Rubin and New Cap - Cross-border insolvency and enforcement of judgments in foreign proceedings in England and Wales (SC)

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Case: Rubin and Another v Eurofinance SA and others and New Cap Reinsurance Corporation Ltd and another v Grant and others [2012] UK SC46 Lords Walker, Maurice Clarke, Sumption and Collins

Synopsis: The Supreme Court has ruled (by a majority of 4:1) that no special common law rules apply permitting judgments in respect of avoidance actions in foreign insolvency proceedings to be recognised where foreign judgments would not be recognised or enforced outside of an insolvency context. The Supreme Court has also ruled that there is no scope for foreign insolvency judgments to be recognised or enforced in the UK under either the Cross-border Insolvency Regulations 2006 or section 426 IA 1986. A foreign insolvency judgment is, however, enforceable in the UK where the judgment is obtained in insolvency proceedings taking place in a jurisdiction to which the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies, where the procedures established under that legislation are followed. In New Cap Re, the judgement in relation to the Australian avoidance action was also enforceable in the UK as the judgement debtor had submitted to the jurisdiction by proving in the foreign insolvency.

Topics covered: Cross Border Insolvency; Common Law Cross Border Insolvency Principles; Clawback Claims; Cross Border Insolvency Regulations 2006; S426 IA86; Foreign Judgments (Reciprocal Enforcement) Act 1933

The Facts

The Supreme Court's decision relates to a combined appeal from decisions of the *Court of Appeal in Rubin and Ors v Eurofinance SA and Ors* [2010] EWCA Civ 895 (See Technical Bulletins 300 and 222) and *New Cap Reinsurance Corporation Limited and Ors v AE Grant and Ors* [2011] EWCA Civ 971(See Technical Bulletin 359]. Members are referred to the previous bulletins for a further summary of the background facts against which the issues came to be determined. In essence, however, in both *Rubin* and *New Cap* the English Court was being asked to enforce judgments based on insolvency avoidance powers obtained in default of the appearance of the respective defendants, it having been accepted or found in respect of each of the cases that the judgment debtor was neither present in the foreign company nor submitted to its jurisdiction. In *Rubin* the English Court of Appeal (CA) had held that it had power under both English common law principles and under the Cross-border Insolvency Regulations 2006 ("CBIR") to enforce a judgment of the US Federal Bankruptcy Court for the Southern District of New York, in default of appearance, of approximately US $10m in respect of fraudulent conveyances and transfer. In *New Cap* the CA followed *Rubin* in its analysis of the common law and also found that the English Court had jurisdiction to enforce a judgment obtained by an Australian liquidator under section 426 IA 1986 and under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (1933 Act). As part of its deliberations the SC also considered the written submissions of Mr Irving Picard, the trustee for the US Securities Investor Protection Act 1970 of Bernard L Madoff Investment Securities LLC, as an interested party in connection with pending proceedings in Gibraltar to enforce US default judgments.

Background

The hearing of the combined appeals involved the SC considering each of the available gateways through which a foreign insolvency judgment can potentially be recognised and enforced in England (with the exceptions of the EC Regulation on Insolvency Proceedings (Insolvency Regulation), and the Judgments Regulation, neither of which were relevant as the judgments debtors under consideration all had their CoMIs outside of the EU). The gateways to enforcement which were considered comprised the following:

1. S426 IA 86 (relevant to *New Cap*, but not *Rubin*).

2 The CBIR (relevant to *Rubin* – but not to *New Cap* as the matters in issue there took place before the implementation of the CBIR).

3 Recognition under the common law (considered in both appeals).

4 The 1933 Act. (Relevant in *New Cap* given that Australia is a country within the scope of the 1933 Act, but not relevant in *Rubin*). By way of reminder, the 1933 Act applies to and concerns the enforcement of any judgment for the payment of money in respect of civil and commercial matters by courts in an applicable jurisdiction (as further described in the Technical Bulletin 359).

Leaving aside any additional considerations arising in an insolvency context it was common ground that under English common law principles of private international law a foreign court outside of the UK has jurisdiction to deliver a judgment *in personam* capable of enforcement or recognition in the UK only where the judgment debtor (1) was present in the foreign jurisdiction when the proceedings commenced; or (2) had made a claim or counterclaim in the foreign proceedings; or (3) had submitted to the jurisdiction by voluntarily appearing in the proceedings; or (4) had agreed to submit to the jurisdiction. This common law rule is summarised in Dicey, Morris & Collins, Conflict of Laws ("the Dicey Rule".) (Rule 36 in 14th edition, 2006 of Dicey, Morris & Collins, and Rule 43 15th edition, 2012, para 14R-054). Further, by the time of the hearing before the CA in *Rubin* the office holders there had accepted that the Dicey Rule in any event applied where an office holder in insolvency proceedings sought to enforce judgments where those judgments did not derive directly from the insolvency proceedings or were not closely connected with them (for example where the office holder in the foreign insolvency proceedings was pursuing a claim for breach of contract or breach of trust).

The Arguments

Recognition under the common law

The office holders seeking to enforce the relevant default judgments relied on principles of common law articulated by Lord Hoffman in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26 as a rule of private international law (See Technical Bulletin 60). In *Cambridge Gas* Hoffman LJ had held that special rules apply in the context of cross-border insolvency because the

purpose of bankruptcy proceedings is *"to provide a mechanism of collective execution against the property of the debtor" and that its purpose was not to "determine or establish the existence of rights"*. Developing this analysis Lord Hoffman held that the principle of universality underlay the common law principles of judicial assistance in international insolvency and that those principles enabled the domestic court to assist the foreign court by doing whatever it could have done in the case of a domestic insolvency case, (and so obviating the need to open local proceedings). In *HIH Casualty and General Insurance Ltd* [2008] UKHL 21 (seeTechnical Bulletin 65) Lord Hoffman went further and said:

"The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution".

The office holders sought to rely on these principles to gain recognition of the avoidance action judgments obtained in the foreign insolvency proceedings. For the judgment debtors it was argued before the SC that the principle of modified universalism was a principle which was subject to limits and that those limits would not permit deviation from the Dicey Rule by virtue of the judgment arising in insolvency proceedings.

The CBIR

At the SC the appellants in *Rubin* had abandoned the argument that the adversary proceedings themselves should not be recognised as part and parcel of the chapter 11 proceedings. However, they maintained that there was no power to grant relief in the form of recognition and enforcement of the foreign judgment under the CBIR. The office holders in *Rubin* sought to rely on the court's discretionary powers under Art 21 to grant *"any appropriate relief' including relief of the type listed in the article of 'any additional relief that may be available to a British office holder…"*. They argued that the fact that recognition and enforcement of foreign judgments is not specifically mentioned in Art 21 as one of the forms of relief available does not mean that such relief cannot be granted. Reliance was also placed on Art 25 concerning the cooperation and direct communication between a court of Great Britain and foreign courts and provides:

"(1) … the courts may co-operate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a British insolvency office holder".

Assistance under s426 IA 86

The judgment debtor in *New Cap* sought to overturn the finding of the CA, (that the Australian default judgment should be enforced pursuant to the court's powers under s426 IA 86) relying principally upon an argument concerning the construction of the language of the section.

1933 Act

The CA had held in *New Cap* that insolvency proceedings were included within the scope of judgments in civil and commercial matters covered by the 1933 Act so that the Australian judgment in respect of insolvency claw-back proceedings could be enforced

either under the 1933 Act or under s426 IA 86 (which it held was not excluded as a route to relief through provisions in the 1933 Act).

The Decision

The Supreme Court Decision

Recognition under the Common law

The SC, articulating its leading judgment through Lord Collins, approached the issue as one of pure policy and rejected the argument that in the interests of universality of bankruptcy procedures the court should '*devise a rule for the recognition and enforcement of judgments in foreign insolvency proceedings which is more expansive, and more favourable to liquidators, trustees in bankruptcy, receivers and other office holders, then the traditional common law embodied in the Dicey Rule*'. Lord Collins held that no such rule presently existed and stated that if such a rule were to be developed it would be a matter for Parliament after appropriate consultation and was not the appropriate subject of judge-made law. The rest of the law lords, with the exception of Lord Clarke, agreed. Lord Collins went further and held that the decision in *Cambridge Gas* was wrongly decided:

Para 132:

"*It follows that, in my judgment, Cambridge Gas was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man*".

Although agreeing broadly with Lord Collins as to his reasoning and conclusions in his judgment, Lord Mance reserved his opinion on whether *Cambridge Gas* was wrongly decided as this point had not been argued before the SC and because *Cambridge Gas* was distinguishable given that it concerned shareholdings in an insolvent company rather than *in personam* claims. Lords Walker and Sumption agreed with Lord Collins' judgment without qualification and Lord Clarke issued a short minority judgment. Lord Clarke agreed that *Cambridge Gas* was distinguishable, but did not agree with the majority decision that it was wrongly decided. In a minority ruling he considered that the appeal on *Rubin* should be dismissed. He agreed on all other issues with the judgment of Lord Collins.

The Application of the Dicey Rule and Submission to the Jurisdiction

In the context of *New Cap*, and having found that the Dicey Rule did apply, Lord Collins went on to consider the question of whether the judgment debtors had submitted to the jurisdiction for the purposes of that rule. He articulated at para 161 the principles by which this issue was to be determined.

"The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts".

It was not in issue that the judgment debtors had not taken any steps in the clawback proceedings themselves, but Lord Collins went on to consider whether the steps taken by the judgment debtors in the Australian liquidation amounted to a submission to the jurisdiction for the purposes of the Dicey Rule. The judgment debtors had submitted a proof of debt and proxy form at a meeting of creditors, voted on a scheme of arrangement and had claims to a sum of £650,000 admitted by the office holder (although they had not received a dividend) and albeit that these steps had all post-dated the entry of the default judgment. Relying on old English case law authority in *Ex p Robertson, in re Morton* (1875) LR Eq 733, Lord Collins concluded that, having chosen to submit to the Australian insolvency proceeding by proving in the insolvency, the judgment debtors should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. He commented at para 167 *"It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding*".

The CBIR

The SC unanimously concluded that as the CBIR includes no express provision dealing with enforcing a foreign judgment against a third party there was no power under the CBIR for the court to do so. Lord Collins commented at paragraph 143:

"It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties".

Assistance under s426(4) and (5) IA 86

The decision of the SC that the judgment debtors in *New Cap* had submitted to the jurisdiction of the Australian Court made the SC's decision on the scope of s426 strictly obiter. Nevertheless Lord Collins went on to express a view about the applicability of the section as the matter had been fully argued. In practice the obiter decision of the SC on the scope of s426(4) and (5), will carry very significant weight. Lord Collins concluded that there was no power for the court to make an order enforcing a foreign insolvency order under s426(4) and (5). He reached this decision having observed that s426(1) and (2) dealt with the enforcement of orders from one part of the United Kingdom to another, but that in contrast s426(4) and (5) made no mention of enforcement. He concluded that if it were to be held that the court had a general power to enforce under s426(4) this would

render s426(1) and (2) largely redundant.

Comment

The SC's decision represents a retreat and narrowing of the power of the court to assist foreign office holders since the era of Lord Hoffman but only in so far as enforcement of judgments, not the recognition of the insolvency proceedings themselves or indeed the granting of assistance within those proceedings. The SC has concluded that the Dicey Rule must be satisfied if a foreign judgment is to be enforced in the case of insolvency proceedings as it must in other contexts. It is a decision which has quite overtly been taken on policy grounds. The SC has, however continued to endorse the general principle that the English court has power at common law to recognise and grant assistance to foreign insolvency proceedings and at paragraphs 29-34 of the judgment considers, with apparent approval the circumstances in which the English court has exercised this common law power (being circumstances ranging from the granting of stays of local proceedings to orders for the examination of debtors). No doubt the full extent to which such assistance can be given will be clarified in future case-law. Whilst there is uncertainty as to the precise extent to which the English court can give assistance the decision (whether at common law or under either the CBIR or s426 IA 1986) the decision at least brings certainty to the issue of enforcement of overseas judgments. It seems likely, however, that parallel proceedings may now more frequently have to be opened in cross-border insolvency cases unless of course they fall under the Insolvency Regulation or under the European Winding Up Directives for banks and insurance companies. In some respects the most interesting aspect of the SC's decision in the context of *New Cap* is the submission to the bankruptcy court by filing a proof in the liquidation, and how far this may affect future practices. No general guidance is given about what may amount to submission save that it is to be 'inferred from all the facts' and has to be considered objectively. In a restructuring context where compositions are relied upon to bind a minority of dissenting creditors, it will be interesting to see whether reliance on that composition in other jurisdictions may fall foul of being enforced, if the dissenting minority have not otherwise submitted to the jurisdiction.
