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EDITORIAL

A Shift Away from 'Modified Universalism': The Supreme Court's Decision in *New Cap* and *Rubin*

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The Supreme Court has handed down its joint decision in the appeals of *New Cap Reinsurance Corporation Ltd (in liquidation) and another v A E Grant and others* ('*New Cap*') and *Rubin and others v Eurofinance SA* ('*Rubin*').[1]

The Supreme Court (majority of 4:1, Lord Clarke dissenting) held that claims to recover money by insolvency officeholders should only be capable of being brought in the jurisdiction where the defendant, and not the debtor, is based, unless the defendant submits to the jurisdiction of the relevant insolvency court pursuant to the usual rules of private international law. Insolvency proceedings do not constitute a separate category of claim with their own jurisdictional rules which are distinct from private international law and which would allow for recognition and enforcement at common law on a more liberal basis.

The Supreme Court's decision represents a significant shift away from the principle of '(modified) universalism' in cross border insolvency to which we have grown accustomed in recent years. That principle (being the idea that there should, so far as possible, be a single insolvency proceeding in the jurisdiction in which the debtor is based which is then recognised elsewhere, thus providing a uniform approach to the debtor's creditors and assets wherever they are located) was driven by a notion of 'fairness'. The way the Supreme Court saw it, to give effect to the principle, the court would be adopting a more liberal rule for the recognition and enforcement of judgments in foreign insolvency proceedings for the avoidance of transactions than is provided for under the usual rules of private international law. As a matter of policy, the Supreme Court did not agree that, in the interests of universalism, there should be a different approach in insolvency proceedings.

The appeals

The two appeals concerned whether (and, if so, in what circumstances) an order or judgment of a foreign court in proceedings to set aside antecedent transactions would be recognised and enforced in England and Wales.

The insolvency officeholders in both cases argued that the judgments were insolvency judgments and therefore the approach set out in *Cambridge Gas*[2] should be followed. The defendants were neither present in the foreign country nor did they regard themselves as having submitted to the jurisdiction and they argued that the judgments were in personam and that the usual rules of private international law applicable to in personam judgments should be followed. Therefore the Supreme Court had to consider whether the usual rules of private international law should be applied in deciding whether the foreign judgments could be enforced or whether insolvency proceedings constituted a separate category of claim with their own jurisdictional rules.

The *Rubin* case involved a judgment in respect of fraudulent conveyances and transfer for around USD 10m obtained by default in the US Federal Bankruptcy Court against English defendants. An application was then issued in the English High Court seeking its assistance in enforcing the US judgment.

In the *New Cap* case, the Australian liquidator of New Cap Re obtained default judgment for about USD 8m in the New South Wales Supreme Court (the 'Australian Court') against a Lloyd's Syndicate in relation to preferential payments made by New Cap Re to the Syndicate in the months before New Cap Re went into administration in Australia. The Australian Court issued a letter of request to the English Court seeking assistance under s426 Insolvency Act 1986 through orders requiring the Syndicate to pay the relevant amounts to New Cap Re. The liquidator alternatively sought payment of the amount due under the

Notes

1 [2012] UKSC 46.

2 *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508.

judgment of the Australian Court applying common law recognition and assistance principles as well as registration of the judgment under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the '1933 Act').

The decision

The Court decided that judgments of this nature were in personam judgments and that the normal rules of private international law applied but, in the case of *New Cap*, the Syndicate had submitted to the jurisdiction of the Australian Court for the purposes of these rules, because it had submitted proofs of debt and attended creditors meetings in the liquidation. Therefore enforcement by way of registration under the 1933 Act was available to the liquidator through this route.

As there had been no submission to the jurisdiction by the defendants in the Rubin case, the receivers in the *Rubin* case was not successful.

The Supreme Court's reasoning

Having decided that the judgments were in the nature of in personam judgments, the Court held that the established rules of recognition and enforcement applied. In general terms, under both the common law and the 1933 Act, a foreign court has jurisdiction to give a judgment in personam of recognition and enforcement against the person whom the judgment was given if that person: (i) was present in the foreign court when the proceedings were instituted; (ii) was a claimant, or counterclaimed, in the foreign proceedings; (iii) submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings; or (iv) agreed to submit to the jurisdiction of the foreign court before the commencement of proceedings.

There were a number of grounds upon which the Supreme Court declined to apply a different regime for the recognition of judgments in insolvency proceedings for the avoidance of transactions.

- Developing a different rule for actions concerning the avoidance of transactions would mean that two aspects of jurisdiction would need to be developed (requisite nexus between the insolvency and the foreign court and requisite nexus between the judgment debtor and the foreign court). This would be a radical departure from substantially settled law and hence more suitable for legislation than judge made law.
- The restricted scope of the existing rules reflects the fact that there is no expectation of reciprocity on the part of foreign countries (contrast the degree of reciprocity in the EC Regulation on Insolvency Proceedings).
- Expanding the principle would also be detrimental to UK businesses without any corresponding benefit.
- No serious injustice would result from adhering to the traditional rule upon the recognition and enforcement of in personam judgments.
- In the particular cases of *Rubin* and *New Cap* there were other avenues open to the officeholders.

Lord Collins, Lord Walker and Lord Sumption each held that the Privy Council decision in *Cambridge Gas* had been wrongly decided as there was no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man in that case. Lord Mance held that the decision in *Cambridge Gas* was distinguishable and reserved judgment on whether it was wrongly decided.

The receivers in *Rubin* also sought assistance under the UNCITRAL Model Law as given effect by the Cross Border Insolvency Regulations 2006 ('CBIR'). The Supreme Court also held that neither the Model Law nor the CBIR say anything express about the enforcement of foreign judgments against third parties. Although they should be given a purposive interpretation and should be widely construed in light of the objects of the Model Law, there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties.

As regards s426 Insolvency Act 1986, which was relevant only in *New Cap*, the point was not decided. However, Lord Collins expressed doubt as to whether it would apply to what he regarded as being the enforcement of a judgment.

Implications

As a result of the Supreme Court's decision, office holders conducting cross border insolvencies may need to commence avoidance proceedings against international defendants in a number of different jurisdictions, rather than being able to litigate the claims together in the insolvent's home jurisdiction. As a result, the office holder may need to prove his case before the courts of a number of different jurisdictions leading to increased costs and the very real possibility that the different courts could reach conflicting decisions. The practical implications of this are illustrated by the background to the *New Cap* case in which the liquidator issued 21 applications using his clawback powers against defendants in five countries.

The fact that submitting a proof of debt and participating in the liquidation was regarded as 'submission to the jurisdiction' for the purposes of private international law may be seen as a fair result from the point of view of ensuring that debtors cannot obtain the benefit of participating in the insolvent estate without being required to contribute. However, overseas

creditors who are concerned that they may be the target of avoidance proceedings will need to obtain detailed advice before taking any steps in relation to the liquidation, including undertaking what they might otherwise have regarded as the purely administrative steps of submitting a proof of debt and attending creditors meetings.

Mayer Brown International LLP in London acted for New Cap Re and its liquidator, together with Henry Davis York in Sydney.