

Insolvency & Restructuring

Limits on the Court's Power to Order Disclosure of Information to Assist Foreign Insolvency Proceedings

Introduction

In our August 2014 issue we discussed that Hong Kong courts would recognize and assist foreign liquidators in obtaining information and documents in Hong Kong. However, the Privy Council, in a recent case of *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, put a limit to the Bermudan court's common law power to assist a foreign court in overseas insolvency proceedings by ordering the disclosure of information. Such a common law power was only exercisable when an equivalent order could have been made by the court in which the foreign liquidation was proceeding.

Background

In the *Singularis Holdings* case, Singularis Holdings Limited ("**Singularis**") was incorporated in the Cayman Islands and had been wound up by the Grand Court of the Cayman Islands. PricewaterhouseCoopers ("**PwC**"), which was registered in Bermuda, were the former auditors of Singularis. The liquidators of Singularis in Cayman Islands ("**Liquidators**") obtained orders against PwC under section 103 of the Cayman Islands Companies Law for the disclosure of documents. However, this provision only allowed the production of information belonging to the insolvent company instead of documents belonging to PwC. The Liquidators, then, applied to the Bermudan Court for orders against PwC for the production of PwC's audit work papers. Although section 195 of the 1981 Bermuda Companies Act permitted the disclosure of documents by third parties, this provision could only apply to companies that had been wound up by the Bermudan Court.

The Bermuda Supreme Court exercised common law power to assist foreign liquidators by extending the statutory powers of Bermuda liquidators to them. The court granted the disclosure order by applying section 195 of the 1981 Bermuda Companies Act as if Singularis were a Bermuda company in liquidation. PwC appealed and the Bermuda Court of Appeal set aside the disclosure order. The Liquidators appealed and the Privy Council upheld the refusal to grant the disclosure order by the Court of Appeal.

Common Law Power to Assist

The Privy Council recognized the established "principle of modified universalism" at common law, i.e. a common law power to assist foreign winding up proceedings so far as the court properly can. This power was, however, subject to local law and public policy and to the limits

of the court's own statutory and common law powers. There was no universal answer to the question of how far it was appropriate to develop the common law so as to recognize an equivalent statutory power. It depended on the nature of the power that the court was being asked to exercise.

In the present case, the Privy Council decided that there is a common law power to assist a foreign court of insolvency jurisdiction by ordering the production of information which is necessary for the administration of a foreign winding up.

Limits to Common Law Power to Assist

This power, however, has the following limits:

Firstly, this power is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. This is not available to assist a members' voluntary winding up that is not conducted by or on behalf of an officer of the court.

Secondly, this is a power of assistance which exists for the purpose of enabling courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not available to enable office-holders to do something which they could not do even under the law by which they were appointed.

Thirdly, it is available only when it is necessary for the performance of the office-holder's functions.

Fourthly, any order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. Common law powers of this kind are not a permissible mode of obtaining material for use in litigation, to which different rules and powers apply.

Lastly, its exercise was also conditional on the applicant being prepared to pay the third party's reasonable costs of compliance.

Ruling of Privy Council

The Privy Council refused to grant the disclosure order because the whole basis of the common law power is the right and duty of the Bermudan court to assist the Cayman court so far as it properly can. As the documents to be sought in Bermuda by the Liquidators would not be obtainable under the law of the Cayman Islands, the Bermudan court should not assist the Liquidators to obtain what they could not get in the Cayman Islands.

Conclusion

The Privy Council outlined the limits to the court's common law power to assist a foreign court in overseas insolvency proceedings. The judgment may have a far reaching impact to insolvency cases which involve foreign jurisdictions.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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