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ARTICLE

Enforcement of Foreign Insolvency Judgments: A Missed Opportunity?

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In two conjoined appeals, *Rubin v. Eurofinance S.A.* ('*Rubin*') and *New Cap Reinsurance Corporation v. A E Grant* ('*New Cap*'),[1] the Supreme Court of the United Kingdom was required to consider the circumstances in which a judgment of a foreign court in insolvency avoidance proceedings will be recognised and enforced in England. In the leading judgment, Lord Collins (with whom Lords Walker and Sumption agreed) identified the issue as being whether, as a matter of policy and in the interests of the universality of insolvency proceedings, the court should devise a rule for the recognition and enforcement of judgments in insolvency proceedings which is more expansive, and more favourable to liquidators, trustees in bankruptcy and other insolvency officeholders, than the traditional common law rule. The traditional rule he was referring to is now encapsulated in Rule 43 of *Dicey, Morris and Collins on the Conflict of Laws* (15th edn) and is to the effect that a judgment *in personam* will not be capable of enforcement or recognition unless the judgment debtor was present in the foreign jurisdiction at the time the proceedings were instituted, or has otherwise submitted to the jurisdiction of the foreign court (either by agreement or appearance).

The cases of *Rubin* and *New Cap* presented the Supreme Court with a timely opportunity to address the approach of English law to the interplay between the principles of cross border insolvency and the traditional conflict of laws rules governing the recognition and enforcement of foreign judgments. The answer it gave was somewhat disappointing.

The salient facts can be briefly stated as follows. In *Rubin* the insolvency officeholders, having been recognised in England as foreign representatives of a trust ('TCT') which was subject to Chapter 11 proceedings in New York, sought to enforce in England an insolvency judgment of the US Bankruptcy Court for the Southern District of New York. The judgment was given in adversary proceedings in the Chapter 11, and included causes of action in respect of transactions at an undervalue and preferences arising under the US Bankruptcy Code. In the Court of Appeal and the Supreme Court (but not at first instance), the officeholders only sought enforcement of those parts of the judgment which were based on state and federal avoidance laws. None of the defendants was present in the US at the time the adversary proceedings were commenced and the judgments were given in default of their appearance. However, two of the defendants had had a role in initiating the Chapter 11 proceedings, because they had been involved in an application to the English court for the original appointment of the officeholders as English receivers of TCT for the purposes of causing it to obtain protection under Chapter 11.

In *New Cap*, the insolvency officeholders sought to enforce in England a judgment of the Supreme Court of New South Wales concerning a preference given to a Lloyd's syndicate during the period of 6 months prior to the date on which administrators were first appointed in Australia. The syndicate was not present in Australia at the time the preference proceedings were instituted, nor did it enter an appearance in those proceedings, in any event to the extent that would warrant a conclusion that it had submitted to the jurisdiction of the Australian court in the preference proceedings looked at in isolation. The syndicate did, however, participate in the New Cap insolvency proceedings more generally by submitting proofs of debt and by attending and voting at creditors' meetings.

By a majority of 4:1 (Lord Clarke dissenting), the Supreme Court disagreed with the Court of Appeal in *Rubin* and held that the traditional common law rule is applicable to the enforcement of foreign insolvency avoidance judgments. It also rejected an argument that enforcement was available under the Cross Border Insolvency Regulations 2006.[2] The consequence of these conclusions was that the appeal in *Rubin* was allowed. The syndicate's appeal in *New Cap* was, however, dismissed, on the grounds that it had submitted to the jurisdiction of the foreign court, with the consequence that the relevant judgment was entitled to recognition and enforcement by application of the traditional

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1 [2012] UKSC 46.
2 Implementing the UNCITRAL Model Law.

common law rule. Although strictly *obiter*, because of its conclusion on the submission point, the Supreme Court in *New Cap* also expressed the view that section 426 of Insolvency Act 1986 had no application to the enforcement of judgments given by courts outside the United Kingdom.

In reaching its conclusion, the Supreme Court eschewed the opportunity to take a logical step forward in developing the principle of modified universalism; a principle which was described by Lord Hoffmann in the case of *McGrath v. Riddell, Re HIH Casualty and General Insurance Limited* ('*HIH*')[3] as being the golden thread running through English cross-border insolvency law since the 18th century. Indeed, and this will have come as a surprise to many not least because the point was not fully argued, the Supreme Court decided (on this point by a bare majority) not just that the decision of the Privy Council in *Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors of Navigator Holdings Plc* ('*Cambridge Gas*')[4] did not indicate the direction which the law should take, but that the case was wrongly decided. Lord Mance reserved his opinion on the correctness of *Cambridge Gas* and Lord Clarke's dissent was based, anyway in part, on the propositions that it remained good law and that it pointed the way towards a principled basis for recognition and enforcement of a foreign insolvency avoidance judgment.

Ultimately, the Supreme Court's decision comes down to the fact that the majority did not agree that, in the interests of the universality of insolvency proceedings, there should be a more liberal rule for the recognition and enforcement of judgments given in foreign insolvency proceedings for the avoidance of prior transactions than the traditional common law rule. In the view of Lord Collins, such a conclusion would be a radical departure from substantially settled law, and was more suitable for the legislature than for judicial innovation.

In a number of respects, the decision of the Supreme Court in *Rubin* is a missed opportunity. To understand why, it is necessary to appreciate the interaction between two basic principles; the first is the nature and purpose of collective insolvency proceedings and the second is the way in which the law of cross-border insolvency deals with the administration of insolvent estates with a connection to, or a presence in, more than one jurisdiction.

So far as the first principle is concerned, the main purpose of collective insolvency proceedings is not to establish individual rights by or against individual litigants, with the commensurate grant of an entitlement to the successful party to enforce those established rights; rather it is to replace the race to enforce, whereby individuals pursue their own claims, with an orderly statutory regime, pursuant to which the debtor's assets are collected and distributed amongst creditors *pari passu* or otherwise in accordance with a statutory code. Rights may have to be established as part of that process, but the process as a whole is one of collective execution.

It is well established that one of the essential aspects of implementing such an orderly process for the collection and distribution of a debtor's assets to its creditors is the ability of the court charged with the administration of the insolvency proceedings to avoid prior transactions in such a manner that the statutory scheme is given the effect intended by the relevant insolvency legislation. The ability of an insolvency court to avoid prior transactions (and make the consequential orders necessary to give effect to that avoidance) is a core aspect of most, if not all, insolvency law and the proceeding in which such relief is granted is itself an integral part of the collective insolvency proceedings taken as a whole. An avoidance proceeding is brought to restore the estate to the condition that it should have been in at the commencement of the insolvency. As Lord Hoffmann said in *HIH*[5] 'the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions …'. As such, the most principled approach is to give proper recognition (for enforcement as well as other purposes) to the fact that the judgments of foreign courts in the course of insolvency proceedings, including in particular judgments giving effect to the relevant avoidance law, are part and parcel of those insolvency proceedings.

The second principle is that described by Lord Hoffmann in HIH as the principle of modified universalism, i.e. that to the extent possible, there should be a single insolvency proceeding in relation to a single debtor, which takes place in one jurisdiction and which has universal effect. As recognised by Lord Hoffman in *Cambridge Gas*:[6] '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 to 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 …'

Pure universalism is out of reach, but it is well established that recognition of the insolvency proceeding in the place of the debtor's domicile (for which it may now be necessary to read the place of its centre of main interests), carries with it the active assistance

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3 [2008] 1 WLR 852 (at paragraph 30).
4 [2007] 1 AC 508.
5 [2008] 1 WLR 852 (at paragraph 19).
6 [2007] 1 AC 508 (at paragraph 16).

of the court in so far as it is able properly to give that assistance.[7] Given the encouragement that the law has hitherto given to developing the principle of modified universalism, it is a little difficult to see why assistance should not extend to the enforcement of orders made by a foreign insolvency court in the debtor's COMI, particularly where the defendants are well aware of those proceedings and have made a simple but deliberate decision not to participate in them.

There are, therefore, broad policy considerations, relating to the collective nature of the insolvency process and to fairness to creditors as a whole, which are engaged when it comes to questions relating to the enforcement of judgments which are an integral part of the insolvency process. These are considerations which go beyond the considerations which apply in the case of ordinary civil litigation, where a litigant will normally be seeking to enforce his own judgment in his own individual self-interest. They are sufficient on their own to justify a reworking of the traditional common law. Even if the common law was unable to get there on its own, there was plenty of room for an appropriately expansive construction of the CBIR and section 426 to achieve that result.

Lord Collins recognised these principles, and in some respects their significance. It is a pity that the Supreme Court was not prepared to draw the conclusion from them that it was no more than an incremental development of the common law to hold that an insolvency judgment given by a foreign court with international jurisdiction in relation to the insolvency as a whole should be enforced in England in so far as it is consistent with justice and public policy to do so. This is the result that was favoured by the Court of Appeal in *Rubin* and by Lord Clarke in the Supreme Court and is, it is suggested, a more principled basis on which the law should develop.

It might be said that there are difficulties in identifying a principled distinction between those individual proceedings which are in substance part of the insolvency process taken as a whole (and to which the solution favoured by Lord Clarke should therefore apply), and those individual proceedings which merely happen to be brought by a debtor when subject to a formal informal process. That distinction is, however, one which has been examined in the jurisprudence surrounding the EC Insolvency Regulation[8] and the Brussels I Regulation[9] and simply requires the court to decide whether the relevant claim is one which derives directly from the insolvency proceedings themselves and which is closely connected to them. Lord Collins summarised the cases in his judgment and accepted that this is a workable test capable of adaption to other contexts (including presumably the enforcement of insolvency judgments emanating from courts outside the EU) should it be useful or necessary to do so.[10] It is suggested that the Supreme Court should have recognised the utility of taking such an approach.

This is more especially the case, as the Supreme Court gave at least some recognition to the fact that there are different enforcement considerations in the context of insolvency proceedings. The appeal in *New Cap* was dismissed on the ground that the syndicate had in fact submitted to the jurisdiction of the Australian court by submitting proofs of debt in the liquidation and participating in creditors' meetings. Plainly, these were act of submission to the process as a whole, even if they were not acts of submission in relation to the avoidance proceedings looked at in isolation. The explanation for the Supreme Court's conclusion on this point is said to be that it should not be possible for the syndicate to take any benefit from the insolvency proceedings, without also accepting the burden of complying with all of the orders made in those proceedings. This amounts to a recognition that, for some enforcement purposes (i.e. submission), the collective insolvency process ought to be treated as a whole. It is not immediately obvious why that principle should not be applicable to concepts of enforcement in their entirety, nor indeed is it entirely obvious why the *de facto* initiation of the foreign insolvency process (which the defendants in *Rubin* were responsible for) does not amount to a submission for these purposes, while the participation in it (as occurred in *New Cap*) apparently does.

As to where this leaves matters, the consequence of the Supreme Court's decision is that the common law on cross border insolvency may have reverted to its 'state of arrested development'.[11] Whilst the process of development was reignited by the Privy Council's decision in *Cambridge Gas*, followed by the House of Lords in *HIH*, it appears that any further development of the universalist approach to insolvency proceedings must now await legislative developments. This is unfortunate because there is little sign that there is any political will to take that course. Courts properly responsible for the administration of insolvent estates with cross-border interests will find that their task (and that of any officeholder appointed in that insolvency) has been made more difficult. Given the ability of the court to fashion appropriate protections for defendants against whom enforcement is sought, there is no very obvious reason why this should be so.

Notes

7 See e.g. Millett LJ in *Credit Suisse Fides Trust v. Cuoghi* [1998] QB 818, 827.
8 EC No 1346/2000.
9 EC No 44/2001.
10 See paragraphs 100 and 101 of Lord Collins' judgment in the *Rubin* / *New Cap* appeal.
11 As noted by Lord Hoffmann in *Cambridge Gas* (at paragraph 18).

International Corporate Rescue

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