INVESTOR  
18 PROTECTION ACT LIQUIDATION)



19 Plaintiffs

20 and

21  
22 PRIMEO FUND (IN OFFICIAL LIQUIDATION)

23 Defendant

24  
25  
26 **Appearances:** Mr. Robin Dicker QC and Mr. Stephen Robins instructed by Mr. John Harris  
27 of Higgs & Johnson for the Plaintiffs

28  
29 Mr. Michael Crystal QC instructed by Mr. Peter Hayden and Mr. Nicholas Fox  
30 of Mourant Ozannes for the Defendant

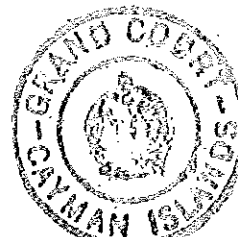
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32  
33 RULING ON PRELIMINARY ISSUES

34  
35  
36 **Introduction and Factual Background**

- 37  
38 1. This is the trial of certain preliminary issues of law based upon stated assumptions of  
39 fact. However, in order to understand the factual assumptions and put the legal  
40 argument into context, one does need to have a general understanding of the relevant  
41 factual background. My summary is drawn from the pleadings and counsels' written  
42 submissions. It is intended to reflect what is common ground between the parties and  
43 should not be read as constituting any findings of fact made by the Court.

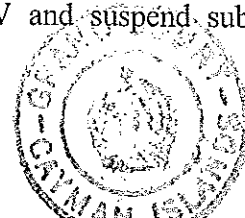
1 2. Bernard L. Madoff Investment Securities LLC (“BLMIS”) is a company incorporated  
2 under the laws of New York, whose principal place of business was in New York City.  
3 It was owned and controlled by Bernard L. Madoff (“Madoff”). Throughout the whole  
4 of the period relevant to this proceeding, BLMIS’ investment advisory business was  
5 being carried on fraudulently. Madoff was arrested on 11 December 2008. The  
6 Securities and Exchange Commission filed a complaint on the same day, and the  
7 United States District Court for the Southern District of New York appointed a  
8 receiver. On 15 December 2008, the Securities Investor Protection Corporation filed  
9 an application in the District Court for the commencement of liquidation proceedings  
10 in respect of BLMIS and Judge Stanton made an order which (i) appointed Mr. Irving  
11 H. Picard as trustee (“the Trustee”), (ii) transferred the case to the United States  
12 Bankruptcy Court for the Southern District of New York (which I shall refer to as “the  
13 New York Court”), and (iii) removed the receiver from office. As a matter of United  
14 States law, the statutory avoidance claims which the Trustee seeks to assert against  
15 Primeo Fund (In Official Liquidation) (“Primeo”) in these proceedings arose at that  
16 moment in time. Madoff admitted that he had operated a massive *Ponzi* scheme  
17 through BLMIS. On 12 March 2009 he pleaded guilty to 11 counts of fraud and was  
18 subsequently sentenced to 150 years in prison.

19  
20 3. On 5 February 2010, I made a declaration under section 241(1)(a) of the Companies  
21 Law by which it is recognized that the Trustee is the only person entitled to act on  
22 behalf of BLMIS in this jurisdiction (“the Recognition Order”). This declaration is  
23 binding on all persons and for all purposes in the Cayman Islands, whether or not such  
24 persons had actual notice of the Trustee’s petition. My reasons for making the  
25 Recognition Order are reported at 2010 (1) CILR 231. BLMIS’ only connection with  
26 the Cayman Islands is that Primeo (and at least two other Cayman domiciled  
27 investment funds) placed funds with it for investment. BLMIS was never licensed  
28 under the Securities Investment Business Law (2003 Revision) to carry on its business  
29 in this country and had no property located here. *Prima facie*, this Court therefore has  
30 no jurisdiction to make a winding up order in respect of BLMIS under section 91(d) of  
31 the Companies Law.



1 4. Primeo was incorporated under the Companies Law on 18 November 1993 and on 1  
2 January 1994 commenced business as an open-ended investment fund subject to the  
3 regulatory requirements of the Mutual Funds Law (Law 13 of 1993). Its offering  
4 document, which was required to be filed with the Cayman Islands Monetary  
5 Authority, described it as "an open-ended investment fund designed for non-U.S.  
6 investors desiring to invest a portion of their assets in a fund emphasizing preservation  
7 of capital through diversification of investments". Its participating shares were listed  
8 on the Luxembourg Stock Exchange. From the inception of its business, Primeo  
9 placed funds for investment with BLMIS pursuant to three written agreements  
10 executed on or about 29 February 1996. These accounts were closed sometime in June  
11 2007. Thereafter, Primeo's investment strategy was changed in that its assets were  
12 invested in the participating shares of two investment funds, namely Herald Fund SPC  
13 which is a segregated portfolio company incorporated under the Companies Law  
14 ("Herald") and Alpha Prime Equity Hedged Fund Limited, a company incorporated in  
15 Bermuda ("Alpha Prime"). Herald and Alpha Prime placed funds for investment with  
16 BLMIS. This new investment strategy is said by Primeo to have been disclosed to its  
17 investors in a revised offering document issued on 25 April 2007. Funds withdrawn  
18 from Primeo's account with BLMIS prior to June 2007 were paid directly to Primeo  
19 and are referred to in the pleadings as the "Direct Transfers". Primeo was not the only  
20 investor in Herald and Alpha Prime, but at some point it did become the largest single  
21 investor in Herald. When Primeo redeemed shares in Herald or Alpha Prime, the  
22 assumption is that they in turn withdrew funds from their accounts with BLMIS. To  
23 the extent that redemption proceeds received by Primeo from Herald and/or Alpha  
24 Prime were funded by withdrawing funds from their BLMIS accounts, it is said by the  
25 Trustee that BLMIS indirectly paid money to Primeo. The expression Indirect  
26 Transfers is used in the Statement of Claim to describe transactions of this sort.

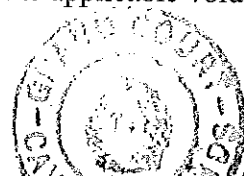
27  
28 5. It follows that, even after changing its investment strategy in 2007, Primeo remained  
29 highly dependent upon BLMIS' integrity and investment performance. On 12  
30 December 2008, the day after Madoff's arrest, Primeo's directors passed a resolution,  
31 *inter alia*, to suspend the calculation of its NAV and suspend subscriptions and



1 redemptions of its participating shares. On 23 January 2009, the sole voting  
2 shareholder of Primeo passed a special resolution for the company to be wound up  
3 voluntarily and two qualified insolvency practitioners, Messrs James Cleaver and  
4 Richard Fogerty, were appointed as joint voluntary liquidators. On 8 April 2009, an  
5 order was made for Primeo's winding up to continue under the supervision of this  
6 Court, whereupon Messrs Cleaver and Fogerty were appointed as the joint official  
7 liquidators.

8  
9 6. In these proceedings the Trustee asserts three different types of avoidance claim  
10 against Primeo in respect of both Direct and Indirect Transfers. First, in Section VI of  
11 the Statement of Claim he asserts claims under section 241 of the Companies Law  
12 and/or at common law based upon the application of the substantive United States law,  
13 including: (a) immediate transferee claims under section 548 of the US Bankruptcy  
14 Code (two-year fraudulent transfers); (b) immediate transferee claims under the New  
15 York Debtor and Creditor Law (six-year fraudulent transfers); (c) subsequent  
16 transferee claims to recover payments avoided under section 547 of the U.S.  
17 Bankruptcy Code (90-day preference payments); and (d) subsequent transferee claims  
18 to recover payments avoided under section 548 of the U.S. Bankruptcy Code (two-  
19 year fraudulent transfers). The US law in this respect is materially different from the  
20 provisions contained in Part V of the Companies Law (2011 Revision), in particular  
21 section 145, although it may be said that the underlying policy objective of ensuring  
22 the fair and equal treatment of creditors is the same.

23  
24 7. Secondly, in Section X of the Statement of Claim, the Trustee asserts claims under  
25 section 241 of the Companies Law and/or at common law in accordance with section  
26 145 of the Companies Law (voidable preferences), as if the liquidation of BLMIS  
27 were occurring in the Cayman Islands rather than in the United States, for the purpose  
28 of recovering Indirect Transfers in the total sum of approximately US\$588 million  
29 which were paid to Primeo within the period of six months immediately preceding the  
30 commencement of the foreign liquidation on 18 December 2008. These transfers are  
31 referred to as the "Six Month Payments". Whether the applicable voidable preference



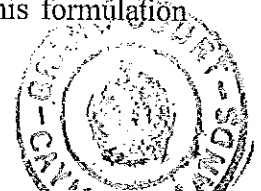
1 provision is section 168 of the Companies Law (2007 Revision) which was in force at  
2 the time when the Six Month Payments were made or section 145 of the 2010  
3 Revision which did not come into force until 1 March 2009 (being after  
4 commencement of the liquidation) is an issue which does not fall to be decided at this  
5 stage of the proceedings.

6  
7 8. Thirdly, in Section XII of the Statement of Claim, the Trustee asserts claims under  
8 section 147 of the Companies Law (fraudulent trading), so as to require Primeo to  
9 make a contribution to the estate of BLMIS. However, it is now conceded by counsel  
10 for the Trustee that this claim must fail by reason of the fact that section 147 did not  
11 come into force until 1 March 2009. It follows that I am now only concerned with two  
12 broad issues – whether the Trustee is entitled, either pursuant to section 241 or at  
13 common law, to assert US law avoidance claims (as pleaded in Section VI of his  
14 ~~Statement of Claim~~) and/or Cayman Island law preference claims (as pleaded in  
15 Section X of the Statement of Claim).

16  
17 9. By the Order which I made on 19 January 2011, the Court will now determine the  
18 following preliminary issues of law :

19  
20 (1) Whether, on the assumption that the Plaintiffs have avoidance claims against  
21 the Defendant under U.S. insolvency law on the basis pleaded in the Plaintiffs'  
22 Statement of Claim, the Grand Court is able to apply U.S. insolvency law  
23 under section 241 and/or section 242 of the Companies Law and/or at common  
24 law (Section VI of the Statement of Claim) (“Preliminary Issue 1”).

25  
26 (2) Whether the Court is entitled to apply section 145 of the Companies Law or  
27 equivalent rules as a matter of common law or under sections 241 or 242 of the  
28 Companies Law so as to avoid the Six Month Payments (as defined in the  
29 Statement of Claim) and/or to entitle the Plaintiffs to judgment for the Credit  
30 Balance (as defined in the Statement of Claim) and/or for any shortfall, as if  
31 (contrary to reality) BLMIS had gone into liquidation in the Cayman Islands on  
32 15 December 2008 (Section X of the Statement of Claim). This formulation



1 does not take into account the possibility that the Court might be entitled to  
2 apply section 168 of the Companies Law (2007 Revision) rather than section  
3 145 of the current law.<sup>1</sup> Counsel agreed that this preliminary issue should be  
4 re-formulated as follows – Whether the Court is able to apply avoidance  
5 provisions of Cayman Islands insolvency law in aid of a foreign insolvency  
6 proceeding as a matter of common law or under sections 241 and 242 of the  
7 Companies Law. (“Preliminary Issue 2”).

8  
9 (3) Whether the Court is entitled to apply section 147 of the Companies Law or  
10 equivalent rules as a matter of common law under sections 241 or 242 of the  
11 Companies Law to require the Defendant to make a contribution to the estate  
12 of BLMIS (Section XII of the Statement of Claim) (“Preliminary Issue 3”).  
13 This issue no longer falls to be decided.

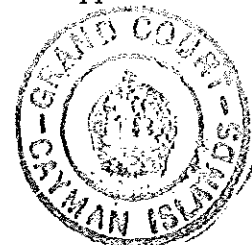
14  
15 (4) Whether Sections VI, X and/or XII of the Statement of Claim should therefore  
16 be struck out as disclosing no reasonable cause of action (“Preliminary Issue  
17 4”). It is now accepted that Section XII should be struck out.

18  
19 (5) Whether, in the event that the Plaintiffs or either of them have valid non-  
20 proprietary claims against the Defendant as pleaded in the Statement of Claim  
21 any sums due from the Defendant to the Plaintiffs or either of them in respect  
22 of such claims would be off-set pursuant to section 140 of the Companies Law  
23 against sums due from the Plaintiffs or either of them in respect of any claims  
24 sounding in debt, damages, equitable compensation or restitution which the  
25 Defendant may have against the Plaintiffs or either of them in respect of  
26 investments made with the Second Plaintiff by or on behalf of the Defendant  
27 (“Preliminary Issue 5”).

28  
29 (6) Whether, in the event that there is no off-set between any sums due in respect  
30 of the Plaintiffs’ Claims and any sums due in respect of the Defendants’  
31 Claims, the rule in *Cherry v Boulton* (1839) 4 My & Cr 442 applies so that the

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<sup>1</sup> Section 168 formed part of the Companies Law, Cap.22 as originally enacted in 1961.



1 liquidators of the Defendant would have a right of quasi-retainer exercisable  
2 against the Plaintiffs so as to entitle the Defendant to retain dividends  
3 otherwise payable by the Defendant to the Plaintiffs or either of them in respect  
4 of the Plaintiffs' Claims ("Preliminary Issue 6").

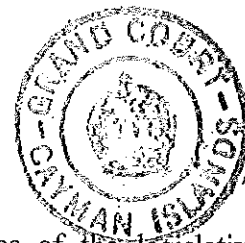
5  
6 (7) Whether, if the Liquidators of the Defendant would have a right of quasi-  
7 retainer, the entitlement to retain is up to an amount equal to the full amount of  
8 the liability of the Plaintiffs or either of them to the Defendant in respect of the  
9 Defendants' Claims or some lesser amount and, if so, what amount  
10 ("Preliminary Issue 7")

11  
12 These preliminary issues give rise to important questions about the nature and extent of  
13 this Court's statutory jurisdiction to make orders ancillary to a foreign insolvency  
14 proceeding and its common law jurisdiction to provide assistance in connection with  
15 foreign bankruptcy proceedings.

16 **Cross border insolvency co-operation: Part XVII of the Companies Law**

17 10. Until recently the corporate insolvency law of the Cayman Islands was based almost  
18 entirely upon Part IV of the English Companies Act, 1862. This surprising state of  
19 affairs came about because the draftsman of the Companies Law, Cap.22 originally  
20 enacted by the Cayman Islands Legislature in 1961 chose to adopt parts of the existing  
21 Jamaican Companies Law, Cap.69 and parts of the English Companies Act 1948. The  
22 provisions relating to the liquidation of solvent and insolvent companies contained in  
23 Part V of the Cayman Islands Law were reproduced (with certain omissions) from Part  
24 II of the Jamaican Law which was itself reproduced from Part IV of the English 1862  
25 Act. This statutory provision remained in force, largely without amendment, until the  
26 Companies (Amendment) Law 2007 was brought into force on 1 March 2009. Prior to  
27 this date matters relating to cross-border insolvencies were not addressed in the  
28 legislation at all. The main focus of the 2007 Law is the amendment of the law  
29 applicable to domestic liquidation proceedings and the introduction of a  
30 comprehensive set of winding up rules which had not previously existed. It addresses  
31 the international aspects of corporate insolvency proceedings in two respects only.





1  
2 11. One of the unfortunate and probably unforeseen consequences of the legislative  
3 draftsman's decision in 1961 to adopt Part IV (but not Part VIII) of the 1862 Act is  
4 that it was generally accepted, at least until 2005,<sup>2</sup> that this Court had no jurisdiction to  
5 make winding up orders in respect of insolvent foreign companies even if they were  
6 carrying on business and had assets in this country. The jurisdiction was limited to  
7 companies "formed and registered" under the Cayman Islands Law. The 2007 Law  
8 cures this problem by conferring jurisdiction upon this Court, under what is now  
9 section 91(d) of the Companies Law (2011 Revision), to make winding up orders in  
10 respect of an insolvent foreign company which (i) has property in the Cayman Islands;  
11 or (ii) is carrying on business in the Cayman Islands; or (iii) is the general partner of a  
12 limited partnership registered under Cayman Islands law; or (iv) is registered under  
13 Part IX of the Companies Law as a foreign company whether or not it has actually  
14 carried on business here. This Court has not yet had an opportunity to consider the  
15 criteria which must be applied in deciding how to exercise this discretionary  
16 jurisdiction.

17 12. The 2007 Law also introduced Part XVII of what is now the Companies Law (2012  
18 Revision): It sets out a mechanism by which this Court can provide assistance to the  
19 representative of a foreign company which is the subject of a bankruptcy proceeding in  
20 its country of incorporation. The material text of Part XVII is as follows:

21  
22 "240. "In this Part –

23  
24 'debtor' means a foreign corporation or other foreign legal entity subject to a foreign  
25 bankruptcy proceeding in the country in which it is incorporated or established;

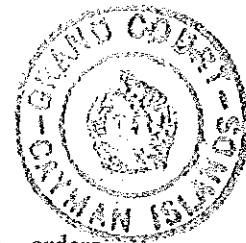
26  
27 'foreign bankruptcy proceeding' includes proceedings for the purpose of reorganising or  
28 rehabilitating an insolvent debtor; and

29  
30 'foreign representative' means a trustee, liquidator or other official appointed in respect  
31 of a debtor for the purposes of a foreign bankruptcy proceeding".

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<sup>22</sup> In *Dyoll Insurance Company Limited* 2004-5 CILR 412 Levers J. did in fact make a winding up order in respect of a foreign company based upon a novel and highly artificial interpretation of what is meant by "forming and registering" a company under Cayman Islands law.





1  
2 241.(1) "Upon the application of a foreign representative the Court may make orders  
3 ancillary to a foreign bankruptcy proceeding for the purposes of –

- 4 (a) recognising the right of a foreign representative to act in the Islands on  
5 behalf of or in the name of a debtor;  
6 (b) enjoining the commencement or staying the continuation of legal  
7 proceedings against a debtor;  
8 (c) staying the enforcement of any judgment against a debtor;  
9 (d) requiring a person in possession of information relating to the business or  
10 affairs of a debtor to be examined by and produce documents to its foreign  
11 representative; and  
12 (e) ordering the turnover to a foreign representative of any property belonging  
13 to a debtor".  
14

15 (2) An ancillary order may only be made under subsection (1)(d) against -

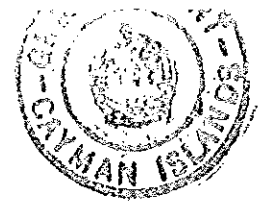
- 16  
17 (a) .....  
18 (b) a person who was or is a relevant person as defined in section 103(1).  
19

20 242. (1) In determining whether to make an ancillary order under section 241, the Court  
21 shall be guided by matters which will best assure an economic and expeditious  
22 administration of the debtor's estate, consistent with –

- 23  
24 (a) the just treatment of all holders of claims against or interests in a  
25 debtor's estate wherever they may be domiciled;  
26 (b) the protection of claim holders in the Islands against prejudice and  
27 inconvenience in the processing of claims in the foreign bankruptcy  
28 proceeding;  
29 (c) the prevention of preferential or fraudulent dispositions of property  
30 comprised in the debtor's estate;  
31 (d) the distribution of the debtor's estate amongst creditors substantially  
32 in accordance with the order prescribed by Part V;  
33 (e) the recognition and enforcement of security interests created by the debtor;  
34 (f) the non-enforcement of foreign taxes, fines and penalties; and  
35 (g) comity;  
36

37 (2) In the case of a debtor which is registered under Part IX, the Court shall not make an  
38 ancillary order under section 241 without also considering whether it should make a  
39 winding up order under Part V in respect of its local branch."  
40

- 41 13. I make some general observations about this provision. First, Part XVII supplements  
42 and partially codifies the common law. It does not abolish the common law rules  
43 which continue to exist alongside the new statutory provision. Second, the statutory



1 provision reflects the traditional English common law rule that this Court will  
2 recognize only the authority of a liquidator or trustee appointed under the law of the  
3 country of incorporation. (*Dicey, Morris & Collins, The Conflict of Laws*, 14<sup>th</sup> Ed.  
4 Para.30R-097). This contrasts with the approach reflected in the UNCITRAL Model  
5 Law which recognizes the courts of the country in which an insolvent company has its  
6 “centre of main interest” as being competent to exercise bankruptcy jurisdiction,  
7 which is not necessarily the country in which the company is incorporated. The  
8 Cayman Islands legislature chose not to adopt this model. This Court has no  
9 jurisdiction to provide judicial assistance under section 241 upon the application of a  
10 foreign representative of an insolvent company appointed by a court in any country  
11 other than the country of its incorporation. Third, the Recognition Order which I made  
12 under section 241(1)(a) has two related consequences. It constitutes recognition that  
13 the Trustee is the only person entitled to act as agent on behalf of BLMIS for the  
14 purpose of enforcing in this jurisdiction any cause of action belonging to the company.  
15 It also determined that the New York court is competent to exercise bankruptcy  
16 jurisdiction in respect of BLMIS and that the Trustee, as its appointed officeholder, is  
17 therefore entitled to seek the assistance of this Court pursuant to section 241 and/or at  
18 common law. What I have to decide in this case is whether the scope of the assistance  
19 available to the Trustee, whether under section 241 or at common law, enables him to  
20 pursue transaction avoidance claims against Primeo and, if so, whether this Court  
21 should apply the substantive foreign law applicable in the New York bankruptcy  
22 proceeding or the domestic law which would be applicable if a winding up order had  
23 been made against BLMIS in this jurisdiction.

- 24
- 25 14. Mr. Crystal’s argument is that the power to apply transaction avoidance provisions  
26 (whether domestic or foreign) in support of a foreign bankruptcy proceeding is not  
27 included in section 241(a) to (e) as one of the forms of relief which may be granted by  
28 this Court. I accept that the list is exhaustive. It does not use language such as  
29 “including” or “for example”. There is no catch all provision for “making any other  
30 appropriate relief”. The contrary argument is that paragraphs (a) to (e) list “purposes”,  
31 not “powers”. Mr. Dicker’s point is that section 241(1) confers only one general



1 power upon the Court, which is the power to make orders ancillary to a foreign  
2 bankruptcy proceeding. He says that paragraphs (a) to (e) merely describe various  
3 purposes for which this single generalized power may be exercised. If these  
4 paragraphs are not a list of powers, it may be said that the application of transaction  
5 avoidance provisions (whether domestic or foreign) is merely incidental to the exercise  
6 of the Court's general power. I do not accept this argument. It seems to me that  
7 paragraphs (a) to (e) describe *both* powers and the purposes for which they may be  
8 exercised. For example, the effect of paragraph (c) is that the Court may make an order  
9 staying the enforcement of any judgment against a debtor. It seems to me that the  
10 draftsman is identifying a power (in this case the power to make an order or injunction  
11 which is negative in effect) and describing the particular purpose for which it may be  
12 exercised (that is, to prevent enforcement of a judgment against an insolvent debtor).  
13 Paragraph (d) identifies a power to make an order or injunction which is mandatory in  
14 effect. It also describes the purpose for which it may be exercised, in this case  
15 requiring persons to give evidence and/or produce documents. On its true construction,  
16 I think that section 241(1) is intended to be an exhaustive list of the Court's statutory  
17 powers to grant ancillary relief in aid of a foreign bankruptcy proceeding.

18  
19 15. Having reached this conclusion, the next point is whether, on its true construction,  
20 paragraph (e) constitutes a power to make orders for the purpose of setting aside  
21 antecedent transactions and ordering the repayment of money to the debtor. It states  
22 that the Court may order "the turnover to a foreign representative of any property  
23 belonging to a debtor". Mr. Dicker makes the obvious point that the power to set aside  
24 antecedent transactions is an essential feature of any personal bankruptcy or corporate  
25 insolvency regime. This explains why "the prevention of preferential or fraudulent  
26 dispositions of property comprised in the debtor's estate" is one of the matters required  
27 by section 242(1) to be taken into account by the Court in deciding whether to exercise  
28 its discretionary powers. I would go further and say that the absence of this feature  
29 under the applicable foreign law might point to the conclusion that the foreign  
30 proceeding should not be characterized as a "bankruptcy proceeding" at all for the  
31 purposes of Part XVII. For these reasons it would not have been surprising if the

1 Legislature had included within section 241(1) a power to make orders for the purpose  
2 of setting aside preferential payments or the fraudulent dispositions of property  
3 comprised in a debtor's estate. On the other hand, if this had been the Legislature's  
4 intention, I think it is surprising that it is not stated expressly.

- 5  
6 16. Mr. Dicker submits that I should have regard to the legislative history as an aid to the  
7 construction of Part XVII. It is open to the Court to have regard to what was said in the  
8 Law Reform Commission's report entitled *Review of the Corporate Insolvency Law*  
9 *and Recommendations for the Amendment of Part V of the Companies Law* dated 12<sup>th</sup>  
10 April 2006 for the purpose of identifying the statutory objective and the mischief at  
11 which the provisions of Part XVII are aimed. (Bennion's *Statutory Interpretation*, 4<sup>th</sup>  
12 Edition, Section 216). The report's executive summary states –

13  
14 ~~“ • There is currently a considerable degree of cross-border co-operation in respect of~~  
15 ~~insolvency matters, but the basis upon which this co-operation is afforded depends~~  
16 ~~largely upon judicial practice.~~

17 • The Commission therefore recommends that the law relating to international co-  
18 operation in respect of insolvency matters be codified and included in a new Part [XVII]  
19 of the Companies Law.”

20  
21 The Commission was clearly recommending “codification” rather than reform. The  
22 mischief appears to have been the absence of “black letter law”. The report itself is a  
23 very high level summary which does not contain any real analysis of the issues which  
24 must have been considered by the Commission. Section 17.3 merely recommends that  
25 this Court be given a statutory power to make ancillary orders and states that “The  
26 powers are set out in a proposed Part [XVII] of the Companies Law and are based upon  
27 the corresponding provisions of the United States Bankruptcy Code with which local  
28 practitioners are very familiar.” It does not even identify the “corresponding provisions.”  
29 It is also open to the Court to have regard to what was said by the Attorney-General when  
30 introducing the Companies (Amendment) Bill to the Legislative Assembly for the  
31 purpose of identifying its legislative objective when the criteria described by the rule in



1        *Pepper –v- Hart*<sup>3</sup> are met. Even if I did think that Part XVII of the Law, or any part of it,  
2        is ambiguous or obscure (which I do not), what the Attorney-General actually said in the  
3        Legislative Assembly would be of no real assistance. He merely said, “The powers set  
4        out in Part [XVII] are based upon the corresponding provisions of the United States  
5        Bankruptcy Code with which local practitioners are familiar.”<sup>4</sup> He said nothing more. He  
6        was merely repeating the statement in the Commission’s report without any explanation  
7        whatsoever.

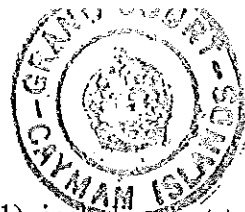
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9        17.    However, it is reasonably apparent from the language of sections 241 and 242 of the  
10        2007 Law that the legislative draftsman must have paid some regard to section 304 of  
11        the US Bankruptcy Code, notwithstanding that it had been repealed long before the  
12        bill was published. It seems to me that he looked to section 304 only because he was  
13        not intending to enact provisions based upon the UNCITRAL Model Law as was done  
14        by the United States in October 2005 (Chapter 15 of the Bankruptcy Code) and by the  
15        United Kingdom in April 2006 (the Cross-Border Insolvency Regulations). The  
16        obvious alternative model to which the Legislature might have looked for guidance is  
17        that reflected in section 426 of the UK Insolvency Act 1986. A key feature of this  
18        model is that the court is empowered to give assistance only in connection with  
19        insolvency proceedings pending in “designated countries”. The designated countries  
20        are limited to the British Overseas Territories and certain Commonwealth countries  
21        whose corporate insolvency laws are similar to or based directly upon the English law.  
22        The United States is not one of them. Rather than adopt this model, which would have  
23        depended upon the Governor in Cabinet to designate the countries whose courts could  
24        be assisted, the Legislature decided to give the Court a discretionary power to provide  
25        assistance provided that (a) the foreign bankruptcy proceeding is capable of  
26        recognition in accordance with the traditional common law rules and (b) the  
27        substantive law of the foreign proceeding is consistent with Cayman Islands policy

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<sup>3</sup> The decision of the House of Lords in *Pepper (Inspector of Taxes) –v- Hart* [1993] AC 593 has been followed and applied in this jurisdiction. It explains the circumstances in which it is permissible for this Court to have regard to statements made by ministers to the Legislative Assembly, as reported in the Official Hansard Report, in arriving at the legal meaning of an enactment.

<sup>4</sup> See *Official Hansard Report*, 2007/8 Session, Monday 17 September 2007, page 456.





1 objectives relating to the matters set out in section 242(1), including just treatment of  
2 all creditors, preferential or fraudulent dispositions and the recognition of security  
3 interests. Even if the foreign proceeding is recognized, as it has been in this case, this  
4 Court could still decline to provide assistance if the order sought by the Trustee would  
5 likely produce or contribute to an economic result which is inconsistent with the policy  
6 objectives of the Cayman Islands corporate insolvency law.

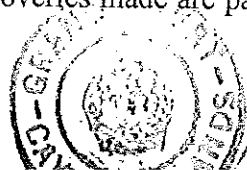
7 18. In my view, this is the extent to which it can be said that the Cayman Islands  
8 Legislature had regard to model reflected in section 304, which had of course been  
9 repealed and replaced with Chapter 15 by the time that the 2007 Law was enacted.  
10 However, Mr Dicker goes further and suggests that, to the extent that the language of  
11 sections 241 and 242 is actually the same or similar to that used in section 304, I  
12 should construe and apply the Cayman Islands law in the same way as the US courts  
13 had construed and applied the US law. He referred to the decision of Buschman J. in  
14 *Re Metzeler*, 78 B.R. 674 (Bankr. SDNY 1987) as an authoritative statement of the  
15 way in which the US courts had interpreted and applied section 304. This case  
16 concerned an ancillary petition filed in the New York Court by Mr. Friedrich Metzeler,  
17 who had been appointed by a German court as trustee of an insolvent German  
18 company. He sought an order for the recovery of \$508,952 as a preferential and  
19 fraudulent transfer. One of several issues was whether the trustee could rely upon the  
20 US law or was limited to reliance upon the German Bankruptcy Act. It was held that  
21 the US court would apply the foreign law. In the course of his judgment Buschman J  
22 referred to a decision of the US Supreme Court in *United States -v- Whiting Pools Inc*,  
23 462 U.S. 198 FN10 and said –

24 “To be sure, this analysis depends in large part on the *Whiting Pools* analysis that estate  
25 property includes property recoverable under § 547 and § 548, and we have held above  
26 that the voidability powers of a foreign representative and the nature of the foreign estate  
27 must be tested by foreign law. In this, there is no inconsistency. The term “property of  
28 the estate” employed in § 109(a) is to be construed according to the definition adopted in  
29 *Whiting Pools*. Although, *Whiting Pools* refers to transfer avoidable under §§ 547 and  
30 548, our task is to construe § 304. That Congress provided for turnover actions in §  
31 1410(b) is sufficient indication of its expectation that the concept applies to similar  
32 avoidance actions based on foreign law in light of the policies sought to be achieved. It  
33 thus seems clear that Congress intended that foreign preference and fraudulent transfer

1 actions seeking to recover property located here are a sufficient basis on which to ground  
2 a § 304 petition and we so hold.”

3 It is clear that the expression “property of the estate” includes property recoverable under  
4 the avoidable transfer provisions and that the expression “turnover of the property of such  
5 estate” (as used in section 304) includes actions (referred to as “turnover actions”) to set  
6 aside antecedent preferential payments and fraudulent dispositions. Mr Dicker focuses on  
7 the use of the word “turnover” in section 241 and invites me give it an American  
8 meaning. In my view, this is not an approach which I am entitled to adopt for two  
9 reasons. First, for the reasons which I have explained, there is no sufficient basis upon  
10 which I can properly infer that the Legislature intended that words and expressions used  
11 in Part XVII should be given the technical meanings which would likely be ascribed to  
12 them if those words had been used by the United States Congress in a statute relating to  
13 the same general subject-matter. I think that the Legislature merely looked to (the then  
14 repealed) section 304 of the US Bankruptcy Code as a general model which was thought  
15 to be more appropriate than the model reflected in section 426 of the UK Insolvency Act.  
16 Second, I should avoid falling into the error of focusing unduly on the single word  
17 “turnover” and failing to pay proper regard to the provision as a whole. Section 241(1)(e)  
18 empowers the Court to order “the turnover to a foreign representative of any property of  
19 the debtor”. Property of the debtor means property of the company, which is not the  
20 same thing as “property of the estate”.

- 21 19. The conceptual difference between the “property of the debtor” and the “property of  
22 the estate” is perfectly clear and well understood by insolvency practitioners. (See the  
23 decision of the English Court of Appeal in *Re Oasis Merchandising Ltd* [1998] Ch.  
24 170). The expression “property of the debtor” means the assets which are the property  
25 of a company at the time of the commencement of the liquidation and the property  
26 representing it, including rights of action which might have been pursued by the  
27 company itself prior to the liquidation. This contrasts with “property of the estate”  
28 which means the assets available for distribution to the creditors in a company’s  
29 liquidation, including the rights of action which are available only to the official  
30 liquidator as a result of a winding up order having been made. An official liquidator’s  
31 right to pursue preference claims and the recoveries made are part of the “property of

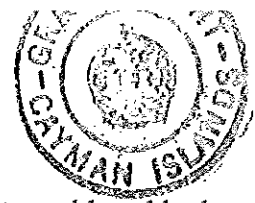




1 the estate” available for distribution to creditors but not part of the “property of the  
2 debtor” within the meaning of section 241(1)(e). I think what the draftsman had in  
3 mind was situations of the kind which arose in *Re Reserve International Liquidity*  
4 *Fund Ltd (In Liquidation)* (Unreported, 1 April 2010). This case concerned a company  
5 incorporated in the British Virgin Islands which carried on business as a money market  
6 daily liquidity fund. It got into financial difficulty as a result of the credit crunch in  
7 September 2008. Its directors believed that these difficulties could be overcome and  
8 resisted any form of liquidation or reorganization proceeding, but an unpaid creditor  
9 succeeded in persuading the High Court in the British Virgin Islands to make an order  
10 for its compulsory liquidation and the appointment of official liquidators. The  
11 company had \$10 million on deposit with each of the Cayman Islands branches of two  
12 well known banks. The official liquidators gave instructions for these funds to be  
13 transferred to an account in Tortola under their control. The company’s directors  
14 refused to recognize the liquidators’ authority and instructed the banks to transfer the  
15 funds to an account in New York which would be under their own control. This Court  
16 made an order under section 241(1)(a) recognizing the BVI official liquidators as the  
17 persons entitled to give instructions to the banks on behalf of the company. I think that  
18 this factual scenario illustrates what is meant by “ordering the turnover to a foreign  
19 representative of property belong to the debtor”. It relates to property belonging to a  
20 company prior to the commencement of its insolvent liquidation and does not include  
21 property which is recoverable only by an officeholder pursuant to the transaction  
22 avoidance provisions of the applicable bankruptcy law. I think this interpretation is  
23 also consistent with the fact that Part XVII provides foreign representatives with a  
24 simple procedural mechanism for obtaining various different kinds of ancillary relief  
25 in a single proceeding. Transaction avoidance and preference claims may give rise to  
26 complex legal and factual disputes which are best resolved in an action commenced by  
27 writ. It follows that the Trustee has no statutory right under section 241 to pursue an  
28 action against Primeo for recovery of the Six Month Payments.

29 20. I shall nevertheless go on to consider whether the foreign or domestic law would be  
30 the substantive law applicable in the event that it is subsequently held that the Trustee  
31 is entitled to pursue his claim under section 241. Mr. Dicker argues that there are a





1 series of reasons why I should conclude that if section 241 applied, it would enable the  
2 Trustee to assert transaction avoidance claims based upon the United States law.  
3 Firstly, he says that the concept of making “orders ancillary to a foreign bankruptcy  
4 proceeding” implies that the focus is on the foreign proceeding and the foreign law.  
5 The word “ancillary” means “subservient, subordinate and ministering to something  
6 else”. However, section 241 should be interpreted in the light of the amendments made  
7 to Part V and enacted at the same time. As I have already observed, section 91(1)(d)  
8 expressly empowers this Court to make winding up orders in respect of foreign  
9 companies and section 242(2) mandates that it must consider doing so before deciding  
10 to make any ancillary order if the company in question is registered under Part IX of  
11 the Companies Law.<sup>5</sup> In these circumstances the Cayman Islands liquidation would be  
12 regarded as “ancillary” to the foreign liquidation, but it is perfectly clear that a local  
13 liquidation proceeding can only be conducted in accordance with Part V of the  
14 Companies Law. I think that Mr. Dicker is attempting to read too much into the use of  
15 the word “ancillary”.

16 21. Secondly, it is said that as a matter of principle the application of the foreign  
17 substantive law to transaction avoidance and preference claims is the logical choice  
18 because this is the law applicable to the distributional regime. It is said to be illogical  
19 to “mix and match” by applying the domestic law to avoidance issues when the  
20 distribution regime is governed by a foreign law. I follow the logic, but this is the  
21 result at common law and it seems to me that if the Legislature intended to change the  
22 common law it would have said so expressly. Thirdly, Mr. Dicker argues that the  
23 application of foreign law is consistent with the reference in section 242(1)(c) to the  
24 “prevention of preferential or fraudulent dispositions of property comprised in a  
25 debtor’s estate”. He says that this sub-section refers to dispositions taking place before  
26 the commencement of the foreign bankruptcy proceeding. This must be right. It means  
27 that Part V of the Companies Law would be applied as if a local liquidation  
28 proceeding had commenced in respect of BMLIS on 15 December 2008, with the

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<sup>5</sup> Part IX of the Companies Law (2011 Revision) provides that any foreign incorporated company which establishes a place of business or carries on business in the Cayman Islands must make a filing with the Registrar of Companies and become registered as a “foreign company”.

1 result that the “suspect period” is calculated back from this date. However, this  
2 requirement does not point to the conclusion that sections 241 and 242 require the  
3 application of the foreign substantive law.  
4

5 22. Fourthly, it is argued that the application of foreign law would be consistent with the  
6 reference to in section 242(1)(c) to property comprised in the “debtor’s estate” which,  
7 as I have already explained, means the property available for distribution to creditors  
8 including the proceeds of preference claims. The exercise of this Court’s jurisdiction  
9 to make orders ancillary to a foreign bankruptcy proceeding does not result in the  
10 establishment of a separate parallel liquidation proceeding in this jurisdiction. Nor  
11 does it result in the creation of a separate local estate on a territorial basis. It follows  
12 that the “debtor’s estate” referred to in sub-section (1)(c) must mean the estate as  
13 defined and constituted under the foreign law. However, the purpose of an ancillary  
14 order is not to ensure the constitution of an estate in accordance with the foreign law in  
15 question. Its purpose is the more general one of assisting the foreign court to achieve  
16 an economic and expeditious administration of the estate in a manner consistent with  
17 Cayman Islands policy objectives in respect of the matters reflected in section 242(1).  
18 However, laws relating to the avoidance of antecedent transactions vary significantly  
19 from country to country and it could be said that mandating the application of a myriad  
20 of foreign laws would actually be *inconsistent* with this general objective.

21  
22 23. Mr. Dicker’s fifth point is that the reference to “comity” in Section 242(1) demands  
23 the application of foreign law. In *HSH Cayman II GP Ltd –v- ABN Amro Bank NV*  
24 2010 (1) CILR 375 the Court of Appeal defined the concept of comity in terms used  
25 by the US Supreme Court over a hundred years ago in *Hilton –v- Guyot* (1895) 159  
26 US 113-

27  
28 “Comity is the recognition which one nation allows within its territory to the legislative,  
29 executive and/or judicial acts of another nation, having due regard to international duty  
30 and convenience, and to the rights of its own citizens or of other persons under the  
31 protection of its laws”.





1  
2  
3  
4 What this means in the present context is that the courts of two countries can be  
5 expected to seek and grant assistance in corporate insolvency proceedings for the  
6 purpose of achieving commonly held policy objectives, notwithstanding that the  
7 application of their own laws to any given set of factual circumstances would not  
8 necessarily produce exactly the same or even a similar economic result. Both the US  
9 Bankruptcy Code and Part V of the Cayman Islands Companies Law recognize the  
10 need to set aside antecedent transactions in certain circumstances in order to achieve  
11 the policy objective of treating an insolvent company's creditors equally, but the actual  
12 rules of law are materially different. In principle, comity enables this Court to lend its  
13 assistance to the New York proceeding notwithstanding that the application of the  
14 foreign versus the domestic law could produce materially different economic results.  
15 Adherence to the concept of comity does not necessarily mean that the New York  
16 court should be expected to apply Cayman Islands law or that the Cayman Islands  
17 court should be expected to apply United States law in any given set of circumstances.  
18 For these reasons I do not think that the requirement to have regard to comity implies  
19 that the Legislature intended applications for ancillary relief under section 241 to be  
20 governed by foreign law. The application of Cayman Islands law is entirely consistent  
21 with an adherence to comity.

- 22  
23  
24  
25 24. Mr. Dicker's sixth point is that the legislative history of Part XVII, to which I have  
26 already referred, points to the conclusion that the Legislature must have intended this  
27 Court to apply the foreign substantive law when deciding whether to make ancillary  
28 orders under section 241, with the exception of orders for evidence under section  
29 241(1)(d) which can only be made against a "relevant person" as defined by Cayman  
30 Islands law. He relies on *Re Metzeler* (supra) in which Buschman J. held that "a  
31 foreign representative may assert under section 304, only those avoiding powers  
32 vested in him by the law applicable to the foreign estate". For the reasons which I have

1 already given, the fact that the US courts interpreted section 304 in this way does not  
2 lead me to infer that the Legislature intended this Court to interpret section 241 in the  
3 same way. If the Legislature had intended to abolish the common law rule (which  
4 applies the domestic law), it would have said so expressly.

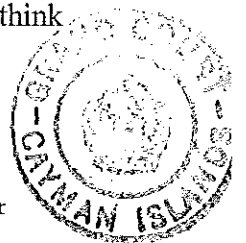
5 25. Mr. Dicker also points to sub-section (2)(b) as implying that, upon its true  
6 construction, the whole of section 241 requires the application of the substantive  
7 foreign law. Sub-section (2)(b) says that an order for evidence can only be made  
8 against someone who is a “relevant person” within the meaning of section 103(1) of  
9 the Companies Law.<sup>6</sup> This amounts to an express requirement to apply the substantive  
10 domestic law for this purpose, thereby implying, according to Mr. Dicker, that foreign  
11 law must be applicable in all other respects otherwise sub-section (2)(b) would have  
12 been unnecessary. The difficulty with this argument is that it suggests an intention to  
13 “mix and match” the application of both domestic and foreign law, which the  
14 Legislature is inherently unlikely to have intended. For example, this approach might  
15 lead to the conclusion that this Court must apply section 103(1) of the Companies Law  
16 for the purpose of identifying the target of an order for production of documents and at  
17 the same time apply the foreign law, rather than section 103(3)(b), for the purpose of  
18 defining the subject matter of the order.<sup>7</sup> This is inherently unlikely. I think that the  
19 purpose of section 241(2)(b) is merely to emphasize that orders for evidence and  
20 production of documents will only be made against those whom the law regards as  
21 “insiders”.

22 26. This Court’s common law jurisdiction to provide assistance in respect of foreign  
23 corporate insolvency proceedings (whatever its scope) depends upon the application of  
24 the domestic law. If the Legislature had intended this rule to be abolished by the  
25 enactment of Part XVII, it would have said so expressly. If, and to the extent that, the  
26 Trustee is entitled to proceed under section 241 at all, on its true construction I think  
27 that section 241 requires the application of Cayman Islands law

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<sup>6</sup> Put simply, a “relevant person” is an insider. It is defined narrowly to mean those involved in the promotion or management of a company.

<sup>7</sup> Section 103(3)(b) provides that the subject-matter of a production order will be limited to “documents belonging to the company”.





1 **Cross-border insolvency co-operation: the position at common law**

2  
3 27. I now turn to consider the scope of the Trustee's common law right to seek the  
4 assistance of this Court. The starting point for this analysis is the decision of the Privy  
5 Council in *Cambridge Gas Transportation Corporation v Official Committee of*  
6 *Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508. This case concerned  
7 an insolvent group of companies engaged in the shipping industry. The group structure  
8 was complex. For the purposes of understanding the Privy Council's decision, it can  
9 be stated in the following simplified way. The top holding company was a Bahamian  
10 company called Vela Energy Holdings Ltd ("Vela"), which owned an intermediate  
11 holding company incorporated in the Cayman Islands called Cambridge Gas  
12 Transportation Corporation ("Cambridge Gas"). Cambridge Gas owned 70% of the  
13 shares of Navigator Holdings Plc, ("Navigator") which was incorporated in the Isle of  
14 Man. Navigator owned the shares of the ship owning companies. Navigator filed a  
15 petition in the New York Court for relief under Chapter 11 of the US Bankruptcy  
16 Code. Its principal creditors were the holders of a \$300 million bond issue. The  
17 group's investors, acting through Vela, proposed a reorganization plan which the New  
18 York Court rejected in favour of a plan proposed by Navigator's creditors. The  
19 approved reorganization plan provided that, upon entry of the court's confirmation  
20 order, title to all the shares in Navigator would vest in the creditors' committee,  
21 thereby extinguishing the interest of its shareholders, including Cambridge Gas which  
22 owned 70% of the shares. The overall intended economic result was that the creditors  
23 would acquire ownership and control of the underlying ship owning companies. Since  
24 Navigator was incorporated in the Isle of Man, the applicable conflict of laws rules  
25 establish that its shares are treated as property located in the Isle of Man. The New  
26 York Court therefore issued a letter of request to the Manx court and the creditors'  
27 committee petitioned the Manx court for an order vesting the shares in their  
28 representatives.

29 28. In the Manx court Cambridge Gas contested the creditors' right to have the New York  
30 Court's confirmation order recognized and enforced. It was argued that the  
31 confirmation order must be either a judgment *in rem* or a judgment *in personam* and

1 that, in either case, it was not capable of being recognised and enforced in the Isle of  
2 Man in accordance with the well established common law rules relating to the  
3 enforcement of foreign judgments.<sup>8</sup> If the New York Court's order was properly  
4 characterized as a judgment *in rem*, it could not be recognized as affecting title to the  
5 Navigator shares because they are treated as property located in the Isle of Man, not  
6 New York. Alternatively, if it was characterized as a judgment *in personam*, it could  
7 not be enforced because Cambridge Gas itself had not submitted to the jurisdiction of  
8 the New York Court. The Manx court accepted this argument, as did the Court of  
9 Appeal, although its conclusion that Cambridge Gas had not submitted to the  
10 jurisdiction of the New York court was regarded as highly technical bearing in mind  
11 that the Chapter 11 petition had been filed by Navigator (its indirect subsidiary) and  
12 Vela (its indirect parent company) had participated in the proceeding by proposing its  
13 own reorganization plan. Nevertheless, the case proceeded before the Privy Council on  
14 the basis that Cambridge Gas had not submitted to the jurisdiction of the New York  
15 Court.

16 29. The Privy Council held that orders made in bankruptcy proceedings, including  
17 corporate insolvency proceedings, do not fall into the category of either judgments *in*  
18 *rem* or judgments *in personam*. Lord Hoffmann said (at paragraphs 13 and 14) that –

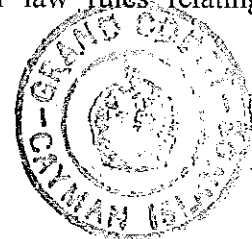
19 “Judgments *in rem* and *in personam* are judicial determinations of the existence of rights:  
20 in one case rights over property and in the other, rights against a person. When a  
21 judgment *in rem* or *in personam* is recognized by a foreign court, it is accepted as  
22 establishing the right which it purports to have determined, without further enquiry into  
23 the grounds upon which it did so. The judgment itself is treated as the source of the right.

24 The purpose of bankruptcy proceedings, on the other hand, is not to determine or  
25 establish the existence of rights, but to provide a mechanism of collective execution  
26 against the property of the debtor by creditors whose rights are admitted or established.”

27  
28 The Privy Council treated the New York Court's confirmation order as a judgment *in*,  
29 and for the purposes of, the collective enforcement regime of the bankruptcy proceedings,  
30 which are governed by the sui generis private international law rules relating to

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<sup>8</sup> See Dicey, Morris & Collins *The Conflict of Laws*, 14<sup>th</sup> Edition, Rule 36.





1 insolvency. On this basis the New York Court's confirmation order was recognized and  
2 enforced in the Isle of Man.

3  
4 30. The rationale for this approach is derived from the principle of universality in  
5 bankruptcy proceedings. Lord Hoffmann said (at paragraph 16) –

6 “The English common law has traditionally taken the view that fairness between creditors  
7 requires that, ideally, bankruptcy proceedings should have universal application. There  
8 should be a single bankruptcy in which all creditors are entitled and required to prove. No  
9 one should have an advantage because he happens to live in a jurisdiction where more of  
10 the assets or fewer of the creditors are situated.”

11 In the case of corporate insolvency proceedings this principle of universality is given  
12 effect by recognizing the person who is empowered by the foreign law to act on behalf of  
13 the insolvent company as entitled to do so in the Cayman Islands. Two key questions then  
14 arise. Firstly, what are the criteria under Cayman Islands law by which this Court must  
15 decide whether or not to recognize the foreign representative? In the United Kingdom  
16 this question has been answered by the Cross-Border Insolvency Regulations 2006. In the  
17 United States it has been answered by Chapter 15 of the Bankruptcy Code. Both these  
18 legislative provisions are based upon the UNCITRAL Model Law which introduces the  
19 concept that recognition should depend upon identifying a company's “centre of main  
20 interest”. The Cayman Islands legislature had the opportunity to enact this model but  
21 chose not to do so. Section 241 of the Companies Law answers this question by codifying  
22 the traditional conflict of laws rule that the authority of a trustee or liquidator appointed  
23 in the place of incorporation will be recognized in the Cayman Islands. The second  
24 question is what is the effect of recognition, once granted? Lord Hoffmann answered this  
25 question by deciding that “recognition carries with it the active assistance of the court”.  
26 In *Cambridge Gas* itself the only form of assistance sought by the creditors was the  
27 recognition and enforcement of the New York Court's confirmation order. However,  
28 Lord Hoffmann also answered the broader question about the nature and scope of the  
29 assistance available at common law in the following way (at paragraph 22) –

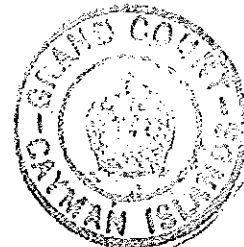
30  
31 “What are the limits of the assistance which the court can give? ... At common law, their  
32 Lordships think it is doubtful whether assistance could take the form of applying

1 provisions of the foreign insolvency law which form no part of the domestic system. But  
2 the domestic court must at least be able to provide assistance by doing whatever it could  
3 have done in the case of a domestic insolvency ... The purpose of recognition is to enable  
4 the foreign office holder or the creditors to avoid having to start parallel proceedings and  
5 to give them the remedies to which they would have been entitled if the equivalent  
6 proceedings had taken place in the domestic forum”.

7 31. Lord Hoffmann returned to this subject again in *Re HIH Casualty and General*  
8 *Insurance Ltd* [2008] 1 WLR 852. The case concerned four Australian insurance  
9 companies which were being wound up in Australia and in respect of which  
10 provisional liquidators had been appointed in England. The question was whether the  
11 English court had power to direct remission of assets collected in England to Australia,  
12 notwithstanding that there were material differences between the English and  
13 Australian statutory regimes for distribution which meant that some creditors would  
14 benefit from remission whilst others would be worse off. The House of Lords  
15 unanimously decided that remission should take place, but their lordships’ reasoning  
16 differed. The decision of the majority (Lord Scott, Lord Neuberger and Lord Phillips)  
17 was based entirely upon the English statutory power to assist foreign insolvency  
18 proceedings. Lord Hoffmann (with whom Lord Walker agreed) also considered that  
19 such a power existed at common law. Lord Hoffmann characterized the principle of  
20 universality as a principle of English private international law that, where possible, there  
21 should be a unitary insolvency proceeding in the courts of the insolvent’s domicile which  
22 receives worldwide recognition and which should apply universally to all the bankrupt’s  
23 assets (at paragraph 6):

24 “Despite the absence of statutory provision, some degree of international co-operation in  
25 corporate insolvency had been achieved by judicial practice. This was based upon what  
26 English judges have for many years regarded as a general principle of private  
27 international law, namely that bankruptcy (whether personal or corporate) should be  
28 unitary and universal. There should be a unitary bankruptcy proceeding in the court of the  
29 bankrupt’s domicile which receives world-wide recognition and it should apply  
30 universally to all the bankrupt’s assets.”

31 The purpose of the principle is to ensure that the debtor’s assets are distributed under one  
32 scheme of distribution (paragraph 30):

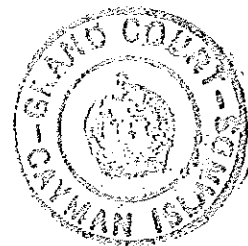




1 “The primary rule of private international law which seems to be applicable to this case is  
2 the principle of (modified) universalism, which has been the golden thread running  
3 through English cross-border insolvency law since the 18th century. That principle  
4 requires that English courts should, so far as is consistent with justice and UK public  
5 policy, co-operate with the courts in the country of the principal liquidation to ensure that  
6 all the company’s assets are distributed to its creditors under a single system of  
7 distribution.”

8 32. In *Schmitt –v- Deichmann* [2012] 2 All E.R. 1217 the English High Court considered  
9 whether an administrator appointed in respect of a foreign bankruptcy proceeding has  
10 a right at common law to pursue transaction avoidance claims in the English court.  
11 The case concerned a German incorporated company, Phoenix Kapitaldienst GmbH  
12 (“Phoenix”), which had carried on an investment management business in Germany  
13 and elsewhere. Its German appointed administrator alleged that its business had been  
14 carried on fraudulently in much the same way as the fraud committed against BLMIS’  
15 investors. The administrator sought to commence proceedings to set aside transactions  
16 allegedly done at an undervalue with the intention of defrauding creditors. However, it  
17 was common ground that the statutory scheme did not apply and so the question was  
18 whether the English court had power at common law to assist the foreign administrator  
19 and, if so, whether the assistance extended to doing whatever the English court could  
20 have done in the case of a domestic liquidation proceeding, including the exercise of  
21 its statutory powers to set aside antecedent transactions. The court ordered that  
22 Phoenix’ administrator could assert avoidance claims based upon the substantive UK  
23 law. Proudman J. said (at paragraph 62) –

24 “...Reading together the *Cambridge Gas Transport* case, *RE HIH Casualty and General*  
25 *Insurance Ltd*, *Re New Cap Reinsurance Corp Ltd* and *Rubin’s* case, I derive the  
26 following propositions: (i) there is power to use the common law to recognise and assist  
27 an administrator appointed overseas, (ii) assistance includes doing whatever the English  
28 court could have done in the case of a domestic insolvency, (iii) bankruptcy proceedings  
29 are collective proceedings for the enforcement (not establishment) of rights for the  
30 benefit of all creditors, even when those proceedings include proceedings to set aside  
31 antecedent transactions, (iv) proceedings to set aside antecedent transactions are central  
32 to the purpose of the insolvency.”

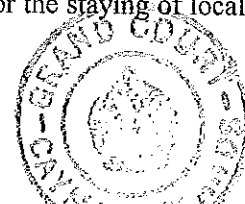


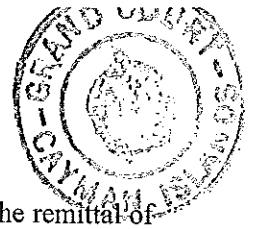
1 The question which I have to ask myself is whether this statement of the common law has  
2 survived the recent decision of the UK Supreme Court in *Rubin -v- Eurofinance SA*  
3 [2012] UKSC 46.

4 33. In *Rubin* the UK Supreme Court held by a majority (Lord Clarke dissenting) that  
5 *Cambridge Gas* had been wrongly decided. A default judgment had been entered  
6 against Eurofinance SA in a bankruptcy proceeding pending before the New York  
7 Court for about \$10 million based upon, *inter alia*, various transaction avoidance  
8 provisions of the US Bankruptcy Code. It was common ground that it was an *in*  
9 *personam* judgment and that the judgment debtor was not present in the United States  
10 and had not submitted to the jurisdiction of the New York Court within the meaning of  
11 the common law rule stated as “Rule 43” in *Dicey, Morris & Collins*, 15<sup>th</sup> Edition,  
12 para.14R-054. The Court of Appeal had followed Lord Hoffmann’s reasoning in  
13 ~~*Cambridge Gas*~~ and held that ~~*Dicey’s Rule 43*~~ does not apply to foreign judgments  
14 made in transaction avoidance proceedings because they are essential to the collective  
15 enforcement regime in insolvency and are governed by special rules. In the Supreme  
16 Court, the majority rejected this proposition and held that *Cambridge Gas* had been  
17 wrongly decided. However, they did not reject the underlying proposition that  
18 recognition at common law “~~carries with it the active assistance of the court~~”. They  
19 only rejected the proposition that “active assistance” extended to the enforcement of *in*  
20 *personam* judgments made in bankruptcy proceedings which would not otherwise be  
21 enforceable in accordance with the established conflict of laws rules articulated in  
22 *Dicey’s Rule 43*. Lord Collins said (at paragraphs 29 and 31) –

23 “29. ...at common law the court has power to recognize and grant assistance to foreign  
24 insolvency proceedings. The common law principle is that assistance may be given to  
25 foreign officeholders in insolvencies with an international element. The underlying  
26 principle has been stated in different ways: ‘recognition..... carries with it the active  
27 assistance of the court’: *In re African Farms Ltd* [1906] TS 373, 377; ‘This court... will  
28 do its utmost to co-operate with the United States Bankruptcy Court and avoid any action  
29 which disturbs the orderly administration of [the company] in Texas under Ch. 11’:  
30 *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.”

31 “31. The common law assistance cases have been concerned with such matters as the  
32 vesting of English assets in a foreign officeholder, or the staying of local proceedings, or





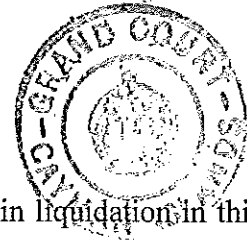
1 orders for examination in support of the foreign proceedings, or orders for the remittal of  
2 assets to a foreign liquidation, and have involved cases in which the foreign court was a  
3 court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign  
4 country or, if a company, was incorporated there...”

5 34. Lord Collins did not express a view on the question which I have to decide, which is  
6 whether the assistance available to the Trustee at common law extends to providing  
7 him with what he later described as a “direct remedy”, meaning an original cause of  
8 action which can be pursued against a person in this jurisdiction. However, it seems to  
9 me that he was leaving open the possibility that the office holder in *Rubin* would be  
10 entitled at common law to pursue transaction avoidance claims under English law (as  
11 well as pre-existing causes of action not dependent upon the existence of bankruptcy  
12 proceedings). He said (at paragraph 131) -

13 “131. ....It would not be appropriate to express a view on whether the officeholders in  
14 the present cases would have, or would have had, a direct remedy in England, because  
15 there might be, or might have been, issues as to the governing law, or issues as to time-  
16 limits or as to good faith. Subject to those reservations, several of the ways in which the  
17 claims were put (especially those parts of the judgment which were not the subject of  
18 these proceedings) in the United States proceedings in *Rubin* could have founded  
19 proceedings by trustees in England for the benefit of the creditors (as beneficiaries of the  
20 express trust). In addition there are several other avenues available to officeholders ...  
21 [under the various statutory provisions applicable in the UK].”

22 It remains open to this Court to accept Lord Hoffmann’s answer to the question which I  
23 have to decide. I conclude, as Proudman J. did in *Schmitt –v- Deichmann*, that the scope  
24 of the assistance available at common law includes the power to entertain a preference  
25 claim under section 145 (or its predecessor section).

26 35. Having prepared a draft judgment, I invited further written submissions from counsel  
27 on the question whether the common law jurisdiction to provide assistance in this way  
28 (which Mr. Crystal describes as “non-traditional assistance”) is possible if the only  
29 connection with this jurisdiction is the fact that the counterparty to the relevant  
30 transactions (in this case Primeo as recipient of the Six Month Payments) happens to  
31 be incorporated in this jurisdiction and therefore subject to the territorial jurisdiction of  
32 this Court. My initial view was that the common law jurisdiction to provide active  
33 assistance by enabling the foreign representative to invoke the Court’s statutory



1 jurisdiction to set aside preferential payments as if BLMIS was in liquidation in this  
2 jurisdiction ought to depend upon the existence of a sufficient connection between the  
3 foreign company and this jurisdiction, determined by reference to the criteria set out in  
4 section 91(d). In Mr Dicker's submission, this approach would be inconsistent with the  
5 case law and wrong in principle.

6 36. In *Cambridge Gas* the Privy Council relied upon a decision of the Transvaal Supreme  
7 Court in *Re African Farms Ltd* [1906] TS 373. It concerned a company incorporated in  
8 England, having its head office in London, but carrying on business and owning assets  
9 in the Transvaal (which subsequently became part of the Union of South Africa). In  
10 February 1906 the company was put into voluntary liquidation. Two months later an  
11 unpaid creditor, with notice of the liquidation, obtained judgment against the company  
12 in the Transvaal court, whereupon the English liquidator presented a petition by which  
13 ~~he sought either a winding up order or an order recognizing and authorizing him to~~  
14 ~~take possession of the local assets and distribute them amongst the creditors in~~  
15 ~~accordance with the English statutory scheme. It was held that the Transvaal court had~~  
16 ~~no jurisdiction to make a winding up order, but it nevertheless made a declaration that~~  
17 ~~the English liquidator was entitled to the sole administration of all the company's~~  
18 ~~assets in the Transvaal subject to certain conditions. A stay of execution against the~~  
19 ~~local judgment creditor was implicit in the court's order. Innes C.J. said (at page 378) -~~

20 "...the grant of assistance to the English liquidator, in a case where the Court could not  
21 wind up itself, may possibly be open to the objection that we are doing by indirect means  
22 what the law has given us no power to do directly."

23 He went on to answer this point (at page 381-2) in the following way –

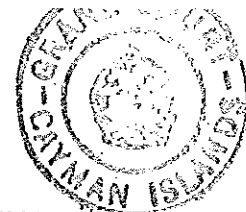
24 "The true test appears to me to be not whether we have the power to order a similar  
25 liquidation here, but whether our recognizing the foreign liquidation is actually prohibited  
26 by any local rules; whether it is against the policy of our laws, or whether its  
27 consequences would be unfair to local creditors, or on other grounds undesirable. And  
28 that test is, in the present case fully satisfied."

29 37. The decision in *Re African Farms Ltd* was cited with approval by Lord Hoffmann in  
30 *Cambridge Gas* in support of the proposition that recognition carries with it the active  
31 assistance of the Court. The question whether the scope of the available assistance was



1 in any way dependent upon the Manx court having jurisdiction to make a winding up  
2 order in respect of Navigator did not arise because Navigator was incorporated in the  
3 Isle of Man. However, this point was subsequently addressed by the Supreme Court of  
4 Bermuda in *Re Founding Partners Global Fund Ltd* [2011] Bda L.R. 22. *Founding*  
5 was a company incorporated in the Cayman Islands in respect of which this Court had  
6 made a provisional winding up order. Upon the application of the provisional  
7 liquidators, this Court issued a letter of request to the Bermudian court by which it was  
8 asked to direct that they should have all the powers of a liquidator as if they had been  
9 appointed by the Bermudian court. Upon their *ex parte* application the court made an  
10 order, in reliance upon the Transvaal court's decision in *African Farms* and the Privy  
11 Council's decision in *Cambridge Gas*, that the appropriate assistance which could be  
12 afforded to the Cayman liquidators was to empower them to exercise all the powers  
13 conferred on liquidators under the Bermudian Companies Act 1981, notwithstanding  
14 that the Bermudian court did not have jurisdiction to make a winding up order in  
15 respect of the company. Based upon the analysis of Lord Hoffinan in *Cambridge Gas*  
16 and Ward L.J. in *Rubin*, Kawaley J. said that "it is wholly irrelevant for the purposes  
17 of recognition at common law whether or not this Court could (if needed) wind up the  
18 company". I think what he meant by this statement is that the scope of the assistance  
19 available at common law is not dependent in any way upon the existence of  
20 jurisdiction to make a winding up order. The matter in issue before the court was  
21 simply the right to collect the monies deposited in the company's account with a local  
22 bank, but the scope of the order for directions seems to have encompassed the  
23 possibility that the Bermudian court would have jurisdiction under the Companies Act  
24 to make an order setting aside a payment as a fraudulent preference, even though it had  
25 no jurisdiction to make a winding up order. However, it seems to me that Kawaley J's  
26 analysis has to be reconsidered in light of the fact that the UK Supreme Court  
27 overruled the Court of Appeal's decision in *Rubin* and held that *Cambridge Gas* was  
28 wrongly decided.

- 29 38. In *Rubin* the UK Supreme Court confirmed the common law power to recognize and  
30 grant assistance to foreign proceedings and Lord Collins expressly approved the  
31 statement made by Innes C.J in *African Farms* that recognition carries with it the



1 active assistance of the court, but he did not address the question whether recognition  
2 carries with it the right to pursue causes of action which would not otherwise exist in  
3 the absence of a winding up order. Lord Collins said –

4 “29. Fourth, at common law the court has power to recognize and grant assistance to  
5 foreign insolvency proceedings. The common law principle is that assistance may be  
6 given to foreign officeholders in insolvencies with an international element. The  
7 underlying principle has been stated in different ways: “recognition .... carries with it the  
8 active assistance of the court”: *In re African Farms Ltd [1906] TS 373, 377*; “This court  
9 ... will do its utmost to co-operate with the United States Bankruptcy Court and avoid  
10 any action which might disturb the orderly administration of [the company] in Texas  
11 under ch.11”: *Banque Indosuez SA v Ferromet Resources In [1993] BCLC 112, 117”*

12 He went on to give examples of the way in which courts have provided assistance at  
13 common law.

14 “31. The common law assistance cases have been concerned with such matters as the  
15 vesting of English assets in a foreign officeholder, or the staying of local proceedings, or  
16 orders for examination in support of foreign proceedings, or orders for the remittal of  
17 assets to a foreign liquidation, and have involved cases in which the foreign court was a  
18 court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign  
19 country or, if a company, was incorporated there.”

20 Mr. Crystal characterizes these examples as “traditional assistance”, the availability of  
21 which is dependent upon recognition alone. He contrasts this with “non-traditional  
22 assistance” of a kind which involves conferring upon the foreign representative a cause of  
23 action under the local insolvency law (in this case the fraudulent preference provisions of  
24 section 145 of the Companies Law or its predecessor section 168), which would not  
25 otherwise be available in the absence of a winding up order. He argues that the  
26 justification for this type of assistance is, as a matter of comity, to avoid putting the  
27 foreign representative (and so creditors of the foreign estate) to the expense of having to  
28 commence a parallel winding up proceeding in this jurisdiction merely to access relief  
29 available to an official liquidator under Part V of the Companies Law.

30 39. It may be said that orders vesting local assets in a foreign representative or declaring  
31 his right to deal with such assets are not dependent upon the exercise of a statutory  
32 power available only to official liquidators appointed by this Court. Similarly, the



1 grant of a stay of proceedings or a stay of execution upon the application of a foreign  
2 representative merely involves the exercise of a general power in a manner which  
3 recognizes the existence of the foreign insolvency proceeding. Traditional assistance  
4 of this sort does not depend upon conferring a cause of action upon the foreign  
5 representative or giving him access to a remedy under the domestic insolvency law  
6 which would not otherwise exist, absent a winding up order. The argument is that  
7 traditional assistance is dependent upon recognition alone. Non-traditional assistance  
8 is dependent upon the application of an additional "sufficient connection test" to  
9 determine whether or not there is jurisdiction to make a winding up order, without  
10 which the local court cannot properly treat the foreign representative as having any of  
11 the rights and remedies available only to a locally appointed official liquidator. Mr.  
12 Crystal's argument has a compelling logic, but it is not actually consistent with the  
13 approach which appears to have been approved by Lord Collins in *Rubin*. He stated (at  
14 paragraph 33) that "Cases of judicial assistance in the traditional sense include *In re*  
15 *Impex Services Worldwide Ltd* [2004] BPIR 564, where a Manx order for examination  
16 and production of documents was made in aid of the provisional liquidation in  
17 England of an English company." In this case a foreign liquidator made an application  
18 to the Manx court for an order for the examination of an individual in aid of the  
19 foreign liquidation proceeding. The application was made under section 206 of the  
20 Companies Act (Isle of Man) 1931 which is the equivalent of section 103 of the  
21 Companies Law. It was held that the statutory jurisdiction was not available because  
22 Impex was not a "company" within the meaning of the Act. Nevertheless, the Manx  
23 court held that it had power at common law to make an order for examination in  
24 exactly the same terms as the statutory power even though the statutory power did not  
25 apply. This decision, which is described by Lord Collins as an example of traditional  
26 common law assistance, is inconsistent with Mr Crystal's analysis and suggests that  
27 recognition is sufficient for granting assistance, even when it involves treating the  
28 foreign representative as having rights and remedies otherwise available *only* to  
29 official liquidators appointed by this Court.

30 40. It might be said that this approach conflicts with the general principle that this Court  
31 has no inherent jurisdiction to exercise a statutory power in circumstances not falling



1 within the provisions of the Law in question. This point was addressed in the decision  
2 of the Privy Council in *Al Sabah -v- Grupo Torras SA* [2005] 2 AC 333. The case  
3 concerned an individual who was subject to a personal bankruptcy proceeding in the  
4 Bahamas. The trustee in bankruptcy obtained a letter of request from the Bahamas  
5 court seeking the aid of this Court in setting aside two trusts settled by the debtor  
6 under Cayman Islands law pursuant to section 107 of the Bankruptcy Law (1997  
7 Revision). It was held that this Court had a statutory jurisdiction under section 156 of  
8 the Cayman Islands Law and/or under section 122 of the UK Bankruptcy Act 1914.<sup>9</sup>  
9 However, in giving judgment Lord Walker made the following observation (at  
10 paragraph 35) –

11 “The respondents relied in the alternative, on the second issue, on the inherent  
12 jurisdiction of the Grand Court. This point was not much developed in argument and  
13 their Lordships can deal with it quite shortly. If the Grand Court had no statutory  
14 jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent  
15 power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary  
16 powers conferred by section 107 of its Bankruptcy Law in circumstances not falling  
17 within the terms of that section. The non-statutory principles on which British courts  
18 have recognized foreign bankruptcy jurisdiction are more limited in their scope ..... and  
19 the inherent jurisdiction of the Grand Court cannot be wider.”

20 What this means is that the common law cannot bring into play a statutory provision to  
21 achieve a purpose which is different from the object of the statute. The object of  
22 section 107 of the Bankruptcy Law (1997 Revision) is to confer jurisdiction on the  
23 court to set aside voluntary settlements only in connection with personal bankruptcy  
24 proceedings. The Law has no application to corporate insolvency proceedings. Lord  
25 Walker’s point is that the common law cannot be invoked to apply provisions of the  
26 Bankruptcy Law to achieve an objective outside the scope of the statute. To put the  
27 point another way, as Lord Neuberger did in *HHH* (supra) (at paragraph 76), the  
28 common law cannot be used to thwart a statutory purpose. However, bringing the  
29 preference claim provisions of section 145 into play in respect of BLMIS in the  
30 circumstances of this case does not, in my view, depart from or thwart the statutory

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<sup>9</sup> These statutes relate only to personal bankruptcy and have no application to corporate insolvency proceedings.



1 objective of the Companies Law in the way contemplated by Lord Walker and Lord  
2 Neuberger.

3  
4 41. Treating BLMIS as being the subject of a liquidation proceeding under Cayman  
5 Islands law as at the date of the foreign bankruptcy proceeding (15 December 2008),  
6 even though there was no jurisdiction to make a winding up order, is consistent with  
7 the general principle of modified universalism and does not, in my view, involve  
8 applying the statute for an unintended purpose or tend to thwart its intended purpose.<sup>10</sup>  
9 Indeed, the very concept of recognizing a foreign bankruptcy proceeding, involves  
10 recognizing that certain legal consequences have occurred from a specific date. The  
11 effect of the Recognition Order in this case is, *inter alia*, that the Trustee is recognized  
12 as having authority to act for BLMIS with effect from the date upon which the New  
13 York Court made its order, namely 15 December 2008. This Court has recognized that  
14 BLMIS has been in bankruptcy since that date. Applying the provisions of section 145  
15 in this way is an incidence of recognition and it is consistent with the statutory  
16 objective. For these reasons I have come to the conclusion, not without some  
17 hesitation, that this Court does have jurisdiction at common law to apply the avoidance  
18 provisions of Cayman Islands insolvency law in aid of the BLMIS liquidation whether  
19 it would have had jurisdiction to make a winding up order.

20 **Insolvency set-off and the rule in *Cherry -v- Boulton***

21 42. I now turn to Preliminary Issues 5 and 6 which concern the applicability of insolvency  
22 set-off under section 140 of the Companies Law and the rule in *Cherry -v- Boulton*.  
23 The preliminary issues proceed on the hypothesis that the Plaintiffs have valid non-  
24 proprietary claims (whether arising under foreign or domestic law) as pleaded in their  
25 Statement of Claim and that Primeo has claims sounding in debt, damages, equitable  
26 compensation or restitution against the Plaintiffs, or either of them, which it will be  
27 entitled to plead by way of counterclaim. Primeo is in liquidation under the

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<sup>10</sup> Section 91(d) of the Companies Law was not in force on 18 December 2008. Even if it had been in force, the factual circumstances relating to BLMIS are such that the Court would have had no power to make a winding up order.



1 supervision of this Court with the result that its assets will be distributed subject to the  
2 insolvency set-off provisions contained in section 140 of the Companies Law which  
3 provides as follows:—

4 “(1) Subject to sub-section (2), the property of the company shall be applied in  
5 satisfaction of its liabilities *pari passu* and subject thereto shall be distributed amongst  
6 the members according to their rights and interests in the company.

7 (2) The collection in and application of the property of the company referred to in  
8 subsection (1) is without prejudice to and after taking into account and giving effect to  
9 the rights of the preferred and secured creditors and to any agreement between the  
10 company and any creditors that the claims of such creditors shall be subordinated or  
11 otherwise deferred to the claims of any other creditors and to any contractual rights of set  
12 –off or netting of claims between the company and any person or persons (including  
13 without limitation any bilateral or any multi-lateral set-off or netting arrangement  
14 between the company and any person or persons) and subject to any agreement between  
15 the company and any person or persons to waive or limit the same.

16 (3) In the absence of any contractual right of set-off or non set-off, an account shall  
17 be taken of what is due from each party to the other in respect of their mutual dealings,  
18 and the sums due from one party shall be set-off against the sums due from the other.  
19

20 (4) Sums due from the company to another party shall not be included in the account  
21 taken under subsection (3) if that other party had notice at the time they became due that  
22 a petition for the winding up of the company was pending.  
23

24 (5) Only the balance, if any, of the account taken under subsection (3) shall be  
25 provable in the liquidation or, as the case may be, payable to the liquidator as part of the  
26 assets.”

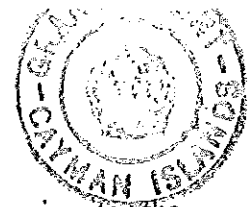
27 43. This provision was introduced by the 2007 Law and codifies the pre-existing law  
28 which was that contractual rights of set-off or non set-off concluded in the ordinary  
29 course of business prior to the commencement of the liquidation were enforceable by  
30 and against the liquidator and, in the absence of any contractual right, rule 4.90 of the  
31 English Insolvency Rules 1986 would be applied. To this extent it can be said that  
32 section 140 is based upon rule 4.90 with the result that this Court will regard the  
33 decisions of the English courts on the meaning and effect of rule 4.90 and its  
34 predecessors as persuasive authorities relating to the interpretation of the Cayman  
35 Islands statute. It is common ground that there is no relevant contractual right as  
36 between Primeo and BLMIS and that for present purposes I am only concerned with



1 the residual insolvency set-off rule. It is also common ground that its application is  
2 automatic and self-executing.

3 44. It is well established as a matter of English law, and I think also as a matter of Cayman  
4 Islands law, that there are certain situations in which insolvency set-off will not apply  
5 so as to enable a creditor of a company in liquidation to rely on his claim against the  
6 company to extinguish or reduce the company's claim against him. Insolvency set-off  
7 cannot be relied upon as a defence to a liquidator's claim against a contributory for  
8 calls on unpaid or part-paid shares: *Re Overend, Gurney & Co., Grissell's case* (1866)  
9 LR 1 Ch. App 528. Nor can insolvency set-off be relied upon as a defence to a  
10 misfeasance claim against directors and others: *re Anglo Co-operative Society, ex*  
11 *parte Pelly* (1882) 21 Ch. D 492. Nor is it a defence to a claim by a liquidator to  
12 recover voidable preferences: *Lister -v- Hooson* [1908] 1 KB 174. The rationale for  
13 the non-application of the insolvency set-off in these special situations is obvious. The  
14 legislative intention that contributories make good a company's capital, that delinquent  
15 directors pay compensation and that recipients of preferential payments be put back in  
16 the position they would have been in had the payment not been received, would be  
17 defeated by the application of set-off. It follows that if BLMIS was in compulsory  
18 liquidation under Cayman Islands law, Primeo's liquidator would not be entitled to  
19 set-off its ordinary non-proprietary claim for a debt etc against a preference claim  
20 asserted by BLMIS' liquidator under section 145 (or the predecessor section 168) of  
21 the Companies Law.

22 45. I am wholly un-persuaded that Primeo can avoid this result in the event that the  
23 Trustee is entitled to assert a preference claim at common law as if it were in  
24 liquidation in this jurisdiction. For present purposes I have to assume two things. First,  
25 I must assume that the Trustee and/or BLMIS is entitled to claim recovery of the Six  
26 Month Payments as a preferential payment under Cayman Islands law as pleaded in  
27 Part X of the Statement of Claim. For the reasons which I have explained, the  
28 substantive law applicable to this claim is Cayman Islands law, which includes section  
29 140 of the Companies Law as interpreted and applied in the manner which I have  
30 described. Second, I must assume that Primeo has a non-proprietary claim against



1 BLMIS for a debt etc, being a cause of action which existed prior to the  
2 commencement of its liquidation, which for these purposes is treated as being 15  
3 December 2008. On the basis of these assumptions, the Trustee is entitled to pursue a  
4 preference claim against Primeo under Cayman Islands law and Primeo is entitled to  
5 prove in BLMIS' notional liquidation as an ordinary unsecured creditor. In these  
6 circumstances, mandatory insolvency set-off under section 140 does not apply. This  
7 result turns upon the characterization of BLMIS' claim and Primeo's cross-claim. The  
8 result would be different if the Trustee was pursuing on behalf of BLMIS an ordinary  
9 contractual or tortious cause of action which had arisen prior to the liquidation. In such  
10 a case the Trustee would prove in the liquidation as an ordinary unsecured creditor and  
11 set-off would apply. The result is different if the Trustee's claim is properly  
12 characterized as the kind of claim which is not subject to set-off under section 140,  
13 which depends upon the Court determining that the Trustee is entitled at common law  
14 to pursue a preference claim under Cayman Islands law. The right to pursue a  
15 preference claim under the domestic law necessarily carries with it the domestic set-off  
16 rules as interpreted and applied in accordance with the authorities to which I have  
17 referred.

18 46. In my view it is impossible to arrive at a different result by calling in aid the rule in  
19 *Cherry -v- Boulton*. This is a principle of equity which means that where a person  
20 entitled to participate in a fund is also bound to make a contribution in aid of that fund,  
21 he cannot be allowed so to participate unless and until he has fulfilled his duty to  
22 contribute. It can apply to a variety of different situations, including the case of an  
23 insolvent company in liquidation. Primeo's argument is that its liquidators will be  
24 entitled to withhold payment of any dividend to BLMIS in respect of a judgment on its  
25 pleaded claim for recovery of the Six Month Payments unless and until it pays in full  
26 the amount owing to Primeo on a judgment in respect of its (as yet un-pleaded)  
27 counterclaim. So long as BLMIS can properly be treated as if it is in liquidation in this  
28 jurisdiction and its pleaded claim against Primeo is properly characterized as one to  
29 which mandatory set-off under section 140 does not apply, it is not open to Primeo to  
30 rely upon the rule in *Cherry -v- Boulton* as a means of circumventing this result. The  
31 reason for this conclusion is explained in the UK Supreme Court's decision in *Re*



1            *Kaupthing Singer & Friedlander Ltd (No.2)* [2012] 1 AC, per Lord Walker at  
2 paragraphs 52 and 53.

3            “52 The situation in this line of authority is that a shareholder is a creditor of an insolvent  
4 company, but his shares are not fully paid up, so that he is liable as a contributory.  
5 Suppose he has 10,000 £1 shares, 10p paid, and is owed £15,000, but the dividend  
6 prospectively payable is only 30p in the pound. If the liquidator calls on him for £9,000  
7 to make his shares fully paid up, he has no right of set-off, and to that extent he is  
8 disadvantaged (that is *In re Auriferous Properties Ltd* [1898] 1 Ch 691). If he seeks to  
9 prove in the liquidation, the liquidator can rely on the equitable rule as it applies in a case  
10 of this sort—that is, that he can receive *nothing* until he has paid *everything* that he owes  
11 as a contributory. That is *In re Auriferous Properties Ltd (No 2)* [1898] 2 Ch 428. The  
12 rule is also very clearly stated by Buckley J in *In re West Coast Gold Fields Ltd* [1905] 1  
13 Ch 597, 602 (affirmed [1906] 1 Ch 1, and cited in para 20 above). Payment of the call is a  
14 condition precedent to the shareholder's participation in any distribution, and again the  
15 shareholder is to that extent disadvantaged.”

16  
17            “53 So the equitable rule may be said to fill the gap left by disapplication of set-off, but it  
18 does not work in opposition to set-off. It produces a similar netting-off effect except  
19 where some cogent principle of law requires one claim to be given strict priority to  
20 another. The principle that a company's contributories must stand in the queue behind its  
21 creditors is one such principle.....”

22            Another such principle is that the recipients of preference payments must repay without  
23 the benefit of set-off. Assuming that the Trustee's pleaded claim is properly characterized  
24 as a preference claim which is not subject to mandatory set-off, Primeo cannot rely on the  
25 rule in *Cherry -v- Boulton*.

26            47.        However, I should perhaps mention one other aspect of the matter which does not  
27 form part of the preliminary issues which I have to decide but was touched upon in the  
28 course of the argument. When a creditor has repaid the amount adjudicated to have  
29 been a preference payment under section 145 (or its predecessor section 168), he then  
30 becomes entitled to prove in the liquidation for that amount. The policy of the law is  
31 that the recipient of a preferential payment should be put back in the same economic  
32 position that he would have been in, had he not received the payment (which is of  
33 course why insolvency set-off does not apply). However, it has been said that if  
34 Primeo were to repay the Six Month Payments as constituting preferential payments  
35 under Cayman Islands law, it would still not be entitled (as a matter of US law) to



1 prove in the liquidation of BLMIS for this amount or have this amount taken into  
2 account for the purpose of making a claim based upon a “cash in/cash out” calculation.  
3 This Court’s common law jurisdiction to assist in connection with a foreign  
4 bankruptcy proceeding is discretionary. In determining whether it can properly provide  
5 such assistance, it seems to me that the Court must take into account the same policy  
6 considerations which would be applicable under section 242(1). The mere fact that the  
7 application of the foreign law produces an economic result which is different from that  
8 which would be produced by the application of Cayman Islands law is not of course a  
9 reason for refusing this Court’s assistance. However, if it were to be established that  
10 the assistance sought by a foreign representative is intended to produce an economic  
11 result which is plainly contrary to a fundamental policy of the Cayman Islands law, the  
12 claim would be dismissed.

13 **Conclusions**

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14 48. This Court has no power to entertain preference or transaction avoidance claims under  
15 section 241(1)(e) of the Companies Law (2011 Revision) and, even if such power  
16 existed, the Court would have no power to apply foreign law. It follows that Section  
17 VI of the Statement of Claim must be struck out as disclosing no reasonable cause of  
18 action.

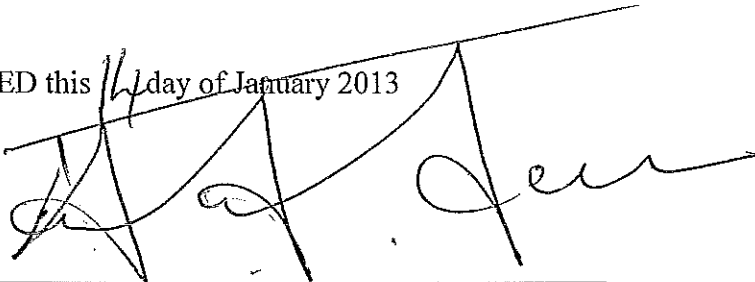
19 49. Having determined that the Trustee is entitled to recognition under section 241, it  
20 follows that the Court does have a discretionary power at common law to entertain the  
21 Plaintiffs’ preference claim based upon the application of the domestic corporate  
22 insolvency law as if BLMIS was the subject of a winding up order. The Court’s power  
23 is not dependent upon establishing that there is jurisdiction under section 91(d) to  
24 make a winding up order in respect of BLMIS. It follows that Section X of the  
25 Statement of Claim does disclose a reasonable cause of action should not be struck  
26 out.

27 50. In the event that the Plaintiffs establish their claim, as pleaded in Section X of the  
28 Statement of Claim, any sums due from Primeo to the Plaintiffs (or either of them)  
29 will not be set-off pursuant to section 140 of the Companies Law against any sums due

1 from the Plaintiffs (or either of them) in respect of any claims sounding in debt,  
2 damages, equitable compensation or restitution which Primeo may have against the  
3 Plaintiffs (or either of them) in respect of investments placed with BLMIS. Nor will  
4 the rule in Cherry -v- Boulbee apply, so the official liquidators of Primeo will have  
5 no right of quasi-retainer exercisable against the Plaintiffs.

6 51. Having reached these conclusions, I did not consider it necessary to deal with  
7 Preliminary Issue 7.

8  
9 DATED this 14 day of January 2013

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14  


15 **The Honourable Mr. Justice Andrew J. Jones QC**  
16 **JUDGE OF THE GRAND COURT**

