In the Matter of x (a bankrupt) Royal Court of Guernsey

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The Royal Court of Guernsey has recently handed down its decision in In the matter of X (a bankrupt), only a matter of months after the decision of the Privy Council (on appeal from the Court of Appeal of Bermuda) in Singularis Holdings Limited v PricewaterhouseCoopers, the most recent in a line of authorities to consider the much-debated principle of 'modified universalism' in the context of cross-border insolvency proceedings.

Lieutenant Bailiff Hazel Marshall QC's considered judgment stretches to some 83 paragraphs over 24 pages and it is not the purpose of this briefing note to traverse the facts of the case in their entirety, or to contemplate the myriad issues that arose (some of them very specific to Guernsey law) in any detail, but primarily to focus on those aspects of the Lieutenant Bailiff's decision relevant to the split-decision of the Privy Council in Singularis. A copy of the full judgment will be available on the Guernsey legal Resources website and from your usual Ogier contact, from the 1 September 2015.

The issue

As noted by LB Marshall at paragraph 16 of her judgment, the issue to be decided in In the matter of X was whether the Royal Court of Guernsey has jurisdiction exercisable in favour of a Trustee in Bankruptcy of an English bankrupt, appointed by order of the English Court (such position as subsequently recognised by the Royal Court), to order a third party resident within the jurisdiction of the Royal Court to provide documents and information to the Trustee to assist her to perform her functions in seeking to trace assets of the bankrupt, or at least enabling her better to understand the affairs of the bankrupt.

The Royal Court explored a number of different propositions put forward by the Applicant, in seeking to establish that the Court had the necessary jurisdiction to grant the third party disclosure orders sought, including in respect of the possible applicability of the Bankruptcy Act 1914 and also whether the position of H.M. Sheriff was sufficiently analogous to that of a trustee in bankruptcy. Two other propositions in particular were considered, as follows.

Analogy with corporate insolvency

The Applicant submitted that the essential point, in the light of the Singularis decision, was whether granting the orders sought would be inconsistent with Guernsey law or public policy, which the Applicant submitted it would not. In doing so, the Applicant drew an analogy with the powers conferred on the Court by statute in respect of corporate insolvency in Guernsey law, namely section 426 of The Companies (Guernsey) Law, 2008 and by way of analogy to the decision of the then Deputy Bailiff, Sir de Vic Carey in the Guernsey case Re Med Vineyards Limited (1995) where it was held that, as part of the inherent supervisory jurisdiction of the Royal Court, an office holder may be able to obtain an order enabling him to examine directors and third parties and obtain documents from them.

LB Marshall rejected this argument, stating that even under the decision in Singularis, the function of consistency was really in the nature of a check mechanism and potential limit on the relevant power, and not a substantive justification for finding its existence. In other words, it was necessary to find that the power prima facie existed, and then to consider whether it in fact could not exist, or should not be exercised, because of apparent inconsistency with either the law or public policy of the assisting court's jurisdiction.

The 1929 Law and Ordonnance

Finally, the Court gave consideration to the well-known but little-used legislation in the arena of personal insolvency, which dates back to 1929, namely the *Loi ayant rapport aux Débiteurs et à la Rénonciation* and the *Ordonnance relative a la Rénonciation*.

However, the Lieutenant Bailiff rejected the Applicant's submissions, notwithstanding she conceded that she had at one stage been minded to consider that the 1929 Law might provide the Applicant with a sufficient basis to support the grant of the orders sought. LB Marshall ultimately was not satisfied that the analogy between the situations postulated in the 1929 Law and the situation in the present case were sufficiently close, and also she considered that there was a far more fundamental analytical problem, which she considered brought her back to the Singularis case.

The minority view in Singularis

As acknowledged by LB Marshall in her judgment, Singularis is "*a long and complex case*", and a full analysis is beyond the scope of this briefing note.

In Singularis, all five judges in the Privy council determined that one decisive reason for reversing the decision of the Bermudian court of first instance and refusing relief in that case was that in practice the Bermudian court would be granting relief to a liquidator in Cayman, which the liquidator could not have obtained in Cayman itself; this was therefore an improper exercise of the power held by the Bermudian court – *if any*.

However, the Privy Council was divided on whether there in fact was any such power, i.e. an inherent jurisdiction to apply a statutory power to a different, albeit analogous, situation. Three members of the Board held that there was and two that there was not, but because all members concluded that it would be inappropriate, in the circumstances, to exercise the power if it did exist, this was not a point which it was necessary to determine in order to reach the actual result in that case.

LB Marshall noted that in Singularis there was a judicial division on the very point that she needed to decide in the first place, namely whether or not there exists any common law power, or inherent jurisdiction to make the orders sought by the Applicant. She noted that *"[i]t is very unusual to have a dissenting judgment in the Privy Council, because it is general convention that the Privy Council gives unanimous advice to Her Majesty, and it is therefore to be inferred that this is a difficult legal point*."

The Lieutenant Bailiff determined that (paragraph 78): *"I would say that, untrammelled by any constraints of binding authority, my judgment would strongly side with the minority judgment in the Privy Council. I would find against the existence of any common law power in this context, ie an inherent jurisdiction to treat a power conferred only by statute as being available in a case which is not within the statute, relying on some combination of usefulness, a generous assessment of analogy, and resort to a supposed beneficial principle of "modified universalism" of insolvency law of indefinite and necessarily presupposed extent*."

In any event, LB Marshall noted that the absence of any such jurisdiction in Guernsey had actually been expressed in the earlier Guernsey cases of Bird v Meader (Re Tucker (a Bankrupt)) and Slinn v The Official Receiver and Liquidator of Seagull Manufacturing Co., and she did not read Singularis, even in the majority judgment, as suggesting any intention to overrule local law previously established. She was also mindful that a power to take the step of requiring third parties, possibly under threat of sanctions, to provide information in these circumstances was a draconian power and that to find some kind of hidden general common law type power in this area would be to take the kind of "*step leap*" that Lord Mance said in his dissenting judgment in Singularis should not be taken. The Lieutenant Bailiff was also strongly influenced that the alternative 'letters of request' route was available to the Applicant (as a UK trustee in bankruptcy) under the Insolvency Act 1986 (Guernsey) Order 1989. However, the 1989 Order only makes available the letter of request route to the courts of the British and Crown Dependency jurisdictions and not, for example, to the courts of the Caribbean or other Commonwealth jurisdictions.

Conclusion

In the light of the decision in *In the matter of X*, it appears that the position of insolvency office-holders in other jurisdictions, in the context of personal insolvency, is that, unless such persons are able to rely on the 'letters of request' route referred to, they will not be able to obtain an order of the Royal Court compelling the provision of documents or information from third parties in Guernsey. It also may be that, given LB Marshall's preference for the minority decision in *Singularis*, in the absence of any specific legislative power enabling liquidators or administrators to seek information from third parties, foreign insolvency officer holders in respect of companies may also have difficulty in obtaining an order in Guernsey against Guernsey based persons holding information about the insolvent entity.

From the point of view of creditors in other such jurisdictions, this clearly is an unsatisfactory position, and indeed LB Marshall noted that the Bermudian court at first instance in Singularis had no doubt been motivated by what she said was her own initial intuitive response to try to be helpful in adopting the approach that the powers contended for were salutary, and really ought to be available as a matter of assistance.

Of relevance, the Commerce and Employment Department of the States of Guernsey recently consulted with stakeholders, consumers, industry associations, practitioners and other interested parties on potential reform of Guernsey's system of commercial insolvency and personal bankruptcy, such period of consultation having closed on 31 December 2014.

The consultation paper proposed a new personal insolvency regime, similar to current UK procedures, such as a low value debt relief order, an individual voluntary arrangement and the ability to allow a trustee in bankruptcy to manage a bankrupt's affairs for the benefit of creditors, for a period of time, after which the bankrupt will be discharged, together with restrictions on what the bankrupt individual can do during the subsistence of a bankruptcy order. The reforms also propose useful additions to the corporate insolvency regime such as a statutory basis for liquidators to seek information and documents relating to the insolvent company from directors and third parties. Once these reforms are in place, the issues raised by LB Marshall in In the matter of X will probably disappear. At the moment, however, it does appear that, for example, a Cayman liquidator seeking information from third parties in Guernsey may not be able to obtain such an order given the lack of specific legislative provision in Guernsey.

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