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Revocation of Winding-Up Orders and the Development of the Common Law

The judgment of the Isle of Man's appeal court (the Staff of Government Division) in the case of *Spirit of Montpelier & others v Lombard Manx [2015]* addressed important issues in relation to the Isle of Man's company and insolvency laws and the powers of Judges to create and develop principles of common law in order to best serve the interests of justice.

The case involved a special purpose corporate vehicle which had been incorporated for the sole purpose of holding a specific asset, a luxury yacht. The appellant company had entered into finance arrangements with the respondent finance company. The appellant company subsequently defaulted on its obligations. Relying upon the event of default, the finance company sought and successfully obtained a winding-up order. The court in making the winding-up order had concluded that having regard to all the circumstances, including the likely realisation value of the asset, that the company was in a state of insolvency. The appellant company appealed against the winding-up order. The appeal was largely founded on events which occurred subsequently to the making of the winding-up order being the emergence of further asset valuation evidence, which cast doubt on the valuation which had informed the court's decision to make the winding-up order.

At the directions stage of the appeal, the appeal court suggested that the case be referred back down to the lower court so that it might reconsider whether the subsequent events would have any impact on the decision to make the winding-up order. An application was then also made to the court of first instance seeking revocation of the winding-up order in light of the new evidence.

One of the arguments submitted to the court of first instance was that there was a general power of revocation within the Isle of Man's court rules which provides that:-

> *"A power of the Court under these Rules to make an Order includes a power to vary or revoke the Order."*

This argument was rejected since it was considered that on the true construction of the Rules such power of revocation must be confined to orders made under the Rules themselves and a winding-up order is made pursuant to a statutory power conferred by the Companies Acts. The appeal court later agreed with such analysis. The court of first instance could only find that there was a power to stay a winding-up pursuant to section 94(1) of the Companies Act 1931.

A second limb argument was however put to the court of first instance contending that the court had jurisdiction to revoke the Order as a matter of common law. This argument was also rejected and in so doing the court noted that in England and Wales a power to revoke a winding-up order had been expressly introduced by rule 7.47(1) of the English Insolvency Rules 1986, but that prior to that, the

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English authorities supported the proposition that no such power of revocation had existed at common law. No rule or statutory provision equivalent to the English rule 7.47(1) had been introduced or enacted in the Isle of Man and the court therefore determined that the position under Manx common law was equivalent to the pre-1986 position under English law and that consequently the court did not have any jurisdiction to revoke a winding-up order. This conclusion was however reached with "considerable reluctance" and the court regarded it as unfortunate that there was no provision under Manx law equivalent to rule 7.47(1), observing that:-

> *"If it is to be declared that Manx common law incorporates a provision similar to rule 7.47(1) of the English (Insolvency) 1986 Rules then it is more appropriate that such be declared by the Appeal Division or the Judicial Committee of the Privy Council."*

In considering the position at common law, the Manx appeal court was therefore faced with the thorny question as to the extent to which a court can determine and define the existence of a particular principle of common law whilst balancing the need to refrain from interfering with what ought to properly fall within the function of the legislature. In this context the words of Lord Denning were remembered in drawing a distinction between the "timorous souls" who left it to Parliament to determine the law and those "bold spirits" who developed the common law according to the needs of the times.

The starting point for the appeal court's deliberations was the well-known and often cited decision of the Privy Council (on appeal from the Isle of Man) in *Frankland v R* [1987] and Lord Ackner's dicta that the decisions of English courts, particularly those of the House of Lords and Court of Appeal, whilst not binding on Manx courts were of high persuasive authority and *"generally should be followed unless there is some provision to the contrary in a Manx statute, or there is some clear decision of the Manx Court to the contrary or exceptionally there is some local condition which would give good reason for not following the particular English decision."* The appeal court noted that such dicta was now approaching thirty years old and subsequent cases had resulted in some erosion of these principles. In particular the appeal court's decision in Dominator Limited v Gilbertson SL and others [2009] where it had been stated:-

> *"For the purposes of this appeal it is unnecessary for this Court to express any view as to whether or not (the dicta of Lord Ackner) have the same force today as they had over twenty years ago. However even without the benefit of full argument on such issue, we are bound to express some doubt as to whether they do so in the context of a jurisdiction which is becoming increasingly independent of English statutes and procedures and is frequently choosing to be informed by and to adopt the common law and practices found in jurisdictions other than England."*

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The appeal court further noted the dicta of Deemster Doyle in Howell v Department of Health and Social Security [2009] in which it was stated:-

> *"Manx law has developed significantly since Lord Ackner uttered those words over twenty years ago now."*
>
> *"It is to be hoped that Manx common law will develop independently in accordance with the needs, requirements and interests of the inhabitants of the Isle of Man and indeed the international community of which the Island is a part. It is to be hoped that Deemsters will not slavishly follow English decisions, which in certain cases may not be in the best interests of the Island, in areas where it would be more appropriate to develop Manx law in a different way to the way in which English law has developed and is developing."*

The appeal court was however further reminded of the need for courts to be astute not to trespass on the proper role of the legislature and the dicta of Lord Collins in *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UK PC where the court had been urged to develop common law by the adoption of a principle that where local legislation did not provide for relevant assistance to a foreign office holder, the legislation should be applied by analogy as if the foreign office holder were a local insolvency. Lord Collins in that case described it as *"impermissible legislation from the Bench"* and *"profoundly contrary to the established relationship between the judiciary and the legislature"* and therefore *"profoundly unconstitutional".*

Having considered the position, the appeal court accepted that whilst judicial development of the common law is both inevitable and desirable, certainty should not be sacrificed for flexibility or vague notions of where the interests of justice may lie and that litigants need to be able to know what the law is and the Judges need to recognise that their role is to determine the law and not to assume the mantle of the legislature. Equally however the court accepted that its inherent jurisdiction under Manx common law must provide a remedy for a company which has been wound up, where such winding-up is not in the interests of justice. The court took account of the wholly unsatisfactory nature of the stay of a winding-up order and concluded that it was satisfied that it was entitled to determine whether in such circumstances its own inherent jurisdiction at Manx common law could provide a more appropriate remedy. It was further satisfied that the requirements of the case required it to do so. The appeal court considered that in *Re Frankland* did not require it to regard decisions of the English courts prior to the making of rule 7.47(1) as binding on the Manx courts and that even on the terms of that decision such decisions were only of high persuasive authority and generally should be followed in the absence of a Manx statute. The appeal court further determined that it did have the ability to formulate its own law in a way which was considered most appropriate

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for the needs, requirements and interests of the inhabitants of the Island and the wider international community of which the Island is a part. It considered that it was insufficient for it to conclude that the matter was solely for the Island's legislature and that it was appropriate to address the issue of inherent jurisdiction in that context where the legislature had not taken any opportunity to amend or re-enact new legislation or rules which would otherwise address the issue. Accordingly the appeal court concluded that it had an inherent jurisdiction at common law to review, rescind or vary a winding-up order where such an order is necessary in the interests of justice. It was further held that such jurisdiction should only be exercised where there has been a material change in circumstances since the making of the order or if the facts on which the original order had been made were mistaken innocently or otherwise or if there had been a manifest mistake on the part of the Judge in formulating the order.

Conclusion

In a small offshore jurisdiction it is probable that legal practitioners may encounter situations were definitive local judicial precedent may be absent. This is not reflective of any lack of sophistication but is merely a consequence of the generally lower volume of cases passing through a smaller jurisdiction's courts when compared to the relatively larger volumes which pass through the courts of larger onshore states. As a consequence, legal practitioners and the courts in the Isle of Man have often looked beyond their own shores for legal authority and most typically to the courts of England and Wales. The close connection and many common characteristics between the Isle of Man and the UK naturally leads to close alignment of statute law and common law principles across many areas. For a number of years past the courts of the Isle of Man have not confined themselves to consideration of English case law and have sought to draw jurisprudence and authority from cases decided in a number of other common law jurisdictions. It is important that where there may be some lacuna in local law, the courts have the courage to develop the common law in a way which serves both the ever changing needs and circumstances of the community and the interests of justice. The *Spirit of Montpelier* case confirms that the Manx courts are not afraid to develop and apply principles of common law in appropriate circumstances. This is to be welcomed since whilst the legislature of the Isle of Man can and does on occasion move with surprising agility, the ability of the courts to develop common law principles in appropriate circumstances will continue to play a crucial role in filling any gaps which might otherwise lead to injustice.

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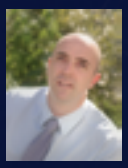

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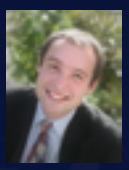

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