11-01-05

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Privy Council Appeal No. 1 of 2004

(1) Barbara Alice Al Sabah and
(2) Mishal Roger Al Sabah *Appellants*

v.

(1) Grupo Torras S.A. and
(2) Clifford Culmer as trustee of the property of Sheikh Fahad Mohammed Al Sabah, bankrupt *Respondents*

FROM

THE COURT OF APPEAL OF THE CAYMAN ISLANDS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 11th January 2005

Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood

*[Delivered by **Lord Walker of Gestingthorpe**]*

Background

1. The appellants Barbara Alice Al Sabah and Mishal Roger Al Sabah are the wife and adult son respectively of Sheikh Fahad Mohammed Al Sabah ("the debtor"). The debtor was formerly head of the Kuwait Investment Authority in London. It embarked on a huge programme of investment in Spain through a Spanish company named Grupo Torras SA ("GT"). With the help of co-conspirators the debtor defrauded GT on a very large scale. The misappropriations were effected by four separate fraudulent schemes between 1988 and 1990. After a long civil trial in London the debtor was found liable for very large damages (see *Grupo Torras SA v Al Sabah* [1999] CLC 1, 469). There have

subsequently been various proceedings in different parts of the world by which GT, and more recently the debtor's Bahamian trustee in bankruptcy, have sought to recover funds in order to satisfy the judgment. GT has so far recovered about US$178m from the debtor or trusts established by him, but that is only a small part of the total indebtedness.

2. The debtor is now resident in the Bahamas. On 29 June 2001 he was adjudicated bankrupt under the Bahamian Bankruptcy Act 1870. The bankruptcy was deemed to have commenced on 6 February 2001. GT's proof of debt was for a sum of the order of US$800m. On 30 July 2001 the first meeting of creditors was held and Mr Clifford Culmer, a partner in BDO Mann Judge of Nassau, was appointed as trustee in bankruptcy.

3. The debtor is the settlor in respect of two trusts governed by the law of the Cayman Islands. One is the Comfort Trust, which he established (under the name of The Chester Trust) under Bahamian law on 29 September 1992. On 30 December 1992 a corporate trustee resident in the Cayman Islands, Bank of Butterfield International (Cayman) Ltd, was appointed as trustee of the trust and on 12 February 1993 the trust's proper law was changed to that of the Cayman Islands, and its name was changed to its present name. The debtor is the principal beneficiary under this trust and the appellants are also beneficiaries. The other is the Eaglet Trust, established on 14 February 1992 and governed from its inception by Cayman law. The trustees are Pictet Trustee SA (a Swiss company) and Pictet Bank and Trust (Cayman) Ltd (a Cayman company). The appellant Mishal Al Sabah is the principal beneficiary under this trust.

4. The trustee in bankruptcy's case is that the two trusts own and control, through a network of companies, very valuable assets (the Comfort Trust alone is said to be worth over US$27m) which enable the debtor, despite his bankruptcy, to enjoy a life of luxury. On 31 August 1995 GT commenced proceedings in the Cayman Islands (cause no. 271 of 1995) against the trustee of the Comfort Trust and various companies owned by the trustee, pleading proprietary claims. The pleadings have been extensively amended and the proceedings are still on foot. GT has also obtained summary judgment from the Grand Court of the Cayman Islands in effect converting its English money judgment into a Cayman money judgment. These Cayman proceedings are of no more than background relevance to the claim by the Bahamian trustee in bankruptcy, which is of central importance in this appeal.

The letter of request and subsequent proceedings

5. On 14 February 2002 the trustee in bankruptcy made an ex parte application to the Bahamian Grand Court for an order under section 122 of the Bankruptcy Act 1914 of the United Kingdom (or alternatively under the inherent jurisdiction) requesting aid from the Grand Court of the Cayman Islands. On 12 March 2002 Lyons J gave a short reasoned judgment (mainly concerned with section 122 of the Bankruptcy Act 1914) and made an ex parte order for a letter of request to be issued seeking assistance under three heads: (i) that Mr Culmer's appointment as trustee in bankruptcy of the property of the debtor should be recognised in the jurisdiction of the Cayman Islands; (ii) that the trustee should be granted "all general law powers and the statutory powers accorded to a trustee in bankruptcy in [the jurisdiction of the Cayman Islands] and in particular... the powers under section 107 of the [Cayman] Bankruptcy Law (1997 Revision)"; and (iii) that he should be granted such other powers as the Grand Court of the Cayman Islands thought fit.

6. Section 107 of the Bankruptcy Law (1997 Revision) of the Cayman Islands provides that any voluntary settlement (an expression which is widely defined) of property is to be void against the trustee in bankruptcy if the settlor is made bankrupt (i) within two years after the date of the settlement or (ii) within ten years after the date of the settlement unless (in the latter case) the beneficiaries can prove that the settlor was, when he made the settlement, able to pay all his debts without the aid of the property comprised in the settlement (and that the settled property passed to the trustee on execution of the settlement). Although this enactment speaks of the settlement being "void" it is common ground that this should be interpreted as "voidable" in accordance with the decision of the English Court of Appeal in *In re Hart; Ex parte Green* [1912] 3 KB 6. If the Cayman trusts are to be set aside under section 107, that can be achieved only by an order of a court of competent jurisdiction, prima facie the Grand Court of the Cayman Islands.

7. The Bankruptcy Act 1987 of the Bahamas contains (in section 71) provisions similar to those of section 107 of the Cayman statute but they are not identical. In particular, the power conferred by section 71 of the Bahamian statute is exercisable only if the bankrupt settlor was (apparently at the time of the settlement) a trader (within the meaning of a rather old-fashioned statutory definition). Their Lordships heard no argument as to whether the

debtor was at any time a trader within the meaning of the Bahamian statute and they express no view on the point. But it appears to have been one of the considerations which led the trustee in bankruptcy to seek a letter of request to the Cayman court. The other consideration may have been doubt as to whether the Cayman court would give effect to an order of the Bahamian court setting aside a trust governed by Cayman law. Their Lordships express no view on that point either; it was mentioned in the course of the hearing but was not fully argued, and is of no direct relevance to the outcome of this appeal (its only relevance is that if the doubt is well-founded, it shows that the Bahamian trustee in bankruptcy, like the Scottish trustee in bankruptcy in *Galbraith v Grimshaw* [1910] AC 508, 510 may still "find himself ... falling between two stools").

8. The Bahamian court's letter of request came before the Grand Court of the Cayman Islands on 15 March 2002, when Smellie CJ considered it ex parte. He made an immediate order (followed by a written judgment delivered on 27 March 2002) acceding to the letter of request and (in particular) granting the Bahamian trustee in bankruptcy the powers conferred by section 107. The main points in his judgment can be summarised as follows: (i) that section 156 of the Bankruptcy Law (1997 Revision) of the Cayman Islands, and further or alternatively section 122 of the Bankruptcy Act 1914 of the United Kingdom, authorised the Grand Court to act on the letter of request; (ii) that the Grand Court should as a matter of discretion confer the section 107 powers, since any Cayman assets relevant to the bankruptcy were likely to be held in trust; and (iii) that the order could in any case be made under the Court's inherent jurisdiction.

9. The matter then came before Henderson J inter partes on three days in September 2002. Henderson J also had before him an application to join the trustee in bankruptcy as a co-plaintiff in cause no. 271 of 1995. He reserved judgment and handed down a written judgment on 8 November 2002. In relation to the letter of request Henderson J decided (i) that the Chief Justice had rightly exercised jurisdiction (although Henderson J took a rather different view as to the reasons); (ii) that the order should not be set aside on grounds of material non-disclosure (this is not an issue in the appeal to the Board); and (iii) that any further exercise of the Court's discretion should be postponed until after a full consideration of the evidence.

10. The appellants appealed to the Court of Appeal of the Cayman Islands and the appeal came before that Court (Zacca P and Rowe and Taylor JJA) in July 2003. On 1 October 2003 the Court of Appeal (in a reserved judgment of the Court delivered by Taylor JA) dismissed the appeal. The appellants now appeal to Her Majesty in Council with final leave granted on 5 December 2003. The principal issues in the appeal are as follows:-

(i) Was the Court of Appeal correct in its view that the Grand Court had jurisdiction under section 156 of the Bankruptcy Law (1997 Revision)?

(ii) If not, did the Grand Court have jurisdiction under section 122 of the Bankruptcy Act 1914 of the United Kingdom (on the basis that it was not repealed by the Insolvency Act 1985) or under its inherent jurisdiction?

(iii) If the Grand Court had jurisdiction under any of these routes, did it have power to confer the section 107 powers on a Bahamian trustee in bankruptcy?

The Legislation

11. In considering these issues it is necessary to look closely at the terms and antecedents of a number of statutory provisions, including in particular section 156 of the Bankruptcy Law (1997 Revision) of the Cayman Islands and section 122 of the Bankruptcy Act 1914 of the United Kingdom. As the Court of Appeal recorded, it had had submissions covering enactments passed in the United Kingdom, Jamaica and the Cayman Islands over a period of more than 130 years, and the judgments at first instance and in the Court of Appeal reflect the care with which all the courts below have approached this difficult task. Their Lordships have also had the benefit of thorough research and admirable arguments from both sides; the depth of the research is particularly impressive in view of the severe damage and disruption which has unfortunately been suffered in the Cayman Islands as a result of the recent hurricane.

12. Before embarking on the detail of the legislation their Lordships think it desirable to set out some basic points about legislation in the imperial context. The earliest statute to which it is necessary to refer is the Bankruptcy Act 1869 of the United Kingdom. In the middle of the reign of Queen Victoria the British Empire was nearing its fullest geographical extent (although there was some later expansion, especially in Africa) and the

establishment of local legislatures (dating back to the 1850s in the case of most states of Australia, to the eighteenth century in the case of most of the provinces of Canada, and to the early seventeenth century in the case of Bermuda) marked the beginnings of the long progress towards independent status within the Commonwealth. The enactment of the Colonial Laws Validity Act 1865 ("an Act to remove doubts as to the validity of colonial laws") reaffirmed the superior power of the Westminster Parliament but made clear that colonial laws could depart from any non-statutory rules of common law or equity. The 1865 Act did not in terms refer to the enactment of laws with extraterritorial effect. But most colonial legislatures had powers (granted either under the Royal Prerogative, or by the Westminster Parliament) to make laws "for the peace, order and good government" of the territory in question and this implied (but did not clearly define) some territorial restrictions. This gave rise to many difficulties both before and after the 1865 Act (see generally D P O'Connell, The Doctrine of Colonial Extra-Territorial Incompetence (1959) 75 LQR 318). The 1865 Act has of course ceased to apply to independent members of the Commonwealth, the first repeals having been effected by the Statute of Westminster 1931. The balance of law-making authority, as between the Crown and the Westminster Parliament, was regulated (in relation to settled colonies) by the British Settlements Act 1887 (see generally Halsbury's Laws (4th Edit., 2003 Reissue) Volume 6, paras 821-823.

13. During the nineteenth century the English court was fairly ready to hold that an Act of the Westminster Parliament, especially if concerned with general rules of law, was intended to apply throughout the Empire. So in *Callender, Sykes & Co v Colonial Secretary of Lagos* [1891] AC 460, the Board held (at a time when Nigeria had no bankruptcy law of its own) that the general vesting provisions of the Bankruptcy Act 1869 of the United Kingdom (and not merely provisions about reciprocal enforcement) applied in Nigeria. But the Westminster Parliament's supreme legislative competence has in practice been more and more constrained by two factors. One has been an increasingly strong constitutional convention (eventually given statutory force, in relation to the Commonwealth countries to which it applied, by the Statute of Westminster 1931) not to interfere, unasked, in the laws of Commonwealth countries which enjoyed representative government. The other has been the courts' long-standing practice, in construing statutes of the Westminster Parliament, of presuming that their intended territorial extent is limited to the United Kingdom, unless it is clear that a wider extent is intended: see for

instance the observations of Lord Russell of Killowen CJ in *R v Jameson* [1896] 2 QB 425, 430. This presumption is of long standing but (with increasingly precise drafting techniques) it appears to have become stronger over the years, and it has become common for an Act of the Westminster Parliament to contain power for all or part of its provisions to be extended to British territories by Order in Council. A detailed commentary on the current position as to the territorial extent of an Act of Parliament can be found in Bennion, Statutory Interpretation, (4th Edition, 2002) pages 275-305.

14. At the time of the enactment of the United Kingdom Bankruptcy Act 1869 the Bahamas were a British colony acquired by settlement; Jamaica was a British colony acquired by conquest; and the Cayman Islands were a British colony acquired by settlement but governed (under the Cayman Islands Act 1863 of the Westminster Parliament) as a dependency of Jamaica. The Bahamas became fully independent in 1973; Jamaica became fully independent in 1962; and the Cayman Islands are still a British colony, now officially termed a British overseas territory. Before the 1863 Act the Cayman Islanders had magistrates and a parish meeting which exercised limited law-making powers. The effect of the 1863 Act was to confirm the existing arrangements so far as they went, but the islanders' institutions became subject to the jurisdiction of the Governor, legislature and Supreme Court of Jamaica. The law of Jamaica was in general to apply to the Cayman Islands. That state of dependency continued until 1959. It is of central importance to the first issue, that is the construction of section 156 of the Cayman Bankruptcy Law.

15. The Bankruptcy Act 1869 of the United Kingdom provided principally for bankruptcies in England. The Scottish law of bankruptcy developed on very different lines and had its own statutes enacted by the Westminster Parliament (see generally Professor McBryde's work on [Scottish] Bankruptcy (1959) pages 2-4). Ireland also had its own statutes enacted at Westminster. Nevertheless the 1869 Act had some extraterritorial effect, as already noted. In particular, sections 73 to 77 contained provisions which provided in different ways for mutual recognition and assistance in respect of bankruptcy proceedings in other parts of the United Kingdom and throughout the British Empire. Section 74 is the most important for present purposes. It was re-enacted (with a small change of language to which neither side attached importance) as section 118 of the Bankruptcy Act 1883 and again

re-enacted (without any change) in section 122 of the Bankruptcy Act 1914. Section 122 is in the following terms:

> "The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

16. The principal bankruptcy statute in force in the Bahamas is the Bankruptcy Act 1870. It did not contain any power comparable to section 74 of the United Kingdom Bankruptcy Act 1869 (the antecedent of section 122). But when he ordered the despatch of a letter of request, Lyons J was satisfied that section 122 applied in the Bahamas, having been specially mentioned in a Bahamian enactment (after the Bahamas became fully independent in 1973) entitled "Acts of the United Kingdom Parliament applying in or affecting the Bahamas otherwise than by virtue of an enactment of the Legislature of the Bahamas." The correctness of that conclusion is not an issue in this appeal.

17. The legislative history in Jamaica and the Cayman Islands is more complicated. The Jamaican Bankruptcy Law 1871 did contain, in section 64, provisions similar but by no means identical to those of section 74 of the Bankruptcy Act 1869. Section 64 was in the following terms:

> "All the courts in bankruptcy, and the officers of such courts, shall act in aid of and shall be auxiliary to each other in all matters of bankruptcy, and any order of any one court in a proceeding in bankruptcy may, on application to another court, be made an order of such other court, and may be carried into effect accordingly: And an order of any court in bankruptcy seeking aid, together with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request is made,

> could exercise in regard to similar matters within their respective jurisdictions."

These provisions do not in terms have any extraterritorial effect. Bankruptcy law was administered in Jamaica by several district courts whose jurisdiction was based on the residence or place of business of the debtor, with an appeal to the Supreme Court (see sections 60 and 62 of the 1871 Act). The Grand Court of the Cayman Islands did not have any jurisdiction in bankruptcy until the enactment (as a Jamaican statute) of The Cayman Islands Administration of Justice Law 1894. Section 41 of that law provided as follows:-

> "The Grand Court shall have and exercise all the jurisdiction and powers in Bankruptcy now vested in the Chief Court of Bankruptcy of Jamaica, save and except the jurisdiction now vested in the Supreme Court of Judicature of Jamaica as the Chief Court of Bankruptcy sitting as a Court of Appeal, but any such appeal shall lie to the full Court of the Supreme Court of Judicature of Jamaica, and all the Bankruptcy Laws and Rules now in force in Jamaica shall extend and apply to the Cayman Islands and to the said Grand Court."

The reference to the Chief Court of Bankruptcy of Jamaica is explained by changes made by sections 3-11 of the Jamaican Bankruptcy Law 1880, which established the High Court of Justice as the Chief Court of Bankruptcy, and gave limited jurisdiction (where the estate of the debtor was worth less than £200) to the Resident Magistrates' Courts, with an appeal (in either case) to the Court of Appeal.

18. So after 1894 section 64 of the Jamaican Bankruptcy Law 1871 (by then re-enacted as section 161 of the Jamaican Bankruptcy Law 1880) still made sense, with a very limited degree of extraterritorial effect as between the Grand Court of the Cayman Islands and the various Jamaican courts with original jurisdiction in bankruptcy (the Court of Appeal of Jamaica having jurisdiction to hear appeals from all of them). These statutory provisions remained in force unchanged throughout the first half of the twentieth century. The Cayman Islands were still a dependency of Jamaica at the inception of the short-lived British Caribbean Federation. But the Cayman Islands and Turks and Caicos Islands Act 1958 repealed the Cayman Islands Act 1863 and provided for the Cayman Islands to have a new constitution, granted by The Cayman Islands (Constitution) Order in Council 1959 (SI 1959 No.

863). This provided for the Governor of Jamaica to be ex-officio the Governor of the Cayman Islands, with limited legislative powers conferred concurrently on the Governor with the advice and consent of the Cayman Legislative Assembly (on the one hand) and the legislature of Jamaica (on the other hand), with power being reserved to Her Majesty in Council to amend or vary the Order in Council.

19. The 1959 Order in Council was revoked by The Cayman Islands (Constitution) Order in Council 1962 (SI 1962 No. 1646), which was intended to take effect on 6 August 1962, simultaneously with Jamaica's attainment of full independence under the Jamaica Independence Act 1962. The 1962 Order in Council was inadvertently not laid before Parliament and was brought into force retrospectively by The Cayman Islands (Constitution) Order 1965 (SI 1965 No. 1860). The present constitution was brought into force by The Cayman Islands (Constitution) Order 1972 (SI 1972 No. 1101). Both the 1962 and the 1972 Constitutions conferred law-making power "for the peace, order and good government of the Islands" on the Administrator (later the Governor) with the advice and consent of the Legislative Assembly, with power reserved to Her Majesty in Council.

20. That completes the relevant constitutional history. But it is necessary to go back a little in time to the enactment of the Cayman Bankruptcy Law 1964. The general effect of the various constitutional instruments was to maintain existing laws in force in the Cayman Islands, subject to any necessary modifications. But with Jamaica's independence it was appropriate for the Cayman Islands to have their own body of statute law. That was the purpose of The Revised Edition (Laws of the Cayman Islands) Law 1960 (a Cayman enactment). It provided (in section 3) for the Governor to appoint Commissioners to prepare a revised edition of the laws of the Cayman Islands and (section 8) a Table of the Acts and Laws in force on 31 December 1963. The Commissioners had power (section 4) to make a variety of formal or verbal changes (no doubt in the interests of clarity, simplicity, uniformity and accuracy) but section 6 provided:

> "(1) The powers conferred upon the Commissioners by section 4 of this Law shall not be taken to imply any power in them to make any alteration or amendment in the matter or substance of any Act or Law or part thereof.

> (2) In every case where any such alteration or amendment is, in the opinion of the Commissioners, desirable, the Commissioners shall draft a Bill setting forth such alterations and amendments and authorising them to be made in the revised edition, and every such Bill shall, subject to the sanction of the Governor, be submitted to the Legislative Assembly and dealt with in the ordinary way."

Several amendments to the Jamaican Bankruptcy Law 1880 were made by the enactment of The Statute Law Revision (Amendments) Law 1963 which was passed by the Cayman Legislative Assembly (apparently under section 6 (2) of the 1960 Law) but no amendment of section 161 was made by those means. Such textual alterations as were made must have been made under the limited powers conferred by section 4 of the 1960 Law.

21. The Commissioners' labours did in due course produce three volumes of statutes entitled "The Laws of the Cayman Islands 1963", with the Bankruptcy Law as chapter 7. It is still in force, with some amendments not material to this appeal, as the Bankruptcy Law (1997 Revision). There has never been any change to section 156 which (with the side note "Enforcement of Warrants and Orders of Courts") is in the following terms:

> "All the Courts in bankruptcy and the officers of such Courts, shall act in aid of and be auxiliary to each other in all matters of bankruptcy and any order of any one Court in a proceeding in bankruptcy may, on application to another Court, be made an order of such other Court, and be carried into effect accordingly. An order of any Court in bankruptcy seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise in regard to the matters directed by such Order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

22. It will be apparent that most of the language of the section, like that of section 161 of the Jamaican Bankruptcy Law 1880, is close to that of section 122 of the Bankruptcy Act 1914 of the United Kingdom. But whereas the United Kingdom statute applied to all British courts, the only extraterritorial operation of the Jamaican statute was very limited (and constitutionally unexceptionable), that is to the Cayman Islands as Jamaica's

dependency. Under section 156 of the Cayman statute it is very hard to see what effect (extraterritorial or otherwise) could sensibly have been intended, since the Cayman Islands had only one court with bankruptcy jurisdiction, and its Governor and Legislative Assembly had (at best) very limited power to legislate with extraterritorial effect.

The first issue: Section 156

23. So their Lordships come to the first issue, the meaning of "all the Courts in bankruptcy" at the beginning of section 156. It is, once the background has been explained, a short point of statutory construction. The Court of Appeal noted four possible interpretations: (i) all United Kingdom and British courts (the view of the Chief Justice); (ii) all bankruptcy courts worldwide (the view of Henderson J); (iii) all bankruptcy courts in the Cayman Islands (of which there was only one, so that the provision would have no present application at all); and (iv) Cayman and Jamaican bankruptcy courts (a view which neither side put forward in the Court of Appeal, and which the Court of Appeal regarded as untenable).

24. The Court of Appeal preferred the view of the Chief Justice. The Court was reluctant to find that section 156 had no coherent present meaning, and was directed simply to the possibility of there being more than one Cayman court with bankruptcy jurisdiction at some time in the future (a possibility which would in any event have called for primary legislation). The Court attached little weight to the argument that the Governor and the Legislative Assembly had no general power of extraterritorial legislation by treating section 156 as a sort of declaratory repetition or re-enactment of section 122 of the Bankruptcy Act 1914 so as to provide a complete bankruptcy code for the Islands:

> "We believe the proper view to be that a correct statement of prevailing law contained in an enactment will fall within the competence of the enacting body notwithstanding that such body does not itself have authority to make or change the law so stated – that such a practice is constitutionally unobjectionable, whether in state or provincial legislation, municipal by-laws, rules and regulations of administrative tribunals or other branches of government or by-laws or articles of a body corporate created under statutory authority."

The Court also relied (as did the respondents before the Board) on the contrast in language between "Courts" in section 156 (and its Jamaican antecedents) and the singular "Court" (defined as the Chief Court in Bankruptcy) in sections 157 and 158 (and their Jamaican antecedents).

25. Their Lordships readily understand why the Court of Appeal was anxious to interpret section 156, if possible, in a way that gives it a sensible present effect. But for the legislative history as summarised above the Court of Appeal's interpretation might have been possible, although to treat section 156 simply as a declaratory repetition of the United Kingdom provision would involve some remoulding of the statutory language. The section would have to be read as conferring on the Grand Court authority to send letters of request to United Kingdom courts and other British courts, and as placing it under a duty to respond to letters of request from such courts, while leaving the powers and duties of the other courts to be conferred or imposed by other legislation enacted in the United Kingdom or elsewhere in the Commonwealth.

26. But in their Lordships' view the history of the Jamaican legislation, and the way in which it has been transposed into Cayman legislation, make such an interpretation impossible. When the transposition took place the state of Jamaican law was that for nearly a century section 64 of the Bankruptcy Law 1871, and then section 161 of the Bankruptcy Law 1880, had provided a system of co-operation in bankruptcy matters which made sense in the domestic context of Jamaica. Section 122 of the Bankruptcy Act 1914 and its antecedents provided for mutual assistance between the Jamaican courts and the British courts. It is inconceivable that the Commissioners appointed under The Revised Edition (Laws of the Cayman Islands) Law 1960 (who seem, from the contents of the Statute Law Revision (Amendments) Law 1963, to have been scrupulous about what might be regarded as amendments of substance) should have intended to make a significant change of substance without invoking the procedure in section 6 (2) of the 1960 Law. This aspect of the matter does not seem to have been raised in the Court of Appeal, which seems to have thought that the amendment to section 161 was included in the 1963 amending statute.

27. Their Lordships must therefore conclude that the Commissioners cannot have understood the effect of this part of the Jamaican legislation. Had they done so they would have realised that there was no way in which it needed to be, or could sensibly

be, transposed into a legal system under which there was only one bankruptcy court. Section 156 has no practical present effect in the Cayman Islands. Therefore the appellants succeed on the first issue.

The second issue: repeal of section 122

28. This issue is also an issue of statutory construction, the relevant statute being the Insolvency Act 1985 of the United Kingdom. The question is whether that Act repealed section 122 in its entirety, and across the whole range of its extent, or repealed it in relation to the United Kingdom but left it in force in relation to the Channel Islands, the Isle of Man, and all other parts of Her Majesty's Dominions (including fully independent Commonwealth countries) in which it was still in force. Although this too is in the end a short point of construction it is by no means an easy one. Counsel on both sides put forward some elaborate arguments representing the fruits of painstaking research. But the only sure conclusions that their Lordships can draw are that the drafting techniques of successive generations of parliamentary counsel have not been wholly uniform, and the reasons for variations in their techniques are often obscure.

29. The relevant provisions of the 1985 Act are as follows:

(i) Section 213 provided for mutual assistance between courts within different parts of the United Kingdom, and between its courts and those of a "relevant country or territory". It was the predecessor of section 426 of the Insolvency Act 1986, which is discussed below as part of the third issue.

(ii) Section 235 (3):

> "The enactments mentioned in Schedule 10 to this Act are hereby repealed to the extent specified in the third column of that Schedule."

(iii) Section 236 (2):

> "This Act shall come into force on such day as the Secretary of State may, by order made by statutory instrument, appoint; and different days may be so appointed for different purposes and for different provisions."

(iv) Section 236(3) provided that certain provisions of the Act do not extend to Scotland. Subsection (4) provided that with

certain exceptions (including section 235 and the relevant parts of Schedule 10, Part IV) the Act does not extend to Northern Ireland.

(v) Section 236(5):

"Her Majesty may, by Order in Council, direct that such of the provisions of this Act as are specified in the Order shall extend to any of the Channel Islands or any colony with such modifications as may be so specified."

(vi) Schedule 10, Part III (Bankruptcy Repeals) included the following:

4 & 5 Geo. 5.c.59.	The Bankruptcy Act 1914	The whole Act, except sections 121 to 123

(vii) Schedule 10, Part IV (Other Repeals) included the following:

4 & 5 Geo. 5. c.59	The Bankruptcy Act 1914	Sections 121 to 123.

30. The Secretary of State made two relevant Commencement Orders on 6 February 1986 and 10 November 1986 respectively. The Insolvency Act 1985 (Commencement No. 2) Order 1986 (SI 1986 No. 185) provided for the coming into force on 1 April 1986 of most of the provisions of section 213 and of Schedule 10 "except insofar as it relates to courts in the United Kingdom acting in aid of and being auxiliary to British courts elsewhere". The Insolvency Act 1985 (Commencement No. 5) Order (SI 1986 No. 1924) provided for the coming into force on 29 December 1986 (with a very few immaterial exceptions) of all the remaining provisions of the 1985 Act.

31. No Order in Council was made under section 236 (5) extending any provision of the Insolvency Act 1985 to the Cayman Islands, nor has any such Order ever been made under section 442 of the Insolvency Act 1986 (which replaced section 236 (5)). In particular, there has been no such extension of the repeal of section 122. The respondents rely on this simple point as their key argument. The appellants say that no extension of the repeal was necessary, since section 122 was repealed outright by the Insolvency Act 1985 itself. They contend that the presumption against extraterritorial operation of a United Kingdom statute does

not apply (at any rate with the same force) to a repeal. They point to other statutes (especially Statute Law Revision Acts and Statute Law (Repeals) Acts ranging from 1867 to 1995) in which clear words of exception were used (for instance, in section (13) of the Statute Law (Repeals) Act 1995, "This Act does not repeal any enactment so far as the enactment forms part of the law of a country outside the United Kingdom; but Her Majesty may by Order in Council provide that the repeal by this Act of any enactment specified in the Order shall on a date so specified extend to any of the Channel Islands or any colony"). They point to the Insolvency Act 1986 (Guernsey) Order 1989, by which section 426 of the Insolvency Act 1986 was extended to Guernsey. This Order in Council did not include any express repeal of section 122. Similarly, Jersey and the Isle of Man have enacted their own provisions for mutual assistance (in article 48 of the Bankruptcy (Desastre) (Jersey) Law 1990 and section 1 of the Manx Bankruptcy Act 1988 respectively) without any express repeal of section 122.

32. The Court of Appeal did not find it necessary to reach a definite conclusion on this point, although it appears to have been inclined towards the view that section 122 had not been repealed in relation to the Cayman Islands. This inclination seems to have been based partly on the decision of the Full Court of the Supreme Court of Victoria in *Ukley v Ukley* [1977] VR 121, which (at pages 124-5) attached great weight to the power to extend the relevant statute (the Evidence (Proceedings in other Jurisdictions) Act 1975) by Order in Council (although not to Victoria) and (at page 131) concluded, after a full discussion of the authorities, that there is "no sufficient reason for distinguishing between a statute which repeals an earlier statute and one which amends it". Mr Dicker QC (for the appellants) sought to distinguish this case because Victoria, unlike the Cayman Islands, had full self-government at the time when the 1975 Act was passed. Mr Popplewell QC (for the respondents) was right in commenting that the position of the Cayman Islands is really an *a fortiori* case.

33. It is surprising that there should be any room for doubt as to whether an important provision of primary legislation has or has not been fully repealed by a modern statute which appears to have been drafted skilfully and with close attention to detail. It is particularly noteworthy that in section 236 (4) the draftsman has painstakingly excepted certain repeals (all affecting Ireland) from the general provision that the Act does not extend to Northern Ireland.

34. After carefully considering all the competing arguments their Lordships have come to the conclusion that the Insolvency Act 1985 did not repeal section 122 in its application outside the United Kingdom. Section 236(4) (the provision about Irish repeals) and section 236(5) (the power for Her Majesty by Order in Council to extend any of the provisions of the Act to certain territories outside the United Kingdom) strongly support the natural reading of section 235(3) and Schedule 10. The only possible drafting defect was that parliamentary counsel omitted (presumably as unnecessary) precautionary formulae (such as that used in the 1995 Act mentioned in paragraph 31 above) which have been used from time to time, both before and since the 1985 Act, by other parliamentary counsel. That carries little weight as against the matters just mentioned. Nor can much weight be attached to the fact that there may have been an oversight (or a deliberate reliance on implied repeal) in subsequent instruments affecting the Channel Islands and the Isle of Man. Therefore the respondents succeed on the second issue.

35. The respondents relied in the alternative, on the second issue, on the inherent jurisdiction of the Grand Court. This point was not much developed in argument and their Lordships can deal with it quite shortly. If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope (see Dicey & Morris, The Conflict of Laws, 13th Edition (2000) Volume 2, pages 1181-2, 1186-3) and the inherent jurisdiction of the Grand Court cannot be wider.

The third issue: section 107

36. The conclusion that section 122 of the Bankruptcy Act 1914 remains in force in the Cayman Islands leads to the third issue, that is the nature and width of the jurisdiction that it confers on the Grand Court. In particular, does it authorise the Grand Court to exercise in favour of the Bahamian trustee in bankruptcy a special statutory power which might not be available to him (because of the "trader" requirement) if the trusts in question were governed by Bahamian law and the trustees were resident in the Bahamas and facing proceedings in the Bahamian court?

37. Mr Popplewell has urged the Board to give an affirmative answer to that question. He has pointed to the alternatives spelled out in the latter part of section 122:

> "... such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

He has submitted that this equates the receipt and acceptance of a letter of request with a hypothetical bankruptcy in the receiving territory, with consequences described as follows by Chadwick J in *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621, 626, a case on section 426 of the Insolvency Act 1986:

> "The scheme of subsection (5) appears to me to be this. The first step is to identify the matters specified in the request. Secondly, the domestic court should ask itself what would be the relevant insolvency law applicable by the domestic court to comparable matters falling within its jurisdiction. Thirdly, it should then apply that insolvency law to the matters specified in the request, notwithstanding that on this hypothesis, those are matters which would not, or might not, otherwise fall within its jurisdiction by reason of some foreign element."

Rattee J agreed with that passage in *Re Bank of Credit and Commerce International SA (No. 9)* [1994] 2 BCLC 636, 655, and both decisions were referred to with approval by the Court of Appeal in *Hughes v Hannover Rückversicherungs-AG* [1997] 1 BCLC 497, 511-515.

38. To this Mr Dicker replied that these are all recent authorities on section 426 of the Insolvency Act 1986, which is in different and wider terms than section 122, and that the Court of Appeal was in error in treating them as having any relevance to section 122. It is therefore appropriate to set out the relevant provisions of section 426:

> "(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."

Subsection (10) contains a wide definition of "insolvency law". Subsection (11) defines "relevant country or territory" as any of the Channel Islands, the Isle of Man, and any country or territory which the Secretary of State designates by statutory instrument.

39. Mr Dicker submitted that section 122 (like its statutory predecessors, but unlike section 426) conferred an essentially auxiliary jurisdiction, which granted new remedies but did not create new rights. The High Court of Australia said as much (in relation to section 118 of the Bankruptcy Act 1883 of the United Kingdom) in *Hall v Woolf* (1908) 7 CLR 207, 212. Moreover in *Galbraith v Grimshaw* [1910] AC 508, 511-2, Lord Macnaghten said,

> "It may have been intended by the Legislature that bankruptcy in one part of the United Kingdom should produce the same consequences throughout the whole kingdom. But the Legislature has not said so. The Act does not say that a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the Courts of the different parts of the United Kingdom shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy. The English Court, no doubt, is bound to carry out the orders of the Scottish Court, but in the absence of special enactment the Scottish Court can only claim the free assets of the bankrupt. It has no right to interfere with any process of an English Court pending at the time of the Scotch sequestration."

40. *Galbraith v Grimshaw* was primarily concerned with section 117 of the Bankruptcy Act 1883. What the House of Lords actually decided was that where a Scottish sequestration (that is, bankruptcy) occurred about a fortnight after an English garnishee order nisi, the judgment creditor prevailed over the trustee in bankruptcy, although the result would have been different if both

the attachment and the bankruptcy had occurred in the same jurisdiction (whether England or Scotland). The attachment in England had not been completed, but the fact that it had started meant that the garnished debt was no longer "free assets" of the bankrupt. But in referring to the Court's auxiliary function Lord Macnaghten must have had in mind section 118.

41. The general tenor of his opinion is adverse to the notion of a hypothetical bankruptcy in the receiving territory, as the operation of section 426 has been described in the recent authorities already mentioned. In The Law of Insolvency (3rd edition, 2002, page 773) Professor Ian Fletcher has criticised *Galbraith v Grimshaw* as a "somewhat unsophisticated, if not disingenuous, decision, which purports to disallow any possibility that the rules of law in force in one jurisdiction may enjoy effect elsewhere by virtue of rules of private international law in force in the other countries concerned", and he suggests that it is overdue for reconsideration. The decision has also been described as "unfortunate" in Anton, Private International Law (2nd edition, 1990 p.734).

42. Section 122 was given a cautious interpretation by Farwell J in *Re Osborn* [1931-2] B & CR 189, a case in which an Isle of Man trustee in bankruptcy was seeking the assistance of the English court in relation to the bankrupt's immovable property in England. *Re Osborn* is one of very few reported English cases on the operation of section 122. It has since been cited in many overseas cases in relation to the degree of discretion which the receiving court has in applying the apparently mandatory terms of section 122 (or comparable overseas enactments). Another of the rare English cases on section 122 is *Re A Debtor (Order in Aid No 1 of 1979) ex parte Viscount of the Royal Court of Jersey* [1981] Ch 384, in which Goulding J (after noting at page 399 the striking differences between insolvency laws in England and Jersey) said at page 400,

> "The word 'bankruptcy' in section 122, if indeed it refers at all to *process* of bankruptcy, must, in my judgment, be construed in a wide sense, for the section is designed to produce co-operation between courts acting under different systems of law, and it would be much restricted if extended only to jurisdictions which reproduce all the main features of English procedure. Dodd J took much the same view of a similar provision in the Bankruptcy (Ireland) Amendment Act 1872: see *In re Bolton* [1920] 2 IR 324, 327."

43. In addition to *Hall v Woolf* and *Ukley v Ukley* their Lordships were referred to a number of other Australian authorities, the most important of which are *Re Ayers* (1981) 34 ALR 582 and on appeal *Ayers v Evans* (1981) 39 ALR 129; and *Radich v Bank of New Zealand* (1993) 116 ALR 676. These cases are of limited assistance since they are concerned with section 29 of the Bankruptcy Act 1966 of the Commonwealth of Australia, which although similar in its general scope to both section 122 and section 426, is not in identical terms to either. The key provisions of section 29 are in subsections (2) and (3):

> "(2) In all matters of bankruptcy, the Court:
>
> (a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and
>
> (b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.
>
> (3) Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction."

In *Ayers* the Federal Court of Australia was largely concerned with the aspect of indirect enforcement of the revenue laws of a foreign country (the New Zealand Inland Revenue Department was a major creditor of the bankrupt). There are passing references to the judgments in *Hall v Woolf* and *Galbraith v Grimshaw* but the main issue was as to the mandatory nature of the Court's response to a letter of request.

44. *Radich* was concerned with whether a debtor, already bankrupt in New Zealand, should be made subject to a further sequestration order in Australia. It was held on appeal that the Australian Court had erred in exercising its discretion to bring about a second bankruptcy. The Federal Court was critical of *Hall v Woolf*, Einfeld J (at p. 683) saying that it had produced a "virtual nonsense" and Drummond J (at p.692) referring to "unsatisfactory aspects of the reasoning" in it. But all three Justices regarded it as a decision on unusual facts (involving a change of domicile in the

course of the bankruptcy). Drummond J said of section 29(3) (at p695):

> "The jurisdiction the Australian court has under s 29(3) is a wide one ... The Australian court is not limited in providing assistance to a foreign court to cases in which the Australian and the foreign court have powers that mirror each other. If there is a 'matter of bankruptcy' within s 29(3) before the foreign court, the Australian court, in response to a request for aid, can exercise any of the powers it has under the Bankruptcy Act 1966 if that same matter had arisen in Australia, being powers the exercise of which will provide assistance to the foreign court in the circumstances of the particular case."

So here the Federal Court saw section 29(3) as importing a hypothetical bankruptcy in the receiving state.

45. Their Lordships see some force in the criticisms which have been made of *Hall v Woolf* and *Galbraith v Grimshaw*. The distinction between "rights" and "remedies" is not, in the context of auxiliary jurisdiction in bankruptcy, marked by a bright line (though their Lordships cannot accept Mr Popplewell's submission that even the debtor himself, before his bankruptcy, had some inchoate right to have his own trusts set aside). Section 122 is expressed in terms of exercising jurisdiction; section 29(3) is expressed in terms of exercising powers; section 426(5) is expressed in terms of applying insolvency law. That is not in their Lordships' view a sound basis for concluding that section 426 has conferred different and wider powers on the court which receives a letter of request. The Court of Appeal in *Hughes v Hannover Rückversicherungs AG* [1997] 1 BCLC 497, 515 did not take that view. Moreover there is nothing in the report of the Cork Committee on Insolvency Law and Practice (1982, Cmnd 8558) to suggest that section 426 was intended to make a large extension in the Court's auxiliary jurisdiction in bankruptcy otherwise than in a geographical sense (that is, by extending its scope to any "relevant country or territory"): see Chapter 49, especially paragraphs 1909-1913.

46. For these reasons their Lordships conclude, despite Mr Dicker's skilful submissions in support of the appeal, that the jurisdiction conferred by section 122 is, in the Cayman Islands and the other territories in which it remains in force, essentially as wide

as that conferred by section 426. Therefore the respondents succeed on the third issue.

47. In reaching this conclusion their Lordships have not overlooked the express provision in section 426 (5) requiring the Court to have regard to the rules of private international law. If asked to exercise its powers under section 426 the English court may find it necessary to consider whether the requesting court has properly exercised jurisdiction over a debtor with no obvious connection with its territory, and it might also, in some circumstances, have to take account of the general principle against enforcement of the public laws of another country. But that was true of section 122 also: see the judgment of the Court of Appeal of Guernsey in *Re Tucker (a bankrupt)* (1988) 89 MLR 220. Considerations of private international law may be material in subsequent proceedings which the Bahamian trustee in bankruptcy takes in the Grand Court. But their Lordships have no reason to suspect that there will be any real doubt about the debtor's sufficient connection with the Bahamas, where he is permanently resident. Moreover the larger of the trusts in question, the Comfort Trust, was originally governed by Bahamian law, and the switch to the Cayman Islands seems to have taken place when the English proceedings against the debtor were already imminent. Their Lordships have no criticism of the observations made by the Court of Appeal as to the Grand Court's eventual exercise of discretion in this matter.

48. Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed with costs.