GHOST IN THE MACHINE:[1]

Survival of the Bankruptcy Cooperation Statute

Paul J. Omar

Introduction

1 From the late 18th century onwards, the development of the doctrine of comity by the courts in England stimulated progress towards cooperation by inviting courts to make contact with each other and to develop working relationships involving cases they had in common with other jurisdictions.[2] Over the years, various cases have added to those first steps in cooperation through the recognition of overseas proceedings and the appointment of office-holders. Their subject matter has included orders granting title to office-holders over property, giving them powers to act within the jurisdiction, ordering examinations and the production of documents to aid discovery, issuing injunctions and stays to prevent piecemeal dismemberment of the debtor's estate, opening ancillary proceedings in aid of main procedures elsewhere, as well as the approval of reconstructions and creditors' schemes.[3]

2 In the context of the bankruptcy of individuals, judicial ingenuity came to be supplemented, at an early stage, by cooperation measures focusing on assistance between courts in the common-law world. This cooperation framework began with 19th-century provisions focusing on enabling judicial notice to be taken of bankruptcy orders and

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[1] In Ancient Greek theatre, at critical moments, an actor dressed as a deity would descend and explain plot developments of which the audience might be neglectful. *Al-Sabah*, the Privy Council case discussed below, appears like a reminder of what might have been forgotten or overlooked.

[2] *Solomons v Ross* (1764) 1 Hy Bl 131n; 126 ER 79; *Sill v Worswick* (1781) 1 H Bl 665.

[3] Authorities include *Re Matheson Brothers Ltd* (1884) 27 Ch D 225; *Re Queensland Mercantile Agency* (1888) 58 LT 878; *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385; *Bergerem v Marsh* (1921) B&CR 195; *Macaulay v Guaranty Trust Co of New York* (1927) 40 TLR 99; *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196; *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112; *Re BCCI (No 10)* [1997] Ch 213; *In re Impex Services Worldwide Ltd* [2004] BPIR 564.

judgments, the mutual enforcement of these orders and various procedural steps that could be taken in support of procedures taking place elsewhere. In the first instance, such procedural cooperation focused on the courts within the different legal jurisdictions of the United Kingdom but subsequently permitted cooperation between the courts of the Empire (later Commonwealth). These were joined by measures mandating assistance between the same courts.[4] Later measures, addressing the specific nature of corporate entities, dealt with the issue of ancillary assistance as a form of cooperation.[5]

3 It is likely that the assistance provisions were first embodied in bankruptcy legislation as a response to the growing numbers of insolvencies of persons and partnerships affecting assets located in a number of Imperial (later Commonwealth) jurisdictions. The assistance provisions would thus help by enabling practical procedural steps to be taken, despite the possible existence of several pools of assets, to effectively administer the estate as a whole. During the period of Imperial expansion, the establishment of colonies and possessions overseas required the establishment of courts to deal with the common law deemed to have been "exported" as part of the settlement of overseas territories.[6] Various Charters of Justice set up institutions local to these colonies and territories and gave them civil and criminal jurisdiction, bankruptcy usually being treated as part of the ordinary civil jurisdiction of the court. However, an early case carefully outlined the principle that the assistance provisions could only function where the courts in question actually had jurisdiction in bankruptcy.[7]

4 Where this was the case, the making of an order seeking the aid of another court would be deemed sufficient authority to enable the other

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[4] Section 220, Bankruptcy Act 1849; ss 73–74, Bankruptcy Act 1869; s 117–118, Bankruptcy Act 1883; s 122, Bankruptcy Act 1914. Note these are all contained in Acts whose substantive law is that of England and Wales, Scotland and Northern Ireland having their own personal bankruptcy regimes. However, the assistance provision is regarded as having effect internally throughout the United Kingdom.

[5] Now ss 221 and 225, Insolvency Act 1986 (UK).

[6] Swinfen, *Imperial Control of Colonial Legislation 1813–1865* (1870, Clarendon, Oxford), at 54–55, citing Clark, *A Summary of Colonial Law* (1834), at 8, who states: "The common law of England is the common law of the plantations . . .".

[7] *Callender Sykes & Co v Colonial Secy of Lagos* [1891] AC 460, holding, however, that the courts of the Gold Coast Colony (now part of Ghana) did not in fact have bankruptcy jurisdiction at the relevant point in time.

court to exercise the jurisdiction it would have if the matter were before it for consideration. Issues arose, of course: the use of the word "British"[8] as part of the definition prompted enquiries in a number of cases as to whether particular courts were included.[9] Furthermore, the remit and purpose of the section were considered in *Re a Debtor*,[10] in which it was held that the definition of "bankruptcy" referred to the judicial process dealing with insolvent persons and was to be construed in a wide sense as the section was designed to produce cooperation between courts acting under different systems of law.

5 Once a court was satisfied that the request for aid fell within the ambit of the provision, there was no general duty to scrutinise anterior proceedings unless it could be shown that they were defective under the proper law of the court or that they offended against public policy, thus setting a favourable trend for cooperation measures. This did not mean, however, that courts would not set conditions on the assistance given, particularly where there were interests within the jurisdiction that could potentially come into conflict.[11] Particular difficulties existed where the foreign bankruptcy contained a sizeable revenue debt,[12] which courts were quite reluctant to enforce.[13]

6 The "export" phase of the common law also involved the extension of statutes that were glosses on the general law.[14] The view was taken that bankruptcy statutes were by the very nature, as "statutes of general

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[8] The exact phrase being "every British Court elsewhere having jurisdiction in bankruptcy or insolvency".

[9] Pro: *Re Nall* (1899) 20 NSWR 25 (New South Wales); *Re Fogarty* (1904) QWN 67 (Queensland); *Re Maundy Gregory* (1934) 103 LJ Ch 267 (Palestine Mandate); *Re Osborne* (1931–32) B&CR 189 (Isle of Man). Contra: *Re Graham* [1928] 4 DLR 375 (Saskatchewan); *Re James* [1977] 1 All ER 364 (post-UDI Rhodesia). See also *Clunies-Ross v Totterdell* (1988) 98 ALR 245, where an Australian court held that the definition applied to the Cocos Keeling Islands for the purpose of assistance to an Australian court.

[10] *Re a Debtor (ex p Viscount of Royal Court of Jersey)* [1981] Ch 384.

[11] *Re Osborne* (1931–32) 15 B & CR 189; *Re Jackson* (1973) NILR 67. See also *Re Gibbons* (1960) Irish Jurist 60, where a discretion was made against granting aid under the equivalent Irish provision: s 71, Bankruptcy (Ireland) Act 1872.

[12] *Government of India v Taylor* [1955] AC 491.

[13] See, however, *Re Bomford* 2002 JLR *N* [34], where the court held it would be unfair to refuse assistance merely because the tax authorities are the most substantial of a number of major creditors.

[14] Clark, above n 4, calls these "statutes in affirmance of the common law".

application", exported as part of that process.[15] Post-settlement, however, the view was that any statutory law could not be regarded as extended to an overseas colony or territory unless that jurisdiction was named in the statute.[16] The Colonial Laws Validity Act 1865 underpinned this by providing that laws of the colonies were effective within the territory, unless repugnant to an Imperial statute, while Imperial statutes would have force across the Empire in any territory specifically mentioned.

7 Thus, although English bankruptcy models were often transplanted into other jurisdictions as local ordinances or laws,[17] they remained subordinated to legislation of the Westminster Parliament. This situation persisted until it became accepted that the nations constituting the Commonwealth were solely responsible for their own legislation, a situation given effective recognition by the Statute of Westminster 1931, the passing of which was prompted by the case of the then Dominions, but whose terms were subsequently applied whenever other territories and colonies became independent.

Survival of the provision

8 Whether enactments occurred in colonies and territories prior to or following independence, many of the countries now in the Commonwealth legislated in bankruptcy and adopted frameworks modelled on the Bankruptcy Acts 1883 and 1914. Some of these also chose to provide for an assistance provision to be included.[18] The argument could be made that, as they did so, not only did the new autochthonous legislation replace the Imperial statute, but these cooperation measures superseded those in the latest version of the Bankruptcy Act (whether 1883 or 1914) that conceivably could have applied in the relevant colony or territory.[19] In rare instances, the

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[15] Roberts-Wray, *Commonwealth and Colonial Law* (1966, Stevens and Sons, London), at 554–555.

[16] The argument is made here that, by referring to "every British Court elsewhere", the necessary inference is that all colonies and territories whose courts regarded themselves as British would be included. Hence the examination referred to in n 6 above.

[17] Markham Lester, *Victorian Insolvency* (1995, Clarendon Press, Oxford), at 295–296.

[18] Examples include s 160, Bankruptcy Act 1880 (Jamaica); s 112, Bankruptcy Act (Cap 48) (formerly Ordinance 22 of 1944) (Fiji); s 29, Bankruptcy Act 1966 (Australia); s 104, Bankruptcy Act 1967 (Act 360) (Malaysia).

[19] The last of these, s 122, Bankruptcy Act 1914 ("s 122"), reads:

application of the assistance provision was continued, as in Australia, by express mention in the local statute[20] until it was ultimately repealed in 1980.[21]

9 The assumption of this automatic supersession, however, turned out to be erroneous. As early as 1962, it was noted in Gibraltar that s 122 extended to the territory, its application to the jurisdiction being confirmed as part of a census of English laws that were deemed to continue to apply to Gibraltar.[22] This might explain the precautionary repeal in the Solomon Islands of the Bankruptcy Act 1914 (and the 1926 amendments to it) that states "in so far as they form part of the law of Solomon Islands [the statutes] are hereby repealed".[23] This "imperial vocation" of the assistance provision, especially of its latest incarnation (s 122), was also confirmed in a limited number of cases, including in New Zealand[24] and, more recently, in Guernsey.[25]

10 The Privy Council also referred to the continued vitality of the section in the case of *Al-Sabah*,[26] which involved a request for assistance from the Bahamian court to the court in Grand Cayman in the bankruptcy. In the case, which also explored the history of the assistance provision, the panel were of the view that the repeal of the Bankruptcy Act 1914, with a view to the consolidation of personal and

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> "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 such Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

[20] Former s 29(2), Bankruptcy Act 1966, preserving the operation of s 122, Bankruptcy Act 1914.

[21] Section 18, Bankruptcy Amendment Act 1980 (No 12 of 1980).

[22] Appendix I, English Law (Application) Act 1962 (Ordinance 17 of 1962).

[23] Section 145, Bankruptcy Act (Cap 3 of the Laws of the Solomon Islands) (1996 edition).

[24] *Re Peebles* (8 May 1973) (unreported judgment), doubted in *Re Beadle* (1 September 1980) (unreported judgment).

[25] *In re X (A Bankrupt), Brittain v JTC (Guernsey) Ltd* (Judgment 36/2015) (6 July 2015) (discussed below).

[26] *Al-Sabah v Grupo Torras* [2005] UKPC 1; [2005] 2 AC 333.

corporate insolvency provisions in the short-lived Insolvency Act 1985 (quickly replaced by the Insolvency Act 1986) and the application of the new assistance provision in s 426 of the latter text, could have no effect outside the United Kingdom. The contention by the respondents that the presumption against extra-territorial application of a statute did not necessarily affect repeals was not considered to have much merit. The result of the case was to leave the assistance provision with a ghostly half-life in any jurisdiction to which it applied that had not expressly repealed it.[27] This would be so, in theory, even where a domestic statutory regime had been put in place, within a bankruptcy law or otherwise, that was being used for the purposes of assistance.

The modern-day fallout in the Channel Islands

11 Part of the assumption for the continued survival of the s 122 provision rests on a reading of its terms which speak of assistance being forthcoming by or to any "British" court. As such, the section could apply to the Channel Islands, whose laws are mixed in origin, but whose denizens have British citizenship. The two Bailiwicks have a very different constitutional status from colonies and territories, however, being regarded as Crown Dependencies, a status they enjoy together with the Isle of Man. Due to their special status as Crown dependencies and historic acknowledgment by the Crown of the special nature of their domestic law, the extension of bankruptcy laws as statutes of general application could not historically occur.

12 As such, the procedure for any extension is that any laws of the Westminster Parliament sought to be applied in Jersey or Guernsey have to be expressly extended by the terms of the statutes or regarded as extended by necessary implication. The usual practice, however, is to provide in the legislation for a power to make an Order extending all or some of the provisions of the statute.[28] In that light, it is arguable whether the simple mention of "British Court[s] elsewhere" would suffice to extend the bankruptcy statute expressly but it has been accepted in both jurisdictions as being applicable.[29] Furthermore, any purported extension would also be subject to the text subsequently being registered by the Royal Courts in each of the Bailiwicks to which it was to be extended.[30]

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[27] *Ibid*, at para 34.
[28] See e.g. s 8(2)(b), Contracts (Applicable Law) Act 1990, authorising the extension by Order of the Rome Convention 1980 to the Channel Islands.
[29] *Re a Debtor* (Jersey) and *Re X* (Guernsey) being the relevant authorities.
[30] *Re X*, at paras 30–33, refers to an Order in Council made in September 1961 extending the Bankruptcy Act 1914 to Guernsey. *The Jersey and Guernsey*

13 Complicating the position, however, is the fact that both jurisdictions have adopted their own provision to further cross-border assistance. In Guernsey, the step taken was to request the extension by the United Kingdom of the relevant provision of the Insolvency Act 1986 (s 426) in reliance on a power contained in s 442 of the same Act authorising the extension of any of the statute's provisions to the Channel Islands. This was duly made by Order with appropriate amendments being made.[31] In Jersey, the passing of the Bankruptcy (Désastre) (Jersey) Law 1990 offered the occasion for the inclusion of an art 48 (now art 49), which used language similar to that in s 426 to craft an autochthonous provision.[32]

14 In this light, the question may be asked as to what of s 122 still survives the creation of these domestic frameworks?

Guernsey

15 Section 122 was canvassed recently in the case of *Re X*, which involved the application by a trustee in bankruptcy in respect of recognition of her appointment in England and Wales, her right to collect assets belonging to the debtor located in Guernsey and to examine persons involved in the administration of companies connected to the debtor.[33] The first two orders were granted without much ado, while the third, the subject of the judgment, was said to be "more controversial".[34] For reasons of speed, the trustee sought to avoid the letter of request route and asked the court to exercise powers to permit the examination.[35] The court was concerned as to the source of these powers, whether the law of Guernsey or indeed of England and Wales, where the order could have been made (but might have been limited by concerns over service out of the jurisdiction), or whether it was necessary to invoke its inherent jurisdiction to grant the request.[36]

Law Review Miscellany in Issue 2 of 2011 on the theme of "Terrorist asset freezing and the evolving constitutional relationship", notes *Ex p Bristow* (1960) 35 PC 115, where the court apparently held that the Act did apply to Jersey even though it had not been registered.

[31] Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989/2409).

[32] See, by this author, "A Jersey Perspective on Cross-Border Insolvency: Article 49 and Receivers" (2013) 17 *Jersey and Guernsey Law Review* 131.

[33] *Re X*, at paras 8–9.

[34] *Ibid*, at para 10.

[35] *Idem*.

[36] *Ibid*, at paras 11–12 and 17.

16 Counsel for the trustee based his initial argument on the effects of *Singularis*,[37] which, given that the facts were dissimilar as to any differences in powers between the courts, supported the contention that the only issue for the Guernsey court to determine was whether it would be contrary to Guernsey public policy to make such an order.[38] The similarity between the two courts and the powers they had available was supported by the way that the Guernsey court had previously authorised the use of its inherent jurisdiction to make an order in similar terms in furtherance of corporate insolvency law, holding that to do so was part of the "broad supervisory power" the court had in relation to the administration of insolvencies.[39] The court was not particularly moved by the analogies to be drawn with corporate insolvency in Guernsey but more the lack of similarity between Guernsey and English bankruptcy law. In the court's view, this prompted greater consideration of the public policy choice involved in recognising a power for which there could be no parallel in Guernsey, given that personal insolvency in Guernsey could be said not to have any equivalent to the regime in England and Wales.[40]

17 Two further arguments made in a similar vein, seeking to persuade the court that statutory frameworks could be extended by analogy, ultimately did not find favour. One of these sought to rely on the fact that the debt-collection mechanism available through the local procedure of *désastre*, in support of which the law contained powers to investigate in cases where doubt existed over the cooperation of the debtor in surrendering property and papers, could authorise the extension of similar powers in the case of a debtor subject to proceedings elsewhere but whose conduct in Guernsey was under scrutiny.[41]

18 The other argument, more relevant to the subject matter of this article, relied on the powers in s 122 extending the orders-in-aid procedure to all British courts overseas, including potentially Guernsey. Counsel's enquiries had elicited the fact that the Bankruptcy Act 1914 had been registered in Guernsey in 1961, ostensibly "so that

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[37] *Singularis Holdings Ltd v PwC* [2014] UKPC 36. See, by this author, "Diffusion of the Principle in *Cambridge Gas*: A Sad and Singular Deflation" (2015) 3 *Nottingham Insolvency and Business Law e-Journal* 31.
[38] *Re X*, at paras 19–20.
[39] *Ibid*, at para 21, citing *Re Med Vineyards Ltd* (unreported, Royal Court, 25 July 1995).
[40] *Ibid*, at para 25.
[41] *Ibid*, at paras 60–62, referring to the *Loi (1929) ayant rapport aux Débiteurs et à la Renonciation*.

Her Majesty's subjects . . . may have notice of the said Act being passed". Curiously, this phrase was preceded by a statement that registration of the Statute was not "essential to its operation" on the Island.[42] This could suggest there was perhaps no fundamental intention to affect the local law on debt collection and bankruptcy but would not impede the application of such provisions as were expressly or impliedly extended, such as s 122, through the qualification of its application to "British" courts.

19 Counsel's argument, however, was that the effect of the registration, the views of the Privy Council in *Al-Sabah* and the absence of any repealing Order, the repeal in the United Kingdom being ineffective overseas, all combined to suggest that the 1914 legislation remained in effect in Guernsey.[43] The court understood the argument as being essentially two-fold, in other words whether the registration effected (i) the transfer of the entirety of the statute, including the useful powers sought to be used in the instant case, or (ii) only s 122 was applicable but by necessary implication of its first limb (the injunction on assistance) read into the assistance provision had to be powers that were necessarily supportive of the application.[44]

20 At this point, the court had recourse to the report of an *amicus curiae*, who had been appointed early in proceedings. The report usefully summarises the process by which legislation of the Westminster Parliament was transmitted into Guernsey law, pointing out that providing authority for and the subsequent making of an extension Order was seen as the desirable procedure to enable representations to be made by the Island authorities as part of the process.[45] The report admitted that there was variance between the English and Guernsey views of the necessity for registration as part of the transposition process but that the normal procedure was to do so. In the case of the Bankruptcy Act 1914, the statute was a rare example of the legislation having direct application, while explanation for the late registration appeared to be connected to the fact of a 1960 case in which the issue had arisen.[46]

21 For the *amicus curiae*, however, the registration process, as the Order itself mentioned, simply had the effect of notice. It served merely to alert local residents of the existence of the legislation but could not "operate dispositively" to apply the legislation other than in

[42] *Ibid*, at para 30.
[43] *Idem*.
[44] *Ibid*, at para 31.
[45] *Ibid*, at para 32.
[46] *Ibid*, at para 33.

terms the statute itself expressed.[47] As a result, the registration had the effect of notifying the extension of s 122, because the provision itself was intended to apply, whether expressly or implicitly, but the registration could not operate to apply the entirety of the statute whose extension wholesale could be regarded as being contrary to the conventions by which the United Kingdom legislated for Guernsey.[48]

22 In that light, all that applied of the statute was the assistance provision, the registration simply confirming this and "putting it beyond doubt",[49] while the repeal in the United Kingdom, together with the views of the Privy Council in *Al-Sabah*, left the provision unaffected in its application to Guernsey.[50] As such, the court could confidently disregard the argument that the registration had recognised the transposition of the entirety of the statute, especially those that allowed for the examination of debtors and connected parties.[51] However, whether those powers could be read in as a necessary adjunct to the application of the assistance provision fell to be analysed. For the court, arguments based on a broad reading of the provision could not be sustained. This meant that the court could not, in fulfilling its assistance obligations, "conjure for itself a jurisdiction to do anything that would be of assistance in progressing a bankruptcy".[52]

23 In the end, for the court, the issue in all of these cases was not whether public policy prevented the extension of these powers but whether there was in fact any inherent jurisdiction to apply such powers, from whichever source drawn, in situations where those powers did not apply, "on the grounds simply that the court judges the situation to be sufficiently analogous". Thus, *Singularis* needed to be reconsidered.[53] The court noted the division in opinion before the Privy Council on whether the power in fact existed[54] but referred to the collective view, which appeared to be that a court could not "conjure for itself an inherent jurisdiction" simply because it would be a "good idea" to do so. There would need to be a "sound separate basis" for determining the existence of just such an inherent jurisdiction apart

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[47] *Idem*.
[48] *Ibid*, at para 34.
[49] *Idem*.
[50] *Ibid*, at paras 35–36.
[51] *Ibid*, at para 37.
[52] *Ibid*, at paras 38–39.
[53] *Ibid*, at para 64.
[54] *Ibid*, at para 67.

from the fact that a power existed in another context, which it might be useful to import into the one under scrutiny.[55]

24 In the Guernsey court's view, powers to examine and compel discovery, which by their nature were draconian, needed express statutory authority. Furthermore, the customary law in Guernsey was very different from the common law at issue in *Singularis* and it would be a "step leap" too far for it to contain such a power.[56] Even if there were such a power, the court was not persuaded that it should be used, as other more appropriate avenues existed, such as through the making of a letter of request which would allow the local court to choose whether to apply its own or the requesting court's law.[57] The effect of this would be to invoke the assistance provision in its modern form, avoiding any reliance on s 122.

Jersey

25 In Jersey, the assumption was that s 122 operated on the Island. In fact, its use has been recorded in a number of instances. In *Royco*,[58] the liquidator of a Jersey company trading in England was recognised as having *locus standi* on behalf of the company to make an application for the company's assets to be placed *en désastre*. The proceedings arose in the context of a group of companies conducting business in London which obtained monies fraudulently from investors. Following an investigation by the Department of Trade and Industry, the High Court in London appointed a liquidator to gather in monies, some of which were held by Royco in the United States. In order to access those monies, the authorities in New York required that there be a bankruptcy in the country of incorporation, thus necessitating the application by the liquidator for proceedings to be opened before the Jersey court, following which the Viscount co-operated in recovering the monies.

26 At the end of the recovery stage, on an application by the Viscount for authority to transfer funds to the English liquidator, the court accepted that the problems posed by the presence of fraud and the destruction of records made it impossible to determine accurately the inter-company indebtedness of the group and made it necessary to pool

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[55] *Ibid*, at para 68.
[56] *Ibid*, at para 80.
[57] *Ibid*, at paras 81–82, where the Guernsey court is not in fact persuaded that *Singularis* would bind it on this point, holding it not to have been an essential element of the *ratio*.
[58] *In re Royco Inv Co Ltd (en désastre)* 1991 JLR *N*–6a. End-stage proceedings were reported at 1994 JLR 236.

all the monies gathered in various proceedings for a single distribution to all entitled creditors, wherever situated.[59] The court saw a need to show comity, especially as the High Court in England had reached the conclusion that the compromise was in the interests of the general body of creditors of Royco and the other associated companies. The judge saw no good reason to reach a different conclusion, being similarly satisfied that the scheme of distribution proposed was the fairest to the creditors and investors alike.

27 In *In re Tucker*,[60] the spectre of foreign revenue claims appeared where a request was made by the United Kingdom Inland Revenue to the Jersey court to assist it in compelling the debtor to disclose certain information, being authority for the proposition that the court would not assist in what amounted to indirect enforcement of a revenue claim, applying the rule at common law. Some softening of the strict position appeared in *Le Marquand*,[61] where the rule in *In re Tucker* was held not to extend to an application made by the liquidator of an insolvent company who was not acting as the agent of the foreign revenue authority and whose claim was not limited solely to the recovery of tax, even if it were likely that the majority of proceeds would go to satisfying the foreign revenue authority as the largest creditor.[62]

28 Section 122 has also enabled outgoing requests for assistance. The most famous of these was in *Re a Debtor*,[63] which appeared to be the first application for aid under the 1914 legislation from Jersey to the United Kingdom. The Viscount had sought an order to enable the sequestration of the debtor's personal property in England and Wales and for his appointment as the receiver of all the debtor's movable property with power to realise and sell the same. The debtor's

[59] The court relied on the authority of *Re Woodham Builders Ltd* (1961) 253 Ex 190, in which the Viscount was authorised to remit moneys after the deduction of his fees and the payment of preferential creditors in Jersey.

[60] *In re Tucker* 1987–88 JLR 473, which reflects *Dicey and Morris'* Rule 3 encapsulating the prohibition against the enforcement, whether directly or indirectly, of foreign revenue claims. *Re Walmsley* 1983 JJ 35 is earlier authority which prevents a claim against a deceased's estate being made where the object is to meet a debt due to a foreign revenue authority.

[61] *Le Marquand v Chiltmead Ltd* 1987–88 JLR 86.

[62] See also *In re Bomford* 2002 JLR *N* [34]; *Re Williams* 2009 JLR *N* [16].

[63] [1981] Ch 384, where the judge, Goulding, J, in commenting on the dearth of authority, memorably lamented that "important parts of the Law still reside in the breasts of the judges and practitioners of the Island". Happily, that is no longer so.

objections, ably put forward by the renowned Muir Hunter, QC, were three-fold: that the Royal Court was not a British court elsewhere, further, that the Royal Court was not a court having jurisdiction in bankruptcy or insolvency, both stipulations of the 1914 Act, and, lastly, that *désastre* proceedings were not a matter of bankruptcy or insolvency that could fall within the scope of the section.

29 The court virtually ignored these arguments, holding that, evidence having been given of the Island's history and constitutional position, the Royal Court was undoubtedly a British court at the time the legislation was enacted and that, despite the differences there were between the English and Jersey procedures, the words bankruptcy or insolvency ought to be construed in a wide sense, given that the section was designed to secure co-operation between courts with potentially different systems of law. Further, as the *désastre* proceedings could by definition be seen as a judicial or administrative process for dealing with the property of a person unwilling to pay his debts, it was indeed a bankruptcy or insolvency process. Accordingly, the court held that the Royal Court was a court with the requisite jurisdiction. Ultimately, the letter of request was acceded to and the court appointed the Viscount as the receiver of the debtor's movable property in England and Wales, including any after-acquired property, *ie* property acquired by the debtor following the date of the *désastre* order.

30 When eventually s 122 was repealed and replaced in the United Kingdom in 1986, the action subsequently taken by the Jersey legislative authorities to enact art 49 could suggest the view was held that the repeal in the United Kingdom left the section as of no effect elsewhere. However, the later decision in *Al-Sabah* suggested that, to the extent that no local legislation has been enacted repealing its effect, the provision in theory would still remain in force. This would have the effect of retaining, as far as Jersey law is concerned, the presence of s 122, given that art 50 and the Schedule of the law (as first enacted) effecting repeals do not expressly mention s 122.

31 Views in Jersey appear to cast doubt on this point, with Dessain and Wilkins stating that "it can hardly be doubted that the section has no current application in Jersey".[64] The view could be taken, of course, that art 49 implicitly effects the repeal of s 122.[65] However, the Privy

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[64] Dessain and Wilkins, *Jersey Insolvency Law and Asset-Tracking* (3rd ed) (2006, Key Haven Publications, Oxford), at para 6.4.3.

[65] There is some support for this proposition in Graveson, *Conflict of Laws: Private International Law* (7th ed) (1974, Sweet & Maxwell, London), at 551, where the author states: "Thus, section 122 [of the Bankruptcy Act

Council, in referring to the issue in *Al-Sabah*, noted the adoption in Jersey of local provisions for mutual assistance "without any express repeal of section 122".[66] The court also went on to state, in relation to the arguments being advanced with respect to the survival of s 122 outside the United Kingdom:

> "nor can much weight be attached to the fact that there may have been an oversight (or a deliberate reliance on implied repeal) in subsequent instruments affecting the Channel Islands and the Isle of Man."[67]

32 This suggests that, at the very least, the issue remains open and the courts in Jersey could continue to determine that s 122 is still operable. This would avoid the need to wait for countries and territories to be prescribed for the purposes of art 49. It would also permit an open system of co-operation and mutual assistance, albeit limited to those courts that would consider themselves as "British" and also, perhaps more importantly, only in personal bankruptcy cases. However, this might not be necessary, given that the Jersey courts have been evolving a customary law framework for cooperation in cases where art 49 does not apply,[68] rendering the need for a revival of s 122 nugatory.

Summary

33 Section 122 appears now to be largely of historical interest. The Act of which it was a part has been superseded in practically every jurisdiction to which it applied, having been replaced in many instances by more modern bankruptcy regimes better suited to the present day. The assistance provision itself, however, appears to continue to have a shadow-life, being regarded, in light of *Al-Sabah*, as still out there and of potential application in any jurisdiction which has not taken the trouble to repeal it expressly. It is a logical conclusion, comforted by the jurisprudence, since the common law has never had a doctrine of desuetude, as some civil law countries do, under which a law can expire when its utility is no longer evident. Furthermore, unlike the replacement of common law regimes by statutory ones, where the view is, if the statute occupies the same area

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1914] no longer extends to India and Pakistan." This was, of course, written long before the judgment in *Al-Sabah*.

[66] *Al-Sabah*, at para 31.

[67] *Ibid*, at para 34.

[68] Examples include *Re F & O Fin AG* 2000 JLR *N*–5a; *Montrow Int Ltd v Tacon* 2007 JLR *N* [49].

as the common law, it is intended to supersede it,[69] the supersession of legislation by legislation requires active intervention.

34 This has not occurred in either Guernsey and Jersey, though both jurisdictions have established their own frameworks for cross-border assistance. Although the creation of both of these domestic frameworks preceded the decision in *Al-Sabah*, the invocation of s 122 in both Bailiwicks should have alerted the authorities to the need to consider whether and how to repeal the provision. Although not imperative, a little adjustment of the statute book might be called for, if only on grounds of certainty, particularly if the intention is to privilege the domestic measures and not to have to rely on the resurrection of an old (albeit once useful) remedy.

Paul J. Omar, of Gray's Inn, Barrister, Former Visiting Professor, Institute of Law, Jersey.

[69] *Singularis*, at para 28.