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The Privy Council in *Singularis*: The Forerunner of the End of Activism in the Court's Jurisprudence

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Abstract The courts slowly started to adopt the doctrine of modified universalism, as evidenced in Cambridge Gas. Although the doctrine was distinguished in certain circumstances, i.e. in Rubin and Hew Cap, it was becoming more and more prevalent in the courts. This came to an end in the judgment in *Singularis v PwC* (1914) UKPC 36. Although the facts of the case did not allow for a more positive result, the dissenting judgements were clear that there is no doctrine of modified universalism as such. This questions the proper function of the appellate court, which in many situations ought to lay down policies. The European Court of Justice was an activist court for many years. Is there a legitimate reason for the Privy Council or any other appellate court to depart from such a path and take a more restrained approach? What would have happened to chancery if the courts had not been activist enough in the XIV century to remedy any deficiencies?

The Facts

The joint official liquidators of PwC and SICL applied to the companies' former auditors (PwC) for additional information relating to the companies' affairs. 'The evidence is that the liquidators have been unable to trace certain assets which they consider must have existed, and that relevant information about those assets is likely to be in the possession of PwC. This has not been accepted in terms, but neither has it been disputed. The Board … [proceeded] upon the footing that it… [was] correct' [para 2].

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Issues

The judges had to decide whether the Bermudan court had a common law power to facilitate liquidation by ordering the production of information. The second issue was whether, 'if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.'

The Case

The Law Lords were concurrent on the issue that the appeal should be dismissed. However, they came up with different justifications. Lord Sumption, Lord Clarke and Lord Collins considered that the appeal should be dismissed purely on the grounds "(1) that there is no common law power to apply the legislation which applies to domestic insolvencies by analogy to foreign insolvencies, and that the Bermudian courts should not exercise a common law power… [as] the Cayman Islands courts have no such power" [para 149]. Lord Mance and Lord Neuberger dissented on the ground that 'the common law power in question does not exist' [para 149].

Commentary

- General remarks

The result, on the particular circumstances of this case, was correct, as the Law Lords were concurrent and reasonable in their negative finding in relation to the second issue. A comprehensive stance in this respect is present in Lord Collins' speech, in which he stated '[t]he provisions of neither the Cayman Islands nor Bermuda statutes apply to the material sought by the Liquidators in this case. This is because: (1) the power in Section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Cayman Islands, who had a relevant connection with a company in liquidation (including its former auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company" extends only to material belonging to the companies … and (2) the power to summon is exercisable only in respect of a company which that court has ordered to be wound up, and in the SICL appeal [PwC v Saad [2024] UKPC 35] the Board has advised that the winding up order must be stayed because the court has no jurisdiction to wind up a company incorporated outside Bermuda, to which Part XIII of the Companies Act is not expressly applied' [para 41]. However, the dissent as to the first issue proved to be controversial. It is argued that this dissent undermines the doctrine of modified universalism. As argued by Anderson, insolvency practice is pragmatic in nature. 'Few insolvency cases reach the highest appellate level because commercial considerations tend to dictate a different outcome.'[1]

[1] Hamish Anderson, 'Six of the best: the record of the Supreme Court in the insolvency cases decided in its first 4 years' (2004) 3 JBL 184, 194.

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Furthermore, as observed by Anderson, the Supreme Court is a policy court.[2]

It is argued that is also true in the case of the Privy Council. In his article, Anderson criticises recent judgments, mainly of the Supreme Court, as lacking a purposive approach. The case law discussed by Anderson in his article indicates that the court engages in 'a traditional role in rationalising, and where necessary overruling, past precedents but there are few signs of the sort of policy objectives displayed by the House of Lords in *Cambridge Gas* and *HIH*.'[3] The consequence is that, 'despite the importance of the issues which have been addressed, the law has taken no giant steps forward.'[4]

This is contrary to what Lord Neuberger said in para 151 and 152, where he states that new principles are hard to assess. It is argued that wider principles are needed as the area might be difficult to legislate on for commercial reasons and there are some academic voices saying that English law, in its superiority, does not move forward. Cases like this create opportunities to fill these gaps. Both the Supreme Court and the Privy Council are not bound by their case law, so a minimalist view, as recommended by Neuberger, is not necessary to prevail. Privy Council decisions are not binding on English courts; therefore it can be easily distinguished when there would be such need. Furthermore, principles were acknowledged as part of the common law system by writers such as Dworkin.[5]

The former argued that, even in hard cases, judges do not make new law, but exercise their discretion by incorporating existing principles.

- Proper role of the appellate court

For centuries, the appellate courts played an active role in their jurisprudence, laying down broad principles that subsequently were narrowed down. Chancery is the best example, but this is equally true in the case of the ECJ that for many years has been distilling wide principles to avail individuals, such as direct effect in *Van Gend en Loos*.[6] Judicial activism has underpinnings both in common law and civilian traditions. However, in civilian countries, this activism for obvious reasons was narrowed down to constitutional courts.

Competition between the courts is also a very important factor enabling the creation of new rules. Adam Smith praised forum shopping competition between courts in medieval and early modern England.[7]

There are apparent benefits of competition such as the fact that beneficial practices can be both discovered and copied. The ideal practice is not always that

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[2] Ibid.

[3] Ibid, 206.

[4] Ibid, 206.

[5] Roland Dworkin, *Law's Empire* (Hart Publishing 1998) 6-11.

[6] Anthony Arnull, *The European Union and its Court of Justice,* (OUP 2006) 612.

[7] Adam Smith, 'An inquiry into the nature and causes of the wealth of nations' in E. Cannon (eds) *Book V,* (University of Chicago Press 1776) 423.

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apparent. Legal competition enables experimentation,[8] although his stand is open to insightful critique, particularly by Posner and Landes.[9]

It is argued that pro-plaintiff rules will not emerge if the courts serve many tasks.

The doctrine of modified universalism is prevalent in insolvency. This area, as well as any other commercial and technical area, is difficult to legislate for, as Parliament might not necessarily have sufficient expertise and many decisions can be made more efficiently at the bottom. For this reason, there are good reasons for broader principles. Bingham J. observed in the English case of *Customs and Excise v Samex ApS,* '[t]he interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton.'[10]

For centuries, commercial law was created by the action of courts. Commercial courts are grounded in commercial custom[11] and for this reason can rule better than legislators. The lack of good faith in English contract law is largely a product of the commercial sense of English courts and the countries that have decided to pass legislation in this respect have usually got it wrong.

Conclusions

The result in *Singularis* is just. The court held that the principles of modified universalism alone were not sufficient to allow a court to exercise such powers in a domestic insolvency. The Privy Council was not unanimous that there was no power at common law to grant such assistance where the law of the foreign liquidation (Cayman Islands) did not itself contain such a power. The broad statements made in dissenting judgments that there is no doctrine of modified universalism as such, calls for questions about the appropriate role of the appellate court. The European Court of Justice (ECJ) was an activist court for many years. There is not a legitimate reason for the Privy Council or any other appellate court to depart from such a path and take a more restrained approach. It was pointed out that chancery would be greatly impeded if the courts had not been activist enough from the XIV century onwards to remedy any deficiencies. For all these problems, it is argued that it would be better if the courts would take a proactive role in adjudication and rule out broad principles. Forum shopping can have many advantages and broad principles, such as modified universalism that allow it, can prove very beneficial, as better rules can be created.

[8] Edward P Stringham and Todd J Zywecki, 'Rivalry and superior dispatch: and analysis of competing courts in medieval and early modern England' (2011) Public Choice 147, 514.

[9] William M Landes and Richard A Posner, 'Adjudication as a private good (1979) 8 Journal of Legal Studies 235, 254.

[10] *Customs and Excise v Samex ApS,* [1983] 3 CMLR 194, 211.

[11] Stringham and Zywecki, supra note 9, 510.

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