

1994

## Commonwealth Caribbean Courts' Jurisdiction in Winding up of Foreign Corporations

Vincent W. Meerabux

*Bermuda Attorney General's Chambers*

Follow this and additional works at: <https://ir.law.fsu.edu/jtlp>



Part of the International Trade Law Commons

---

### Recommended Citation

Meerabux, Vincent W. (1994) "Commonwealth Caribbean Courts' Jurisdiction in Winding up of Foreign Corporations," *Florida State University Journal of Transnational Law & Policy*. Vol. 3: Iss. 1, Article 2. Available at: <https://ir.law.fsu.edu/jtlp/vol3/iss1/2>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Transnational Law & Policy by an authorized editor of Scholarship Repository. For more information, please contact [efarrell@law.fsu.edu](mailto:efarrell@law.fsu.edu).

# COMMONWEALTH CARIBBEAN COURTS' JURISDICTION IN WINDING UP OF FOREIGN CORPORATIONS

VINCENT W. MEERABUX\*

It is well established that the Courts in the Commonwealth Caribbean may wind-up a foreign corporation. The term "foreign corporation" refers to a corporation that is not incorporated in the country in which the court is exercising its winding-up jurisdiction. This article sets out the basic principles drawn from decided cases which should guide the court in the exercise of its ancillary winding-up jurisdiction. Due to the absence of any reported cases from the West Indian Law Reports, cases from England were selected because insolvency laws in the Commonwealth Caribbean generally are modeled after the laws of England and the courts there draw on English sources.

## PRINCIPLE 1

The law of the country of incorporation governs the status of a corporation and that includes its dissolution. Lord Wright, delivering the opinion of the House of Lords in *Lazard Brothers v. Midland Bank*,<sup>1</sup> said:

English Courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations. Thus in *Henriques v. Dutch West India Co.* (1) the Dutch company were permitted to sue in the King's Bench on evidence being given "of the proper instruments whereby the law of Holland they were effectually created a corporation there." But as the creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognize the one, as the other, fact.<sup>2</sup>

---

\* Parliamentary Counsel & Legal Adviser, Attorney General's Chambers, Bermuda

1. [1933] A.C. 289 at 297. See generally P. ST. J. SMART, *Ancillary Winding Up and the Foreign Corporation*, 39 INT'L. C. L. QUART (1990).

2. *Id.* at 827-855.

In *In re English Scottish and Australian Chartered Bank*<sup>3</sup> Justice Vaughan Williams said:

One knows that where there is a liquidation of one concern the general principle is—ascertain what is the domicile of the company in liquidation; let the court of the country of domicile act as the principal court to govern the liquidation; and let the other courts act as ancillary, as far as they can, to the principal liquidation. But although that is so it has always been held that the desire to assist in the main liquidation—the desire to act as ancillary to the Court where the main liquidation is going on,—will not ever make the Court give up the forensic rules which govern the conduct of its own liquidation.<sup>4</sup>

The Court of Appeal upheld this decision.

## PRINCIPLE 2

In the interests of justice, where a Commonwealth Caribbean court is the appropriate and proper tribunal in which the liquidation should proceed, the liquidation would so proceed. Lord Salmon stated in *MacShannon v. Rockware Glass Ltd.*<sup>5</sup> that the doctrine of *forum non conveniens* "has never been part of the law of England. And, in my view, it is now far too late for it to be made so save by Act of Parliament."<sup>6</sup>

However, a change was brought about by judicial law-making by the House of Lords. In light of the highly persuasive decisions of that House, the doctrine of the natural or convenient forum (*forum conveniens*) is now part of the Commonwealth Caribbean private international law. The House of Lords reformulated the principle of the doctrine in *The Spiliada Maritime Corporation v. Cansulex Ltd.*<sup>7</sup> In that case Lord Templeman said:

But whatever reasons may be advanced in favor of a foreign forum, the plaintiff will be allowed to pursue an action which the English court has jurisdiction to entertain if it would be unjust to confine him to remedies elsewhere.<sup>8</sup>

In the same case, Lord Goff stated:

---

3. [1893] 3 Ch. 385.

4. *Id.* at 394

5. [1978] A.C. 795 at 817B. For the development of the modern law, see *Forum Non Conveniens: A View From the Shop Floor*, 104 LAW Q.REV. 554-575 (Oct. 1988).

6. [1978] A.C. 795 at 817B.

7. [1987] A.C. 460.

8. *Id.* at 464-465.

The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all parties and the ends of justice.<sup>9</sup>

In *In re A Company*,<sup>10</sup> on the question whether the court had jurisdiction to wind up a Liberian company which had no assets in England, it was held that for the court to make a winding-up order against a foreign company it was not necessary to show that the company had assets within the jurisdiction, but a sufficiently close connection with the jurisdiction had to be established. The court also held that the facts—that the loan agreement had been negotiated, executed, and performed in England, the company's directors were residents of England, and the company had bank accounts in England, while there was no evidence that the company carried on business outside England—demonstrated a sufficient connection with the jurisdiction and since there was no more appropriate jurisdiction for the winding-up of the company and since there was a reasonable possibility of benefit accruing to the creditors from the making of a winding-up order, an order would be made. Gibson (J.) said:

It is also appropriate for the court to consider whether any other jurisdiction is more appropriate for the winding-up of this admittedly insolvent company. In my judgment, there is none. Miss Heilbron accepts that Liberia is not a serious rival to this country for the purpose of jurisdiction. The company seems to have had nothing to do with Liberia after its incorporation. But she suggested that Greece might be a more appropriate jurisdiction. I do not accept that. Apart from the fact that the vessel flies a Greek flag and that notices under the loan agreement and first preferred mortgage are required to be sent to the company care of Esperos in Greece I cannot see on what basis Greece would be a more appropriate jurisdiction to wind up the company. In my judgment, for the reasons I have given, the company has a much closer connection with this jurisdiction.

I am therefore satisfied that, on the evidence that has been put before me, the company has a sufficiently close connection with the jurisdiction, and that there is no more appropriate jurisdiction for the winding-up of the company which plainly ought to be wound up.<sup>11</sup>

---

9. *Id.* at 476.

10. *In re A Company*, [1988] 1 Ch. 210 (Ch. D.).

11. *Id.* at 226-27.

## PRINCIPLE 3

A Commonwealth Caribbean court has discretion to make a winding-up order, ancillary or otherwise, in respect of a foreign corporation. In *In re Union Bank of Calcutta*,<sup>12</sup> a joint stock banking company established in India with correspondents and liabilities in England was in liquidation in India. A shareholder's petition for winding-up was dismissed by Knight Bruce (V-C), who said:

The company established in India, and is an Indian company, but has correspondence here . . . That, however, does not render it necessary to act under the statutory jurisdiction, if it is not shown that there exist in this country the means of doing substantial justice, or more good than harm, by so interfering.<sup>13</sup>

Since much more mischief would arise from acting on the petition than from declining to interfere, the Court left the parties to the remedies open to them under the law of England, of India, or of both countries.

## PRINCIPLE 4

A Commonwealth Caribbean court has discretion to refuse to grant a winding-up order if such an order is simply not needed. In *In re Jarvis Conklin Mortgage Co.*,<sup>14</sup> a company had been incorporated in the state of Missouri (in the United States) to lend money on American lands. The company was in liquidation in America and had a certain amount of uncalled share capital in England. Judge Romer, in refusing to make a winding-up order, said:

The company had only a branch office in this country. More than a year ago the company had been in liquidation in America, and the receivers there had got in the greater part of the assets. It was not suggested that the liquidation in America would not be efficient, or that the assets would not be properly got in. If a winding-up order was made it would only be ancillary to the American one, and such a winding-up was not needed.<sup>15</sup>

## PRINCIPLE 5

The mere existence of a winding-up order made by a foreign court does not take away the rights of the court of a Commonwealth Caribbean country to make a winding-up order. In *Re Matheson*

12. *Compare* (1850) 3 De G & S M 253, reprinted in LXIV ENGLISH REPORTS 467.

13. 3 De G. & S M at 257; LXIV ENGLISH REPORTS at 469.

14. (1895) 11 T.L.R. 373.

15. *Id.*

*Brothers, Limited*,<sup>16</sup> it was held that the pendency of a foreign liquidation does not affect the jurisdiction of the court to make a winding-up order, in respect of the company under such liquidation, although the court will as a matter of international comity have regard to the order of the foreign court. Judge Kay said:

This being the case, what is the effect of the winding-up order which it is said has been made in *New Zealand*? This Court upon principles of international comity, would no doubt have great regard to that winding-up order and would be influenced thereby, but the question of jurisdiction is a different question, and the mere existence of a winding-up order made by a foreign Court does not take away the right of the Courts of this country to make a winding-up order here, though it would no doubt exercise an influence upon this Court in making the order. Now at this moment there are no proceedings pending to secure the assets here, nor has any application been made to the Courts of this country for that purpose, and in the meantime, however ready this Court may be to show courtesy to the Courts of *New Zealand*, it does seem proper to interfere, and that sufficient reason exists for taking proceedings in order to secure the English assets. Having, therefore, jurisdiction to make a winding-up order I feel myself at liberty to sanction the acceptance of the undertaking offered by Mr. *Hart*. I have said thus much as to my own opinion upon the effect of the Act. But there is the authority of *In re Commercial Bank of India* (1), in which counsel of eminence were engaged on both sides, Mr. *Southgate*, Q.C., Mr. *Bristowe*, and Mr. (now Lord Justice) *Lindley* being for the petitioners, and Mr. (now Lord Justice) *Baggallay* and Mr. *Kekewich* for the official liquidator of the new company. There a joint stock company formed in *India*, registered under Indian law, and having its principal place of business in *India*, with an agent and a branch office in *England*, was ordered to be wound up under the Act of 1862, and Lord *Romilly* said (2): "I think I have jurisdiction to make the order; if the company is not wound up here, these persons will not be able to get their money."

I shall accordingly hold that the Court has sufficient jurisdiction to sanction the acceptance of the undertaking, and if the undertaking had not been given that it had sufficient jurisdiction to appoint a provisional liquidator; for I consider that I am justified in taking steps to secure the English assets until I see that proceedings are taken in the *New Zealand* liquidation to make the English assets available for the English creditors *pari passu* with the creditors in *New Zealand*.<sup>17</sup>

---

16. (1884) 27 Ch. D 225.

17. *Id.* at 230-231.

## PRINCIPLE 6

A winding-up order would be made in a Commonwealth Caribbean country if its domestic creditors would be discriminated against in the foreign liquidation. If foreign creditors are prepared to account for what they received in the foreign proceedings they will be allowed to claim in such winding-up. In *Banco De Portugal v. Waterlow & Sons, Ltd.*<sup>18</sup>, Lord Selborne stated:

The Portuguese assets were, by the Law of *England*, which we have to administer, (and, I may add, in accordance with the general principles of private international law as to moveable property,) subject to and bound by the English liquidation, except so far as the local law of *Portugal* might have intercepted any portion of them while within its jurisdiction. Every creditor coming in to prove under, and to take the benefit of, the English liquidation, must do so on the terms of the English law of bankruptcy; he cannot be permitted to approbate and reprobate, to claim the benefit of that law, and at the same time insist on retaining, as against it, any preferential right inconsistent with the equality of distribution intended by that law, which he may have obtained either by the use of legal process in a foreign country, or otherwise.<sup>19</sup>

## PRINCIPLE 7

Appeals to international comity in insolvency procedures would be rejected in order to protect the interests of the domestic creditors who would otherwise be marginalized in a foreign liquidation. In *Felixstowe Dock and Railway Co. v. United States Lines Inc.*,<sup>20</sup> the defendant, a United States company, was registered to operate in England as an overseas company. Following severe financial difficulties, the defendant obtained a restraining order from a United States district court, the purpose of which was to enable it to survive as a going concern by freezing its assets, including those located outside the United States, so that it could reorganize its financial position under the supervision of the court and a creditors' committee, and provide for the payment of creditors. During that reorganization period the defendant intended to close down its European operations and concentrate its shipping activity in North America.

The plaintiffs, who were English and European trade creditors of the defendant, were granted *Mareva* injunctions in the course of seeking payment for services which they had provided. The combined

---

18. [1880] 5 App. Cas. 161.

19. *Id.* at 169.

20. [1988] 2 All E.R. 77.

effect of the injunctions was that the defendant was required to retain sufficient assets in England to cover the total sum owed to the plaintiffs. The defendant applied to set aside the injunctions on the following grounds: (i) that the English courts should recognize the restraining order of the United States court on the basis of international comity and allow that court to govern the disposition of the defendant's English assets; (ii) that, by retaining those assets in England, the *Mareva* injunctions prevented the assets from being administered according to United States bankruptcy procedures; and (iii) that continuing the injunctions would give the plaintiffs priority over other creditors.

The defendant subsequently obtained a modified restraining order from the United States court allowing the English actions to continue to adjudication provided the *Mareva* injunctions were discharged and the assets in question were transferred to the United States. The defendant contended that the English court had no jurisdiction to make or continue the *Mareva* injunctions because the effect of the restraining order was to divest the defendant of its assets and to revest the assets in it as trustee for its creditors, with the result that those assets were no longer subject to the *Mareva* jurisdiction.

It was held that the defendant's application would be dismissed for the following three reasons:

First, in contrast with the position under an administration order made under the Insolvency Act 1986,<sup>21</sup> where the assets of the insolvent company were vested in an independent administrator, under Chapter XI of the U.S. Bankruptcy Code,<sup>22</sup> the assets of the debtor corporation remained in its possession as debtor-in-possession. It followed therefore that the United States restraining order had not divested the defendant of the beneficial ownership of its assets and revested the assets in it in a new legal capacity as trustee for the benefit of the creditors. Consequently, such of its assets as were in England remained amenable to the *Mareva* jurisdiction.

Secondly, on the basis of international comity the proper approach of an English court was to regard the courts of the country of incorporation as the principal forum for controlling the winding-up of a foreign company, but where that company held assets in England the usual practice was to carry out an ancillary winding-up in England according to English bankruptcy procedures while working in harmony with the foreign courts. Accordingly, although the English court would recognize the authority of the United States district

---

21. Insolvency Act 1986 (United Kingdom).

22. 11 U.S.C. § 1104(a)(19).



court, it would not recognize any decree *in personam*, such as the restraining order, which removed the English assets outside the English court's control. Moreover, having regard to the fact that English practice was in line with § 304 of the U.S. Bankruptcy Code,<sup>23</sup> which provided a procedure for ancillary bankruptcy proceedings, continuation of the *Mareva* injunctions would not unjustly impede the United States bankruptcy proceedings.

Thirdly, in deciding whether to continue or to discharge the *Mareva* injunctions the court had to weigh up the competing claims of the parties regarding the merits of continuation or discharge of the injunctions and the overall balance of convenience. On the one hand, given that the plaintiffs' business activities did not extend to North America and that the defendant intended to withdraw from Europe, there could be no possible benefit to the plaintiffs in seeing the *Mareva* assets transferred to the United States and used as part of the defendant's general fund, particularly since the creditors' committee would be concerned to keep the defendant afloat as a going concern in North America and thus would concentrate on maintaining trading links with its U.S. creditors. On the other hand, the defendant would suffer no material prejudice if the *Mareva* injunctions were continued, since its English assets would remain untouched because the court would not permit a garnishee order to be used to enable a judgment creditor to gain priority over other creditors. Finally, in view of the fact that England was the acknowledged *forum conveniens*, albeit conditionally, for the resolution of the plaintiffs' claims the defendant's objection to continuation of the ancillary orders failed, particularly as separate insolvency proceedings were already under way or pending elsewhere in Europe. The *Mareva* injunctions would therefore be continued.

Judge Hirst said:

I wish, however, to stress that the court would in principle always wish to co-operate in every proper way with an order like the present one made by a court in a friendly jurisdiction (of which the USA is a most conspicuous example). But whether this is appropriate in any given case, and, if so, the precise nature and extent of such co-operation, must depend on the particular sphere of activity in question and the English law applicable thereto, as discussed in the ensuing section of this judgment, together with the overall circumstances.<sup>24</sup>

---

23. 11 U.S.C. § 304.

24. [1988] 2 All E.R. at 91b-c.

## PRINCIPLE 8

Where a winding-up is ordered the powers of the liquidator may be restricted to collecting the assets within the country and settling a list of creditors. In *In re Commercial Bank of South Australia*,<sup>25</sup> a banking company, incorporated and carrying on business in Australia, had a branch office in London but was not registered in England. The company had English creditors and assets in England. Two petitions were presented to wind-up the company which had stopped payment in both Australia and England.

On the hearing of the petitions an order was made appointing a provisional liquidator. The powers of the provisional liquidator were limited to the taking possession of, collecting, and protecting the assets of the company in England. When the petitions came on again to be heard it appeared that a petition to wind up the company had been presented in Australia and a provisional liquidator had been appointed there. It was held that there was jurisdiction to make an order to wind-up the company and that the jurisdiction could not be affected by subsequent proceedings in Australia. Judge North granted the petition, stating:

The question is whether the English creditors ought to be left to recover their debts in a winding-up of the company in *Australia*, their debts having been contracted here, and there being a large amount of assets here. Two winding-up petitions have been presented here, and all I know about the proceedings in *Australia* is, that an order has been made for the appointment of provisional liquidators. . . . I think, therefore, that the English creditors are entitled to have a winding-up order made by this Court. I do not think it would be right to insert any special directions in the order; this is not the proper time for giving such directions. But I will say this, that I think the winding-up here will be ancillary to a winding-up in *Australia*, and, if I have the control of the proceedings here, I will take care that there shall be no conflict between the two Courts, and I shall have regard to the interests of all the creditors and all the contributories, and shall endeavor to keep down the expenses of the winding-up so far as is possible. I think it clear that there is jurisdiction to make a winding-up order.<sup>26</sup>

## PRINCIPLE 9

Where a winding-up is ordered by a Commonwealth Caribbean court it is to protect the property in the Commonwealth Caribbean

---

25. [1886] 33 Ch. D. 174.

26. *Id.* at 178.

country and the creditors in that country. This principle is stated in *North Australian Territory Co. Ltd. v. Goldsbroueh Mort. Co. Ltd.*<sup>27</sup>

#### CONCLUSION

I have highlighted the important principles governing the winding-up of a foreign corporation. The principles enunciated in the common law authorities are flexible. However, the courts wish to co-operate with the insolvency courts of other countries to a large extent cut down by the discretion of the courts to take into account "the particular sphere of activity in question and the English law applicable thereto . . . together with the overall circumstances."<sup>28</sup> Trade takes place increasingly on an international level. It is to be hoped that the recognition of the increasingly international aspects of insolvency will result in an international insolvency convention. As it is, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters<sup>29</sup> does not apply to bankruptcy, winding-up and analogous proceedings.

---

27. [1889] 61 L.T. 716 at 717.

28. *Felixstowe Dock and Railway Co. v. United States Line* [1988] 2 All E.R. 77 at 91b-c.

29. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1978 J.O. (L299) 32, 29 I.L.M. 1417.