Author Devi Shah

Cross-border insolvency and the active assistance of the English courts – the decision in *New Cap Re*

INTRODUCTION

On 15 March 2011, the High Court of Justice used its statutory powers under s 426 of the Insolvency Act 1986 ('IA 1986') to order a Lloyd's syndicate to pay an amount due under a judgment of the Supreme Court of New South Wales in Australia (the 'Australian Court') relating to unfair preference payments. It did so pursuant to a letter of request issued by the Australian Court requesting the High Court's assistance. The High Court also ruled that it had the power to and would assist under common law in the same manner: *In the matter of New Cap Reinsurance Corporation Limited (in liquidation) and in the matter of the Insolvency Act 1986* [2011] EWHC 677 (Ch).

The case is an interesting example of the English courts' approach to requests for assistance from foreign courts and officeholders and of the application in practice of the principle that so far as possible there should be a single, universally recognised insolvency process in the domicile of the insolvent applying to all of its assets, wherever these are located. The case also considered for the first time whether insolvency proceedings are covered by the Foreign Judgments (Reciprocal Enforcement) Act 1933 ('FJ(RE)A 1993') as applied to judgments of Australian courts (pursuant to the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994 ('1994 Order')).

THE FACTS

The respondents, members of a Lloyd's syndicate for two years of account (the 'Syndicate') had entered into certain reinsurance contracts with New Cap Reinsurance Corporation Limited ('New Cap Re'). New Cap Re was an Australian reinsurance company which was licensed in Australia and conducted its business in Australia. The Syndicate and New Cap Re subsequently entered into a commutation agreement, pursuant to which New Cap Re made lump sum payments to the Syndicate just over three months before New Cap Re went into administration (and subsequently liquidation) in Australia.

New Cap Re's liquidator commenced proceedings against the Syndicate in Australia alleging that the payments constituted 'unfair preferences' and were thus 'voidable transactions' under relevant Australian insolvency legislation. Those proceedings were one of around 20 actions brought by the Australian liquidator to claw back preferential payments against defendants located worldwide. The Syndicate did not formally file an appearance before the Australian Court, although its solicitors' correspondence on various matters was placed before the Australian Court at their request. These matters included the arguments that New Cap Re was not insolvent at the time of the payments, that the liquidator's claim was caught by the arbitration provisions in the underlying agreements and that the Syndicate had a defence to the claims based on good faith.

The Australian Court held in a detailed judgment on the merits (albeit given in the absence of the Syndicate) that the payments were preferential under Australian insolvency law and ordered the Syndicate to pay corresponding sums plus interest. In doing so, it considered and dismissed the Syndicate's arguments as expressed in the correspondence before it. The Australian Court also issued the letter of request referred to. The Australian Court made reference in its letter of request to the High Court's jurisdiction under s 426 of the IA 1986 'to act in aid of and assist this [Australian] Court'. Section 426(4) provides that:

> 'The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having corresponding jurisdiction in … any relevant country or territory.'

Australia is a 'relevant country' having been designated as such by the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986.

THE DECISION OF THE HIGH COURT

Mr Justice Lewison sitting in the High Court exercised his powers under s 426 of the IA 1986 to assist the Australian Court and ordered the Syndicate to pay amounts corresponding to the Australian judgment.

He considered that the combination of the letter of request issued by the Australian Court and s 426 provided the basis on which the court could apply not only its own law and inherent jurisdiction but also the law of the Australian Court from which the request came. Lewison J applied previous authority (*Hughes v Hannover Re* [1997] 1 BCLC 497 and *England v Smith* [2000] BPIR 28), taking the approach that the discretionary power that the High Court retains under s 426 is of a limited nature – the discretion should be exercised unless it is 'improper' to do so.

He noted that the Court of Appeal in *England v Smith* emphasised the mandatory terms deployed in the section ('shall assist'), the

International Feature

Biog box

Devi Shah is a partner in Mayer Brown International LLP's Restructuring, Bankruptcy and Insolvency practice in London. She led the team at Mayer Brown which acted for *New Cap Re* and its liquidator, together with Henry Davis York in Sydney.

'important public policy of comity between nations' and the weight that should be given to fact the issuing court had given consideration to the application for the issue of a letter of request and had decided to grant it.

Having set out the relevant principles, Lewison J considered the factors relevant to the exercise of his discretion under s 426. He considered the argument that the Australian law relating to preferences differed in some respects to English law. However, such differences were not important, because the Secretary of State had designated Australia a relevant country and must have taken this into account and because s 426 on its face authorised him to apply Australian law.

He considered the question of whether the Syndicate was prejudiced by the Australian proceedings. He noted that the Syndicate had had every opportunity to take part in them but had chosen not to do so, but rather participated indirectly by having its position put forward in the correspondence placed before the Australian Court. He also made reference to the fact that the Syndicate had participated in New Cap Re's insolvency proceedings by attending creditors' meetings and submitting proofs of claim.

The Australian Court gave detailed consideration to the application in reaching its conclusions. As to the argument that the Syndicate had been willing to submit to proceedings in England, the seat of New Cap Re's insolvency was Australia and he did not accept that Lloyd's syndicates were not able properly to conduct proceedings in Australia. He also dismissed the argument that the liquidator's claim was stale. Accordingly, he ruled that he would assist the Australian Court as requested.

Although the case was decided on the grounds of s 426, Lewison J also held, on the basis that common law powers to assist subsist in parallel to s 426 (following the approach of Lords Hoffmann and Walker in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, as the Court of Appeal has done in *Rubin v Eurofinance SA* [2011] 2 WLR 121), that the same discretionary considerations would lead him to exercise common law powers of assistance if that were necessary. Applying the principle of 'modified universalism' hailed by Lord Hoffmann in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 and applying *Rubin*, Lewison J held that the preference actions were part of the Australian insolvency proceedings. As such, the Australian Court was the proper court to determine the claims and the ordinary rules of private international law relating to enforcement of judgments in personam did not apply. The Australian Court's order was therefore enforceable against the Syndicate.

As to the Syndicate's arguments under the FJ(RE)A 1993, Lewison J ruled that the FJ(RE)A 1993 did not apply, because insolvency proceedings (which, he held, included preference claims and other claims to set aside transaction entered into before the onset of insolvency proceedings) are not intended to be included within the ambit of the FJ(RE)A 1993.

Even if part of the Australian Court's order was registrable, the order included a declaration that the two payments pursuant to the commutation agreements by New Cap Re to the Syndicate constituted voidable preferences. Lewison J held that the Syndicate was bound by the declaration pursuant to s 8 of the FJ(RE)A 1993. This provides that a judgment to which Pt 1 applies or would have applied if it was for the payment of a sum of money is to be recognised in the UK as conclusive between the parties unless the judgment (here, that of the Australian Court), had it been registered pursuant to the FJ(RE)A 1993, could have been set aside (for example, on the basis that the Australian Court did not have jurisdiction to make it).

However, applying *Rubin* and *Cambridge Gas*, the Australian Court did have *sui generis* jurisdiction in relation to the preference proceedings notwithstanding that no formal appearance had been filed in them by the Syndicate, and there were therefore no such grounds.

COMMENT

The High Court's ruling is symptomatic of a growing trend for English courts to co-operate across jurisdictional boundaries where foreign insolvency proceedings raise issues with cross-border aspects. Permission to appeal has been granted to the Syndicate in this case. *Rubin* itself is under appeal to the Supreme Court. In today's increasingly complex global market, further developments in this area will no doubt be watched with interest. ■