

Singularis

[*Singularis Holdings Ltd v PricewaterhouseCoopers*](#) [2015] AC 1675

10th November 2014

Bermuda; Cayman Islands

Privy Council

Key Words

Common law assistance; obtaining information; asset tracing; judicial assistance;

Summary of Facts of the Case

Singularis was a Cayman Islands company being wound up in the Cayman Islands. Its liquidators sought information relating to the company's affairs from the company's auditors, a Bermuda registered partnership, in order to trace company assets. The court in the Cayman Islands granted an order requiring that PwC make certain documents available, however, under Cayman Islands law, the order extended only to material belonging to the company (Singularis). In order to obtain material belonging to the PwC itself the liquidators of Singularis applied to the court in Bermuda for an order requiring the auditors to produce all documents relating to the affairs of the company. The Bermuda Companies Act 1981 section 195 empowers the Supreme Court of Bermuda to so order, but only in relation to a company that the Court had ordered to liquidate. The Chief Justice of the Supreme Court of Bermuda exercised what he termed a common law power to order the auditors to produce information that they could have been ordered to produce under section 195 had the company been wound up in Bermuda. PwC appealed to the Court of Appeal for Bermuda, which overturned the decision of the Supreme Court on the basis that its decision was not an appropriate exercise of discretion because it was an order made in support of a Cayman Islands liquidation that could not itself have been made by the Cayman Islands court. Furthermore, the Court of Appeal doubted that there was jurisdiction to make such an order in circumstances where section 195 did not apply. The liquidators of Singularis then appealed to the Privy Council.



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Cooperation and/ or Coordination Issue

The Privy Council assessed whether a court in Bermuda had a common law power to assist a foreign liquidation by ordering the production of information in circumstances where it had no power to wind up the company itself and where its statutory power to order the production of information was confined to situations where the company had been wound up in Bermuda? The court was also required to rule on whether such a common law power would be exercisable when an equivalent order could not be made by the court in the jurisdiction in which the foreign liquidation was proceeding? Within the EU, there are a number of treaties that espouse the value and benefit of assistance and cooperation, both in specific areas of law and more generally. Thus, though clear importance is placed on the principles of cooperation and assistance, how the power to assist may apply or be limited may be more likely to come down to the individual case and relevant legal instruments in more recent times.

Resolution

The Privy Council found that while there was a power at common law to assist the officers of a foreign court of insolvency jurisdiction by ordering the production of information necessary for the administration of a foreign winding up, such power could not enable those officers to do something that they could not do under the law under which they had been appointed [para 25]. Thus, although the use of common law powers vis-à-vis companies outside the scope of the statute was not expressly excluded by the law in Bermuda, it was not a proper exercise of the power of assistance for a court to make an order enabling the liquidators to obtain material unobtainable under the domestic law of the court that had appointed them. Furthermore, the Privy Council found that the common law power of the court to recognise and grant assistance to foreign insolvency proceedings was primarily exercised through the existing powers of the court and while these powers could be extended or developed through the traditional judicial law-making techniques of the common law, the judiciary could not extend the scope of insolvency legislation to cases where it did not apply [para 38].

Interesting for the purposes of these case studies, was that the Privy Council rejected a significant aspect of the judgment in *Cambridge Gas*, namely the basis for applying the legislation on an “as if” basis – in other words by analogy “as if” the foreign insolvency were a domestic insolvency – or dispensing with the statutory procedure (para 38). The Privy Council stated that unless domestic law – Manx law in the case of *Cambridge Gas* – allowed for certain procedures, the judiciary was not entitled to apply such procedures by analogy at common law.

Applicability to Preventive Restructuring

While *Singularis* concerned information being sought in the course of a liquidation, it is not implausible that information held by auditors may be required during a restructuring attempt. Accordingly, a similar issue may arise. These cases may be useful in interpreting obligations to cooperate under the EIR Recast may be adjudicated in manner similar to how the common law obligations of assistance are considered in these cases. (See text of Report 2).

Applicability of Existing Rules and Guidelines

EIR Recast

The orders at issue in this case may arise where the EIR Recast applies to any of the proceedings listed in Annex A. The question in essence relates to the co-operation obligations arising under the EIR Recast and the effect which those obligations would have in similar situations. In other words, would co-operation obligations provided for in the EIR Recast translate into similar obligations to assist which have arisen in this series of English Privy Council cases. If so European courts may find these cases instructive regarding the consideration of their obligations to co-operate. The common law assistance cases may be instructive in interpreting obligations to co-operate.

Recommendations and Guidelines

It was noted that a case with facts similar to *Singularis* would not come within the scope of the EIR Recast. With that said, where a case concerns the need for information and does come within the scope of the Regulation, there are some guidelines that could assist parties. For example, the CoCo Guidelines requires insolvency practitioners to communicate with one another directly as soon as they are appointed and places the onus on the insolvency practitioner in the main proceeding to take the initiative in this regard [Guideline 6]. The ALI-III Global Principles may also be useful in such a context in that they aim to encourage the sharing of information between insolvency practitioners. With due regard for applicable law and confidentiality, insolvency practitioners should share non-public information i.e. information not freely available on public for a [Principle 9] and should promptly and fully disclose all relevant information on a continuing basis [Principle 33].