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Universalism in Retreat

***Rubin and Another v Eurofinance SA and Others and New Cap Reinsurance Corporation (in Liquidation) and another v AE Grant and Others* [2012] UKSC 46**

The landmark Court of Appeal decision in *Rubin* has recently been appealed to the Supreme Court, which has also considered an appeal from the Court of Appeal decision in *New Cap*, which followed on from the *Rubin* case.

The Court of Appeal Decisions

Rubin

The Court of Appeal in *Rubin* was asked to consider whether an English court (i) should recognise US Chapter 11 proceedings, together with a default judgment based on, inter alia, unjust enrichment, restitution and fraud, in the US Bankruptcy Court, as a foreign main proceeding in accordance with the UNCITRAL Model Law on Cross Border Insolvency, and (ii) whether a US Bankruptcy Court default judgment based on state or federal avoidance laws could be enforced as a judgment of the English court.

In response to the first question, the Court of Appeal held that foreign court proceedings could be recognised under the Model Law. As to the second question, the ordinary common law rules relating to the enforcement of foreign judgments against persons (i.e. *in personam* proceedings, which would require the claimant to issue separate proceedings in England to enforce the judgment in circumstances where, as here, the defendant had not submitted to and was not otherwise subject to the US Bankruptcy Courts' jurisdiction) were determined not to apply to bankruptcy proceedings. The Court of Appeal held that the US Bankruptcy Court judgment, which related to clawback proceedings analogous to the antecedent transaction provisions of section 238 and 239 of the Insolvency Act 1986 (the "**Insolvency Act**"), *was* a bankruptcy proceeding.

New Cap

In *New Cap*, Australian liquidators of an Australian insurance company instituted a clawback claim against members of a Lloyds syndicate to which payments had been made; the liquidators obtained default judgment through a New South Wales Court. The distinction between *New Cap* and *Rubin* was Australia's status as a "designated state" for the purpose of section 426 of the Insolvency Act. The claimants argued that they were entitled to enforce the default judgment in the UK by exploiting the section 426 procedure, which facilitates the assistance of the UK courts in connection with proceedings instituted in designated states against a letter of request. The claimants submitted a letter of request and the High Court ordered the defendants to pay. The defendants appealed, on the basis that section 426 requests (which are intended to provide assistance in connection with *insolvency* proceedings) could not extend to the enforcement of a foreign judgment.

The Court of Appeal in the *New Cap* case concluded that, despite the absence of precedent, there was no reason in principle why the assistance to be granted under section 426 should not extend to the enforcement of a foreign court judgment. The Court of Appeal was, however, obliged to address another difficulty. This was presented by the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the "**1933 Act**") which is applicable to the UK and Australia. The 1933 Act provisions apply in cases where the foreign court had jurisdiction (which the New South Wales Court clearly had). Section 6 of the 1933 Act, however, ostensibly precluded the application of the section 426 procedure to facilitate the enforcement of foreign judgments, since it stated:

> "*no proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this part of this Act applies, other than by way of registration of the judgment, shall be entertained by any court in the UK*".

The Court of Appeal held, surprisingly, that the 1933 Act did not preclude the enforcement of a foreign judgment under the section 426 procedure, concluding that the procedure did not amount to proceedings for recovery of a sum payable under a foreign judgment.

In both the *New Cap* and *Rubin* Court of Appeal decisions, the courts, whether against the background of reciprocity or treaty arrangements or (as in the case of Rubin) the common law, were disposed to recognise an overarching principle that bankruptcy proceedings commenced in the court of the bankrupt's domicile should receive worldwide recognition.

The Supreme Court Decision

The Supreme Court decision overrules the Court of Appeal decisions in a number of significant respects and appears to reverse the trend towards the overarching universalism principles developed in earlier decisions and espoused by the Court of Appeal.

In summary, the Supreme Court has held that:

(i) There is a distinction between, on the one hand, *in personam* (i.e. against a person) and *in rem* (i.e. against property) judgments, which are judicial determinations of the existence of rights, and on the other, bankruptcy proceedings, which provide a method of collective execution.

(ii) The recognition and enforcement of judgments given in the course of insolvency proceedings (regardless of whether they are in the context of transaction avoidance proceedings, as in both *Rubin* and *New Cap*) are subject to the ordinary common law rules (including the so called *Dicey Rule*) applying to *in personam* and *in rem* judgments. Transaction avoidance proceedings will, generally speaking, be of an *in personam* character. Those common law rules require, inter alia, the debtor to submit to the jurisdiction of the relevant court. The majority of the Supreme Court (Lord Clarke dissenting and Lord Mance leaving the point open) rejected the argument that those common law rules should be modified with respect to foreign judgments in insolvency proceedings. The majority of the Supreme Court concluded that such a radical change in approach could only properly be achieved by legislation. Lord Collins said that:

> "*A change in the settled law of recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction...has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation.*"

(iii) It follows, and it was concluded that, the decision in *Cambridge Gas* (considered and approved in *Rubin*), in which the Privy Council, endorsing the application of the principle of universality to insolvency proceedings, recognised an order of the US Court in Chapter 11 proceedings in respect of shares in a Manx company, was wrongly decided.

(iv) The UNCITRAL Model Law is not designed to provide for enforcement of judgments and there is no ability under the Cross Border Insolvency Regulations 2006 to recognise judgments given in the course of foreign insolvency proceedings.

(v) Section 426 of the Insolvency Act empowered the court to grant assistance with respect to insolvency proceedings to designated countries and territories (such as Australia in the *New Cap* case) but this does not extend to the recognition and enforcement of foreign judgments.

(vi) The majority overturned the decision of the Court of Appeal in *Rubin*, it having been clearly established that the *Rubin* appellants had neither appeared in the relevant proceedings nor submitted to the jurisdiction of the US Bankruptcy Court.

(vii) So far as *New Cap* is concerned, the appeal was dismissed unanimously, but on the grounds that the appellants had submitted to the Australian insolvency proceeding and had to, therefore, be taken to have submitted to the jurisdiction of the Australian court supervising that proceeding. It followed that the Australian judgment against the appellants was enforceable in England under the 1933 Act and by way of registration under that Act, there being no reason to conclude that the 1933 Act does not apply to insolvency proceedings. It seems probable that had the judgment not been enforceable under the 1933 Act, the Supreme Court would have applied the ordinary common law rules relating to the enforcement of foreign judgments.

Comment

This case has been seen by some as an unwelcome blow to the principle of (modified) universalism actively being espoused by the English courts. The judgment can, however, be construed as (at least) a tacit acceptance by the Supreme Court that the law in this area should be revisited. In the short term at least the decision should give greater certainty to prospective defendants to foreign law avoidance actions.

It should be noted that *Cambridge Gas* is a Privy Council decision; the courts in common law jurisdictions may choose to follow *Cambridge Gas* (and adopt all or some of the dicta of Lord Hoffman as to the scope of assistance which may be afforded under the common law in foreign insolvency cases) rather than the Supreme Court decision. In addition, the application of EC Insolvency Regulation to the issues addressed in this decision was not considered, since none of the defendants had its centre of main interests in the EU.

Any Questions?

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