In the matter of X (a bankrupt)
Royal Court
6th July, 2015

JUDGMENT 36/2015

Application to the Royal Court by a Trustee in Bankruptcy of an English bankrupt, upon application to the Royal Court for the right to examine any person connected to or involved in the conduct of the affairs of the Bankrupt, including any person connected to or involved in the management or control of two Guernsey registered companies.

Approved Text
04.08.2015

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

IN THE MATTER OF X (A BANKRUPT)

BETWEEN:

LOUISE MARY BRITTAIN
(In her capacity as Trustee in the Bankruptcy of X)
Applicant

-v-

JTC (GUERNSEY) LIMITED
Respondent

Hearing dates: 4th, 22nd, 29th June and 6th July 2015

Judgment handed down: 6th July, 2015
Approved text: 4th August, 2015

Before: Her Hon Hazel Marshall QC, Lieutenant Bailiff

Present: **Advocate M. C. Newman for the Applicant**
Advocate R. Gist as amicus curiae
The Respondent was not represented

Cases, texts and legislation referred to:

(a) Legislation:

Guernsey

Loi ayant rapport aux Débiteurs et a la Rénonciation 1929
Ordonnance rélative à la Rénonciation 1929

The Preferred Debts (Guernsey) Law 1983
The Companies (Guernsey) Law 1994 s 110
The Preferred Debts, Désastre Proceedings and Miscellaneous Provisions (Guernsey and Alderney) Law 2006
The Companies (Guernsey) Law 2008 s 426

England and Wales

Merchant Shipping Act 1854
Copyright Act 1911
Bankruptcy Act 1914, ss 25 122
Insolvency Act 1986, ss 366, 426
Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989 No. 2409)

(b) Cases:

Guernsey

Chambers v. Her Majesty's Sheriff: Royal Court, 9 and 22 December 1977
Bird v. Meader (Re Tucker (a Bankrupt): Court of Appeal No. 23 of 1989,
Slinn v. The Official Receiver and Liquidator of Seagull Manufacturing Co. (Unreported) 5th August 1991
Re Med Vineyards Limited (Unreported) Royal Court 25th July 1995
In re Montenegro Investments (2013) 14 GLR 345

England and Wales

Re Impex Services Worldwide Ltd [2004] BPIR 564
Al-Sabah and Another v. Grupo Torras [2005] 2 AC 333,
Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508
Rubin v. Eurofinance SA [2013] 1 AC 236
Singularis Holdings Limited v. PriceWaterhouseCoopers [2015] 2 WLR 971.

(c) Textbooks

Dawes: *The Laws of Guernsey,* Chapter 11
Halsbury's Laws 5th Ed Vol 13, p 791,

JUDGMENT (approved)

Background:

1. This judgment has been anonymised at the request of the applicant, initial hearings in this matter having been the subject of confidentiality orders so as to support the potential efficacy of the relief being sought.

2. On 27th November 2014 X was adjudicated bankrupt in England and Wales by an order of the Bolton County Court. X had resisted bankruptcy at an early stage and took procedural steps to appeal, which were withdrawn at the eleventh hour on 1st February 2015. The Applicant, Louise Mary Brittain, was then appointed as Trustee in Bankruptcy with effect from 18th February of this year.

3. English law is to be proved as a matter of fact in Guernsey, but it is well-known (and I am satisfied) that the effect of the bankruptcy order in English Law is that all the property of X became vested in the Trustee. Her function and duty is to gather in all such property and realise

it for the benefit of X's creditors according to the rules for distribution in bankruptcy in England. She has various powers conferred by English Law to enable her to do so. She has been notified of creditors of X claiming debts from him of about £1,000,000 in total. He apparently has no creditors in Guernsey.

4. According to information supplied to Miss Brittain, X was the sole shareholder in an English company, which I will call "M Co.", until his wife acquired 50% of the shares from him, apparently rather recently in about 2013. X was and remains the sole director of M Co.

5. M Co. owns a Guernsey registered company, which I will call "MG Co.", which in turn owns 33.88% of a second Guernsey registered company which I will call "MGL Co." These two companies are administered in Guernsey by the Respondent to this application ("JTC"). The remainder of MGL Co. is apparently owned by companies which are business vehicles for an associate of X and that associate's family.

6. MGL Co. in turn owns two Swiss subsidiary companies which between them own valuable interests in a renowned golf course complex in Spain. The Trustee has ascertained that MGL Co. has agreed to sell those interests (by selling the Swiss companies) for a substantial sum which I understand is €50M and the sale is due to complete in about a month's time, at the end of July. The proceeds will be paid to MGL Co. and then be distributed in accordance with shareholder's rights, from that company up the company structure to MG Co. and then to M Co. and thus finally potentially come into the hands of X at this point.

7. The Trustee says she is concerned, from X's conduct in relation to the bankruptcy and also from the fact that she says he has displayed *"non-cooperation generally"* (presumably with regard to the bankruptcy process) *"including in respect of transfer of shares in M Co. to her"* that he may well be seeking to put funds out of the reach of the Trustee and his creditors. She is not, however, any more specific about matters of non-cooperation than as stated. I do note that there does, though, appear to have been a long statement by X of his assets and his position which was drafted with the help of responsible English solicitors who, I understand, were DLA.

8. In these circumstances, the Trustee applied to the Royal Court for substantive orders, (1) recognising her appointment as X's Trustee in Bankruptcy, and (2) recognising her rights, as such, to collect funds and assets of his in Guernsey. Such orders, which are not controversial, were granted by me on 4th June 2015.

9. However, she has made a further application for (3) an order that she be recognised as having the right, upon application to the Royal Court, -

> *"To examine any person(s) connected to and/or involved in the conduct of the affairs of the Bankrupt, including an examination of any person(s) connected to and/or involved in the management or control of [MG Co]. and [MGL Co]."*

The "including" does somewhat beg the question as to whether those persons are involved in the conduct of the affairs of the Bankrupt as opposed to those particular companies at least two stages removed from him, but that is not a matter that I have been concerned with.

10. This third application is more controversial. The English Court undoubtedly has statutory powers under English insolvency legislation to make such an order (see Section 366 of the Insolvency Act 1986). However, those are English powers and the question is how far and in what circumstances this Court has jurisdiction to exercise similar powers. As will be explained below, it is undoubtedly possible for the Royal Court to exercise powers equivalent to those of the English Court if it is requested to do so by the formality of a Letter of Request from the English Court to act in aid of English personal insolvency proceedings. This arises from Section 426 of the 1986 Insolvency Act and also by direct application of the Insolvency Act 1986 (Guernsey) Order 1989 (English SI 1989 No. 2409). For various reasons – which I understood to be principally the cumbersome nature of the process, requiring the English bankruptcy to be transferred to the High Court in the first instance, and the consequent delay,

which would increase the risk of the application coming to X's notice and enabling him to take evasive measures if he was so inclined – the Trustee does not wish to take that formal route. The Trustee, through Advocate Newman, urges that it is not necessary for her to do so, as the Royal Court has jurisdiction to grant her such relief directly and without any such request.

11. It is apparent therefore that any such power must be found in some aspect of jurisdiction with which the Royal Court is seised directly. As I indicated to the advocates at the adjourned hearing, it appeared to me that there were broadly three such possibilities, although they subdivide into five. The first would be from Guernsey's own legislation, either expressly if there were a provision directly authorising the court to make such an order, or by necessary implication, if it could be seen that such a power was necessary or desirable in order to give efficacy to some other express provision of Guernsey legislation. The second possible source would be United Kingdom legislation, again either expressly or possibly as a matter of implication, if the United Kingdom had exercised its power to legislate in relation to Guernsey. This would be unusual, and is something which, certainly by convention, the UK does not do in relation to the domestic legislation of this island, at any rate without consultation, but it is a power which the UK has preserved and therefore it is a possible source of jurisdiction for this Court. Lastly, the third source of any power for this court to grant the relief sought by the Trustee would be, and would have to be, the inherent jurisdiction of this Court. So that is the ultimately distilled framework of the basis on which it might be possible for the Applicant to obtain the order which she seeks, and these have been investigated in the course of the several hearings of the Trustee's application.

12. At the first hearing, I was concerned about the court's jurisdiction, and I therefore directed that the Trustee have leave to make an application to the Royal Court for this relief, and to serve it in particular on JTC. I did so in terms which were intended to, and I trust did, make clear that the granting of leave to make the application was not to be taken to imply that the Court considered that it necessarily had jurisdiction to grant the order sought.

13. The application was duly made and served on JTC. Through their advocates they indicated that they took issue with the generality and breadth of the order being sought but, subject to that being narrowed to their satisfaction, they were entirely neutral about whether an order could be made; they would comply with any court order which was made but because of confidentially considerations they would only act under an order of the court. They also indicated that in the interests of saving expense they did not propose to be represented at the ensuing hearing. In the meantime, they accepted to keep confidential the fact of the application being made.

14. Advocate Newman therefore appeared before me unopposed on the return date for the Trustee's application. He submitted that, having recognised Miss Brittain's status and concomitant rights as X's Trustee in Bankruptcy, the Guernsey Court did have jurisdiction to order a third party (namely, JTC) to provide copies of various documents and information which were reasonably available to it within its records, regarding the affairs of MG Co and MGL Co (whom it administered) and the assets and interests of X. In particular, it could grant sight of documents and information regarding the pending sale of MGL Co's interests in the Swiss companies owning the Spanish golf complex. Following his firm's discussions with JTC's advocates, Advocate Newman sought permission to vary the terms of the order originally sought into somewhat narrower and more precise terms that were acceptable in principle to JTC and which had been agreed, and to which he now added provision for the payment of JTC's reasonable costs of complying with the order.

15. Thus, the matter came before me, in effect, unopposed. Advocate Newman was therefore under a duty to the court, which he very properly discharged, to draw all relevant material, as he saw it, to my attention. It was inevitable, however, that his stance on the jurisdiction issue was very much supportive of its existence, and in view of my reservations on that point, and its general importance, I took the step of requesting the assistance of an *amicus curiae* to appear on a further adjourned hearing of the matter. I record at this point I am extremely grateful to Advocate Robin Gist for fulfilling that role at short notice, and that I am grateful to both advocates for what has obviously been a great deal of research and helpful submissions, both

before the resumed hearing on 29th June 2015, and subsequently in writing before this judgment was given, as mentioned below.

The Issue

16. The issue on this application, as it is now to be decided, is therefore whether the Royal Court has jurisdiction exercisable in favour of a Trustee in Bankruptcy of an English bankrupt appointed by order of the English Court and whose position as such is recognised, to order a third party resident within the jurisdiction of the Royal Court to provide documents and/or information to the Trustee to enable or assist the Trustee to perform his or her functions by (possibly) tracing assets of the bankrupt or at least enabling the Trustee better to understand the affairs of the bankrupt.

17. As I have already mentioned, such an order could be made by the English Court subject only to any limits imposed by the possibility of service of process out of that jurisdiction. In substance such an order is available through the mechanism of s. 426 of the 1986 Act, or possibly (as will appear) even Section 122 of the Bankruptcy Act 1914, i.e. through the Letter of Request procedures there laid down. That would enable the Court to exercise the powers available in such circumstances either to itself or to the English Court: see *Slinn v. The Official Receiver and Liquidator of Seagull Manufacturing Co* (Unreported) 5th August 1991. I have already indicated that the Trustee has reasons for not wishing to pursue this route.

18. Consideration of the various authorities, mainly English, which have been cited to me in support of there being a different route available to the Trustee to obtain the relief sought shows that this is an extremely difficult point. My ultimate conclusion is that I will not be granting the Trustee the order sought for reasons which I will give, but my view has vacillated over the course of the three hearings which have taken place, and I therefore think it convenient to explain my decision by reference to the course which the argument took through these stages of the hearing.

19. Advocate Newman's initial argument was founded firmly on his submission on the effects of the recent Privy Council decision of *Singularis Holdings Limited v. PriceWaterhouseCoopers* [2015] 2 WLR 971. This case concerned the jurisdiction of the court of Bermuda to grant orders to liquidators of a company being wound up in the Cayman Islands for production of information from third parties (namely, the company's auditors) based in Bermuda. The court of Bermuda had statutory power to make such an order in the case of a company being wound up in Bermuda. The court of the Cayman had no power to make an order against a third party in a Cayman winding up, its jurisdiction being statutorily confined to documents which were the property of the company being wound up. At first instance the Chief Justice of Bermuda purported to exercise a "common law power" (i.e. an inherent jurisdiction) to make the order by analogy with the Bermudian statutory power "as if" the liquidation was taking place in Bermuda. The Court of Appeal doubted the existence of such a power but held that in any event it was inappropriate to exercise such a power if no such power existed in the courts of the actual insolvency (i.e. Cayman). Their decision was affirmed by the Privy Council in terms which I will have to examine more closely later.

20. Advocate Newman pointed out that the position was not parallel here, as the power which the Trustee was requesting the Royal Court to exercise was a power which was available in the jurisdiction of the insolvency (i.e. England). He submitted that the essential point, in the light of the *Singularis* decision, was simply whether the granting of any such order as was sought by the Applicant (i.e. an order that a third party do provide documents and/or information) would be inconsistent with Guernsey law or public policy. He submitted that it would not be.

21. He relied, as support for this proposition, on analogy with the powers conferred on the court by statute in respect of a corporate insolvency in Guernsey law. At this juncture, he did not rely on any personal insolvency regime in the law of Guernsey, referring only to the procedures of *désastre* and *saisie*, which he accepted were very different from a scheme of bankruptcy. His reliance was on the very wide jurisdiction conferred by s. 426 of *The Companies (Guernsey)*

Law 2008, which (he submitted) would be held to authorise the making of such an order in favour of a liquidator, by analogy with the case of *Re Med Vineyards Limited* (Unreported, Royal Court 25th July 1995) where the court (the then Deputy Bailiff, Sir de Vic Carey) found an inherent jurisdiction to order a former director to give information to the company liquidator, even though that person was not within the terms of the statute, doing so as a matter of necessary implication as part of the broad supervisory power conferred on the court in relation to a liquidation under the predecessor of s. 426 (namely, s. 110 of *the Companies (Guernsey) Law 1994*).

22. Advocate Newman relied on the fact that the court was able to "fill in" (as it was described) the broad framework of statutes by providing ancillary powers in aid as being a general part of Guernsey law. He submitted that this case was a clearly analogous situation, and that the principle of *Re Med Vineyards* showed that invoking such a power was plainly consistent with Guernsey law generally. He submitted further that insofar as earlier cases such as *Bird v. Meader (Re Tucker (a Bankrupt)):* Court of Appeal No. 23 of 1989, or *Slinn v. The Official Receiver and Liquidator of Seagull Manufacturing Co. Limited:* Court of Appeal No. 169 of 1991 (above) appeared to deny that any such inherent jurisdiction or power existed, and to confine the availability of any such relief to the situation where it had been sought under the Letters of Request procedure, this must now be reconsidered in the light of the more modern, pragmatic and flexible approach which (he submitted) was evident from *Singularis*.

23. I did not feel able to accept Advocate Newman's submission that the effect of the *Singularis* case was really as simple and broad as he suggested, despite a natural inclination, particularly coming more from an English background, to feel that the making of such orders was commonplace and therefore sympathy with the Trustee in Bankruptcy's position. It seemed, and seems, to me that the submission made by Advocate Newman is tantamount to arguing that the court can conjure up an inherent jurisdiction based solely on the doctrine of the "modified universalism" of insolvency procedure, as justification for, in effect, operating the powers of the original court (here England) "as if" they were available in the assisting court's jurisdiction, subject only to a general limitation that those powers should not be inconsistent with the law or public policy of the assisting court. In fact, that proposition seems to me to be expressly disavowed in *Singularis*, a long and complex case.

24. Even at the initial hearing, however, and focusing then, as was the course of the argument, on the qualification of consistency, it seemed to me that even under the *Singularis* decision itself, 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. It could not, in my judgment, be elevated to the level of saying that merely because a power was consistent with the jurisdiction of the assisting court, this was sufficient reason for finding that an inherent jurisdiction existed to exercise it. I have become more and more confirmed in that view as I have considered further authorities in the course of the case.

25. One factor of importance in considering the weight of the "not inconsistent" point was that this argument was, in my judgment, hindered by the fact that Guernsey law – as I was informed and as it appeared at this initial stage – did not appear to have any true equivalent of bankruptcy or personal insolvency in English law. It therefore appeared to me that the lack of any such basic regime could render it strongly arguable that it would in fact be *in*consistent with the scope or policy of Guernsey law to find the inherent jurisdiction suggested, as it would involve finding an inherent power to grant an order in aid of a foreign officeholder for whom there was no proper equivalent in Guernsey. For that reason, mere analogy with corporate insolvency, which is a different regime from personal insolvency, was not, in my judgment, very helpful; "consistency" can be considered at various levels, ie the very broad principle, or the particular area of jurisdiction and law with which one is concerned, and a judgment needs to be made as to the appropriate level.

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26. Following my rejection of Advocate Newman's initial general proposition, therefore, the matter was adjourned to a later hearing, because the arguments had drawn the attention of the court to the question whether Advocate Newman's proposition could derive any assistance from a possible application of the English Bankruptcy Act 1914. This was a possibility prompted by dicta in the case of *Bird v. Meader (Re Tucker)* (1989) (above). That case had decided that orders similar to those sought by the Applicant here *could* be granted, drawing attention to the basis of the Letters of Request procedure provided by s. 122 of the 1914 Act, which expressly extended to Guernsey as regards intra-jurisdictional cooperation with the courts of the United Kingdom. It therefore seemed from that that there was a possibility of the English legislation having some operative effect in Guernsey. The application was therefore adjourned to enable this point to be further investigated. It was at this point that, the matter being of some constitutional importance, I requested the assistance of an amicus curiae, which Advocate Gist then provided.

27. At this further hearing, Advocate Newman provided further submissions in relation to the possibility of jurisdiction having been conferred on this court by the operation of the Bankruptcy Act 1914, and he submitted that, at the end of the day, the 1914 Act *did* remain in force in Guernsey, to at least some extent, and to an extent that actually assisted him.

28. The English Bankruptcy Act 1914 contained at ss. 122 and 123, the precursors of the current English legislation. At s. 123 matters of orders and warrants of the court were dealt with. S. 122 is the particularly material section. It says-

> *"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 or be auxiliary to each other in all matters of bankruptcy…."*

It is accepted that the courts of Guernsey would come within the definition of "British court" within that section. The section then continues-

> *"..and an order of the court seeking aid, with the 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."*

That section is the basis of the cases to which I have already referred, namely, *Tucker* and *Seagull*, which operated the second limb of that section as previously mentioned.

29. The Bankruptcy Act 1914 contains a further section which would have been of assistance to Advocate Newman. This is s. 25, which creates powers to grant relief very similar to that being sought by the Trustee, namely the disclosure of documents and information from third parties. S. 25 was the forerunner of s. 366 of the Insolvency Act 1986.

30. Advocate Newman's further researches indicated that the Bankruptcy Act 1914 had been registered in the Guernsey Registry. The argument which he therefore advanced was this. He submitted that the Bankruptcy Act in its entirety was registered in the Island of Guernsey (and transmitted to Sark) and he produced and exhibited a copy of the terms of the registration. This registration was in fact effected pursuant to an Order in Council made in 1961 in relation to the Bankruptcy Act 1914. I do not need to read all the terms of this, but the end of the Order provides:-

> *"It is hereby further ordered that the said Act be registered and published in the Island of Guernsey not as being essential to its operation therein but that Her Majesty's subjects in the Bailiwick may have notice of the said Act having been passed, and that they are bound thereby."*

Based on this, Advocate Newman submitted that by the registration and the Order in Council, the 1914 Act, in its entirety, was registered, and the effect of the registration was therefore to bring that particular legislation into domestic Guernsey law. There has been no repeal or reversal of this and consequently, referring here to reasoning of the Privy Council decision of Al-Sabah and Another v. Grupo Torras [2005] 2 AC 333, when the Bankruptcy Act 1914 was repealed in the United Kingdom by the Insolvency Act 1986, the effect was only to repeal the legislation with regard to the United Kingdom itself, as the repealing legislation did not extend any further than the United Kingdom. Without specific Orders in Council being issued (and there were none) the effect was therefore that the Bankruptcy Act 1914 remained in operation in Guernsey.

31. As I said, Advocate Newman's primary submission was that the entirety of the 1914 Act had actually come into Guernsey law, therefore including s 25, and had never in practice been repealed. His secondary submission was alternatively that at least s.122 had come into Guernsey law and never been repealed, and that the first limb of that section, (which I read above, separately from the second part of the section) was on its own sufficient to imply the necessary jurisdiction. Such a power would be desirable and necessary as ancillary to the substantive stipulation of the section that the Guernsey court should act in aid of and be auxiliary to the courts of England in relation to personal bankruptcy in England.

32. Advocate Gist provided an extremely learned and helpful note on the history and the application of United Kingdom legislation as extended to Guernsey and therefore to the jurisdiction of this court, and provided some examples. He pointed out there are two methods by which a United Kingdom statute has force in Guernsey, namely either by way of direct application or through an extending provision. An Act of the United Kingdom Parliament does not apply automatically to Guernsey but may apply directly if Guernsey is named in it or because it must apply by necessary implication. Usually, though, an Act does not apply directly but contains a provision empowering Her Majesty by Order in Council to extend any of the provisions of the Act specified, subject to adaptation if necessary, to Guernsey, thus affording the Guernsey authorities an opportunity to make representations about the Act, and consultation to take place before it is actually extended.

33. Advocate Gist observed that the Bankruptcy Act 1914 was a rare example of an Act of the United Kingdom Parliament being of direct application to (in this case) the Channel Islands, specifically referring to this by inclusion in ss. 122 and 123. He pointed out that there was a difference of opinion between the United Kingdom and the Channel Islands as to whether it was necessary for the efficacy in local law of provisions of direct application that the particular statute should be registered in the relevant island. It was the view of the United Kingdom, set out in *Halsbury's Laws* 5th Ed Vol 13, at p 791, that registration was desirable but not fatal to its application whereas the Channel Islands' view had generally been to consider that registration was necessary for effective application. Advocate Gist pointed out that this issue had arisen in a case in Jersey in 1960 and he suggested that this might explain the delay between 1914 and the actual registration of the Bankruptcy Act 1914 itself, only in September 1961. Importantly, though, he went on to explain that registration must not be confused with a provision to extend an act to the Bailiwick. It is tolerably clear, he submitted, despite the difference of view about whether the Act required to be registered in order to come into actual force, that registration itself merely brings to a Guernseyman's attention that legislation is in place that affects him; it does not itself operate dispositively to apply the legislation other than in the terms that are actually expressed in the Act itself.

34. Consequently, Advocate Gist's advice was that the registration of the 1914 Act in 1961 would, beyond doubt, have brought to the Guernseyman's attention that ss 122 and 123 had effect in Guernsey, because those were the sections that were stated in it to apply explicitly or implicitly to Guernsey. Beyond that, however, he suggested that it would be unconstitutional, and contrary to the general understanding that existed even in 1914 as regards the extent and process of the United Kingdom's legislating for Guernsey, for the registration to be taken to have had any greater effect. Thus, his submission was that the Act itself showed that only ss

122 and 123 were ever intended to have force in the islands, not the entirety of the Act, and registration merely put this effect beyond doubt.

35. With regard to the fact that the Bankruptcy Act had been repealed, and the effects of this, he submitted that one could derive some assistance from comparable case studies in relation to the Copyright Act 1911 and the Merchant Shipping Act 1854, which were originally applied to the Channel Islands and where there was a difference in the way in which they were later repealed. The question which arose in such cases was whether the replacement in the UK by a further Act operated an implied repeal of the effects of the earlier Act even outside the UK, or whether in fact an express repeal was necessary in this regard.

36. Advocate Gist observed that as far as the question of express or implied extra-territorial repeal arose in this case, the situation with regard to the 1914 Act had been examined, albeit in regard to other British jurisdictions in *Al-Sabah v. Grupo Torras* case (above). From this he concluded that the Bankruptcy Act 1914 was never extended wholesale to Guernsey, but that the mutual assistance sections, ss 122 and 123, were provided between the courts and did come into force, and that on balance (but on balance only) it might be that these sections remained in force. It is of course the case that in any event more elaborate provisions in relation to assistance have been enacted in Section 426 of the Insolvency Act 1986 and that there has been an express extension to Guernsey. Whether this might have effected implied repeal of any concurrent application of Section 122, was not really examined.

37. Against this background I reject Advocate Newman's somewhat ambitious submission that the Bankruptcy Act 1914 had applied wholesale to Guernsey since certainly 1961 and in theory even 1914. This would, of course, mean that Guernsey had all along had a regime of personal bankruptcy law akin to English law available, unbeknownst, as far as one can see, to any practitioner or anybody else, since these dates. That proposition is sufficiently remarkable as to reinforce the unlikelihood of its being correct. I am therefore satisfied that s 25 of the 1914 Act has never applied directly in Guernsey, and can therefore be of no assistance to Advocate Newman in this case.

38. In the light of the advice of Advocate Gist, I would be prepared to recognise the arguability of ss 122 and 123 of the Bankruptcy Act having remained applicable in Guernsey law, and in consequence, I need to consider Advocate Newman's secondary submission. This is that jurisdiction to make the order which he seeks can be found to be conferred by the first limb of s. 122, which can and should be construed independently of the second limb. He submits that the second limb is prefaced only by the conjunction "and", which has the effect merely of addition, and not of qualification. The first limb can therefore be found to have its own, discrete, operation and in order to give full effect to this, the court would be intended to have the powers which he seeks to invoke. Such powers are necessary to enable the court to implement the general provision that it must act in aid of and auxiliary to the English court.

39. Ingenious though this argument is, in my judgment it involves placing too much weight on implication. The section must be read and construed as a whole, and its effect is a matter of impression. It seems to me that the point of s.122 is to stipulate the obligation of mutual assistance which is being laid down by the section as a whole, and I do not find it possible to divorce the first limb of s. 122 from the second limb in the way relied on by Advocate Newman. In my judgment, the first limb lays down the general concept of mutual assistance, and the second limb then goes on to elaborate on how that obligation is to be fulfilled and what powers are intended to be exercised in doing so. In fact, even looking at the first limb of s 122 on its own, I do not think it can carry the weight which Advocate Newman seeks to place upon it, namely that of enabling the court in effect to conjure for itself a jurisdiction to do anything that would be of assistance in progressing a bankruptcy that was taking place in the jurisdiction of another British court. This is simply too broad. I therefore reject this proposition.

40. However, once again, the course of argument on this topic drew attention to another possible avenue for Advocate Newman, namely whether he could derive assistance from the powers

which might attend any office in Guernsey law with functions similar to that of the Trustee in Bankruptcy in England, which would be powers under the Guernsey common law rather than statute, and thus more readily referable to an inherent jurisdiction of the court. This led, therefore, to consideration of the position of the Sheriff in Guernsey, in the context, once again of the procedure under *désastre*. It was suggested that as the powers of the Sheriff would indeed be common law or customary powers, then if the Sheriff were recognised as having powers such as those which the Applicant was wanting to invoke and as to which the court would give him assistance, then this might suggest that the court would have an inherent jurisdiction to extend such a power to assist the Applicant in the present circumstances.

41. This line of argument arose out of a comment in the ***Tucker*** case, where an order in favour of the applicant had been made. At first instance relief had been granted by the Deputy Bailiff, on the basis of analogy with the Sheriff's ability to examine persons laying claim to property of the person declared to be *en désastre* and to require them to attend before him to justify their title. Describing this tenuous comparison as the "bare bones" of an analogous power, the Court of Appeal were sceptical about the argument, but did not need to decide the point because they went on to find that express powers were available under the Letters of Request procedure under statute. This prompted enquiry in the present case as to how the process of *désastre* operated, and what further powers the Sheriff had. From this discussion it is my understanding that the Sheriff is accustomed - and I imagine that by now this is certainly part of customary law - when presented with an order of the court declaring that a party is *en désastre* (being a state of inability to pay one's debts), to make enquiries of third parties such as banks and so forth as to the existence of assets of that party, and that those third parties habitually co-operate. This is on the basis, one would assume, that they regard themselves as obligated by common law to provide that information.

42. There does not appear to have been any instance that either Advocate Newman or Advocate Gist could uncover of a court order having been obtained for the production of such information. It might well be thought that, on the basis of practice, it would be open to the Sheriff, if he met with lack of cooperation, to seek and obtain an order in a suitable case, but until that is tested, this would only be conjecture.

43. Of course, this is all in the context of *désastre,* which is a somewhat different process. *Désastre* is simply a state of being declared to be unable to pay one's debts. Execution is, as I understand it, made in relation to an individual judgment debt, subject to provisions whereby other creditors may apply to be brought into the process by which assets of the debtor are seized and distributed. This is, however, an on-going process and does not have the effect, as does English personal insolvency, of drawing any line, or, indeed of discharge of the debtor. Therefore the creditors do not have to accept a dividend but can continue receiving distributions until paid off, and the debtor is not under any legal disability with regard to continuing his everyday life while the process of *désastre* is continuing. It may be that these features suit both sides. For the moment, the point is that the question before me was simply whether it could be argued that, by analogy to the position of the Sheriff and the possible power of the court to assist him in carrying out his functions, there could be argued to be an inherent jurisdiction in the court, under customary law, to grant the relief sought by the Applicant in this case.

44. To enable me to consider this possibility, I received a further note from Advocate Gist relating to the investigations that he had made about the position of the Sheriff. He said that he had found very little, only the 1977 case of *Chambers v. Her Majesty's Sheriff* having shed any light on the history and the origin of that office, it being the equivalent to the office of *Sergent de la Paix* in Normandy. He was unable to shed light on the extent of powers of that office; he could only note that there had been an application made in the case of a Mr. Houilbecq to deliver up assets and when he failed to comply, to show why he should not be committed to prison for contempt (which then ensued). Advocate Gist also advised that an *arrêt conservatoire* was in fact not, as he had originally thought it might be, a procedure by which the Sheriff applied to the court to arrest personalty in the hands of a third party in order to preserve it, but that it was in fact the creditor who would make such an application. The

learned *amicus curiae* was thus not able to provide anything further of substance from this source to support the existence of the kind of inherent jurisdiction for which Advocate Newman contends.

45. In fact, I am not satisfied the Sheriff's position, practice or powers are a proper analogy to draw or that they provide sufficient support for this application. *Désastre* is a peculiarly local, Guernsey process. It would be a strong thing to say that because the Sheriff might be able to require the court to assist him in carrying out investigations to assist in that process, that is a safe basis for finding there to be a general common law power to summon third parties and require them to provide information or documents about the financial affairs of others, even if the others are currently under the examination of the court. This is all the more so where one is dealing with a foreign process in a foreign court, rather than a local matter. I therefore reject this as any argument for finding that the court has an inherent jurisdiction to grant an order such as the Applicant seeks, in the circumstances of this case.

46. However, and yet again, research into the position of the Sheriff has led to the consideration of yet another angle. This is the fact that, contrary to the position as it was suggested to me at the start of this application, Guernsey *does* have a law of some similarity to the English law of bankruptcy.

47. This all appears in the admirable treatise of Advocate Gordon Dawes on *The Laws of Guernsey,* albeit now 12 years old, in his section on Guernsey insolvency law. Whilst that law is primarily expounded by Advocate Dawes in the context of *désastre*, he points out that there is legislation on this topic dating from 1929, namely the *Loi ayant rapport aux Débiteurs et à la Rénonciation* and the *Ordonnance rélative a la Rénonciation.* Copies have been provided. For completeness I note that the subsequent *Preferred Debts (Guernsey) Law 1983* and the *Preferred Debts, Desastre Proceedings and Miscellaneous Provisions (Guernsey and Alderney) Law 2006* do not affect the 1929 laws in any way material to this case.

48. Advocate Dawes quotes this legislation as being the next stage in the insolvency process after the more familiar process of *désastre*, and being "the Guernsey equivalent of bankruptcy", but he notes that in more or less living memory, as far as one can detect, there is very little, if any, record of the 1929 Laws actually having been invoked. This is quite remarkable, in view of the fact that they provide a comprehensive and carefully constructed scheme. It is described as being commonly held wisdom that the procedure is expensive and time consuming although Advocate Dawes questions why this should be the case, and suggests that what seems to be under-appreciated is the fact that for the cost of one or possibly two more short court applications there are far reaching and stringent powers available under the 1929 Laws to compel the debtor to co-operate and provide information, and there are powers that are wholly missing from the *désastre* procedure. For example, there are means provided of attacking whatever pension provision the debtor has made as well as his income. In addition, the Law Officers may also be required by the court to intervene in order to investigate a debtor who is suspected of evading his obligations.

49. In short, the 1929 *Loi* and *Ordonnance* provide creditors with all the weapons they require to ensure the maximum possible recovery from a debtor. Obviously the economics will be at the forefront of the creditor's mind but the law has greatest potential in respect of a debtor who, anticipating financial failure, takes dishonest steps to hide what remains of his wealth. Désastre is unlikely to be sufficient in these circumstances, whereas the 1929 *Loi* may succeed.

50. As mentioned, the process of *désastre* appears to have the perceived merit for the creditor of not drawing a line under a mere dividend being paid, and for the debtor of not bringing about impediments to his ability to carry on his daily life, whilst progressing to declarations of insolvency and their consequences under the 1929 Law do engage such limitations. That may be a further reason why the 1929 Law is not frequently invoked in practice, with enforcement of debts being more often pursued via *désastre* and subsequent negotiations and agreements between the parties. However, for present purposes the issue is whether there is anything in

these laws that can assist Advocate Newman to persuade the court that it has jurisdiction to make the orders against third parties which he is seeking.

51. The 1929 *Loi* and *Ordonnance* provide some extensive powers. Advocate Newman refers to and relies principally upon a combination of Articles 3, 17 and 18 of the *Loi.*

52. Part I of the *Loi* deals with imprisonment for debt, limiting this to instances of failure to pay a penalty (other than a contractual one) or certain payments ordered to be made by a court. Article 3 dealt with the court's power to imprison for up to six weeks any person who fails to pay any debt or instalment of which the court has ordered payment, despite having the means to do so, and includes the provision:

> *"Proof of the means of the person making default* [sc in payment] *may be given in such matters, in the manner as the court thinks just, and for the purpose of such proof the court may examine on oath the debtor* ***and any other witnesses****." (emphasis added).*

53. That is very broad and obviously applies to third parties. However, it is in the context of an investigation of the means of a defaulting judgment debtor, which is not the same as that here. The issue for me is not simply whether, in some circumstances, the court has a power which is broad enough to support an order to examine third parties; it is whether the context of any such power is sufficiently close to the present to suggest that it can justifiably be applied in the present case. I do not find Article 3 of any real assistance.

54. The other sections upon which Advocate Newman relies are Articles 17 and 18. These appear in Part IV, which deals with "Procedure in Cases of Fraud" To give some context to this it is necessary to outline the scheme of the *Loi*.

55. Part II although headed "Procedure in cases of Renunciation" in fact deals with the ability of a debtor to apply to the court for a declaration that he is insolvent (Article 6). This initiates a personal insolvency regime under which a Jurat is appointed as a Commissioner, a Committee of Creditors is formed and during a one month period, the debtor's affairs are investigated (Article 7); the court then pronounces upon the debtor's application (Article 11). The debtor is able to apply at any time for renunciation (ie, in effect, discharge) (Article 12), and the court then has wide discretion as to the order it may make, as regards granting or suspending renunciation, or imposing conditions. There is a stipulated presumption against granting renunciation in specified circumstances, examples of which are having failed to keep proper books of account, having assets worth less than 10s in the £ of debts (unless through circumstances outside his control), and having traded whilst insolvent (Article 13). Acts constituting insolvency "misdemeanours" are also provided (Article 15).

56. Part III contains only one Article (Article 16) and provides for any *creditor* of a debtor who is *en désastre* to apply to the court for a declaration of the debtor's insolvency, in which case the procedures of Part II then apply as if this had been the debtor's own application.

57. Articles 17 and 18, on which Advocate Newman relies, are part of Part IV of the *Loi,* relating to cases of fraud. Article 17 empowers the court to enable the Law Officers to investigate and if appropriate to institute proceedings against any debtor against whom acts of fraud are alleged by creditors. Article 18 provides eighteen instances of conduct deemed to be a "fraudulent act" if committed either after, or in some instances before (usually within 6 months before), the declaration of insolvency. These include failing to deliver to the Prévôt all property which the insolvent debtor is required to deliver up, and all books documents and papers in his custody or control relating to his affairs (as well as such matters as concealing, destroying or falsifying records, concealing property, having traded, obtained credit or obtained an agreement from creditors by way of false pretences, etc).

58. The "Prévôt" mentioned in the *Loi* is now the Sheriff. Advocate Newman submits that the debtor who has obtained, or against whom there has been made, a declaration of insolvency is in an analogous position to that of a bankrupt person in the United Kingdom. Article 17 gives

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the Guernsey court a very wide power to make such orders as it thinks reasonable to give an opportunity to the Law Officers to examine possible acts of fraud, and having regard to the various examples of such acts (including non-disclosure and non-cooperation) he submits that the court's jurisdiction is engaged and would be wide enough to confer jurisdiction to make orders similar to those which the English court could make under s. 236 of the Insolvency Act 1986, thus including for the disclosure of information by a third party. The position of the Law Officers carrying out an Article 17 investigation is thus analogous to that of an English Trustee in Bankruptcy, as it is a duty to investigate and bring in the assets of a person declared insolvent in Guernsey. Having regard to all these powers, it is submitted that the Royal Court has a wide power - insofar as not express, certainly implied from context - to examine any witness for the purpose of establishing the means and the assets of a judgment debtor.

59. In summary, what is submitted by Advocate Newman is that Articles 3, 17 and 18, provide enough material to show that where an application is made in a personal insolvency context under Guernsey law, the court can make orders such as those now being sought in aid of appropriate investigations. He invokes the statement of principle made by the Bailiff in the case of *In re Montenegro Investments* *(2013) 14 GLR 345,* as follows:

> *"In my view, the Royal Court, when dealing with insolvency matters, has to be aware that our statutory regime and the regulations thereunder are not as prescriptive as the English legislation. In some instances, the local legislation provides the basic framework and bare bones of an insolvency procedure whilst leaving the Royal Court further scope and flexibility in deciding how to apply its powers in any particular situation. Where it is appropriate to do so, the court may adapt a pragmatic approach to applications and adjust its procedures in order to deal with issues as and when they arise during the course of an insolvency, as long as it is at all times mindful of the powers bestowed on it by the legislature and always acts within the limitations and constraints of the legislation*"

Advocate Newman submits that this approach and the recognised powers of the Court, supports the proposition that the court has, or should find, a jurisdiction to make the orders sought in the present circumstances.

60. This proposition has been advanced very attractively, and I had at one stage been minded to consider that this 1929 legislation and the powers there contained, little used though they were, might well provide Advocate Newman with a sufficient basis to support the grant of the order that he now seeks. However, the more I have read of the authorities, and considered the necessary underlying analysis if he is correct, the more persuaded I have been that that would not be right.

61. The essence of Advocate Newman's proposition, it seems to me, involves that there is a judicial ability to extend a power which it possesses on one context into another sufficiently analogous context, on the justification that this is a legitimate incremental development of the law by judicial interpretation, and that the effecting of such extension(s) is, itself, part of the court's inherent jurisdiction as a court. However, whilst the argument for an inherent jurisdiction of extension is easy to accept in the context of the development by extension of common or customary law principles, that is not this case. Advocate Newman is arguing for an extension of that approach to enable powers conferred by legislation in one context, (the insolvency of a Guernsey debtor) to be extended to a different, albeit analogous context, namely the insolvency of a non-Guernsey debtor under other legislation. The question is, does the Royal Court have an inherent jurisdiction to make such an extension? I do not think that it does.

62. The first reason is that it seems to me that the submissions that are made, admirable and ingenious though they are, seek to apply the power of the 1929 *Loi* in a context which is not really sufficiently analogous, in any event, on examination. The wide powers of Article 3 are conferred for the purpose of examining a contumelious debtor as to his means in order to enforce a judgment debt. The powers of Articles 17 and 18 are conferred in order to

investigate fraudulent acts committed in the course of a bankruptcy, but arise only because there is reason to believe that the debtor has failed to meet his "insolvency obligations" under Guernsey law to disclose all his assets and to cooperate. Thus they arise only after there has been, in effect, an opportunity for the debtor to be heard on this point, and in the context of enforcing the criminal aspects of the 1929 *Loi*, and are not powers granted for the purpose merely of the initial stage of discovering more information about the debtor's affairs and administering the insolvency regime in the first place. I am therefore not satisfied that the analogy between the situations postulated in the 1929 *Loi* and the situation in this case is sufficiently close as to justify finding that it would be only a modest incremental development to hold that those powers could be exercisable in the present case.

63. However, there is a far more fundamental analytical problem, in my judgment, and it unfortunately brings me right back to the point which I initially considered, at a broader level. I noted at the outset that the *Singularis* case seemed to lay down a basic proposition that an "assisting" court could not just apply the law of the assisting jurisdiction, supposedly by analogy, as if the index proceedings were seated in the assisting court's jurisdiction rather than another jurisdiction. Just as the Guernsey Court cannot apply English personal insolvency law as if it had the powers of the English Court when, by definition, it is a Guernsey Court and does not, it cannot apply Guernsey law as if the case before it were proceedings upon a Guernsey declaration of insolvency, when they are not. (Indeed, if one attempted to do so one would probably find that one could not, at this juncture make the particular orders which Advocate Newman seeks, for the reasons mentioned on the previous paragraph).

64. Examining either of these proposed approaches shows, however, that what is being suggested is that the court has an *inherent* jurisdiction to apply *statutory* powers to a situation to which they do not literally apply, on the grounds simply that the court judges the situation to be sufficiently analogous to that in which the statutory powers are available. This leads back, therefore, to considering the *Singularis* case more closely, as this was the proposition which was examined in that case.

65. In *Singularis* the basic proposition was that the courts of Bermuda could exercise, in aid of the courts of Cayman, a power to order Bermuda-based auditors to provide information which, it was conceded, was not information belonging to the company which was being wound up in Cayman. In exercising its own insolvency jurisdiction, the Cayman court could only require production of documents or information belonging to the company. The Bermudian court had no jurisdiction over the parties unless it was winding up a company in Bermuda (which it was not). The Bermudian court at first instance, (no doubt motivated by what, as I said, was my own initial intuitive response to try to be helpful) adopted the approach that the powers contended for by the applicant were salutary and really ought to be available as a matter of assistance. It therefore held that it could apply the powers of the Bermudian court *as if* the liquidation were taking place in Bermuda. That approach was very firmly rejected both by the Court of Appeal and in particular by the Privy Council.

66. In the Privy Council, all five judges decided, that one decisive reason for reversing the Bermudian court of first instance and refusing relief was that in practice the Bermudian court would be granting relief to the 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.* Where the court divided was upon whether there in fact was any such power, ie an *inherent* jurisdiction to apply a statutory power to a different, albeit analogous, situation. Three judges held that there was and two that there was not, but because all judges concluded that it would be inappropriate, in the circumstances, to exercise the power if it did exists, this was not a point which it was necessary to determine in order to reach the actual result in the case, itself. It 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.

67. The division as regards the existence of any inherent jurisdiction to make any such order was that Lords Sumption, Collins – obviously a great authority on conflict of laws – and Clark held

that there was (but that it should not be exercised), but with a very strong dissent from the two other judges, Lord Neuberger and Lord Mance, who were of the view that no such jurisdiction existed (but that it should in any event not be exercised if it did).

68. The decision in *Singularis* repays reading, because one finds, permeating it, the general insistence that a court cannot just conjure for itself an inherent jurisdiction because it would be a "good idea" to have it and that therefore, so long it can point to some reasonable analogy, it is justified in finding, also, the jurisdiction to act. On the contrary, the Privy Council recognised that there has to be a sound separate basis for concluding that such an inherent jurisdiction does exist, independently of its merely being a power exercisable in another context which it would be useful to have in this one. That starting point is to be found even in the judgments of the majority.

69. The main judgment in favour of the existence of such a power or inherent jurisdiction is that of Lord Sumption, and is to be found in the section beginning at [9] "A Common Law Power". This examines the background of the case (it was, of course, a case in which what was being sought was information for the purpose of a liquidation) but it deals also, with the implications of the case of *Cambridge Gas Transportation Corporation vs Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, which set out the doctrine of "modified universalism" with regard to insolvency procedures, as exemplified in three propositions (see the end of the very long [15]). At [18] Lord Sumption then said

> *" Cambridge Gas ... marks the furthest that the common law courts have gone in developing the common law powers of the court to assist a foreign liquidation and it has proved to be a controversial decision. So far as it held that the domestic court has jurisdiction over the parties simply by virtue of its power to assist, it was subject to fierce academic criticism and held by a majority of the Supreme Court to be wrong in Rubin v. Eurofinance SA* [2013] 1 AC 236*. So far as it held that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, its authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in Al-Sabah v. Grupo Torras* [2005] 2 A C, 333..... *. Lord Walker giving the advice of the Board in Al-Sabah had expressed the view that there was no inherent power to set aside Cayman trusts at the request of a foreign court of insolvency in circumstances where a corresponding statutory power existed under the Cayman Bankruptcy Law but did not apply in the circumstances. The Board considers it clear that although statute law may influence the policy of the common law, it cannot be assumed simply because there would be a statutory power to make a particular order in the case of domestic insolvency that a similar power must exist at common law.... ."*

Once again, therefore, one finds warnings against conjuring up an *inherent* power because it would be a "good idea" and can be said to be analogous with a power conferred by statute.

> *"....So far as Cambridge Gas suggests otherwise, the Board is satisfied that it is wrong for reasons more fully explained in the advice proposed by Lord Collins of Mapesbury. If there is a corresponding statutory power for domestic insolvencies there would usually be no objection on public policy grounds for the recognition of a similar common law power but it cannot follow without more that there is such a power. It follows that the second and third propositions for which Cambridge Gas is authority cannot be supported."*

70. He then goes on at [19] as follows:-

> *"However, the first proposition, the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by [Lords Phillips, Hoffmann and Walker] in HIH* [2008] 1 WLR 852 and *by Lord Collins...(with whom*

> *Lords Walker and Sumption JJSC) agreed in [Rubin]. Nothing in the concurring judgment of Lord Mance JSC in that case cast doubt on it."*

He then sets out passages from the judgment of Lord Collins and goes on page 985(b)-

> *"In the Board's opinion the principle of modified universalism is part of the common law but it is necessary to bear in mind first, that it is subject to local law and local public policy and secondly, that the court can only ever act within the limits of its own statutory and common law powers…"*

I observe that the implementation of this may cause practical difficulties of application because if one is looking at statutory powers and their literal application they will tend to apply literally to the locality, giving rise to uncertainty when one is contemplating their proper scope in relation to something that has non-local connections.

71. Lord Sumption thus goes on to consider the limits in the following terms:-

> *"…What are those limits? In the absence of a relevant statutory power they must depend on the common law including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely, an order for the production of information by an entity within the personal jurisdiction of the Bermuda [i.e. the assisting] court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law to do so.*
>
> *[20] The fundamental question is whether a power of compulsion of this kind requires a statutory basis……"*

72. He then goes on to draw distinctions between evidence and information (distinctions which found no favour at all with the strong dissenting judgment) and supports the view that there is a possibility that the law can develop through finding an inherent power by citing the *Norwich Pharmacal* case principles as an example. He refers to other situations in which this has happened, although in somewhat enigmatic terms, at [24]. One was *Re Impex Services Worldwide Ltd* [2004] BPIR 564, a decision of the High Court of the Isle of Man, in which a power to order examination only in relation to a Manx company was conferred by statute, but the Deemster gave effect to such a power by way of common law judicial assistance to a Letter of Request of the High Court in England seeking the examination of persons in the Isle of Man on behalf of the liquidator of an English company, whilst commenting that

> *"The Board would not wish to endorse all of the reasoning given in these judgments, in particular those parts which appear to support the concept of applying statutory powers by mere analogy in cases outside their scope, but the Board considers that the decisions themselves were correct in principle."*

It might appear that this Manx decision his similarities with what I am being asked to do here, which is why I have referred specifically to it, but I am puzzled by the fact that it is described as being "common law" assistance to a Letter of Request, in view of the sections of the relevant statutes which legislate expressly the scope of such assistance between "relevant courts". I also note that the concept of just applying local statutes by analogy is not seen as permissible and equally that the concept of applying the original jurisdiction law as if it applied in the assisting jurisdiction is not permissible.

73. At [25] the majority ratio on this point emerges: -

> *"In the Board's opinion there is power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of foreign winding-up. In recognising the existence of a power the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence…."*

and there are then five limitations-

> *"….. In the first place it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding-up which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, It is a power of assistance; it exists for the purpose of enabling those courts to surmount the problems posed for a worldwide winding-up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed…"*

That, of course, was directly a point in the *Singularis* case itself.

> *"Third, it is available only where it is necessary for the performance of the office holder's functions…."*

That, no doubt, is a matter of fact which requires to be gone into; what the strength of the "necessity" is might be a matter for argument.

> *"Fourth, the power is subject to the limitations of in Re African Farms* [1906] TS 373 *and HIH* [2008] 1WLR 852 *and Rubin* [2013] 1 AC 236*, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case Bermuda…"*

Once again, consistency may be measured in different ways and this may itself create problems although the idea behind that limitation is obviously clear.

> *"It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in [Norwich Pharmacal]* and *Omar v. Secretary of States for Foreign and Commonwealth Affairs* [2013] 1 All ER 161 *at both levels shows that common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered, it is said, by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators like other litigants or potential litigants must accept with all their limitations. Moreover in some jurisdictions it may be held contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency."*

That is a common thread that has run through English authority in relation to the proper use of the compulsory powers in insolvency, although it is not something that had been closely examined in this case.

> *"Finally, as with other powers of compulsion exercisable against an innocent third party, exercising them is conditional on the applicant being prepared to pay the third party's reasonably costs of compliance."*

That final fifth limitation has been dealt with in his case by the amendment of the order that Advocate Newman is now seeking on behalf of his client against JTC.

74. Having thus found the availability of an inherent jurisdiction, Lord Sumption then goes on to apply the principles which he has distilled, but to conclude that for reasons of their not being met, in particular in relation to the availability of the relief requested in the original court itself, it would not be a proper exercise of the inherent power for the order requested to be granted.

75. The dissenting judgments can really be stated very shortly. I observe first, however, that one can sense a degree of intellectual combativeness between the assertions of Lord Sumption ,and those of Lord Mance in particular, with whom Lord Neuberger agreed. To my mind this is a notably strong dissent. It can be encapsulated in the proposition that there is simply no room for any such implied power as a matter of inherent jurisdiction, because in the case of statutory powers their extension is a matter that ought to be the subject of legislation and be the province of the legislature, rather than being something that can properly be developed by judge-made law. In particular, as I see it, Lord Mance convincingly notes the difficulties of actually defining, clearly, the extent of any such jurisdiction or power, and it is to be noted that although this power is said by the majority to exist it is subject to a lot of limitations as mentioned above, and that those limitations are refined and not exactly clear in their extent. This makes it a somewhat unclear power if it does exist and one that is difficult to find and employ as a matter of consistency. Lord Mance comments in particular at [131]:-

> *"Lord Sumption JSC, now suggests that the principle should be further limited to any court ordered liquidation, (though that in turn leaves uncertain status of any winding-up under supervision in any jurisdiction where that possibility, which existed formerly under Section 311(1) of the English Companies Act 1948, still exists)."*

He also points out the difficulties of distinctions such as establishing whether powers are being used for the purpose of identifying/locating assets as contrasted merely seeking information for the assistance of the officeholder in understanding the affairs of the bankrupt or the company. At [135] he says-

> *"Where I part company with Lord Sumption JSC, is in his assertion that the hitherto limited principle of modified universalism which I have just described extends to or justifies (or would be an empty formula without) the assumption or exercise of a common law power to haul anyone before the court (to use Dillon LJ's words in* Ex p. Tucker *[1990] Ch. 148) to be interrogated and to produce documentation on pain of being in contempt, simply because it would be useful for the foreign liquidator to be able to do so and might enable him to locate some assets (or better understand the company's affairs). There is a step leap between enforcing rights to identifiable assets and obliging third parties to assist with documentation and information in order to discover a company's assets (or, still more widely, in order to enable insolvency practitioners to understand the company's affairs)."*

and he then goes on to indicate that merely referring to it [sc the principle of modified universalism] as a "recognised legal principle"

> *"begs the question whether the principle of modified universalism extends beyond the protection of identifiable assets within the jurisdiction to enable orders to be made compelling third parties to assist with the provision of information and documentation which may assist in tracing such assets (or otherwise assist the insolvency practitioners in their understanding of the company's affairs)."*

76. So without the need, I think, to look any further at the misgivings expressed trenchantly by Lord Mance in objection to the propositions put forward by Lord Sumption on behalf of the majority, one finds in this case a judicial division on the very point that I ultimately have to decide in the first place, namely whether or not there exists any common law power, or inherent jurisdiction (effectively the same thing) to make the order that the Applicant seeks.

77. In my judgment, and even in the light of the division in *Singularis,* the existence of such a power cannot depend simply on the existence of such powers, or similar powers, in Guernsey statues because the Privy Council was universal in laying down that it is insufficient justification for extending any statutory power that may exist in Guernsey, to say it should be so extended "because you could make such an order in some circumstances here, and you could make such an order in England, and therefore the court is justified in finding a jurisdiction to apply its similar powers by analogy in this case". There has to be a principled basis for finding that there really is such an implied common law power as that contended for - but even then in Lord Sumption's formulation it was noted that the existence of the power must give way to any local considerations.

78. The common law as it is applied in Guernsey is not necessarily, it seems to me, of the same flavour as was the common law being decided upon in relation to the *Singularis* case because of course the common law of Guernsey - its customary law - has a lot of very different origins from the English common law, as exported to its dependencies such as Bermuda and Cayman. One is reminded of this by the terms of the 1929 *Loi* and *Ordonnance,* the former written authoritatively in French and both including references to the Prévôt, and to Jurats, and Commissioners; but even leaving that on one side, 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.

79. I note in any event, though, that the absence of any such jurisdiction was actually expressed in the earlier Guernsey cases of *Tucker* and *Seagull* which Advocate Newman is therefore constrained to say should be reviewed and regarded as modified, or as overruled, or breathed on as a result of the *Singularis* decision. Obviously this previous law was only impliedly breathed on by three out of five members of the court, but it seems to me that even their approach has regard to the possibility of there being law on this subject established in a local context previously. I do not read *Singularis,* even in the majority judgment, as suggesting any intention to overrule local law previously established.

80. There is another consideration which I am troubled on, and which also inclines me to hold that no such power exists. This is that a power to take the step of requiring third parties, possibly under a threat of sanctions in relation to contempt of court, to provide information to an officeholder in relation to the affairs of another person, is a pretty draconian power and so far as I can see it can be found to exist generally only in the context of statutory powers, whether they are express statutory powers as in the English Companies/Insolvency Acts, or by strong necessary implication, as ancillary to otherwise existing statutory powers. It therefore seems to me that to find some kind of hidden general common law/customary law type power in this area is taking the kind of "step leap" that Lord Mance said should not be taken, and is one that is rather contra-indicated by the history of Guernsey Law.

81. A further factor which very strongly influences me against the finding of any such inherent jurisdiction or power is the availability of Letters of Request procedures which would in fact enable the Applicant to obtain exactly the relief (subject to any questions of the proper breadth of this) that she is seeking in the Guernsey court. These processes can be invoked either, possibly, under the residual effect of Section 122 of the Bankruptcy Act or, and more certainly under Section 426 of the English Insolvency Act 1986 and the Insolvency Act 1986 (Guernsey) Order 1989. These would enable the Guernsey court to invoke either the scope of its own statutory jurisdictions, or the scope of the English court's jurisdiction. I can see nothing that suggests that that course is not available. There are instances where the assisting court can, under this process, make orders that the requesting court could not make where, for example, the availability of such relief depends on the presence in the assisting court's jurisdiction of the party against whom the relief is sought, which seems to me to be exactly the case here. The parties against whom this information is sought are here in Guernsey and have to be pursued

here in Guernsey; the English court may not be able to achieve that but it can request the Guernsey court to exercise its powers, and in that case there is no question of there being any other route by which the Applicant could obtain this relief. However, the mere fact that she finds it inconvenient or has concerns about publicity which have caused her not to take that route seem to me to be a matter that should be dealt with by English procedure and by taking appropriate steps there rather than seeking to circumvent the procedure which is provided. I am reminded, here, of the limits on even the majority's judgment in *Singularis* where it is said that the claimed inherent jurisdiction is not available where there are other methods provided for obtaining the information sought. Indeed, if Advocate Newman's argument on this application is correct, it bypasses the Letters of Request procedure and seems to me to render it pretty well devoid of any useful effect. One would simply apply straight to the court from which one was seeking assistance.

82. My conclusion is therefore that even if there were a power in the court, ie an inherent jurisdiction, and if I were constrained to follow the majority approach in *Singularis*, (and I am not satisfied that I am so constrained, bearing in mind that it was not a necessary part of the actual *ratio* of the case, and that the relief sought by the case was not, in any event, an appeal from Guernsey) I would refuse to grant the relief sought, on the grounds, first, that the absence of such an inherent jurisdiction has already been established in local law, and that no such inherent jurisdiction in support of the "modified universalism" of bankruptcy procedures applies, but also that any such inherent jurisdiction would be available only when it was "necessary" for the performance of the officeholders' functions, and it is not; powers to obtain the compulsory provision of information are available under the Letters of Request procedure.

83. So for those reasons, which I am afraid I have indicated at rather greater length than I might have wished, I am refusing this application.

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