PRINCIPLES OF UNIVERSALISM

Two cases in the Supreme Court may set a precedent for cross-border insolvencies, say Devi Shah and Salem Feeney

In late May the Supreme Court was set to hear the appeals in two cases which are expected to have a significant impact on cross-border insolvencies. At the heart of these cases is the question of the extent to which English courts will embrace the principle of (modified) universalism. This is the idea that there should, so far as possible, be a single insolvency proceeding in the jurisdiction in which the debtor (whether corporate or individual) is based, described memorably as 'the golden thread running through English cross-border insolvency law since the 18th century'. It is driven by notions of fairness – uniformity of approach to the creditors and others with dealings with the insolvency estate, wherever they are located. Where the insolvency proceeding is taking place outside the UK, the Supreme Court will consider the extent to which it will recognise such proceedings and give effect to orders made in the context of the foreign insolvency proceedings.

The cases, which are being heard together in a four-day hearing commencing on 21 May, constitute appeals from the decisions in the Court of Appeal in *New Cap Reinsurance Corporation Ltd (in liquidation) and another v A E Grant and others as Members of Lloyd's Syndicate 991 for the 1997 and 1998 Years of Account [2011] EWCA Civ 971 (the New Cap Appeal)* and *Rubin and another v Eurofinance and others SA [2011] 2 WLR 121 (the Rubin Appeal).*

NEW CAP APPEAL

In the New Cap appeal, the appellants are members of a Lloyd's Syndicate who entered into reinsurance contracts with New Cap Reinsurance Corporation Limited (New Cap Re). New Cap Re is an Australian reinsurance company which is in liquidation and has had a scheme of arrangement sanctioned in respect of it. New Cap Re made certain payments to the appellants four months prior to New Cap Re entering administration in Australia (it subsequently went into liquidation). New Cap Re's liquidator brought proceedings against the appellants in Australia to recover the sums paid alleging that the payments were 'unfair preferences' and should be set aside as 'voidable transactions' under the relevant Australian insolvency legislation.

The appellants did not formally appear before the Australian court although their solicitors put forward their position on various issues in correspondence, which they asked to be placed before the Australian court. They also participated in the insolvency process by filing proofs of debt and voting at creditors' meetings. The Australian court gave a lengthy and reasoned judgment in New Cap Re's favour and ordered the appellants to pay the sums in question to New Cap Re plus interest. The court also issued a letter of request to the High Court in England to act in aid of and assist the Australian court by ordering the appellants to pay the relevant amounts to New Cap Re. The letter of request referred to the High Court's jurisdiction under s426 Insolvency Act 1986 (IA 1986) which provides that 'the courts having jurisdiction in relation to insolvency laws in any part of the United Kingdom shall assist the courts having corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory'.

In a judgment in March 2011, Mr Justice Lewison granted the assistance sought by the Australian court both under s426, IA 1986, and on the basis that there was power to assist by making an order for payment of the sums in question at common law, following the earlier ruling in the Court of Appeal in Rubin. The appellants failed on their appeal to the Court of Appeal, which was heard in August 2011.

RUBIN APPEAL

The Rubin Appeal concerns judgments made in the course of Chapter 11 bankruptcy proceedings in the US in relation to a business trust (TCT) which had been established by Eurofinance and various individuals. In effect, the trust was a Ponzi scheme involving the sale of vouchers relating to the purchase of products, which imposed onerous conditions on their redemption. TCT was placed into Chapter 11 bankruptcy in the US and joint

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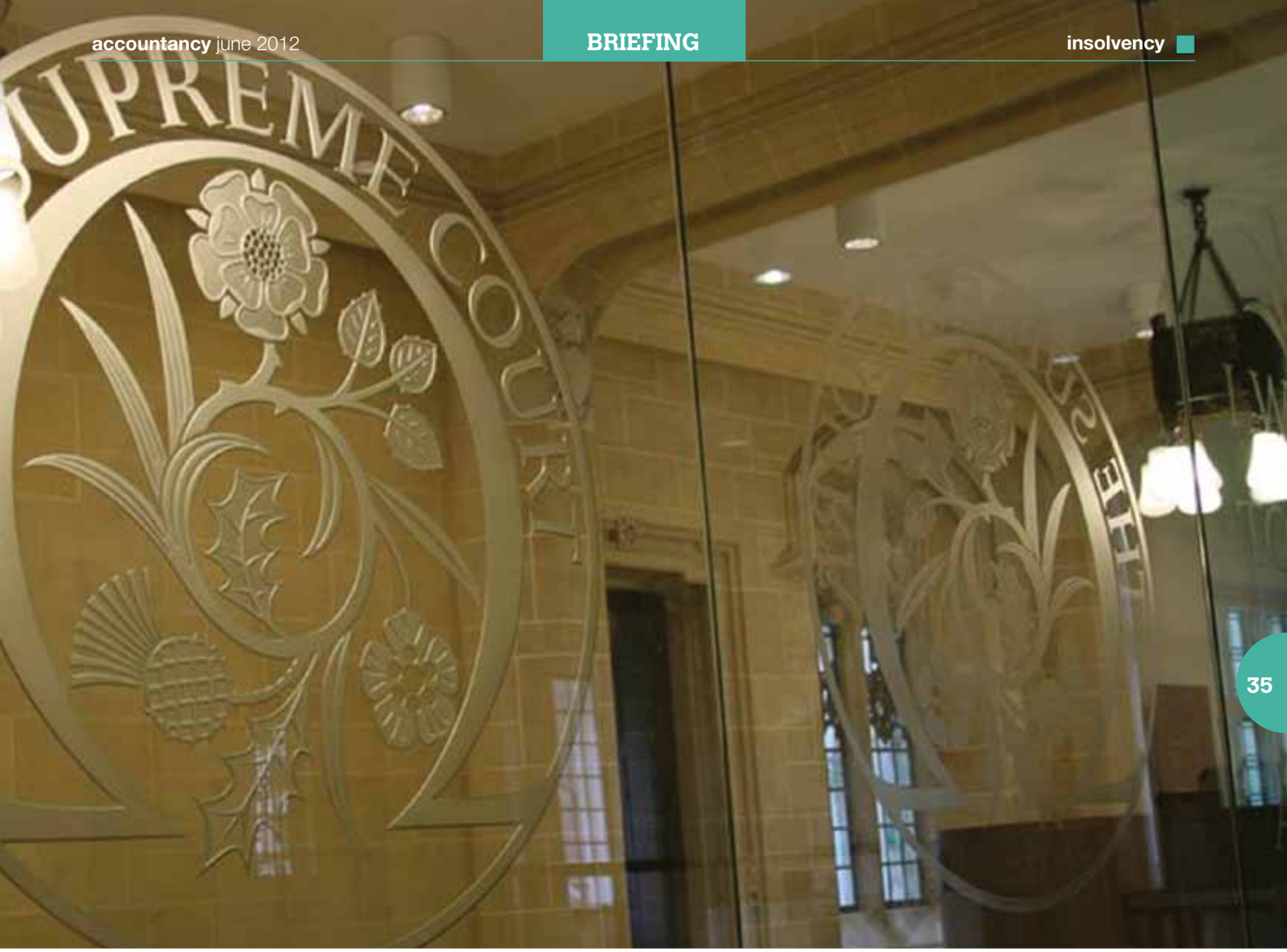

receivers were appointed in the UK. The receivers brought proceedings for the clawback of payments received by Eurofinance and its backers on the basis, among other things, that they amounted to preferences or fraudulent transfers under US bankruptcy law. The targets of those proceedings took the decision not to appear and defend themselves in court, and judgment was made against them.

An application was then issued in the English High Court seeking its assistance in enforcing the US judgment. The High Court recognised the US bankruptcy proceeding as a 'foreign main proceeding' under the Cross-Border Insolvency Regulations 2006 (CBIR), but ruled that it could not give effect to the order for the payment of sums pursuant to the judgment. It took the view that for the judgment to be enforceable by way of assistance, the targets must have submitted to the jurisdiction of the US bankruptcy court, for example, by appearing and defending the proceedings. In the Court of Appeal, the recognition of the US Chapter 11 proceedings under the CBIR was reaffirmed and it was held that the ordinary rules for jurisdiction in relation to claims do not apply to insolvency proceedings. Applying the principle of universalism, it ruled that the English courts should give effect to the clawback judgments as they were part of the insolvency proceedings taking place where TCT was based.

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COMMENT

The issue the Supreme Court faces is neatly illustrated by the background to the New Cap Re case. In that case, as is common in large insolvency cases, the liquidator issued 21 applications using his clawback powers against various recipients of payments in the lead up to the insolvency in five countries. The question is – will he have to issue proceedings in each of those countries in the future, leading to the very real possibility that, first, on similar facts, local courts could reach different positions, and secondly, there will be a significant additional costs burden on the estate?

Interestingly, the Madoff Trustee has made written submissions to the Supreme Court supporting the approach of the Court of Appeal in Rubin. He also faces this issue in seeking to recover monies to reconstitute the Madoff estate. The decision that the Supreme Court makes in relation to these appeals is therefore likely to have far-reaching consequences for the way in which insolvencies of multinational groups with dealings with the UK are run.

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