FEDERAL MAGISTRATES COURT OF AUSTRALIA

BANK OF WESTERN AUSTRALIA v HENDERSON (No.3) *[2011] FMCA 840*

BANKRUPTCY – Creditor's petition – cross-border insolvency – where Respondent debtor subject to insolvency administration in New Zealand – where New Zealand Official Assignee may bring action in Australia under *Bankruptcy Act 1966* (Cth) s.29 or *Cross-Border Insolvency Act 2008* (Cth) – where no action for recognition of foreign judgment – whether *Cross-Border Insolvency Act 2008* prevents making of sequestration order – requirements of cooperation – effect of unrecognised foreign judgments – whether to appoint a Trustee in Australia.

Bankruptcy Act 1966 (Cth), s.29
Cross Border Insolvency Act 2008 (Cth)
UNCITRAL Model Law on Cross-Border Insolvency (UNCITRAL)
Companies Act 1993 (NZ)
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (US)
United States Code (US)
Insolvency (Cross-border) Act 2006 (NZ)
Cross-Border Insolvency Regulations 2006 (UK)

Bank of Western Australia Ltd v Henderson [2011] FMCA 157
Radich v Bank of New Zealand (1993) 116 ALR 676
Levy v Reddy [2009] FCA 63
Re Ayres; Ex parte Evans (1981) 34 ALR 582
Dick as Trustee in Bankruptcy v MacKintosh [2001] FCA 1008
Larsen v Navios International Inc [2011] EWHC (Ch) 878
Paul Andrus et al v. Digital Fairway Corporation (Civil Action No.3:08-CV-119-O)
Winter v Winter and Ors [2010] FamCA 933
U.S. v. J.A. Jones Const. Group, LLC 333 B.R. 637 E.D.N.Y., 2005
Williams v Simpson [2011] 2 NZLR 380
Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508
Rubin and another v Eurofinance SA and others [2010] EWCACiv 895
Bank of Western Australia Ltd v Henderson (No 2) [2011] FMCA 837

Applicant:	BANK OF WESTERN AUSTRALIA
Respondent:	DAVID STEWART HENDERSON
File Number:	SYG 324 of 2010
Judgment of:	Raphael FM
Hearing dates:	16 August 2011 & 18 October 2011
Date of Last Submission:	18 October 2011
Delivered at:	Sydney
Delivered on:	2 November 2011

REPRESENTATION

Solicitors for the Applicant:	Norton Rose
Counsel for the Applicant:	Mr B. Katekar
Solicitors for the Respondent:	Reid Legal

ORDERS

(1) A sequestration order be made against the estate of David Stewart Henderson.

(2) The Applicant Creditor's costs (including any reserved costs) be taxed (in accordance with the *Federal Magistrates Court (Bankruptcy) Rules 2006)* and paid from the estate of the Respondent Debtor in accordance with the Act.

(3) Under the Bankruptcy Regulations a copy of this sequestration order be given to the Official Receiver in Sydney within two days.

THE COURT NOTES:

(i) That the date of the act of bankruptcy is 9 December 2009.

(ii) A consent to act as trustee has been signed by Mr David John Kerr and has been lodged with the Official Receiver in Sydney.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 324 of 2010

BANK OF WESTERN AUSTRALIA
Applicant

And

DAVID STEWART HENDERSON
Respondent

REASONS FOR JUDGMENT

1. This case raises for the first time in Australia's bankruptcy jurisdiction the question of whether the court should make a sequestration order against a debtor who is already under insolvency administration in New Zealand, in respect of which administration the Official Assignee in Bankruptcy has available to himself remedies under s.29 *Bankruptcy Act 1966* (Cth) (the Act) and under the *Cross Border Insolvency Act 2008* (Cth) (the CBI Act).

Background

2. Mr Henderson is a property developer who operated through a stable of companies in both New Zealand and Australia. I am prepared to accept the submissions made on his behalf that the Australian companies, most of which have now been deregistered, are special purpose companies utilised for each development. That is common practice in the property development industry. In order to finance his developments Mr Henderson arranged for his companies to borrow very large sums of money form a number of banks and financial

institutions. He gave personal guarantees of the obligations of his companies.

3. On 9 December 2009 Mr Henderson sent to Miss Elise Cockerill of Bank West, the applicant in these proceedings, a copy of his affidavit sworn on 1 December 2009 made in support of a proposal under Pt.5(2) of the *Insolvency Act 2006* (NZ). The purpose of the proposal was for Mr Henderson to enter into an arrangement with his creditors on the basis that he was insolvent. In the affidavit there is schedule of the creditors whom Mr Henderson acknowledged; they include: Westpac Bank in the sum of $24,930,000 approx.; Babcock and Brown in the sum of $45,000,000; St George Bank in the sum of $3,600,000; Bank of Western Australia (BankWest) in the sum of $25,750,000. The affidavit commences with the following paragraphs:

> "1. I am unable to pay my creditors as they fall due. I set out below the circumstances leading to my insolvency, my creditors my assets and my proposal."

The applicant creditor submits that this constitutes an act of bankruptcy under s.40(1)(h) of the Act which is in the following form:

> **Acts of bankruptcy**
>
> **(1)** A debtor commits an act of bankruptcy in each of the following cases:
>
> (a)-(i)…
>
> (h) if he or she gives notice to any of his or her creditors that he or she has suspended, or that he or she is about to suspend, payment of his or her debts;

4. On 18 February 2010 BankWest presented a creditor's petition based upon this act of bankruptcy. It indicated that Mr Henderson owed it $27,951,556.64 for failure to comply with a demand dated 12 February 2010. In the following year there was considerable activity in New Zealand surrounding the proposed composition. I described both Mr Henderson's indebtedness and some of these proceedings in [2 and 3] of *Bank of Western Australia Ltd v Henderson* [2011] FMCA 157. In short, Mr Henderson obtained the necessary percentage approval for his scheme but BankWest was not present at the meeting nor voted. The matter was then taken to the New Zealand courts where Associate

Judge Doogue found that if the bank had taken part in the vote the percentage by value of those supporting the proposal would have fallen below the required 75%. Court approval is required before any composition of this type can proceed. In this case approval was not granted.

5. On 9 June 2011 Mr Henderson was adjudicated bankrupt in New Zealand. His affairs were placed into the hands of the Official Assignee. In the meantime the current petition had been adjourned and extended. On 29 June 2011 I was informed that the petitioning creditor wished to proceed with the petition and I made orders for the filing of evidence and written submissions prior to a hearing on 16 August 2011. I was provided with some very helpful written submissions prepared by Mr Katekar on behalf of the bank. Mr Henderson appeared by his solicitor Mr Reid. A good deal of Mr Katekar's submission went to jurisdiction. It was originally argued by Mr Henderson in his Notice of Objection, dated 10 May 2010, that the court lacked jurisdiction to make a sequestration order against him because: (a) he is a New Zealand resident who has always conducted his business affairs from New Zealand, (b) he has no dwelling house or place of business in Australia, (c) he does not carry on business in Australia either personally or by means of an agent or manager. At the hearing Mr Reid conceded jurisdiction and the existence of an act of bankruptcy under s.40(1)(h).

6. What remained was a submission under s.52(2)(b) that the court should be satisfied that for other sufficient cause a sequestration order ought not to be made. The nature of the sufficient cause being the ability of the Official Assignee to exercise his rights in Australia either by making use of the provisions of s.29 of the Act or of the CBI Act. Section 29 of the Act is in the following form:

> **Courts to help each other**
>
> (1) All Courts having jurisdiction under this Act, the Judges of those Courts and the officers of or under the control of those Courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy.
>
> (2) In all matters of bankruptcy, the Court:

(a) shall act in aid of and be auxiliary to the courts of the external Territories, and of prescribed countries, that have jurisdiction in bankruptcy; and

(b) may act in aid of and be auxiliary to the courts of other countries that have jurisdiction in bankruptcy.

(3) Where a letter of request from a court of an external Territory, or of a country other than Australia, requesting aid in a matter of bankruptcy is filed in the Court, the Court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.

(4) The Court may request a court of an external Territory, or of a country other than Australia, that has jurisdiction in bankruptcy to act in aid of and be auxiliary to it in any matter of bankruptcy.

(5) In this section, **prescribed country** means:

(a) the United Kingdom, Canada and New Zealand;

(b) a country prescribed by the regulations for the purposes of this subsection; and

(c) a colony, overseas territory or protectorate of a country specified in paragraph (a) or of a country so prescribed.

7. In the Second Reading Speech, given on 13 February 2008, for the *Cross Border Insolvency Bill 2008* Senator Joe Ludwig said:

> "Insolvency laws underpin property rights and reduce uncertainty for participants in the economy. They do this by specifying, in advance, the arrangements that apply when an individual or a company cannot pay their debts. Australia has a well functioning system of laws that deal with domestic insolvencies. The Cross-Border Insolvency Bill 2008 will augment that system. It will apply to insolvencies that have an international dimension.
>
> Over the years international borders have become less significant for economic activity. With the advent of technologies such as the world-wide-web and the lowering of tariff barriers around the world, trade and capital flows more readily between countries. By contrast, legal systems continue to be organised on a nation-by-nation basis.

> The bill will build a bridge between Australia's legal system and those of other jurisdictions. It will do so by providing for an internationally harmonised and streamlined approach to cross-border insolvencies.
>
> The bill will adopt the Model Law on Cross-Border Insolvency developed by the United Nations Commission on International Trade Law. Australia had a significant involvement in the development of the Model Law, with work commencing in the early 1990's under the then Labor Attorney-General Michael Lavarch. The previous Government published a proposals paper dealing with adoption of the Model Law in 2002. Today I will complete the work that Labor started.
>
> The bill includes four key reforms.
>
> First, the Model Law permits courts and insolvency practitioners from different countries to co-operate more effectively.
>
> Second, it makes provision for the coordination of insolvency proceedings that are taking place concurrently in more than one country.
>
> Third, it sets out the conditions under which persons administering a foreign insolvency proceeding have access to Australian courts.
>
> Fourth, it ensures that foreign creditors are not discriminated against merely due to the fact that they are foreign.
>
> The Cross-Border Insolvency Bill will also form a starting point for additional initiatives to streamline insolvency processes involving both Australia and New Zealand. New Zealand has already enacted the Model Law, but has been waiting for Australia to enact the law before providing for commencement. That can now occur. Adoption of the Model Law in both Australia and New Zealand will further the agenda of establishing closer economic relations between the two countries."

In the Explanatory Memorandum for the bill, the legislative draftsman explains:

> "A number of complex issues may arise in the context of cross-border insolvency. An insolvency administrator may have limited access to assets of the company that are located in another country. There may be special rules providing local creditors with access to local assets before funds go to a foreign

administration. There may be limited or no recognition of foreign creditors. There may be inconsistency in the priority of creditors (particularly in relation to employee claims) across jurisdictions. There may be difficulties for foreign creditors seeking to enforce securities over local assets.

The additional complexities surrounding cross-border insolvencies necessarily result in uncertainty, risk and ultimately cost to businesses. It would be of overall benefit to businesses in all countries to have adequate mechanisms in place to deal efficiently and effectively with cross-border insolvencies. Reforms of this nature will facilitate international trade in goods and services and the integration of national financial systems with the international financial system.

Accordingly, in May 1997 UNCITRAL adopted a Model Law on Cross-Border Insolvency. The purpose of the Model Law is to provide effective and efficient mechanisms for dealing with cases of cross-border insolvency. The Model Law:

- sets out the conditions under which persons administering a foreign insolvency proceeding have access to local courts;
- sets out the conditions for recognition of a foreign insolvency proceeding and for granting relief to the representatives of such a proceeding;
- permits foreign creditors to participate in local insolvency proceedings;
- permits courts and insolvency practitioners from different countries to co-operate more effectively; and
- makes provision for co-ordination of insolvency proceedings that are taking place concurrently in different States.

The Model Law is not based on the principle of reciprocity between States. There is no requirement for a foreign representative seeking to rely upon the Model Law to have been appointed under the law of a State which has itself adopted the Model Law. Other States that have adopted the Model Law include: the United Kingdom, Colombia, Eritrea, Japan, Mexico, Montenegro, New Zealand, Poland, Romania, Serbia, South Africa and the United States of America."

8. It is the respondent's submission that by use of either s.29 of the Act or the CBI Act the New Zealand assignee will have an equal ability as an

Australian trustee to gather in and distribute amongst Mr Henderson's creditors the assets he may find either in Australia or elsewhere (presumably excluding New Zealand). There is thus no necessity to make a second sequestration order against Mr Henderson in this country and the making of such a sequestration order would have a prejudicial effect on Mr Henderson because his bankruptcy would continue past the statutory three years from the making of the order in New Zealand to three years from the date upon which he completes his statement of affairs in Australia. The creditor argues that the making of a sequestration order in Australia will allow the appointment of a trustee here who will better be able to investigate Mr Henderson's affairs in this country (which his client will to some extent assist financially) and,

> "It is submitted that there is nothing inappropriate, or oppressive, about the prospect of an Australian trustee conducting an administration of Mr Henderson's estate in Australia, while an administration occurs parallel in New Zealand. Mr Henderson had business dealings in both places. There is a substantial shortfall to creditors, and Bankwest has indicated a willingness to fund steps to seek to undertake investigations in Australia, and potentially recover assets here, for the benefit of creditors generally. If the Australian trustee considers that this would be futile, the trustee would not make any request of Bankwest. If such a request is made by the trustee, Bankwest would not be expected to "throw good money after bad" without considering there are sufficient prospects of recovery. The question of futility does not really arise. There is no suggestion of bad faith." [Applicant's written submissions]

The applicant also submits in relation to the *Cross Border Insolvency Act* issue,

> "… that Act proceeds on the premise that, if the New Zealand Official Assignee wished to obtain recognition of the New Zealand administration in Australia, that could be done. However, the New Zealand Official Assignee has not done that. To the contrary, the New Zealand Official Assignee has agreed to Bankwest proceeding with its creditor's petition, and obtaining a sequestration order. If that position changes, then the provisions of the Cross Border Insolvency Act can come into operation."

Consideration

9. It is clear from the decision of the Full Bench, Einfeld, Foster and Drummond JJ. in *Radich v Bank of New Zealand* (1993) 116 ALR 676, that the Official Assignee has the capacity, utilising s.29 of the Act, to gather in the property both moveable and immoveable of Mr Henderson in Australia. It is also clear that under s.29 the court has power to appoint a receiver of the Respondent's property in Australia in aid of the administration of the respondent's insolvent estate in New Zealand; *Levy v Reddy* [2009] FCA 63 per Collier J. citing *Re Ayres; Ex parte Evans* (1981) 34 ALR 582; *Radich v Bank of New Zealand*, *Dick as Trustee in Bankruptcy v MacKintosh* [2001] FCA 1008, her Honour noted at [15]:

> "In this case Mr Coates for the Applicant has submitted that the present application is not made in terms of the Model Law on Cross Border Insolvency as enacted in Australia by the Cross Border Insolvency Act 2008 (Cth) on the facts before me there is prima facie no inconsistency between s.29 and either the Model Law on Cross Border Insolvency or the Cross Border Insolvency Act 2008 (Cth)."

The question therefore becomes one of policy whether the court should grant the applicant the sequestration order, to which in all other respects it is entitled, or exercise its discretion not to do so on the grounds that the remedy is otiose given the rights and remedies available to the Official Assignee under the two acts.

10. The short answer to that question is, to my mind, that the court should not exercise its discretion. Neither the UNCITRAL Model Law on Cross-Border Insolvency, as adopted in Australia,[1] nor s. 29 of the Act interfere with the court's sovereign power to grant a sequestration order notwithstanding the fact that an order to the same or similar effect has been made in New Zealand.

11. In regards the CBI Act, as the explanatory memorandum makes clear (at [2]), the Model Law provides a mechanism for dealing with cases of cross-border insolvency. This interpretation of the non-intrusive effect of the Model Law is apparent from the Model Law itself, from its

[1] Through the *Cross-Border Insolvency Act 2008* (Cth) (the Act) which received Royal assent on 26 May 2008 and commenced on 1 July 2008.

developmental context, its adoption into Australian law, and from the judicial treatment that it has received, albeit limited. It is worth noting at this point that the Australian adoption of the Model Law proceeded with very little amendment. As the Explanatory Memorandum to the *Cross-Border Insolvency Bill 2008* (Cth) elucidates (at [4]) the Bill adopted the Model Law:

> *"...with as few changes as are necessary to adapt it to the Australian context. It is expected that international jurisprudence on key concepts in the Model Law will assist Australian courts with any interpretative tasks that may arise in relation to the Cross-Border Insolvency Bill."*

As such, much of the discussion of the Model Law that follows is directly applicable to the CBI Act that adopted it.

12. One aspect of the adoption of the Model Law which may prove to be problematic is that of s.10 of the CBI Act, which adopted article 4 and defines the courts that are competent to perform functions under the Model Law. It relevantly states as follows:

> The following courts are taken to be specified in Article 4 of the Model Law (as it has the force of law in Australia) as courts competent to perform the functions referred to in the Model Law relating to recognition of foreign proceedings and cooperation with foreign courts:
>
> (a) if the functions relate to a proceeding involving a debtor who is an individual—the Federal Court of Australia; […]
>
> Note: References in the Model Law to a court or the court are, because of this section, to be read as references to the Federal Court of Australia or the Supreme Court of a State or Territory."

In my opinion, this does not interfere with the Federal Magistrates Court's jurisdiction to make a sequestration order in a matter with a cross-border element. It arguably means that this court neither has access to the mechanisms in the CBI Act, nor is encumbered by the effects of the CBI Act in relation to cooperation.

13. For present purposes consideration will turn on the assumption that the Model Law does apply. Even from this standpoint, it will become

evident that it has no substantial effect upon the local court's jurisdiction. What is apparent, rather, is that when a local proceeding is occurring at the same time as one, or several, foreign proceedings (the case of concurrent proceedings) then the local court must cooperate with the foreign proceeding. As will be seen this does not mean that the local court is prevented from the making of a sequestration order.

The effect of the Model Law upon local proceedings

a) The Purpose and Scope of the Model Law on International Insolvency

14. From the outset the goal of the Model Law was of "facilitating judicial cooperation, and court access for foreign insolvency administrators and recognition of foreign insolvency proceedings".[2] Although this may appear at first to suggest that a local court should necessarily be subservient to a foreign decision, the vision was a constrained one, described as "limited" (at [3]), "relatively modest" (at [16]) and, importantly, as being in relation to "access and recognition" rather than one of automatic universality of decisions. This modesty was necessary as a recognition of the state of legal disharmony that existed at the time of the Model Law's conception (see [16]). The preamble to the Model Law harbours similar aspirations. It reads as follows:

> "The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
>
> (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
>
> (b) Greater legal certainty for trade and investment;
>
> (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

[2] *UNCITRAL: Report of the Working Group on Insolvency Law on the Work of the Eighteenth Session* (Vienna, 30 October - 10 November 1995), para 3. Note that prior travaux préparatoires defined "access" as being understood as "the procedural mechanism utilised by the foreign representative to seek recognition": see *Report of the UNCITRAL Working Group on Insolvency* (26 September 1995 A/CN.9/WG.V/WP42) para 92.

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment."

At most the preamble calls for "cooperation" between courts of different States, as will be seen this does not imply a restriction on a local court's ability to bring proceedings. It does not call for the unilateral acceptance of a foreign court's ruling. It does not call for exclusivity of one court's ruling, but for certainty, fairness, efficiency and facility.

15. The first Article of the Model Law sets out the scope of its applicability. It reads:

"1. This Law applies where:

(a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) Assistance is sought in a foreign State in connection with a proceeding under [identify laws of the enacting State relating to insolvency]; or

(c) A foreign proceeding and a proceeding under [identify laws of the enacting State relating to insolvency] in respect of the same debtor are taking place concurrently; or

(d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [identify laws of the enacting State relating to insolvency]."

Article 2 provides the definition of foreign representative as follows:

"(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;…"

The 'Guide to Enactment of the UNCITRAL Model Law on Cross Border Insolvency' (the Guide) offers some further, albeit minimal, assistance in regards to Art.1 by expanding as follows (at [22]):

> "**Scope of application of the Model Law**
>
> 22. The Model Law may be applied in a number of cross-border insolvency situations, including the following: (a) the case of an inward-bound request for recognition of a foreign proceeding; (b) an outward-bound request from a court or administrator in the enacting State for recognition of an insolvency proceeding commenced under the laws of the enacting State; (c) coordination of concurrent proceedings in two or more States; and (d) participation of foreign creditors in insolvency proceedings taking place in the enacting State (see article 1)."

In the instant case assistance has not been sought in this State by a foreign court or a foreign representative, nor is this court seeking the assistance of a foreign court, nor are foreign creditors seeking this court's assistance. Therefore, the instant case may only come within the scope of the Model Law because concurrent proceedings exist. As will be seen, the effects of this upon this court, if there are indeed any, are minimal.

16. The more general sections of the Guide are conspicuously silent on the situation where foreign courts or their representatives have not sought or are not seeking recognition. Paragraph 3 of the Guide is insightful in this respect, it provides that:

> "3. The Model Law respects the differences among national procedural laws and **does not attempt a substantive unification of insolvency law**. It offers solutions that help in several modest but significant ways. These include the following:
>
> (a) Providing the person administering a foreign insolvency proceeding ("foreign representative") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

(b) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;

(c) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;

(d) Permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;

(e) Authorizing courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;

(f) Providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State;

(g) Establishing rules for coordination of relief granted in the enacting State in favour of two or more insolvency proceedings that may take place in foreign States regarding the same debtor." [emphasis added]

The introductory phrase emphasises that "substantive unification" is not the goal of the Model Law. Substantive unification would presumably involve the automatic recognition of, and submission to, foreign bankruptcy judgments by a local court. It does not seek to automatically restrain local creditors from bringing an action against a person where that person has been made bankrupt elsewhere. Rather the goal is to enable, or to facilitate, the recognition of a foreign judgment through the active participation of the foreign court, its representative or foreign creditors generally. The goal reflects the procedural nature of the Model Law as opposed to any substantial nature. The Guide makes this even clearer when discussing the manner in which the Model Law should be fitted into existing national law. The Guide provides as follows (at [20]):

"With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State. This is manifested in several ways:

…

(b) The Model Law presents to enacting States the possibility of aligning the relief **resulting from recognition of a foreign proceeding** with the relief available in a comparable proceeding in the national law;

(c) Recognition of foreign proceedings does not prevent local creditors from initiating or maintaining collective insolvency proceedings in the enacting State (article 28);

(d) Relief available to the foreign representative is subject to the protection of local creditors and other interested persons, including the debtor, against undue prejudice; **relief is also subject to compliance with the procedural requirements of the enacting State** and to applicable notification requirements (article 22 and article 19, paragraph 2);

(e) The Model Law preserves the possibility of excluding or limiting any action in favour of the foreign proceeding, **including recognition of the proceeding**, on the basis of overriding public policy considerations, although it is expected that the public policy exception will be rarely used (article 6);

(f) The Model Law is in the flexible form of model legislation that takes into account differing approaches in national insolvency laws and the varying propensities of States to cooperate and coordinate in insolvency matters (articles 25-27)." [emphasis added]

The extract clearly posits recognition as a prerequisite to any substantive relief under the Model Law. This is also a conclusion drawn by Pedro A. Jimenez and Mark G. Douglas in relation to the Model Law in the United States, they assert that:

"As a practical matter, recognition under Chapter 15 is a prerequisite to nearly any kind of judicial relief for a foreign debtor in the U.S. If the court refuses to recognize a foreign proceeding under Chapter 15, it has the power to issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from other U.S. courts, although the representative may still sue in U.S. courts to collect on claims belonging to the debtor and does not need bankruptcy

court authority to act extra-judicially on behalf of the debtor in the U.S."[3]

17. Furthermore, as the Applicant notes (at [9] of Supplementary Submissions), the Guide stresses that recognition does not affect the local court's jurisdiction to commence or continue insolvency proceedings (see also Guide to Enactment at [42]). In any event, the Respondent in the instant case is not in a position to seek such recognition, and this is not the appropriate court for recognition under the Model Law to be sought. [4]

18. This conclusion as to the limited scope of the laws is consistent with the articles that relate to the effects of recognition of a foreign proceeding. Chapter III of the Model Law concerns such recognition. It begins with Art.15 which allows a foreign representative to apply for recognition of foreign proceedings and hence implies a requirement of active intervention on that person's part (Art.15(1)). The fact that such an application requires supporting documentation or evidence also suggests that without such evidence a court would not be able to recognise the foreign proceedings. The effects of recognition may include the stay of local proceedings concerning the debtor's assets (Art.20(1)(a)) , however, the "right to commence individual actions or proceedings against the debtor to the extent necessary to preserve a claim against the debtor" is unaffected (Art.20(3)).

19. Even without regards to the effects of recognition, the fact that local proceedings may be commenced irrespective of the existence of unrecognised foreign proceedings is reflected throughout the Model Law. For example, the mere distinction between "foreign main proceedings", and "foreign non-main proceedings" (Art. 2) presumes the co-existence of separate proceedings internationally. This issue was in discussion from as early as the *travaux préparatoires* of 1995, which included the following (at para.72):

> "… the view was widely shared that the instrument to be **prepared should acknowledge rather than resist the possible phenomenon of a plurality of insolvency proceedings.** It was

[3] Pedro A. Jimenez and Mark G. Douglas, 'Two and One-Half years and Counting: The Rapidly Maturing Jurisprudence of Chapter 15 of the Bankruptcy Code' May/June 2008 issue of Pratt's Journal of Bankruptcy Law, at 294. See also pages 296-297.
[4] See s.10, *Cross Border Insolvency Act 2008* (Cth).

> felt that, rather than attempting to restrict secondary proceedings, a goal which, it was said, would not be appropriate for the Commission's work though it may be so within the context of a regional convention as in the case of the EU draft, the instrument should seek to facilitate and maximize the degree of cooperation and coordination between proceedings in more than one jurisdiction." [emphasis added]

This led, (at paras.74-75), to the consideration of the concept of "main proceedings". The following is particularly instructive of the intention behind the Model Law in this regard:

> "In view of the above range of variable circumstances, possibly affecting the nature of cooperation and coordination that might be applied, and the nature of different possible insolvency proceedings taking place in parallel, considerable support was expressed for the view that the Commission legal text should neither attempt to draw specific distinctions in the nature of a hierarchy of proceedings in the context of plurality, nor attempt to define extensively the exact measure of cooperation and coordination among those proceedings. Rather, according to that view, the contribution to be made by the Commission would lie in affirming the principle of maximizing cooperation and coordination and providing legislative, enabling authority for judges inclined to cooperate in any given case." [para 75]

This extract proves illuminating when considering the open-ended nature of the Model Law. In the case of recognition of 'foreign non-main proceedings' a stay of local proceedings is not automatically effected but is discretionary. Article 21, which has been interpreted as having broader scope than Article 20 (see *Larsen v Navios International Inc* [2011] EWHC (Ch) 878, at [23]), deals with recognition of both main and non-main proceedings reads;

> "1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
>
> (a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of article 20;

> (b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of article 20;…"

20. It is clear that multiple proceedings may exist in relation to the one debtor across jurisdictions. Furthermore, any relief can only relate to assets that the local court considers, according to its laws, should be administered in the foreign non-main proceeding (Art.21(3)). The same logic applies to Art.28, which allows, *after recognition*, for the bringing of a proceeding in local courts to recover for assets held within that state's jurisdiction. This again reflects the concern of the Model Law to avoid a pure universalist approach to cross-border insolvency. It is implied that assets that the local court considers to not be covered by the foreign judgment may be controlled through local proceedings. As is explained in a recent edition of the Harvard Law Review, in relation to the United States' adoption of the laws:

> "In its "pure" form, universalism posits that only one judicial body--that of the debtor's home country--should play any role in cross-border cases. **In its more common "modified" form, which Chapter 15 adopts, universalism allows for courts outside the debtor's home country to open secondary cases supplementing the main case.**"[5] [emphasis added]

21. Any substantive effect on the court's ability to entertain proceedings themselves is only instigated when a foreign proceeding has been recognised locally. Furthermore, even at that point, the effect is not to hinder the local court's discretion to bring proceedings. This interpretation of the laws is reflected in the limited case law that they have generated.

b) The interpretation of the Model Law both locally and globally

22. The Model Law instructs courts to interpret them with regards to their international origin and the need to promote uniformity in its application (see Model Law art.8). However, jurisprudence on the laws remains limited and although there is a growing body of precedent in

[5] Harvard Law Review, 'Developments in the Law – Extraterritoriality' 124 HVLR 5, March 2011, at 1292, available at http://www.harvardlawreview.org/issues/124/march11/Developments_in_the_Law_7938.php (accessed 18 October 2011).

regards the recognition of foreign proceedings, jurisprudence on the question of the applicability of the Model Law where no recognition has been made or sought is particularly scant. This is no doubt in large part due to their infancy: the Australian adoption took effect on 1 July 2008 making it only the 15th country to adopt the laws (since then that number has grown to 19)[6]. But it may result from other factors such as the straight-forward nature of the laws,[7] or from a lack of trust in them – resulting in greater use of private international insolvency treaties.[8] The Harvard Law Review's treatment of the laws as promulgated in the United States, suggests that they have been of limited effect thus far (at [1294]) and calls for a stronger public international protocol (at [1304]).

23. In Australia consideration of the laws is particularly limited. An extensive search has uncovered only one decision of an Australian court which may be of some assistance to the instant case: that of *Winter v Winter and Ors* [2010] FamCA 933. That case concerned, in part, an Australian company that was the wholly owned subsidiary of a New Zealand company in liquidation. The issue that arose in regards to the CBI Act concerned whether or not legal proceedings could be brought in Australia in relation to a horse float that was the property of either the New Zealand company or the Australian company. O'Reilly J first considered that the effects of liquidation under the *Companies Act 1993* (NZ), which prevented the bringing of proceedings in relation to the company's assets without the consent of the liquidators, did not extend to Australian proceedings. She then considered the effect of the Model Law opining that it:

> "provides a mechanism for the liquidators, if they wish, to make application to the Federal Court of Australia or the Supreme Court of a State or Territory for recognition of the foreign

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[6] As of 25 June 2010: http://www.unis.unvienna.org/unis/pressrels/2010/unisl138.html (accessed 20 September 2011). According to UNCITRAL, legislation based on the Model Law has been adopted in Australia, Canada, Colombia, Eritrea, Greece, Japan, Mauritius, Mexico, Montenegro, New Zealand, Poland, Republic of Korea, Romania, Serbia, Slovenia, South Africa, the United Kingdom, the British Virgin Islands and the United States of America: UNCITRAL, *Status, 1997 – Model Law on Cross-border Insolvency* (2009) UNCITRAL available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (accessed 18 October 2011).

[7] *Paul Andrus et al v. Digital Fairway Corporation* (Civil Action No.3:08-CV-119-O) (henceforth *Paul Andrus*) at [page 5].

[8] Harvard Law Review, 'Developments in the Law – Extraterritoriality' 124 HVLR 5, March 2011, at 1302.

> proceedings in which they are appointed: Article 15. **Upon recognition**, proceedings here against [the New Zealand company] would be stayed and the right to deal with its assets suspended: Article 20. Further, the liquidators, as foreign representative, upon meeting certain requirements, may intervene: Article 24." (at [208]) [emphasis added]

O'Reilly J noted that no such application had been made for recognition and continued to opine (at [210-212]):

> "In these circumstances Mr Baston submitted, which appears to be correct, that until and if the liquidators apply for recognition of the foreign proceedings this Court is free to deal with and make orders about assets in Australia of A New Zealand and of A Australia its wholly owned subsidiary.
>
> There seems no legal impediment therefore to my ability to make orders in relation to the horse float, a known asset of A New Zealand or A Australia.
>
> In relation to these observations I have given careful considerations to the aspect of comity. However, **the Model Law seems to be framed as a code as there is nothing in it express or implied requiring this Court to not deal with assets unless and until the mechanisms set up in it are triggered.** I would add that by way of courtesy notice of these proceedings against A New Zealand and A Australia was provided to the liquidators by the Court forwarding to them an order made on 24 May 2010, which order made express reference to Article 15 of the Model Law." [emphasis added]

24. This supports a reading of the Model Law and the CBI Act that they do not affect the court's jurisdiction to make a sequestration order even though a similar order is in force elsewhere until they are actively engaged. Of further import is O'Reilly J's additional reference to the notice given to the New Zealand liquidators. In the present case similar notice appears to have been given to the Official Assignee in New Zealand who does not object to a sequestration order being made in Australia and has not sought to have the New Zealand decision recognised as a foreign proceeding under the CBI Act.[9]

[9] Applicant's Further Submissions (at [6]), Affidavit of Mr Goldman, 28 June 2011, para 2 (see Annex 'A').

25. A similar understanding can be extracted from the United States' approach to cases in which no recognition of the foreign judgment has been sought. In *U.S. v. J.A. Jones Const. Group*, LLC 333 B.R. 637 E.D.N.Y., 2005 (henceforth *J.A Jones Const. Group*), it was held that a District Court had no authority to consider a request for a stay of proceedings filed by an interim receiver appointed in accordance with Canadian insolvency law because that receiver had at that point failed to seek recognition of the foreign proceedings. Indeed, Yaad Rotem interpreted the finding as supporting the contention that without recognition, or a petition for recognition, "courts have no authority to consider requests for a stay".[10] In keeping with the Australian authority, the American court restricted the operation of the Model Law to situations when a foreign court actively seeks assistance. The court stated (at [638]) that the provisions of the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (US) which incorporated the Model Law:

> "Generally […] are applicable to cases where "assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding."

And more specifically, (at [638]) that:

> "However, relief under Chapter 15 is available only after a foreign representative commences an ancillary proceeding for recognition of a foreign proceeding before a bankruptcy court."

26. Perhaps not surprisingly, this finding was based not on precedent but rather on discussion in a report made to the United States Congress by the Committee on the Judiciary House of Representatives.[11] The section of the report relied upon importantly includes the following statement in relation to the adoption of the Model Law in the United States:

> "Under the Model Law, notwithstanding the recognition of a foreign main proceeding, full bankruptcy cases are permitted in each country (see sections 1528 and 1529). In the United States,

[10] Yaad Rotem, 'The Problem of Selective or Sporadic Recognition', 10 Chicago Journal of International Law, at 533.
[11] H. Rep. at 107–08, U.S.Code Cong. & Admin.News 2005, 88, 170–71, available at http://www.law.ttu.edu/lawlibrary/library/research/bapcpa_library/house-report-109-31-101-110.htm#Sec._1504._Commencement_of_ancillary_case (accessed 18 October 2011).

the court will have the power to suspend or dismiss such cases where appropriate under section 305."[12]

27. "Section 305" above refers to section 305 of Chapter 11 of the *United States Code* which applies to Bankruptcy. Section 305 regulates cases in which it would be appropriate for the Bankruptcy Court in the United States to decline jurisdiction. It reads:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if: (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
>
> (2)
> (A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and
>
> (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension. (b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section. […]

28. This, in conjunction with *J.A. Jones Const. Group*, confirms that it is expected that the Model Law does not affect a local court's jurisdiction without an application for recognition of a foreign proceeding having been made. For the court to abstain from hearing a matter, based on the Model Law, such a positive action is required and even if recognised the Court retains the discretion not to dismiss or suspend the proceedings. In other words, if the purposes of Chapter 15 of Title 11 of the *United States Code* (the chapter dedicated to the United States' adoption of the Model Law) would be better served by separate, local proceedings continuing, the court may so proceed.

29. *J.A. Jones Const. Group* was cited with approval in *Paul Andrus*. In that case the defendant had sought a stay of the proceedings on the basis that Chapter 15 applied and that therefore the proceedings should be stayed in accordance with s.362. In essence it was submitted that the defendant intended to file for bankruptcy in Canada (presumably in a manner similar to a debtor's petition, see *Paul Andrus* at [page 4]) and that such an intention was sufficient to trigger the automatic stay in Chapter 15. This motion was rejected on the basis that it did not satisfy

[12] Ibid.

the requirements of Chapter 15. The application based on the Model Law was in fact withdrawn and replaced with an application for a stay based on an exercise the court's discretion but it continued to draw heavily on Chapter 15 "for arguments regarding court efficiency and comity with a foreign jurisdiction" [page 5].

In rejecting the application O'Connor J opined as follows:

> "At some point in the future, then, there might be a Chapter 15 bankruptcy case opened in the United States. […] **Depending on the foreign representative's view of how to manage the docket** (s)he faces, there then might be a request for this Court to suspend its proceedings. In that event, Chapter 15 will govern. Until then, the Court is asked to place proceedings on hold indefinitely.
>
> …
>
> A motion to stay in federal court draws no strength from the unrelated matter of potential Chapter 15 proceedings or the myriad of outcomes possible in them." [page 6] [emphasis added]

30. The present matter is thus clearly distinct from that considered in *Paul Andrus*, largely because a foreign proceeding has already come to a close in New Zealand and a foreign representative already exists in the form of the Official Assignee. However, the court's analysis is still of some relevance to the instant matter in regards to both the procedure that should be applied in cases invoking the Model Law where there has been no recognition of a foreign proceeding and in regards to subsequent proceedings when the Model Law is applicable. The emphasis in the above cited passage shows that the U.S. courts see the effects of the Model Law as hinging on the actions of the foreign representative. The court also noted that the, "process Congress enacted [in Chapter 15] is clearly stated therein" and then, in footnote 4 [on page 5], the court elaborated as follows:

> "Chapter 15 directs the petitioned court to receive information provided under petition by a proper foreign representative and then process it through a hearing and deliberation to establish the foreign proceedings' relevance to property in the United States, the interests of the parties, and other probative issues. See 11 U.S.C. §§ 1519-1523; see also 8-1501 Collier on Bankruptcy – 15th Edition Rev. P1501.01. **Only then, and only through the**

> **actions of the foreign representative, might this Court take steps subordinating the Plaintiff's otherwise legitimate right of access to legal protection.**" [emphasis added]

before continuing, "[u]nder that process, the Court has yet to hear from a party with standing to even raise the possibility of relief under Chapter 15.11 § 1504, 1511,1515." Thus, in accordance with *Jones*, the Model Law does not apply until there has been recognition of foreign proceedings instigated by a foreign representative and that until that time action may be brought locally to protect one's legal interests.

31. In relation to later application of the Model Law, O'Connor J considered that given the advanced nature of the proceedings, in the interests efficiency and fairness, it would be better to proceed, and that the potential foreign representative might likewise agree to such proceedings continuing as being a less expensive and time-consuming way to have conclusive evidence on liability and damages (see page 7). That is to say, that O'Connor J may well have been in favour of the proceedings continuing regardless of the existence of a foreign ruling. Similarly in the instant case, which is even further advanced, the making of a separate sequestration order is permissible and apparently not objected to by the Official Assignee in New Zealand.

32. Finally, in *Williams v Simpson* [2011] 2 NZLR 380, a New Zealand case in which recognition was sought under the Model Law, as adopted in New Zealand by the *Insolvency (Cross-border) Act 2006* (NZ), Heath J asserted (at [5]) that,

> "The Act creates procedural, rather than substantive, rights. It provides the basis for a modern legal framework designed to facilitate efficient disposition of cases in which an insolvent debtor is subject to a collective insolvency regime in more than one country or has assets or debts in more than one country."

Once more, this suggests that whilst the Model Law provides the procedure for recognition of foreign bankruptcies, that recognition, and the effects that may flow from it, is not automatic.

33. I have been unable to locate any authorities from Canada or the United Kingdom[13] which directly apply to the instant factual scenario.

Cooperation: Concurrent proceedings

34. Cooperation is dealt with in Chapter IV of the Model Law. Article 25 of which calls for courts to "cooperate to the maximum extent possible" in matters referred to in Art.1 and entitles the court to "communicate directly with, or request information or assistance directly from, foreign courts or foreign representatives".[14]

35. Article 26 applies only to those appointed to administer a reorganisation or liquidation by the local court. It indicates that they must cooperate with foreign courts and foreign representatives. This article is in fact instructive as to the power of a local court to proceed in local bankruptcy matters. It is implied that a local court may appoint its own administrator even though there is a foreign proceeding that has appointed a 'foreign representative'. In regards the instant matter, the presence of this article confirms that a local court may issue a sequestration order.

36. Article 27 details the forms of cooperation that may be undertaken by a local court. It reads:

> "Article 27. Forms of cooperation
>
> Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:
>
> (a) Appointment of a person or body to act at the direction of the court;
>
> (b) Communication of information by any means considered appropriate by the court;
>
> (c) Coordination of the administration and supervision of the debtor's assets and affairs;

[13] Where the Model Laws are adopted by regulation 2 of the *Cross-Border Insolvency Regulations 2006* (UK).
[14] See above at [14] of these reasons. The instant matter falls within the scope of Art.1 as concurrent proceedings in regards the same debtor, hence cooperation must be considered.

(d) Approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) Coordination of concurrent proceedings regarding the same debtor;

(f) [The enacting State may wish to list additional forms or examples of cooperation]." [15]

Once more there is a clear implication that the local court may continue with its own proceedings regardless of the existence of foreign proceedings: when confronted with an issue in cross-border insolvency, it may "appoint a person or body to act at the direction of the court".[16] It is also clear from Article 27, and s.18 of the CBI Act, that the emphasis is on coordination of the proceedings so as to avoid inconsistencies or overlap in orders made.

37. It is Article 29 of the Model Law that instructs that where a foreign proceeding and a local proceeding are taking place concurrently regarding the same debtor, "the court shall seek cooperation and coordination under articles 25, 26 and 27" and also outlines effects of the Model Law in the case that recognition is being sought or has been made (in sub-art.29(a-c)). Both the Guide to Enactment (at [189]) and the Explanatory Memorandum to the CBI Act (at [74]) make clear that the "principle embodied in article 29 is that the commencement of local proceedings does not prevent or terminate the recognition of a foreign proceeding" (see also Applicant's submissions at [16]). This suggests that the guiding principle behind article 29 is to preserve the rights of foreign representatives, and not to impinge upon the rights of local creditors.

38. Importantly, as the UNCITRAL Guide to Enactment makes clear (at [177]), cooperation by either the local representative, or by the court does not require that the foreign proceeding be formally recognised. Consequently, whilst the Model Law doesn't grant a coexisting foreign

[15] Note that Section 18 of the Act reads: "Forms of cooperation: To avoid doubt, no additional forms or examples of cooperation are added by subparagraph (f) of Article 27 of the Model Law (as it has the force of law in Australia)." Although, the Explanatory Memorandum to the Act affirms that the list is not exhaustive (at [71]).

[16] Article 26 ensures that person is also obliged to cooperate with the foreign court or its representatives.

proceeding any substantial effect upon local proceedings, it does ensure that the local court cooperates with the foreign court. This does not affect this court's ability to make a sequestration order; indeed, such a step may even be of assistance to the foreign court or its representative.

Adhesion to Common Law Principles of Recognition of Foreign Judgments.

39. What is evident across the jurisdictions investigated is that to read the Model Law as not affecting this court's ability to make a separate, local sequestration order is not inconsistent with the common law approach to recognition of foreign judgments. As Yaad Rotem states in his treatment of *J.A. Jones Const. Group*, in relation to common law jurisdictions, "[u]nrecognised foreign judgments have no legal effect whatsoever" and "a foreign judgment is meaningless prior to being formally recognised by the courts or the government."[17] He also stresses that in such cases a formal process of recognition is needed.[18] In making those affirmations, Rotem draws on Peter R. Barnett's *Res Judicata, Estoppel, and Foreign Judgments*[19] a recurring theme of which is indeed that a lack of formal recognition leaves a foreign judgment with no effect in local proceedings. In his introduction, whilst considering the increasing number of international disputes, he states that legal rights and duties will increasingly be determined by foreign courts and that foreign judgments and awards will, in turn, "require recognition in local jurisdictions".[20] Barnett consistently stresses that recognition must precede any preclusive effect that a foreign judgment may incur in a local forum. For example, he states:

> "It is, of course, fundamental that a foreign judgment – if it is to have any effect within the local forum – must first be recognised."[21]

And later that:

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[17] Yaad Rotem, 'The Problem of Selective or Sporadic Recognition', 10 Chicago Journal of International Law, at 531-532.
[18] Ibid, at 532.
[19] Peter R. Barnett, *Res Judicata, Estoppel, and Foreign Judgments* (Oxford University Press, 2001).
[20] Ibid, p.4.
[21] Ibid, p.26.

> "Whether a judgment is recognised for the purposes of enforcement of, or preclusion by, a foreign judgment **follows only once the judgment has been recognised**."[22] [emphasis in original]

40. This is of course not to say that foreign judgments should not have effect, or that it is undesirable to enforce them, it is simply to reinforce the notion that recognition is required before any subsequent effects. It should be noted that this is consistent with the notion that foreign bankruptcies should be respected. This is a principle firmly espoused in the English case of *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 (*Cambridge Gas*). It is consistent with recent English precedent in regards to the recognition of foreign bankruptcies. Indeed, the English cases point to a desire for a universalist approach to bankruptcy. In *Cambridge Gas*, Lord Hoffman opined (at [16]) that:

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated…"

41. However, it is clear from the judgment that recognition is still a necessary step to any universalist effect of a foreign judgment. Lord Hoffman also noted (at [20]) that:

> "the underlying principle of universality is of equal application and this **is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England.** In addition, as Innes CJ said in the Transvaal case of In re African Farms Ltd [1906] TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, **'recognition which carries with it the active assistance of the court.**'" [emphasis added].

And, whilst considering any limits to the court's assistance his Honour opined (at [22]):

[22] Ibid, p.32 (see also, p. 35)

> "But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum…"

Whilst the reasoning referred to assistance which a court should provide in the furtherance of the ideals of a universalist approach to bankruptcy, it is clear that any such assistance only follows recognition. This reasoning has since been followed and applied in subsequent cases after the introduction of the Model Law, see for example *Rubin and another v Eurofinance SA and others* [2010] EWCACiv 895 (*Rubin*), *Williams v Simpson* [2011] 2 NZLR 380.

42. In *Rubin*, Ward LJ was considering an application for the recognition of foreign bankruptcy proceedings in England, he concluded (at [62]):

> "I accept the general principle of private international law that bankruptcy, whether personal or corporate, should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets. That is the law stated in the Cambridge Gas case [2007] 1 AC 508 and the HIH Insurance case [2008] 1 WLR 852 and I would follow it. Add to that the further principle **that recognition carries with it the active assistance of the court** which should include assistance by doing whatever this court could have done in the case of domestic insolvency." [Emphasis added]

His Honour supported the above statement by reference to Lord Hoffman's assertion in *Cambridge Gas* at [22], as cited above. The assistance which Ward LJ assented to was not through adhesion to the Model Law, but through common law, however, he did treat Article 27 "cooperation" in obiter, stating that cooperation "to the maximum extent" should include enforcement (at [63]). Importantly though, that statement was made in the context of an application for recognition which is not the instant case. What is apparent from his judgment is that recognition remains a prerequisite to such enforcement.

Conclusion on the Model Law

43. What is clear from all of the above is that recognition is a required step in order for foreign bankruptcy judgments to take effect in a local forum. The Model Law does not attempt to introduce automatic recognition, or automatic universal application of judgments of courts situated in countries that have adopted the Model Law. It was conceived in an environment of respect for difference between jurisdictions and from this it can be assumed that recognition of foreign judgments, a measure that can protect local creditors and a local court's sovereignty, was to be maintained. It was promoted as having a procedural effect as opposed to a substantive effect that might have included automatic recognition and enforcement or effects. In any case, the conduit which the Model Law does provide for coordinating the current proceedings with those in New Zealand are apparently not available to this court (s.10 of the CBI Act). When it does apply, the Model Law does not restrict a local court or local creditors from commencing bankruptcy proceedings nor from concluding those proceedings.

44. The comments made above concerning recognition are not directly relevant to assistance being given under s.29 of the Act. But that section also requires action on behalf of the New Zealand Assignee before it can be utilised. It is not a remedy that can be sought by an individual creditor. BankWest has views about the debtor's assets in Australia, which may or may not be correct. It could not of itself seek the assistance of the Australian courts to investigate. The Assignee has declined to do so. BankWest has a remedy available here, a sequestration order; it should be allowed to utilise it.

Conclusion

45. One practical matter also influences me. A Trustee appointed in Australia will have far more familiarity with and experience in the use of those provisions of the *Bankruptcy Act* which assist in the search for and release of assets within Australia. In a recent application before me I noted that Mr Henderson had sworn that he had no assets in this country *Bank of Western Australia Ltd v Henderson (No 2)* [2011] FMCA 837 but, as I explained in my decision, that he may not have

assets now is not the only relevant consideration. What happened to any assets he did have is equally important. Were they disposed of preferentially or at an undervalue? An Australian Trustee would have a sharper understanding of these matters and the manner in which investigation can be conducted. I believe the conduct of such investigations would also be cheaper if controlled by an Australian Trustee rather than by an agent on behalf of the New Zealand Official Assignee.

46. I do not believe that the extension of the bankruptcy by virtue of the Australian proceedings is sufficient in itself to amount to a reason under s.52 of the Act. The period is only a few months. It would have been considerably less if the debtor had not resisted the application.

47. In light of the above I can be satisfied that the existence of the New Zealand sequestration is not an "other sufficient reason" within the meaning of s.52 of the *Bankruptcy Act*. I am satisfied that the Respondent committed the act of bankruptcy alleged in the Petition. I am satisfied of the other matters required by s.52. I make a sequestration order against the estate of David Stewart Henderson.

48. The court notes that the date of the act of bankruptcy is 9 December 2009 and that Mr David John Kerr has consented to act as Trustee. A copy of this order shall be provided to the Official Receiver in Sydney within 2 days.

49. The costs of the application including any reserved costs shall be taxed and paid from the estate of the Respondent in accordance with the Act.

I certify that the preceding forty nine (49) paragraphs are a true copy of the reasons for judgment of Raphael FM

Date: 2 November 2011