Neutral Citation Number: [2012] IEHC 97

THE HIGH COURT

[2012 No. 70 MCA]

IN THE MATTER OF AN APPLICATION BY MOUNT CAPITAL FUND LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF AN APPLICATION BY MOUNT CAPITAL ASSET SUBSIDIARY LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF AN APPLICATION BY JOHN GREENWOOD AND HADLEY J. CHILTON, JOINT OFFICIAL LIQUIDATORS OF MOUNT CAPITAL FUND LIMITED (IN LIQUIDATION) AND MOUNT CAPITAL ASSET SUBSIDIARY LIMITED (IN LIQUIDATION)

JUDGMENT of Miss Justice Laffoy delivered on 5th day of March, 2012.

1. The application

1.1 The application to which this judgment relates was made *ex parte* on behalf of Hadley J. Chilton and John J. Greenwood (the Liquidators) of Mount Capital Fund Limited and Mount Capital Asset Subsidiary Limited (the Companies). The Liquidators were appointed joint liquidators of each of the Companies by orders of the Eastern Caribbean Supreme Court in the High Court of Justice of the British Virgin Islands on 22nd September, 2009. By orders made on 26th January, 2012 in the High Court of Justice Virgin Islands Commercial Division in relation to each of the Companies, it was ordered that the Liquidators, in their capacity as joint liquidators, should have leave to apply to the High Court of Ireland for recognition of the liquidation of each of the Companies.

1.2 In the *ex parte* docket which initiated the application it was recited that the Liquidators desire the aid of this Court for the purpose of recovering or getting in:

> (i) all of the Books and Records relating to the Companies, and
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> (ii) all of the assets and property of the Companies,

(in each case) within the jurisdiction of this Court and/or within the possession, power or procurement of any person within the jurisdiction of this Court, and for such other lawful purposes from time to time. The specific relief sought in the *ex parte* docket is as follows:

> (a) that this Court recognise the Liquidation Orders made on 22nd September, 2009; and
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> (b) that this Court and the officers of this Court act in aid and be auxiliary to the Eastern Caribbean Supreme Court in the High Court of Justice in the British Virgin Islands and in particular assist and act in aid of the said Court in the following matters: -
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> (i) authorising the Liquidators to exercise in relation to the Companies and each of them the powers afforded to an official liquidator under s. 245 of the Companies Act 1963 (the Act of 1963);
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> (ii) granting to the Liquidators liberty to apply for such orders under s. 245 of the Act of 1963 in relation to the Companies and each of them;
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> (iii) giving the Liquidators liberty to apply for such further and other reliefs as shall appear appropriate to them in exercise of their functions as Liquidators of the Companies and which the Court shall see fit to grant.

2. The factual basis of the application

2.1 The application is grounded on the affidavit of Hadley J. Chilton, one of the Liquidators, who has outlined therein, in broad terms, the circumstances which led to the liquidation of the Companies, the course of the liquidation and the current financial status of the Companies which is that "the scale of financial loss that the Companies have encountered is in excess of USD200 million". Mr. Chilton has also averred as to the purpose of this application, again in broad terms, as –

> ". . . to give the Liquidators standing to seek, in a subsequent application or applications, certain Orders on an inter partes basis in the High Court of Ireland in order to obtain certain documentation which ought to be comprised within the books and records of the Companies but which documents are not at present available to the Liquidators, and other information concerning the business and affairs of the Companies."

2.2 The identity of the entities against whom it is intended to bring applications under s. 245 of the Act of 1963, if the recognition sought is granted by the Court, is clear from the affidavit of Mr. Chilton. They are:

> (a) PricewaterhouseCoopers (PwC);
>
> (b) Deloitte & Touche LLP Ireland (Deloitte): and
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> (c) Citi Hedge Fund Services (Ireland) Ltd. (Citi).

2.3 Mr. Chilton has averred that there is no local "auditor sign off" requirements in the British Virgin Islands. The Companies selected PwC in Ireland as the Companies' auditors for the financial years ended 31st December, 2002, 31st December, 2003, 31st December, 2004 and 31st December, 2005. PwC was involved in the preparation of the Companies' financial statements dated 25th June, 2003, 2nd September, 2004, 7th June, 2005 and 24th May, 2006. Deloitte was the Companies' auditor for the financial years ending 31st December, 2006 and 31st December, 2007. Deloitte was involved in the preparation of the Companies' financial statements dated 27th June, 2007 and 19th May, 2008. Mr. Chilton has outlined the requests made by the Liquidators to both PwC and Deloitte for documentation (whether in electronic or paper format) held by them in relation to the Companies and the responses of PwC and Deloitte.

2.4 As neither PwC nor Deloitte has had an opportunity to reply on affidavit to the averments contained in Mr. Chilton's affidavit, I consider it appropriate to exercise caution in recording the facts deposed to by Mr. Chilton. For present purposes it is sufficient to record that, while in their most recent letter to the Liquidators, which is exhibited by Mr. Chilton, the letter dated 22nd December, 2011, PwC, subject to certain issues being clarified by the Liquidators, have indicated a willingness to furnish certain categories of documents to the Liquidators, on certain terms, the position of the Liquidators is that the PwC response is not sufficient. The Liquidators maintain the position that they are entitled to possession of the Companies' documents and records held by PwC. As regards Deloitte, the most recent item of correspondence on behalf of that firm exhibited by Mr. Chilton is a letter dated 8th September, 2011 from Deloitte's solicitors, Arthur Cox, reiterating that Deloitte does not hold any books or records of either of the Companies. Further, they state that the documents in the possession of Deloitte are "working papers" and Deloitte does not provide any copy of its working papers to any client or third party unless ordered to do so by the Irish courts. That response is also regarded as inadequate by the Liquidators.

2.5 As regards Citi, its predecessors entered into Administration Agreements with the first named of the Companies at the following times and under the following names: on 12th December, 2001 as Hemisphere Management (Ireland) Limited; and on 1st January, 2003 as BISYS Hedge Fund Services (Ireland) Limited. Mr. Chilton has averred that the Liquidators have engaged in voluminous correspondence with Citi regarding the books and records of the Companies held by Citi since their appointment. While they were provided with documents, which had been promised over a year earlier, the Liquidators require access to two named employees, who remain in the employment of Citi, who have detailed knowledge of the administration of the Companies. The Liquidators have not received a substantive response to a request for a meeting with those employees. Mr. Chilton has averred that there would be a significant saving to the Companies if the Liquidators did not have to spend time and incur costs in writing to and placing telephone calls to Citi seeking documents and information which are necessary for the performance of their functions.

2.6 It would be wholly inappropriate for the Court to express, or indeed form, any view as to whether there has been an adequate response to the Liquidators' requests from those parties. That issue is for another day. However, for present purposes, the affidavit of Mr. Chilton does establish that there is an issue as to whether the responses of those parties were adequate.

3. Equivalent provisions of British Virgin Island companies' legislation

3.1 The Liquidators' application is also grounded on the affidavit of Meriel Louse Steadman, a solicitor who has been admitted to practise as a solicitor of the Eastern Caribbean Supreme Court (Virgin Islands), who specialises in corporate contentious insolvency and litigation. Ms. Steadman has averred that, while the British Virgin Islands is a British Overseas Territory of the United Kingdom, it has its own legislature and court system, both of which are independent from the United Kingdom. It is a common law jurisdiction and the courts recognise judicial precedent both in its own jurisdiction and in other common law countries.

3.2 Ms. Steadman has exhibited the Insolvency Act 2003 of the British Virgin Islands (the BVI Act 2003), which she has averred is based on the Insolvency Act 1986 of England and Wales (the UK Act 1986), although modified in a number of respects. Specifically, she has referred to Part VI of the BVI Act which deals with the liquidation of companies. The sections of the BVI Act to which she refers clearly demonstrate an equivalence of approach to the winding up of companies to the approach adopted in this jurisdiction under the Act of 1963 and amending legislation.

3.3 Of particular relevance for present purposes is s. 284 of the BVI Act 2003 under which an application may be made by a liquidator for an order that a person specified appear before the Court "for examination concerning the company or a connected company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company". The persons specified include an officer or former officer of the company and a person who has been an accountant or auditor of the company, in addition to any other person whom the liquidator considers is capable of giving information concerning the company or a connected company. Further, reference is made to s. 285 of the BVI Act 2003 which empowers the Court to require a person who is to be examined before the Court "to produce at the examination any books, records or other documents in his possession or control" relating to the company.

3.4 On the basis of what she has been told by an Irish solicitor in the firm acting for the Liquidators on this application, Ms. Steadman has averred that from the perspective of the law of the British Virgin Islands, the power of the Court under s. 245 of the Act of 1963 is closely analogous to ss. 284 and 285 of the BVI Act 2003.

3.5 Counsel for the Liquidators referred the Court to a recent decision of the House of Lords on the section of the UK Insolvency Act 1986 – *B & C Holdings Plc v. Spicer & Oppenheim* [1993] BCLC 168. I do not consider it necessary to comment on that authority at this juncture. For present purposes it is sufficient to record that I consider that the Liquidators have shown a *prima facie* case for the conclusion of equivalence between s. 245 of the Act of 1963, which they propose to invoke if given recognition, and the corresponding provisions of the BVI Act 2003. The scope of s. 245 is for another day, when the parties against whom an order under that section is sought will be heard by the Court.

4. The relevant authorities on recognition

4.1 Of the authorities to which the Court was referred by counsel for the Liquidators on the entitlement of a court to give recognition to insolvency proceedings in another jurisdiction, the earliest in time is a decision of the Privy Council on an appeal from the Court of Appeal of the Isle of Man in *Cambridge Gas Transportation Corpn v. Unsecured Creditors* [2007] 1 AC 508. That case arose from proceedings in a federal court in New York under Chapter 11 of the United States Bankruptcy Code in which the Federal Court had confirmed a plan providing for the assets of the insolvent companies to be taken over by the creditors and had ordered that the plan be carried into effect. The element of the plan which gave rise to a request for assistance in giving effect to the plan by the Federal Bankruptcy Court to the High Court of Justice of the Isle of Man was a clause which provided that shares in a company incorporated in the Isle of Man should be vested in the creditors' representatives. The issues which were ultimately before the Privy Council arose from a petition by the Unsecured Creditors (the respondents) to the Manx High Court for an order vesting the shares in their representatives and a cross petition by Cambridge Gas Transportation Corporation (Cambridge Gas), a company registered in the

Cayman Islands, which owned, directly or indirectly, 70% of the issued share capital of the Isle of Man company, that the Manx Court should not recognise or enforce the terms of the plan.

4.2 An issue addressed by Lord Hoffmann, delivering the judgment of the Privy Council, was an argument put forward for Cambridge Gas that the New York order was a judgment *in rem* and, consequently, was only binding upon persons over whom the New York court had jurisdiction. Lord Hoffmann rejected that argument stating (at paras. 13 and 14) that bankruptcy proceedings do not fall into either the judgment *in rem* category or the judgment *in personam* category, stating:

> "Judgments *in rem* and *in personam* are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment *in rem* or *in personam* is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."

Having identified certain differences between personal insolvency and corporate insolvency, which he characterised as "matters of detail" and, having referred to the judgment of Brightman L.J. in *In Re Lines Bros.* Limited [1983] 1 Ch. 20, "incidental procedural matters", Lord Hoffmann stated (at para. 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."

4.3 Lord Hoffmann attributed the doctrine of universality of bankruptcy to some extent to the fact that in the eighteenth and nineteenth century Britain was an imperial power, trading and financing development all over the world, and he recognised that countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors. Later (at para. 20), having pointed to the fact that in corporate insolvency as distinct from personal bankruptcy, there is no question of recognising a vesting of the company's assets in some other person, Hoffmann J. stated:

> "But the underlying principle of universality is of equal application and this is given effect by recognising 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."

4.4 Counsel for the Liquidators pointed, in particular, to paragraph 21 of the judgment of Lord Hoffmann in which stated:

> "Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance."

4.5 Lord Hoffmann's decision in the Cambridge Gas case was analysed recently in the Chancery Division of the High Court of England and Wales in In the matter of *Phoenix Kapitaldienst GmbH* [2012] EWHC 62, in which Proudman J., having considered a number of other recent authorities of the United Kingdom courts, stated:

> "Reading together Cambridge Gas [and the other authorities], I derive the following propositions:
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> (i) there is power to use the common law to recognise and assist an administrator appointed overseas,
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> (ii) assistance includes doing whatever the English court could have done in the case of a domestic insolvency,
>
> (iii) bankruptcy proceedings are collective proceedings for the enforcement (not establishment) of rights for the benefit of all creditors, even when those proceedings include proceedings to set aside antecedent transactions,
>
> (iv) proceedings to set aside antecedent transactions are central to the purpose of the insolvency."

As regards the proposition at (ii), in the *Cambridge Gas* case, Hoffmann J. compared the use of a scheme of arrangement agreed by a statutory majority of creditors to replace what would otherwise be the liquidation of an insolvent company, for which there had been a statutory basis in England since 1870 and in the Isle of Man since 1931, with what he described as the "considerably more sophisticated" Chapter 11 plan of re-organisation procedure. In the *Phoenix* case the administrator of a German company, which was an investment undertaking, and, as such, was not subject to Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings, was seeking recognition under English law and was also seeking relief under s. 423 of the U.K. Insolvency Act 1986 which contained statutory power to set aside transactions entered into at an undervalue for the purpose of defrauding creditors, which explains the relevance of propositions (iii) and (iv) referred to by Proudman J. The reliefs sought by the German administrator were granted.

4.6 The decision in the *Cambridge Gas* case has been followed in this jurisdiction both in relation to personal bankruptcy and corporate insolvency.

4.7 In the matter *of David K. Drumm, a Bankrupt* (High Court, 13th December, 2010), the High Court (Dunne J.) made an order that the High Court and its officers do act in aid and be auxiliary to the United States Federal Bankruptcy Court for the district of Massachusetts and, in particular, do assist and act in aid of the Court in –

> (i) declaring all property, both real and personal, of the bankrupt in Ireland vested in the Trustee in Bankruptcy in the United States (the Trustee),
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> (ii) providing that a Certificate of Vesting be registered in the Property Registration Authority or the Registry of Deeds insofar as the bankrupt had title to landed property, and
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> (iii) assisting in the determination and realisation of the interest of the bankrupt in landed property or other assets of the bankrupt situate in Ireland.

The application which led to that order was made *ex parte*, although Anglo Irish Bank Corporation Plc, which was described in the judgment as one of the principal creditors of the bankrupt and which was participating in the bankruptcy proceedings in the United States of America, was notified of the application and was represented by counsel. On this application, counsel for the Liquidators have helpfully put before the Court the perfected order dated 20th December, 2010 in that case and it is worth noting that it included provisions governing the conduct of the Trustee within this jurisdiction, and, in particular, that any matters in controversy between the Trustee and any person resident in this jurisdiction in the winding up of the estate of the bankrupt should be determined by the High Court.

4.8 In her judgment in the *Drumm* case, Dunne J. addressed the question of whether there was an inherent jurisdiction in the Court to make the order sought by the Trustee. Having considered, *inter alia*, the judgment of Lord Hoffmann in the *Cambridge Gas* case, and having pointed to the paucity of authority in this jurisdiction, she stated:

> "I can see no reason of public policy for refusing to assist the trustee in bankruptcy in this case in the manner sought. On the contrary, it seems to me that it is to the benefit of the creditors of the bankrupt to facilitate the trustee in this case."

Accordingly, Dunne J. was satisfied that the Court had inherent jurisdiction to make the orders sought. Earlier, in her judgment, Dunne J. had addressed the issue as to whether there was equivalence of jurisdiction in relation to bankruptcy proceedings in this jurisdiction and in the United States of America. She was satisfied on the basis of the affidavit of an Attorney at Law practising in that jurisdiction as to the consequences and effects of an adjudication in bankruptcy of a qualified resident in the United States of America, in circumstances where the bankrupt filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code, that such equivalence had been established.

4.9 The issue of the recognition of a foreign corporate insolvency process in this jurisdiction was considered by Finlay Geoghegan J. in *Fairfield Sentry Limited (in liquidation) & Anor. v. Citco Bank Nederland NV & Ors*. (High Court, 28th February, 2012). That judgment was delivered following a full hearing of the plaintiffs' claim against the defendants. The first plaintiff (Fairfield) was a company incorporated in the British Virgin Islands which had been ordered to be wound up by the High Court of Justice of the Eastern Caribbean Supreme Court pursuant to the insolvency laws of the British Virgin Islands. The second named plaintiff was one of two joint liquidators appointed by that court. The first defendant (Citco) was a Dutch bank incorporated under the laws of the Netherlands, domiciled there, and with a branch in Ireland and registered under Part X1 of the Companies Act 1963 (as amended). Fairfield had maintained a USD denominated bank account at the Dublin branch of Citco. Each of the two other defendants, a Dutch corporation and a Panamanian company, had obtained from the Dutch courts conservatory garnishment orders in relation to the monies in the name of Fairfield in the Dublin account. That is the context in which the plaintiff sought, as substantive relief, declarations recognising the decisions and orders of the court in the British Virgin Islands winding up Fairfield and appointing the liquidator. The plaintiffs also sought a declaration that the monies in the Dublin account were held by Citco to the order of the liquidator and declarations that each of the orders of conservatory garnishment made by the Dutch courts were not entitled to recognition in this jurisdiction.

4.10 When addressing the issue of recognition of the foreign winding up order, Finlay Geoghegan J. stated that, in her judgment, it was correct that, pursuant to common law in Ireland, the Court has an inherent jurisdiction to recognise orders of foreign courts (in the sense of non-EU courts) for the winding up of companies and the appointment of liquidators. She referred to the judgment of Dunne J. in the *Drumm* case and also the judgment of the Privy Council in the Cambridge Gas case. She stated that, notwithstanding the paucity of authority, she was satisfied that, at common law, the inherent jurisdiction exists, "deriving as it does from the underlying principle of universality of insolvency proceedings". While recognising that the common law requires a different approach in the exercise of its inherent jurisdiction in relation to giving assistance to foreign personal insolvencies, i.e., bankruptcies, and corporate insolvencies, Finlay Geoghegan J. stated (at para. 25):

> "There are differences principally arising from the differing effects of an order of adjudication of bankruptcy on the property of an individual and an order for the winding up on the property of the company. I would respectfully agree with the principle as explained by Lord Hoffmann, when having identified differences between the approach of the English courts to assistance in the case of personal and corporate insolvency he stated at para. 20:
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> '20 . . . but the underlying principle of universality is of equal application and this is given effect by recognising 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.'"

4.11 Finlay Geoghegan J. held that the plaintiffs were entitled to declarations of recognition of the orders of the High Court of Justice of the Eastern Caribbean Supreme Court winding up Fairfield and appointing the liquidator. Having stated that the plaintiffs had not pursued what she considered to be any application for the enforcement of orders of the High Court of Justice of the Eastern Caribbean Supreme Court, save insofar as they permitted the liquidator to maintain the proceedings in the name of Fairfield in this jurisdiction, which she considered to be a matter of recognition rather than enforcement, she made no declaration in relation to enforcement. I will return to that distinction, which I consider to be significant, later. Although this is not strictly relevant to the issues this Court is concerned with, later in her judgment (at para. 111 and 112), Finlay Geoghegan J. rejected a submission made on behalf of the plaintiffs that the distribution of the property of the company in liquidation *pari passu* amongst its creditors is a fundamental principle of Irish law such that it forms part of Irish public policy, for the purposes of Article 34 of Council Regulation (EC) 44/2001 of 22nd December, 2000 on jurisdiction and recognition of enforcement of judgments in civil and commercial matters. That submission had been advanced by the plaintiffs with a view to establishing that the orders of the Dutch courts of conservatory garnishment were not entitled to recognition in this jurisdiction.

4.12 Counsel for the Liquidators also referred the Court to the recent decision of the Supreme Court in *In the matter of Flightlease (Ireland) Ltd. in Voluntary Liquidation* [2012] IESC 12, in which judgment was delivered on 23rd February, 2012 and in which there was discussion of the decision of the Privy Council in the *Cambridge Gas* case. In that case, the factual elements of which arose in what Finnegan J. referred to as a "complex corporate structure", Flightlease (Ireland) Ltd.(Flightlease), a company incorporated in this jurisdiction, was the subject of a voluntary winding up in this jurisdiction. An associated (not using that expression in any technical sense) company, which I will refer to as Swissair, which was in debt restructuring liquidation in Switzerland, sought to prove in the Irish liquidation of Flightlease for the sum of CHF 8m, but the claim was rejected. Swissair instituted proceedings in the Swiss courts seeking return of certain monies paid by Swissair to Flightlease. When the Swiss proceedings were served on the joint liquidators of Flightlease, they brought a motion under s. 280 of the Act of 1963. In the High Court it was directed that a preliminary issue be tried as to whether, in the event that the order sought by Swissair against Flightlease in the Swiss proceedings was granted, that order would be enforceable in this jurisdiction. That preliminary issue was addressed in the High Court by reference to a number of questions, one of which was whether the order sought by Swissair in the Swiss courts would be excluded from enforcement in this

jurisdiction under the common law as arising from a proceeding in bankruptcy or insolvency. In his discussion of that question in the Supreme Court, Finnegan J. considered the relevance of the *Cambridge Gas* decision, which he referred to as "a significant development in the common law of the United Kingdom".

4.13 Before considering the commentary on the *Cambridge Gas* case, I think it is appropriate to consider the manner in which the Supreme Court answered that question. Finnegan J. identified the effect of an order made in the Swiss proceedings in the following passage of his judgment:

> "The effect of any order made in the Swiss proceedings will be to require repayment by Flightlease to Swissair of a sum of money. The nature of that order is that it is an order *in personam*. Insolvency proceedings are concerned with collective execution. They are not concerned with establishing a liability. The nature of the Swiss proceedings is to establish a liability on Flightlease to repay monies. Such an order will only be enforced in this jurisdiction if Flightlease is present in Switzerland at the commencement of the action or has submitted to the jurisdiction of the Swiss court. Neither is the case."

4.14 In answering the question, Finnegan J. stated:

> "The common law in this jurisdiction accordingly remains as before and it follows that proceedings which seek to establish a liability to pay a sum whether taken within insolvency proceedings or separately will result in a judgment *in personam.* The judgment and order is not a judgment or order in an insolvency so as to prevent its enforcement in this jurisdiction. If enforceable it will be enforceable as a judgment *in personam* in accordance with Irish conflicts of law rules."

In this case, the Liquidators are not seeking "to establish a liability to pay a sum" and to that extent this application is distinguishable from the Flightlease case. Moreover, the liquidation in this case is a foreign liquidation seeking recognition in this jurisdiction, not an Irish liquidation. It is necessary, nonetheless, to consider the Supreme Court's criticism of the *Cambridge Gas* decision.

4.15 Finnegan J. in his judgment quoted from the judgment of Brightman L.J. in the *Lines Bros.* case, which judgment is referred to by Lord Hoffmann (at para. 15). The passage quoted in the *Flightlease* case is in the following terms:

> "If the creditor petitions to wind-up a company, or claims in a liquidation initiated by others, he is not engaged in proceedings to establish the company's liability or the quantum of the liability (although liability and quantum may be put in issue) but to enforce the liability. Indeed, he is precluded from initiating or supporting a winding-up petition if his status as a creditor is *bona fide* disputed by the company. The liquidation of an insolvent company is a process of collective enforcement of debts for the benefit of the general body of creditors. Although it is not a process of execution, because it is not for the benefit of a particular creditor, it is nevertheless akin to execution because its purpose is to enforce, on a *pari passu* basis, the payment of the admitted approved debts of the company."

Lord Hoffmann made the following observation (at para. 15) in relation to the judgment of Brightman L.J.:

> "Of course, as Brightman L.J. pointed out in [the *Lines Bros*. case], it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected: or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy proceedings or directed to be determined by ordinary action. But these again are incidental procedural matters and not central to the purpose of the proceedings."

Having quoted the passage from the judgment of Brightman L.J. set out above, Finnegan J. stated:

> "The effect of the distinction is that while liability may be established within an insolvency or in separate proceedings the order made in either case is not an order within the bankruptcy which is concerned exclusively with the process of collective execution but rather an *in personam* or an *in rem* judgment which will be recognised and enforced only in accordance with the rules of conflict of law."

4.16 Later, there appears to be implicit criticism in the judgment of Finnegan J. of the scope of the assistance which is given in the United Kingdom courts in aid of foreign insolvency proceedings, in that it was stated that the United Kingdom courts can, in response to a request for co-operation, make orders of assistance "even though a foreign judgment *in personam* in similar terms and circumstances would not be recognised". On this application, the Liquidators are not seeking to have anything akin to a foreign judgment *in personam* recognised. However, it was also commented that the United Kingdom courts would provide assistance by doing whatever it could have done in the case of a domestic insolvency, which it was suggested represented a significant change in the common law in relation to bankruptcy and insolvency proceedings.

4.17 Two post-*Cambridge Gas* decisions of the Courts of England and Wales are also subject to criticism in the judgment of the Supreme Court and it is appropriate to refer to them because they are among the other authorities, which Proudman J. read together with *Cambridge Gas* in extrapolating the propositions which I have quoted at para. 4.5 above. It was pointed out by the Supreme Court that the Court of Appeal in *Rubin & Anor. v. EuroFinance SA* [2010] EWCA Civ 895 considered whether the principle of universality enabled the Court to enforce a judgment *in personam*, which had been given in New York against the defendants in, and for the purposes of, bankruptcy proceedings in New York, notwithstanding that the defendants had not submitted to the jurisdiction of the New York court. The Court of Appeal held that the principle had that effect. It was observed by Finnegan J. that "[a]cademic comment on the decision is not entirely favourable" and that the decision is under appeal to the Supreme Court. The decision of the House of Lords in *Re H.I.H. Casualty and General Insurance Ltd*. [2008] 1 WLR 852 was cited as demonstrating "uncertainty in the law as it is developing in the United Kingdom". It is true that in that case the House of Lords decided that it was a statutory provision (s. 426 of the Insolvency Act 1986) which gave the Court jurisdiction to accede to a request by a relevant country to direct liquidators in England and Wales in an ancillary liquidation to pay over to the main liquidators in the relevant country all sums collected or to be collected by them, after paying or providing for all their proper costs, charges and expenses. It is also true that there was disagreement among the Law Lords as to whether such an order could have been made at common law.

4.18 In was noted by the Supreme Court in the *Flightlease* case that *Cambridge Gas* and *Rubin* "all draw on the provisions of the Insolvency Act 1986, the Cross Border Insolvency Regulations 2006 and the UNCITRAL Model Law for their decisions". However, counsel for the Liquidators on this application pointed out that in the *Cambridge Gas* case those provisions did not apply and, indeed, Lord Hoffmann stated at para. 18 that the Privy Council was "concerned solely with the common law". In winding up his commentary on the *Cambridge Gas* decision, Finnegan J. stated:

> "As to whether, notwithstanding its uncertain state this court should adopt the approach in *Cambridge Gas* . . ., I am satisfied that it should not. In the area of conflicts of law it is desirable to await development of a broad consensus before developing the common law and it has not been suggested that such a consensus exists among common law jurisdictions. It is in any event desirable that such a significant change in the common law should be by legislation as appears to be the case in the United Kingdom. It is suggested by commentators that the common law in the United Kingdom is developing so that it will approximate with Council Regulation (E.C.) No. 1346/2000. For such a change to occur in this jurisdiction it is desirable that it should occur by way of legislation rather than by judicial development having regard to the significant changes which would be wrought in the common law."

4.19 Finally, in relation to the judgment of Finnegan J. in the *Flightlease* case, I think it is important that I should record that the introduction to the first passage from his judgment which I have quoted at 4.13 above, is the following sentence:

> "I am satisfied that *In Re Lines Brothers Limited* represents the common law in Ireland."

4.20 In his judgment in the *Flightlease* case, O'Donnell J., who stated that he agreed with the conclusion and result proposed by Finnegan J., added some comments, including the following comment in relation to the *Cambridge Gas* approach (at para. 9):

> "Accordingly, for my part, I would not wish to entirely rule out the possibility of the development of an insolvency principle as a matter of common law as indeed was discussed by Lord Hoffmann in the United Kingdom House of Lords in *Cambridge* . . ., and *Re H.I.H.* . . . (House of Lords) and in the United Kingdom Court of Appeal in *Rubin* . . . . It would of course be desirable that this situation could be achieved by international agreement and domestic legislation, but I would not rule out a possible development of the common law, if that appeared necessary. However that question was not argued in any detail on this appeal. The *Cambridge Gas* case was referred to only in the context of whether or not any order obtained in the Swiss proceedings would be an *in personam* judgment. Accordingly, I would reserve the question for another day, when it could be the subject of focussed argument in the context of all the conditions then prevailing."

5. Conclusion on recognition

5.1 The dilemma with which this Court is faced is whether the decision of the Supreme Court precludes this Court from following the approach adopted by Finlay Geoghegan J. in the *Fairfield* case in finding that this Court has inherent jurisdiction to recognise orders of a court outside the European Union ordering the winding up of a company, the appointment of a liquidator and giving liberty to the liquidator to apply for assistance in aid of the court making the order. Having carefully considered the matter, I am satisfied that this Court is not so precluded. I am satisfied that the *ratio decidendi* of the decision in the *Flightlease* case, which I have analysed extensively above, is limited to the situation in which it is sought to enforce at common law "liability to pay a sum" on foot of a judgment made by a foreign court in liquidation proceedings being conducted in this jurisdiction in accordance with Irish law. I am of the view that it does not preclude this Court from giving recognition to orders of the type made by the High Court of Justice of the British Virgin Islands in relation to the Companies.

5.2 On this application, relief in the nature of enforcement, as distinct from recognition, is not sought. In any event, it would be wholly inappropriate to consider an application for relief in the nature of enforcement on an *ex parte* application.

5.3 I consider that the Court does have an inherent jurisdiction to give recognition to insolvency proceedings in jurisdictions outside the European Union. However, I consider that, in the exercise of that jurisdiction, the Court should be satisfied that recognition is being sought for a legitimate purpose. I believe that a legitimate purpose has been demonstrated in this case, in that the objective of the Liquidators is to seek to obtain relief of the nature provided for in s. 245 of the Act of 1963, having demonstrated that, there is equivalence between the law of the British Virgin Islands and the law in this jurisdiction in relation to corporate insolvency generally and, in particular, in relation to disclosure, production of documentation and suchlike for the purpose of performance by a liquidator of his principal duties of taking possession, protecting and realising the assets of the company and distributing the assets, or the proceeds of realisation, in accordance with law.

5.4 While I do not discern any prejudice to any creditor in this jurisdiction or the infringement of any local law in affording recognition, so that, to use Lord Hoffmann's terminology, there is "no discretionary reason for withholding recognition", I have to take into account that this application is made *ex parte* and parties likely to be affected have not been heard. I propose to address that circumstance in the form of order which I intend making.

5.5 There is provision in the Act of 1963 for the enforcement of orders made in winding up of courts outside the State. Section 250(1) provides:

> "Any order made by a court of any country recognised for the purposes of this section and made for or in the course of winding up a company may be enforced by the High Court in the same manner in all respects as if the order had been made by the High Court."

As is pointed out in MacCann and Courtney on the *Companies Acts 1963 – 2009* (at p. 510), only Great Britain and Northern Ireland were recognised under s. 250(1) by Ministerial Order made in 1964, and that provision has now been superseded in respect of insolvency orders made in EU Member States by Council Regulation (EC) No. 1346/2000. However, I do not think that this Court could be regarded as usurping the powers of the relevant secondary legislator by making an order giving recognition in this case. As is clear from the judgment of Dunne J. in the *Drumm* case, as long ago as 1920, in *In Re Bolton* [1920] 2 I.R. 324 the King's Bench Division of the Irish High Court acted in aid of the Supreme Court of South Africa in relation to a bankruptcy in that jurisdiction. Therefore, prior to the conferring of power by s. 250(1) there appears to have been recognised an inherent common law jurisdiction to provide assistance to a foreign court in relation to insolvency proceedings. Section 250(1), in my view, did not eliminate that jurisdiction.

6. Form of order

6.1 The order of the Court will provide that –

> (a) the High Court of Ireland does recognise the orders made on 22nd September, 2009 and 26th January, 2012 by the courts of the British Virgin Islands in relation to each of the Companies, and
>
> (b) the High Court of Ireland and its officers do act in aid and auxiliary to the High Court of Justice Virgin Islands Commercial Division and in particular do assist and act in aid of the said Court in giving the Liquidators liberty to apply for

–

(i) orders under s. 245 of the Act of 1963 in relation to the Companies and each of them, and

(ii) such further and other reliefs as shall appear appropriate to them in the exercise of their functions as liquidators of the Companies.

The order shall contain a *proviso* that any party against whom the Liquidators shall apply for orders in reliance on this order shall be at liberty, on notice to the Liquidators on such application, to challenge the jurisdiction of this Court to make this order insofar as it affects that party.