COMMONWEALTH OF THE BAHAMAS 2015/COM/com/00034

IN THE SUPREME COURT

COMMERCIAL DIVISION

IN THE MATTER OF Part VIIA of the Companies Act Ch. 308

AND IN THE MATTER OF CALEDONIAN BANK LIMITED
(In Official Liquidation under Supervision
of The Grand Court of The Cayman Islands)

AND IN THE MATTER OF THE FOREIGN PROCEEDINGS
(INTERNATIONAL CO-OPERATION) LIQUIDATION RULES, 2012

Before: The Honourable Acting Justice Brian M. Moree, QC

Appearance: Mrs. Sophia T. Rolle-Kapousouzoglou with Ms. Olivia Moss for Caledonian Bank Limited (In Official Liquidation under Supervision of The Grand Court of The Cayman Islands).

JUDGMENT

1. I delivered my decision in this case to dismiss the Amended Petition on 1 February, 2016 and now put my reasons in writing for doing so.

Background

2. Caledonian Bank Limited (In Official Liquidation under the Supervision of the Grand Court of The Cayman Islands) ("**Caledonian Bank**" or "**the Company**") was incorporated on 1 June, 2007 under the laws of the Cayman Islands. On 25 June, 2007 the Company was issued a Class "A" Banking License by the Cayman

Islands Monetary Authority ("**the CIMA**") which permitted it to conduct banking business in the Cayman Islands.

3. The Company is a wholly owned subsidiary of Caledonian Global Financial Services Inc. ("**CGFS**"), the parent of a network of companies known as the Caledonian Group which offered specialized financial services in The Cayman Islands. CGFS is in voluntary liquidation.

4. The principal business of Caledonian Bank was (i) issuing financial instruments and providing financial and administrative services to customers of its broker-dealer affiliate, Caledonian Securities Limited ("**CSL**"); and (ii) accepting deposits.

5. On 6 February, 2015, the United States Securities and Exchange Commission ("**SEC**") commenced proceedings in New York against, *inter alia*, Caledonian Bank and CSL, alleging a violation of the Securities Act of 1933. The allegation is disputed by the Company but the New York Court granted the SEC a temporary restraining order freezing all of the Company's United States-based assets and ordered the repatriation to the United States of proceeds from the Company's stock sales. The public dissemination of this news in the marketplace resulted in an erosion of confidence in the Company which led a large number of its customers to immediately submit withdrawal requests. This created a liquidity crisis for the Company causing it on 9 February, 2015 to suspend the operation of all its services, including accepting deposits and processing withdrawals.

6. This led the CIMA on the following day to exercise its powers under the laws of Cayman to appoint Keiran Hutchison and Claire Loebell as Controllers of the Company ("**the Controllers**"). Upon the intervention of the CIMA the Company's parent, CGFS, immediately passed a Resolution to place the Company into

voluntary liquidation and appoint two liquidators who in turn applied to the Cayman Court by Petition to continue the liquidation under the supervision of the Court. The Petition was dismissed with the Cayman Court holding that while the Voluntary Liquidators had been validly appointed the Controllers continued to be in charge of the affairs of the Company. In making its Order on 12 February, 2015 the Cayman Court confirmed the powers of the Controllers over the Company.

7. Subsequently, on 17 February, 2015 the CIMA filed a Petition to wind up Caledonian Bank ("**the Cayman Proceedings**"). On hearing the Petition the Grand Court of the Cayman Islands ordered on 23 February 2015 ('**the Winding Up Order**') that the Company be wound up and Keiran Hutchison and Claire Loebell ("**the Cayman Liquidators**") be appointed the Joint Official Liquidators of the Company.

8. As of January, 2015 the Company's total assets amounted to approximately US$585 million dollars and its total liabilities were approximately US$560 million dollars including around US$520 million dollars payable to depositors on demand. It had approximately 1,268 customers and almost 1,900 active accounts.

The Cayman Winding up Order

9. It is necessary to note certain provisions of the Winding Up Order. Under paragraph 4, the Cayman Liquidators are authorized to jointly and severally exercise in and outside the Cayman Islands certain powers specified in Part I and Part II of the Third Schedule to the Companies Law (2013 Revision) of the Cayman Islands ("**the Cayman Act**").

10. Part I of the Third Schedule provides that the following powers are exercisable by the Cayman Liquidators with the sanction of the Court:-

(1) Power to bring or defend any action or other legal proceeding in the name and on behalf of the company.

(2) Power to carry on the business of the company so far as may be necessary for its beneficial winding up.

(3) Power to dispose of any property of the company to a person who is or was related to the company.

(4) Power to pay any class of creditors in full.

(5) Power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.

(6) Power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.

(7) Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it.

(8) The power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.

(9) The power to raise or borrow money and grant securities therefor over the property of the company.

(10) The power to engage staff (whether or not as employees of the company) to assist him in the performance of his functions.

(11) The power to engage attorneys and other professionally qualified persons to assist him in the performance of his functions.

11. Part II of the Third Schedule of the Cayman Act provides that the following powers are exercisable by the Cayman Liquidators without the sanction of the Court:

> *(1) The power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as he considers necessary.*
>
> *(2) The power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal.*
>
> *(3) The power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against his estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors.*
>
> *(4) The power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with the respect of the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.*
>
> *(5) The power to promote a scheme or arrangement pursuant to section 86.*
>
> *(6) The power to convene meetings of creditors and contributories.*
>
> *(7) The power to do all other thing incidental to the exercise of his powers.*

12. Further, under the Winding Up Order, the Cayman Liquidators have the power to take such steps as they consider appropriate in respect of legal proceedings either in their own name for and on behalf of the Company, or in the name of the Company to commence winding up, bankruptcy and/or recognition proceedings in

the United Kingdom, Australia, Switzerland and any other jurisdiction where the Company has assets as the Cayman Liquidators may consider necessary and appropriate.

13. I have read the full text of the Cayman Winding Up Order which is attached to the Verifying Affidavit of Keiran Hutchison filed on 19 June, 2015.

Assets in the Bahamas / Bahamian proceedings

14. In December, 2012 Caledonian Bank made a loan ("**the Loan**") to Tower Coral Investment Ltd., a company incorporated under the laws of the Commonwealth of the Bahamas ("**Tower Coral**"), which was secured by a mortgage over Apartment Number P.23 in The Towers of Cable Beach in New Providence ("**the Mortgaged Property**") and a Supplemental Pledge over the shares of Tower Coral. The specific details of the security arrangement are set out in paragraphs 25 – 30 of the Amended Petition.

15. Tower Coral sold the Mortgaged Property in March, 2015 and wishes to pay off the Loan and obtain a Satisfaction of the mortgage. The amount due under the Loan as of 24 February 2015 was $240,214.67. According to the Amended Petition, the Company has other outstanding loans within the jurisdiction of the Commonwealth of the Bahamas with other borrowers valued at approximately US$16,437,000.

16. In these circumstances the Cayman Liquidators caused the Company to file the Petition herein on 9 June, 2015 claiming under Part VIIA, Section 254 (1) (a) of the Companies Winding Up Amendment Act, 2011 declarations that they be recognized to act in The Bahamas on behalf of the Company and that the Cayman Proceedings be recognized as '*foreign proceedings*' within the meaning of section

253 of that Act. The clear purpose of these proceedings is to facilitate actions by the Cayman Liquidators in this jurisdiction to collect monies and/or to take possession of property belonging to the Company as part of the liquidation process taking place in the Cayman Islands.

17. The Cayman Proceedings have been recognized (in various forms) by the courts in England, Australia, the United States of America and Ireland.

18. The Petition is supported by the verifying Affidavit of Keiran Hutchison filed on 19 June, 2015. On the same day Ms. Hutchison also filed an Affidavit of Foreign Law setting out the relevant provisions of The Cayman Act. Under sections 240 – 243 of the Cayman Act the courts of the Cayman Islands have the power to make ancillary orders to foreign bankruptcy proceedings in terms similar but not identical to the provisions of sections 253 – 256 of the Companies Winding Up Amendment Act, 2011 ("**the Bahamian Act**"). The most notable difference in the two statutory regimes for the purpose of this action is that the International Co-operation provisions in the Cayman Act apply to "*foreign bankruptcy proceeding*[s]" defined as including "*proceedings for the purpose of reorganising or rehabilitating an insolvent debtor*" while the parallel provisions in the Bahamian Act apply only to "*judicial or administrative proceedings in* ***a relevant foreign country*****.....**" (my emphasis). The term "*relevant foreign country*" is defined as "*a country, territory, or jurisdiction designated as a relevant foreign country in rules made under section 252 by the Liquidation Rules Committee for the purpose of* [Part VIIA]." Counsel for Caledonian Bank accepts that to date no country, territory or jurisdiction has been so designated. This raises the immediate question as to whether the Cayman Proceedings can properly be regarded as "*a foreign proceeding*" under section 254(1) of the Bahamian Act in view of the fact

that the Cayman Islands (and for that matter no other country) has been designated a "*relevant foreign country*". I will return to this issue later in this Judgment.

19. During the hearing of the Petition I observed that the Petitioner was the Company and enquired whether that complied with section 254 of the Bahamian Act. This resulted in an application to amend the Petition to replace Caledonian Bank as the Petitioner with the Cayman Liquidators. The application was made by the Notice of Motion filed on 25 June, 2015 and I made an order granting leave to amend the Petition in the terms of the Order filed on 6 July, 2015. The Amended Petition was filed on 6 July, 2015 and the Affidavit of Keiran Hutchison verifying the Amended Petition was filed on 14 July, 2015. It is important to note that in addition to substituting the Cayman Liquidators for the Company as Petitioners, paragraph 36 of the Petition was amended to rely on the common law as well as or in the alternative to the statutory provisions in Part VIIA of the Bahamian Act ("**Part VIIA**").

Can the relief sought be granted under Part VIIA?

20. For convenience I set out below in full the provisions of sections 253 – 255 of the Bahamian Act.

> *"**253. Definitions***
> *In this Part –*
> ***"debtor"** means a foreign corporation or other foreign legal entity subject to a foreign proceeding in the country in which it is incorporated or established;*
> ***"foreign proceeding"** means a judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to liquidation or insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization, rehabilitation, liquidation or bankruptcy of an insolvent debtor;*

*"**foreign representative**" means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign proceeding;*

*"**relevant foreign country**" means a country, territory, or jurisdiction designated as a relevant foreign country in rules made under section 252 by the Liquidation Rules Committee for the purposes of this Part.*

254. Ancillary orders

(1) Upon the application of a foreign representative the court may make orders ancillary to a foreign proceeding for the purposes of—

(a) recognizing the right of a foreign representative to act in The Bahamas on behalf of or in the name of a debtor and, in the court's discretion, to do so jointly with a qualified insolvency practitioner;

(b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

(c) staying the enforcement of any judgment against a debtor;

(d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative;

(e) ordering the turnover to a foreign representative of any property belonging to a debtor; and

(f) granting such other relief as it considers appropriate.

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

(a) the debtor itself; or

(b) a person who was or is a relevant person as defined in section 198(1).

(3) An ancillary order shall not affect the right of a secured creditor to take possession of and realize or otherwise deal with property of the debtor over which the creditor has a security interest.

(4) The court shall not make an ancillary order that is contrary to the public policy of The Bahamas.

255. Criteria upon which the court's discretion shall be exercised.

(1) In determining whether to make an ancillary order under section 254, the court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with ---

(a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

(b) the protection of claim holders in The Bahamas against prejudice and inconvenience in the processing of claims in the foreign proceedings;

(c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

(d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part VII;

(e) the recognition and enforcement of security interests created by the debtor;

(f) the non-enforcement of foreign taxes, fines and penalties; and

(g) comity.

(2) In the case of a debtor which is registered under section 174, the court shall not make an ancillary order under section 254 without also considering whether it should make a winding up order under Part VII in respect of its local branch.

256. Publication of foreign proceedings.

(1) Where a company incorporated under Part II or registered under section 174 is made the subject of a foreign proceeding, notice of this fact shall be filed with the Registrar and published in the Gazette.

(2) The notice shall contain the prescribed particulars and shall be filed by the company's liquidator or, if no liquidator has been appointed under this Act, by its directors within fourteen

days of the date upon which the foreign proceeding commenced.

(3) A liquidator or a director who fails to comply with this section is guilty of an offence and liable on summary conviction to a fine of ten thousand dollars."

21. Rule 2 of the Foreign Proceedings (International Co-operation) Liquidation Rules, 2012 reads as follows:

"**2. *Application for declaratory order***

(1) An application by a foreign representative made under section 254(1)(a) of the Act for a declaratory order recognizing his right to act on behalf of a debtor shall be made by petition in accordance with RSC Order 9.

(2) A petition presented under this rule is required to be served only on such persons as the Court may direct.

(3) A petition under this rule shall state—

(a) particulars of the debtor's incorporation;

(b) the nature and place of the debtor's business;

(c) the court or other authority by which the foreign representative was appointed;

(d) the powers and duties of the foreign representative under the law of the place of his appointment; and

(e) the reasons for seeking a declaratory order.

(4) A petition under this rule shall be verified by an affidavit sworn by the foreign representative.

(5) A certified copy of the order of the court or other authority by which the foreign representative was appointed shall be exhibited to the verifying affidavit.

(6) A petition under this rule shall be supported by an affidavit of foreign law which explains the powers and duties of the foreign representative under the law of the place of his appointment.

(7) A declaratory order granted under this rule shall be in Form 1 and shall be gazette."

22. It is clear from the provisions of section 253 and 254 of the Bahamian Act that access to the courts in the Bahamas for recognition and assistance under Part VIIA is not available to every foreign office-holder appointed in foreign insolvency proceedings with an international element. The statutory regime is limited to persons falling within the definition of "foreign representative" contained in section 253. Consequently, for the Court in the Bahamas to make an ancillary order to a foreign proceeding under Part VIIA and for a foreign representative to be accorded access to the Bahamian court under those provisions, the foreign proceeding and the foreign representative must have the attributes specified in the definition of those respective terms in section 253.

23. In my view, neither the Cayman Proceedings nor the Cayman Liquidators ("**the Petitioners**") fall within the statutory definition of such terms in section 253. Accordingly, the statutory regime under sections 253 – 256 is not currently available to the Petitioners as the Cayman Islands has not been designated a "*relevant foreign country*" by the Liquidation Rules Committee for the purposes of Part VIIA. This means that the Petitioners are not, in the language of those sections, '*foreign representatives*' as they were not appointed Liquidators of Caledonian Bank for the purpose of "*...a judicial or administrative proceeding in a...*" country designated by the Liquidation Rules Committee as "*...a relevant foreign country.....*" On the same reasoning, the Cayman Proceedings are not '*foreign proceedings*' within the definition of that term in section 253 of the Bahamian Act. For this reason I am of the view that the declarations sought in the Prayer of the Amended Petition cannot be granted under section 254 (1) (a) of the Bahamian Act.

The common law principle of modified universalism

24. However, based on the submissions of Mrs. Rolle-Kapousouzoglou, that does not dispose of this matter as she contends that notwithstanding the enactment of Part VIIA the Court continues to have its general common law power to assist a liquidator in foreign liquidation proceedings (even if the liquidator is not a 'foreign representative' under section 253) in accordance with the principle of modified universalism. In the case of ***Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26*** Lord Hoffman described the roots of this principle in this way:

> [16] "*The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.....*
>
> [20] *....the underlying principle of universality is of equal application* [to corporate insolvency] *and this is given effect by recognizing the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case of* ***Re. African Farms Ltd 1906 TS 373*** *at 377..... 'recognition carries with it the active assistance of the court'....*
>
> [22] *What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do.*"

25. Lord Hoffman once again addressed this issue in ***Re HIH Casualty and General Insurance Ltd. [2008] 1 WLR 852.*** In paragraphs 6 and 7 of his speech he stated:

> *"6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been*

> *achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.*
>
> *7. This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see* ***Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings pls [2007] 1 AC 508,*** *517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of "modified universalism": see also Fletcher, Insolvency in Private International Law, 2nd ed (2005), pp 15-17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.*

26. Later at paragraph 30 Lord Hoffman described modified universalism as:

> *"...the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as it is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution...."*

27. In ***Rubin v Eurofinance [2013] 1 AC 236*** the subject came under review by the United Kingdom Supreme Court. In referring to the methods under English law for assisting foreign insolvency proceedings, Lord Collins observed that:

> *"...at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. "*

28. The Privy Council had to consider the common law principle of modified universalism in dealing with the issues raised in the case of ***Singularis Holdings***

Ltd. v. PricewaterhouseCoopers [2014] UKPC 36. Lord Sumption stated that under that principle *"...the court has a common law power to assist foreign winding up proceedings so far as it properly can"* bearing *"....in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers."*

29. It will be seen that under the common law principle the power to recognize a foreign office-holder and grant assistance is not restricted by reference to the country, territory or jurisdiction in which he/she was appointed. In this regard it is an open gate subject only to local law and local public policy.

30. I accept without hesitation that the principle of modified universalism is a recognized and established principle of the common law. As Lord Sumption so lucidly and eloquently stated in the **Singularis** case, the principle is founded:

> *".....on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognized and effective internationally.*

31. Under that principle, if it is still applicable in the Bahamas to a person who is not a '*foreign representative*' as defined in section 253 of the Bahamian Act, I would be minded in the circumstances of this case to recognize the right of the Petitioners to act in this jurisdiction on behalf of or in the name of the Company. The Company is incorporated in the Cayman Islands, was licensed as a bank in the Cayman

Islands, was regulated in the Cayman Islands and the centre of its main business interest was in the Cayman Islands. The statutory powers of liquidators in the Cayman Islands are generally equivalent in the Bahamas thereby satisfying what Counsel has termed the "equivalent statutory power test." These are amongst the compelling reasons for concluding that the Cayman Islands is the place for the unitary and universal insolvency action in connection with the Company. However, the critical question in this case is did the common law power to grant recognition and assistance to foreign office-holders (whether or not they are foreign representatives as defined in section 253 of the Bahamian Act) in insolvencies with an international element survive the enactment of the statutory scheme in Part VIIA? Put another way, does the court in the Bahamas have the power under the common law to grant the Petitioners the relief sought in the Amended Petition (or similar relief) in circumstances where such relief is not available under section 254 of the Bahamian Act?

Effect of Part VIIA on the common law power.

32. Counsel contends that there has been no express or implied repeal of the above mentioned common law principle by Part VIIA. She contends that Parliament could not have intended to wholly prevent access to the Bahamian court by a foreign liquidator for international co-operation in the absence of the Liquidation Rules Committee designating any country or jurisdiction a '*relevant foreign country*.' She submits that the common law principle relating to international co-operation in insolvency matters has been "*...available for at least one-hundred years...*" and its repeal would have required either express language in Part VIIA or a clear and unqualified intention to do so. In her submission, neither occurred in this instance.

33. Quite apart from the above point, it is submitted that as the Liquidation Rules Committee has not designated any country as a "*relevant foreign country*", the statutory regime under Part VIIA is not operative. Therefore, Mrs. Rolle-Kapousouzoglou submits that the pre-existing common law principle continues to apply to applications for international co-operation. She forcefully contends that *"[i]t is simply not a tenable proposition that since no country has been designated, no recognition and assistance can be given in any case."*

34. The starting point in considering this question is the recognition of the general principle that a statute will only supersede a pre-existing common law power where the two are so inconsistent that the two cannot stand together. Lord Sumption in **Singularis** expressed the point in this way:

> *"The existence of a statutory power covering part of the same ground may impliedly exclude a common law power covering the whole of it. But it does not necessarily do so. An implied exclusion of non-statutory remedies arises only where the statutory scheme can be said to occupy the field. This will normally be the case if the subsistence of the common law power would undermine the operation of the statutory one, usually by circumventing limitations or exceptions to the statutory power which are an integral part of the underlying legislative policy..."*

35. In reviewing the authorities it is clear that the cases dealing with the implied repeal by statute of an earlier legislative enactment apply equally to the abrogation by statute of a common law principle or rule.

36. These principles are succinctly summarized in the following extract from Halsbury's Laws of England, Fourth Edition at paragraph 1299:

> *"**1299. Implied repeal; in general.** An intention to repeal an Act or enactment may be inferred from the nature of the provision made by the later enactment. Repeal by implication cannot be prohibited, but such an implication is found by the courts with reluctance because*

> *the precision of modern drafting means that necessary repeals are usually effected expressly.*
>
> *The rule is, therefore, that one provision repeals another by implication, if but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together. The courts are particularly reluctant to hold that constitutional enactments have been impliedly repealed.*
>
> *The principles relating to implied repeal of an enactment apply equally to the abrogation by statute of a rule of common law."*

37. While I readily accept these principles I do not see the issue in this case as involving the 'repeal' or 'abrogation' of the common law principle of modified universalism. In my view the issue properly framed is whether the 'open gate' for access to the common law power for recognition and assistance (in the sense that the applicant could have been appointed in any country, territory or jurisdiction) survives the statutory intervention through Part VIIA which restricts the class of persons to whom recognition and assistance may be extended by the Court to a 'foreign representative' as defined in section 253 of the Bahamian Act.

38. The case in the British Virgin Islands ("**BVI**") of ***Re. C (A Bankrupt) [2013] BVIHC (COM) 0080 (31 July 2013)*** is instructive on this issue. In that case trustees in bankruptcy ("**the Trustees**") of the estate of a judgment debtor who had been appointed by the Hong Kong Court applied to the BVI Court for, *inter alia*, (i) orders at common law and under the inherent jurisdiction of the Court for recognition of the Hong Kong bankruptcy proceedings and their standing as Trustees and alternatively (ii) declarations under section 467(3) of the BVI Insolvency Act, 2003 ("**the IA**") that they were the validly appointed Hong Kong Trustees and therefore entitled to (a) take possession of property of the Bankrupt located in the British Virgin Islands and (b) seek additional orders under that

section. Counsel for the Trustees also sought, *in limine*, an order that the Trustees be granted the powers which they would have had if they had been appointed in the BVI under the relevant provisions of the IA. Section 467 is a part of the statutory insolvency regime in the BVI dealing with Cross-border matters and is one of the provisions under Part XIX of the IA (**"Part XIX"**).

39. The provisions of the IA which are material to this matter are very similar to their counterparts in the Bahamian Act. The following definitions are contained in section 466(1) of the IA:

> *"foreign proceeding" means a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy and "debtor" shall be construed accordingly;*
>
> *"foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding;*
>
> *"relevant foreign country" means a country, territory or jurisdiction designated by the Commission as a relevant foreign country for the purposes of this Part;"*

40. Section 467 of the IA reads:

> *"467. (1) For the purposes of this section "property" means property that is subject to or involved in the foreign proceeding in respect of which the foreign representative is authorized.*
>
> *(2) A foreign representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in respect of which he is authorized.*
>
> *(3) Subject to section 468, upon an application under subsection (1), the Court may*

(a) restrain the commencement or continuation of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;

(b) subject to subsection (4), restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property;

(c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;

(d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;

(e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

(f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;

(g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or

(h) make such order or grant such other relief as it considers appropriate.

(4) An order under subsection (3) shall not affect the right of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest.

> *(5) In making an order under subsection (3), the Court may apply the law of the Virgin Islands or the law applicable in respect of the foreign proceeding.*

41. It is apparent that the above sections together with section 468 in the IA are similar (albeit not identical) to sections 253, 254 and 255 of the Bahamian Act.

42. In paragraph [5] of his Judgment, Bannister J [Ag] stated that *"[s]ince the Trustees are appointed by the High Court of the Hong Kong Special Administrative Region they are foreign representatives within the meaning of section 466(1), IA 2003, and are entitled accordingly to apply for assistance under Part XIX of that Act."* I digress to observe parenthetically that the Petitioners in the case before me are not '*foreign representatives*' under the Bahamian Act as the Cayman Islands has not been designated a '*relevant foreign country*'. Returning to the BVI case, on the *in limine* point, the Court rejected the contention that under the common law of bankruptcy the Trustees should be treated as if they had been appointed under and had the powers conferred by Part XII of the IA. After a thorough review of the authorities relied on by Counsel for the Trustees Bannister J [Ag] concluded in paragraph [13] of his Judgment that there was no judicial support for the "*.....suggestion that at 'common law' a foreign insolvency practitioner, once recognized, is to be treated as entitled to exercise the powers which he would have had had he been appointed pursuant to the insolvency laws of the given jurisdiction.*"

43. Further, when referring to the speech of Lord Collins in the case of ***Rubin v Eurofinance [2013] 1 AC 236*** Acting Justice Bannister stated "*[a]s the cases referred to by Lord Collins show, what the Court does when recognizing proceedings at common law, is to deploy its own powers in aid of the foreign proceedings. It does not invest the foreign office holder with powers of his own.*"

44. The Judge disposed of the *in limine* point in this way:

> *"The .....authorities upon which [Counsel for the Trustees] relies do not support the proposition that foreign insolvency practitioners may be clothed by the Court, by virtue of nothing more than recognition, with the rights and powers of an office holder appointed pursuant to IA 2003, which I reject for the reasons which I have given...."*

45. On the question of the interplay between the common law principle in the BVI and the statutory regime in the IA, Acting Justice Bannister stated:

> *"[22] .....Miss Harris' argument is that (a) prior to the enactment of IA 2003 and, as she would have it, at all times since, the Court has had jurisdiction to make orders in aid of any foreign insolvency proceedings, wherever pending; (b) that the legislature could not have deprived the Court of the right or power to make orders in aid without expressly saying so; and (c) that section 470 IA 2003 clearly preserves the common law principle of recognition and assistance. Section 470 is in the following terms:*
>
> > *'Subject to section 443, nothing in this Part limits the power of the Court or an insolvency officer to provide additional assistance to a foreign representative where permitted under any other enactment or rule of law of the Virgin Islands.'*
>
> *In my judgment section 470 has nothing to do with recognition generally. Its effect is restricted to providing for assistance in addition to whatever may be granted under section 467 IA 2003 to a foreign representative. 'Foreign representative' is defined by section 466(1) as a person acting as an office holder in insolvency proceedings in a relevant foreign country designated as such by the Financial Services Commission. Section 470 adds to the relief which may be granted to a foreign representative but does not expand the class of foreign representatives.*
>
> *[23] Having listened to Miss Harris' careful submissions, I accept that this section* [i.e. section 470] *provides for recognition at common law of foreign representatives (as defined) and for the provision of assistance (of the sort discussed by Lord Collins in* ***Rubin****) to them by the Court, whether or not they apply specifically under section*

> *467. To that extent, what I said in paragraph 8 of my judgment in **Picard** was wrong. I was also wrong, I regret to have to say, in denying Mr. Picard the relief (at any rate in some form or another, even if not precisely in the terms in which he sought it) which he had applied for.'*

46. It will be seen that because of section 470 of the IA, the BVI Court accepted that the common law concept of recognition and the provision of assistance arising therefrom continued to apply in the BVI notwithstanding the enactment of Parts XVIII and XIX but only to 'foreign representatives' as defined therein. Consequently, the common law principle was saved by section 470 albeit in a more circumscribed form.

47. In passing, I note that in England the UNCITRAL Model Law ("**the Model Law**") which was implemented by the Cross- Border Insolvency Regulations, 2006 ("**the CBIR**") contains Article 7 which is similar to section 470 of the IA. That Article provides: "*Nothing in this law limits the power of a court or British insolvency office-holder to provide additional assistance to a foreign representative under the other laws of Great Britain.*"

48. It is important to remember that there is no provision in the Bahamian Act and specifically Part VIIA which is equivalent to section 470 of the IA in the BVI or Article 7 of the Model Law. This is material as the conclusion of Bannister J [Ag] in ***Re. C (A Bankrupt)*** expressed in paragraph [23] of his Judgment that a foreign representative can apply for recognition and assistance under the common law in addition to section 467 is entirely based on section 470.

49. While it is *obiter*, I nonetheless regard the views of Acting Justice Bannister as helpful on the wider issue of whether in the BVI the common law principle of international co-operation in cross-border insolvency matters based on universality

survived the enactment of Parts XVIII and XIX of IA as it relates to persons who are not within the statutory definition of foreign representatives. He addressed the matter in these terms:

> *"[24] As for the wider question, whether the common law approach to recognition and assistance survives generally in this jurisdiction in parallel to Parts VII and XIX, it does not arise on this application any more than it arose on Mr. Picard's, since all three applicants were and are foreign representatives for the purposes of Part XIX. Since the question was fully argued by Miss Harris, however, I should perhaps set out my views upon it. I have no doubt that it does not. The provisions of Part XIX (and, for that matter, of Part XVIII) are quite clearly intended to be restrictive of the class of persons who may be the object of the Court's recognition and the beneficiaries of its assistance. Those restrictions would be rendered futile if it were the case that the Court remained at liberty to grant recognition to any office holder it chose, regardless of the jurisdiction in which he had been appointed – certainly if it could proceed to confer upon any such office holder the powers of a person holding office under IA 2003. In my judgment, what Lord Neuberger said in* ***In re HIH Insurance Ltd*** *about the existence of an inherent power in tandem with but extending further than section 426 of the UK Insolvency Act 1986 applies with equal or greater force in this case.*
>
> *[25] It is said that this conclusion cannot be reached unless it can be shown that the legislature 'repealed' or 'abolished' the common law rule of recognition and assistance and that the language of Part XIX is far too weak to permit that inference to be drawn. I do not think that that is a good point. By restricting the class of persons to whom recognition and comity may be extended by the Court, Part XIX is not abolishing or repealing anything. The rule, if it is properly to be described as a rule, still exists. It is merely that its application in this jurisdiction has been defined. Part XIX clearly has the effect of restricting comity to foreign representatives as defined by section 466."*

50. Mrs. Rolle-Kapousouzoglou has skillfully and thoughtfully advanced her submissions in support of the Amended Petition but I am not persuaded that there exists today in this jurisdiction a parallel common law route to the statutory code

set out in Part VIIA for a foreign office holder in an insolvency matter (who is not a '*foreign representative*' as defined in section 253 of the Bahamian Act) to apply to the Court for a recognition and/or assistance order. I am more inclined to the view expressed by Bannister J [Ag] in ***Re. C (A Bankrupt)*** recorded in paragraph 49 above. Parliament has acted through the passage and bringing into force of Part VIIA. That is a statutory code limiting the power of the courts in this jurisdiction to grant recognition and assistance in cross-border insolvency matters to a restricted class of persons; that is foreign office holders appointed in judicial or administrative proceedings relating to liquidation or insolvency in a country, territory or jurisdiction which the Liquidation Rules Committee has designated as a relevant foreign country. Rather than repealing or abrogating the common law principle (sometimes referred to as modified universalism) Part VIIA limits its application to a designated class of persons defined as foreign representatives. It then vests in the Liquidation Rules Committee (not the Court) the power to decide which countries are to be designated under section 253 of the Bahamian Act. The utility of the statutory intervention would be seriously undermined if notwithstanding its enactment, persons who do not fall into the class known as 'foreign representatives' could nonetheless apply to the Court for the very same relief which the statute is intending to restrict to that class.

51. The statutory power in section 254(1) of the Bahamian Act to grant the orders listed therein is limited to an office holder who is a '*foreign representative*' and proceedings which are "*foreign proceedings*" under section 253. That limitation is the central feature of the legislative policy underlying Part VIIA. It is circumvented by the subsistence of the wider common law power based on modified universalism which allows a person who is not a '*foreign representative*' to apply for such orders in respect of proceeding which are not "*foreign proceedings*". To that extent, the statutory power and the common law power

cannot co-exist as the latter renders the former virtually otiose. In that case, as Lord Sumption stated in paragraph 28 of his Judgment in **Singularis,** the statutory power will displace or exclude the common law power. I emphasize here that it is not the common law principle itself which is 'repealed' or 'abolished' but merely its application to persons outside the statutory class of foreign representatives. This is consistent with the views expressed by the BVI Court in the case of ***Re. C (A Bankrupt)*** in paragraphs [24] and [25] of the Judgment.

52. Counsel for the Petitioners has urged the Court to give full rein to the common law power under modified universalism on the basis that such power has not been affected in any way by Part VIIA. However, to adopt that approach would, in my view, be tantamount to ignoring the legislative intervention of Parliament when it passed the Bahamian Act. The sole purpose, or at the very least, the principal purpose of that legislative intervention was to limit the power of the Court to recognize and grant assistance in cross-border insolvency proceedings to foreign office-holders who are appointed in judicial or administrative liquidation or insolvency proceedings in designated countries. To now accept the submission that the enactment of Part VIIA had absolutely no effect on the pre-existing common law principle, therefore meaning that all persons who could have applied before the legislative intervention can still do so, is to undermine the efficacy of the statutory code enacted by Parliament and defeat the legislative policy of Part VIIA. In this regard I reiterate that the Bahamian legislation does not include a provision similar to section 470 of the IA in the BVI or Article 7 of the Model Law.

53. A simple example may be helpful. Let us assume that country 'A' had been designated as a "*relevant foreign country*" under section 253. Thereafter a liquidator who had been appointed by a court in country 'B' applied to the Court

in the Bahamas for recognition and assistance under the common law. Would it be suggested that the Court could act under a common law power to grant recognition to the foreign liquidator and make ancillary orders for assistance even though he would not be a '*foreign representative*' under section 253 and country 'B' was not a '*relevant foreign country*' under that section? In my view, that would not be an option.

54. Accordingly, I have concluded that since the coming into force of Part VIIA it is no longer open to the Court to recognize and grant assistance to foreign insolvency proceedings on the basis of the common law principle of modified universalism in cases which fall outside the provisions of sections 253 – 255 of the Bahamian Act. There is no issue in the Bahamas as to whether the common law principle supplements the statutory regime in cases where the applicant is a foreign representative under section 253. This is because, as stated above, there is no equivalent in the Bahamian legislation to either section 470 of the IA or Article 7 of the Model Law. If I am wrong on this point, it would not, in any event, assist the Petitioners as they are clearly not "foreign representatives" within the statutory definition.

55. It has been submitted that Part VIIA is not currently operative as no country has been designated a "*relevant foreign country*" under section 253 of the Bahamian Act by the Liquidation Rules Committee. I do not accept this submission. Part VIIA is in force and the statutory regime is in place. Its effective date is not subject to the making of at least one designation of a '*relevant foreign country*" by the Liquidation Rules Committee. The 'open gate' policy under the common law principle for applicants has been changed whereby Parliament has created a new 'gatekeeper' who now controls access to the jurisdiction for court orders in cross-border insolvency matters. That gatekeeper, the Liquidation Rules Committee, is

in place. It is a matter for that Committee to decide when it will make appropriate designations under section 253 of the Bahamian Act. In the meantime, I do not accept that the Court can usurp the function of the Committee to make designations under section 253 or proceed under the common law power as if Part VIIA has not been enacted.

56. Counsel for the Petitioners cited a number of English cases to support the orders sought in the Amended Petition. Those cases have to be considered in the context of the framework in that country for providing assistance in foreign insolvency proceedings which is starkly different to the framework in the Bahamas. The position in England was helpfully summarized by Lord Collins in ***Rubin v Eurofinance [2013] 1 AC*** 236 which involved two cases. The first one was commenced in England by the legal representatives of a trust who had obtained in New York default and summary judgments against certain defendants in New York. The applicants applied to the High Court in England to enforce the judgments under the common law and Article 21 of the Model Law. The Court of Appeal in England decided that the judgments could be enforced against the defendants at common law. The defendants appealed. The UK Supreme Court allowed the appeal and declined to adopt a more liberal rule in respect of enforcement of judgments in the interests of the universality of bankruptcy preferring to leave any such changes to the legislature. Their Lordships held that the judgments could not be enforced under the Model Law. Further, as the proceedings against the defendants in the case had been *in personam* and they had not submitted to the jurisdiction of the of the United States bankruptcy court, the judgments could not be enforced by the English court.

57. The second case related to a judgment from the New South Wales court setting aside certain payments which were deemed to have been a preference and ordering

the defendants to repay the monies. The court in New South Wales issued a letter of request asking, *inter alia,* that the English court exercise its jurisdiction under section 426(4) of the Insolvency Act 1986 to order the defendants to pay the sum specified in the order. The liquidator and the company issued proceedings in the English court for relief as sought in the letter of request. The Court of Appeal held that the English court was entitled to enforce the Australian judgment under section 426(4). The defendants appealed. The appeal was dismissed by the UK Supreme Court although their Lordships held that the judgments were to be enforced under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933 rather than under section 426(4).

58. In speaking for the UK Supreme Court Lord Collins stated:

> *"25.....there are four main methods under English law for assisting insolvency proceedings in other jurisdictions....First, section 426 of the Insolvency Act 1986 provides a statutory power to assist corporate as well as personal insolvency proceedings in countries specified in the Act or designated for that purpose by the Secretary of State.....*
> *Second, the EC Insolvency Regulation applies to insolvency proceedings in respect of debtors with their centres of main interest (COMI) within the European Union (excluding Denmark).*
> *Third, the CBIR came into force on 4 April 2006, implementing the Model Law. The CBIR supplement the common law, but do not supersede it. Article 7 of the Model Law provides: "Nothing in this Law limits the power of a court or British insolvency office-holder to provide additional assistance to a foreign representative under other laws of Great Britian."*
> *Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. "*

59. The following commentary appears at paragraph 30-371 of ***Dicey, Morris and Collins on The Conflict of Laws, Fifteenth Edition:***

> *"The application of the Model Law appears to be without prejudice to the availability of other forms of cross-border assistance. Thus, in principle, common law principles of assistance, the statutory procedure under s.426 of the Insolvency Act 1986 and the EC Insolvency Regulation co-exist alongside the Model Law subject to two caveats. The first, referred to above, is that where there is a conflict between British insolvency law and the Regulations, the Regulations prevail. The second is to be found in Art. 3 of the Model Law which provides that to "the extent that this Law conflicts with an obligation of the United Kingdom under the EC Insolvency Regulation, the requirements of the EC Insolvency Regulation will prevail." Further, Art. 7 of the Model Law provides that nothing in the Model Law limits the power of a court or a British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain."*

60. Section 426 (4) & (5) of the English Insolvency Act 1986 relate to international cases and provide that:

> *"(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.*
> *(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.*
> *In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."*

Section 426 (11) sets out this definition:

> *In this section "relevant country or territory" means—*
> *(a) any of the Channel Islands or the Isle of Man, or*

(b) any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument.

61. According to Volume 2 of ***Dicey*** the *"...duty of assistance under section 426 applies only as between courts and before the English court can act it must have received a request.....from the foreign court so to act. Thus a foreign liquidator cannot invoke the assistance of the English court directly: it will be necessary to approach a relevant foreign court which must issue the request."*[1] Therefore, the method to obtain recognition and assistance under section 426 of the Insolvency Act 1986 is not available to individual foreign office-holders and its enactment did not affect their status to seek such recognition and assistance under the common law. In this sense, the provisions of section 426 did not "occupy the field" of the common law principle and therefore did not displace it. Of course, that is unlike the position in the Bahamas where there is no provision in Part VIIA similar to section 426 and the enactment of Part VIIA specifically restricted the class of persons who otherwise could have applied for recognition and assistance under the common law principle.

62. The decision in ***Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26*** confirmed the common law principle of modified universalism in international insolvencies although it was subsequently held by the UK Supreme Court to have gone too far in advancing two further propositions.

63. The issue before the Privy Council in ***Cambridge Gas*** was whether an order by the Federal Bankruptcy Court in New York made in Chapter 11 proceedings was

[1] Paragraph 30-112 of Volume 2 of Dicey on The Conflict of Laws, fifteenth Edition.

entitled to be implemented in the Isle of Man. Their Lordships were solely concerned with the common law power of recognition and assistance[2]. The New York Bankruptcy Court had approved a plan of reorganization which called for the shares of Navigator Holdings plc ("**Navigator**"), a company incorporated in the Isle of Man, to vest in the committee of creditors. Cambridge Gas, a Cayman company, owned directly or indirectly approximately 70% of those shares. The New York court issued a letter of request to the High Court in the Isle of Man requesting assistance in giving effect to the plan. The committee of creditors then petitioned the High Court for an order vesting the shares in Navigator in their representative. Cambridge Gas cross-petitioned the court to oppose the application for recognition and enforcement of the plan contending that it had not submitted to the jurisdiction of the New York court and therefore the order from that court could not affect its property rights in shares in an Isle of Man company. The Privy Council held that the plan could be carried into effect in the Isle of Man. The decision was controversial and attracted strident academic criticism. Eventually in 2013 the majority of the UK Supreme Court in ***Rubin v Eurofinance SA (SC(E)) [2013] 1 AC 236*** held that it had been wrongly decided. In addressing ***Cambridge Gas*** Lord Mance in ***Singularis*** clarified the position when stating:

> "*134. I agree with Lord Sumption and Lord Collins that the second and third propositions for which* ***Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings Plc*** *stands cannot be supported. A domestic court does not have power to assist a foreign court by doing anything which it could properly have done in a domestic insolvency; and it cannot acquire jurisdiction by virtue of any such power. As to the first proposition, for reasons which I explained in* ***Rubin v Eurofinance SA [2013] 1 AC 236****, Cambridge Gas can, if correct, stand for no more than the proposition that a domestic court should, so far as it can consistently with its own law, recognize a foreign bankruptcy*

[2] Judgment of Lord Hoffman at page 148 at letter b.

> *order and deal with identifiable assets within its jurisdiction consistently with the way in which the foreign insolvency would deal with them."*

64. ***In re HIH Casualty & General Insurance Ltd [2008] 1 W.L.R. 852*** required the House of Lords to consider the ambit of the common law power in cross-border insolvencies based on the principle of universalism as compared to the scope of section 426 of the Insolvency Act 1986. The case involved four Australian insurance companies which were being wound up in Australia. As they had assets in England provisional liquidators had been appointed in England and the question was whether the English court had power to direct the provisional liquidators to remit assets collected in England to Australia where there would not be a pari passu distribution among unsecured creditors to the material disadvantage of some creditors. The House of Lords unanimously decided that the assets should be remitted but their Lordships differed in their reasons for that conclusion. The majority based their decision exclusively on section 426 of the Insolvency Act, 1986, (as Australia was a "relevant country"), with Lord Scott and Lord Neuberger declining to accept the existence of a common law power to remit the assets to Australia in view of the differences between the two statutory regimes. Lord Phillips based his decision solely on section 426 and declined to express a view on whether, in the absence of statutory jurisdiction, the court could have ordered the assets to be remitted to the Australian liquidators in the circumstances of the case. Lord Hoffman and Lord Walker, in the minority, considered that the court had an inherent power to direct the remittal of the assets at common law. The case proceeded on the basis of a request under section 426(4) by the Australian court.

65. When considering the issue of the source of the power to remit Lord Scott stated:

> *"61. Section 426 has become part of the statutory scheme. But the resolution achieved by section 426 does not apply to all countries. It does not apply where the principal winding up is being conducted in*

> *a country which is neither part of the United Kingdom nor has been designated by the Secretary of State as a "relevant country or territory". The proposition that the assistance and directions sought by the Australian court and the Australian liquidators in the present case could be given under the inherent power of the court without reliance on section 426(4) and (5) is, in my respectful opinion, unacceptable. It would mean that the assistance and directions could be given in relation to a winding up being conducted in a foreign country that had not been designated a "relevant country or territory" by the Secretary of State. It would constitute the usurpation by the judiciary of a role expressly conferred by Parliament on the Secretary of State."*

66. The point is also addressed by Lord Neuberger in these terms:

> *"76. The notion that the court has inherent jurisdiction to remit English assets to liquidators in another jurisdiction on the basis that the insolvency regime of that jurisdiction would apply, seems to me to sit uneasily with the provisions of section 426(4) and (5), at least in relation to remittal of assets. The inherent jurisdiction to remit must be exercisable in relation to any country whereas section 426 only applies to a "relevant country or territory", i e one designated by the Secretary of State. If the courts had an inherent power to remit to a country with a different insolvency regime, either the courts could exercise that power in relation to a country which was not so designated, or section 426 impliedly restricts the inherent jurisdiction to designated states. The former possibility renders the significance of designation questionable in a case where remittal is sought; indeed it can be said to involve the inherent jurisdiction almost thwarting the statutory purpose. The latter possibility not only involves an implication as to the effect of section 426 which is not exactly obvious; it would mean that the inherent power (if it ever existed) had very little, if any, further purpose. "*

67. While Lord Scott and Lord Neuberger were dealing specifically with section 426 of the English Insolvency Act 1986, they were nonetheless addressing the interplay between the inherent power in the court established by previous judicial decisions and the statutory power under section 426. Their approach to that issue has fortified my view that, in the Bahamas, the common law power based on

modified universalism to make orders ancillary to insolvency proceedings in a foreign country cannot extend to a person who is not a "*foreign representative*" under section 253 of the Bahamian Act.

68. The case of ***In the Matter of Swissair Schweizerische Luftverkehr-Aktiengesellschaft [2009] EWHC 2099 (Ch)*** dealt with an application by English liquidators for directions for the remittal of assets in their possession, net of their expenses and a small amount to cover a preferential claim under English law, to the liquidator in the main liquidation in Switzerland. The Swiss liquidator also applied for the same order under the Model Law. The Court made an order under both the court's power to give directions to liquidators and under Article 21.2 of the Model Law directing the remittal to the liquidator in Switzerland. This case supports the continuing effect of the common law principle in England independent of the specific power conferred by section 426 of the Insolvency Act 1986. As stated in paragraph 61 above this is not, in my view, analogous to the framework in the Bahamas under Part VIIA which expressly restricts the class of persons who can seek orders ancillary to a foreign proceeding as defined in section 253 of the Bahamian Act. It is noteworthy that the applicants in the ***Swissair*** case were the English liquidators under the general powers of the court to give directions to liquidators and the Swiss liquidator under the Model Law as implemented by the CBIR.

69. It will be recalled that under Article 7 the Model Law has the effect of supplementing and not superseding the common law. As observed above, there is no parallel provision in Part VIIA in the Bahamas. Counsel for the Petitioners contended that Article 7 of the Model Law merely allows for additional assistance to what is available under the Model Law (as implemented by the CBIR) and is not a "savings provision for the common law to the extent of providing additional

assistance." I do not view Article 7 in that way and such an interpretation is in conflict with the treatment of the CBIR by Lord Collins in ***Rubin***. It is because of Article 7 that the CBIR is said to supplement rather than supersede or repeal the common law. The words "other laws of Great Britain" in Article 7 include the common law thereby clearly indicating that nothing in the Model Law is intended to abrogate, repeal or exclude the common law. That is a significant distinction between the Model Law and Part VIIA in the Bahamas.

70. Mrs. Rolle-Kapousouzoglou also referred to the case of ***In the Matter of an Application made on behalf of Northshore Mainland Services Inc. v The Export Import Bank of China etal [2015] COM/com/0039***. She is right in submitting that the facts of that case are very different to the instant case and it is distinguishable in many respects. Nevertheless, the Court held in that case in paragraphs 39 and 47 of the Judgment that sections 253-255 of the Bahamian Act 'repealed' the common law and concluded that "....*on the passing of the* [Bahamian Act], *application for recognition and the provision of judicial assistance to foreign insolvencies could only proceed in accordance with the statutory framework.*"

71. I mean no disrespect to Counsel in not referring in this Judgment to all the cases cited in her submission. I have read and considered each of them together with her written submissions.

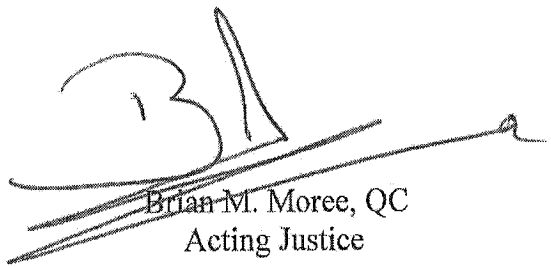
Disposition

72. For the reasons set out above, I dismiss the Amended Petition. While, based on my understanding of the law, I have not been able to grant the orders sought in this action I am satisfied that the Petitioners acted reasonably in bringing these proceedings and the costs in connection therewith should be paid out of the estate of Caledonian. However, bearing in mind that Caledonia is no longer a party in

this action I have some doubt as to whether I can properly make such an order. Accordingly, having expressed my view on the issue, I will not make a formal order for costs.

73. I wish to record my gratitude to Counsel for the Petitioners for her industry and scholarship in providing thorough and detailed submissions in this case. I found those submissions well researched and helpful in dealing with the issues in this case.

Dated this 9th day of February, A.D. 2016



Brian M. Moree, QC
Acting Justice