

COMMENTARY ON “CROSS-BORDER INSOLVENCY – JUDICIAL ASSISTANCE IN THE POST-HOFFMANN ERA”¹

By

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The sub-text of John Martin’s paper corresponds with a sub-heading in a recent paper by Professor Adrian Briggs of Oxford³ – “Why was the judgment in *Rubin* so conservative?”

Perhaps a better description is “traditional”. It is true that three of the five judges expressly disapproved the Privy Council’s decision in *Cambridge Gas* and saw the common law power of assistance as insufficient to support an order enforcing a foreign judgment. But the common law power of granting assistance to foreign insolvency proceedings was expressly recognised and confirmed – albeit within traditional limits. Lord Collins referred to “such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation”.

HIH in the House of Lords⁴ was a case of the last kind but, as Lord Collins emphasised in *Rubin* and *New Cap*, the English court was asked in *HIH* to exercise power under the *Insolvency Act*⁵ to act in aid of or be auxiliary to the New South Wales court in collecting assets of the companies that were subject to not only winding up in New South Wales and also provisional liquidation by order of the English court. There was a statutory basis for the English court’s decision as to the deployment of the UK assets.

Rubin and *New Cap* did not fall within any of these categories and, in to that extent, resembled *Cambridge Gas*⁶. They were cases about the enforcement of foreign money judgments – but money judgments of a particular kind. The claim was not for debt or damages; it was a claim to have the defendant bring to account in the insolvency administration a benefit received by it from the insolvent entity before administration began – where the circumstances of the receipt produced, under local insolvency law, an obligation to disgorge and thereby to enhance the assets available for application towards meeting creditors’ claims. A judgment of that kind redresses inequality among creditors in the interests of fair and orderly administration.

¹ This commentary relates to a paper by John Martin of Henry Davis York. Both the paper and the commentary were delivered at the 30th Annual Conference of the Banking and Financial Services Law Association on 30 August 2013.

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³ Adrian Briggs, “*Rubin* and *New Cap*: Foreign Judgments in Insolvency”, Legal Studies Research Paper 7/2013, Singapore Management University, School of Law, April 2013.

⁴ *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21; [2008] 1 WLR 852.

⁵ *Insolvency Act 1986* (UK), s 426.

⁶ *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508.

The Supreme Court, by majority, rejected the notion that judgments in insolvency proceedings represent a third category of foreign judgment that can be recognised by an English court – the other categories being, of course, a judgment *in personam* and a judgment *in rem*. The message was that, if you want a foreign judgment enforced in England, it will not avail you simply to say that enforcement will assist the process of a foreign liquidation and administration.

The foreign judgments in *Rubin* and *New Cap*, although preference avoidance judgments, were judgments *in personam*. Their enforceability as such in England was therefore seen as depending on a finding that the judgment debtor had been present in the foreign jurisdiction or had submitted to the jurisdiction of the foreign court. The English judgment debtor in *Rubin* escaped on both counts. The English judgment debtors in *New Cap* were caught because of a finding that they had submitted to the jurisdiction of the New South Wales court.

Having myself decided the *New Cap* case in New South Wales⁷, I was unaware that the defendants had submitted to the jurisdiction until I read it in the decision of the UK Supreme Court. The case before me at all times proceeded on the very clear footing that there had been no submission to the jurisdiction. The liquidators never sought to argue otherwise.

But there had been submission, Lord Collins said, because the defendant had taken active steps to participate under the *New Cap* winding up. It had lodged proofs of debt and participated in creditors' meetings. Lord Collins said that,

“having chosen to submit to *New Cap*'s Australian insolvency proceeding, the Syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding.”

His Lordship relied on *Ex parte Robertson; In re Morton*⁸ which, according to the Lexis Nexis citator, had been cited only once before in almost 140 years. The decision there was, in essence, that a Scotsman resident in Scotland who had proved in an English bankruptcy could not later assert his lack of submission to the jurisdiction when sued by the trustee to recover money said to be due by him to the bankrupt.

The case arose under the *Bankruptcy Act 1869* (UK). Section 73 of that Act put every bankruptcy under the control of the bankruptcy courts so that the bankruptcy administration was a judicial proceeding in its own right. The *New Cap* winding up, by contrast, was a creditors' voluntary winding up. It did not stem from a court order. It could have proceeded to finality without any involvement of a court. The vast majority do. The liquidators, unlike their counterparts in a winding up by the court, were not the delegates or subcontractors of any court for bringing the

⁷ *New Cap Reinsurance Corporation Ltd v A E Grant* [2009] NSWSC 662; (2009) 257 ALR 740.

⁸ (1875) LR 20 Eq 733. Professor Briggs suggests that this case had nothing to do with the law on foreign judgments given against a creditor who has lodged a proof of debt and that it was concerned with the question of the English court's own jurisdiction to make an order against a foreign creditor who had taken a dividend: Adrian Briggs, “In For a Penny, In For a Pound” (2013) 1 *Lloyd's Maritime and Commercial Law Quarterly* 26.

administration to a conclusion. In those circumstances, and bearing in mind that any application concerning the winding up might have been made to any one of nine Australian courts, it is hard to see how lodgment of a proof of debt with the liquidators constituted submission to the jurisdiction of the Supreme Court of New South Wales.

Leaving aside this point about creditors' voluntary winding up, the aspect of the *New Cap* case concerning submission to the jurisdiction raises all sorts of questions about just what will constitute submission. Logically, any manifestation of acceptance of the existence of the winding up will do. Perhaps, therefore, it is best for someone in the position of the Lloyd's syndicate hoping to remain beyond the pale to treat an email from the liquidator like one of those dodgy ones we all find in the inbox from time to time and consign to trash unread.

It may not be quite that bad. Indications since *New Cap* was decided suggest that there may be some reluctance to accept any far-reaching notion of submission to the jurisdiction.

Submissions based on the *New Cap* idea of submission to the jurisdiction were made to a judge of the Chancery Division in *Isis Investments Ltd v Oscanello Investments Ltd*⁹. It was held that no submission flowed from the lodgment of proofs of debt that were expressed to be contingent on entitlements being established in pending proceedings.

Like submissions were made to Justice Rares of the Federal Court in *Ackers v Saad Investments Co Ltd*¹⁰, a case decided just last month. The Commissioner of Taxation had lodged proofs of debt with liquidators in the Cayman Islands. When the Commissioner later sought orders preventing remittance of Australian assets to the Cayman administration (on the ground that Australian tax debts would not be recognised there), the liquidators argued for an estoppel based on submission to the jurisdiction of the Cayman court. Justice Rares rejected that argument. He acknowledged the type of submission referred to by Lord Collins but based his decision on the fact that the particular debts, being, from the Cayman perspective, foreign tax debts, were not admissible to proof in the Cayman Islands, that the proof document was not intitled in any proceedings in the Cayman court and that the Commissioner did not seek in any way to participate in proceedings in the Cayman court.

One thing that the *Rubin* and *New Cap* decision will do is to concentrate attention on the avenues for enforcement of insolvency judgments under the UNCITRAL Model Law in those countries where it has been enacted as part of domestic law – including, of course, the United Kingdom, the United States, Australia and New Zealand. Those matters received no real attention at first instance or in the English Court of Appeal. *Rubin* was decided on common law principles; *New Cap* by reference to the statutory “act in aid” jurisdiction. It was only in the Supreme Court that the Model Law was considered in any detail.

⁹ [2013] EWHC (Ch) 7

¹⁰ [2013] FCA 738

Lord Collins dealt with two substantive provisions of the Model Law as adopted in the United Kingdom¹¹ – articles 21 and 25.

Article 25 deals with the matter of co-operation by English courts with foreign courts. Article 25 says that the local court “may co-operate to the maximum possible extent” with foreign courts (in the Australian version¹², “may” reads “shall” consistently with the Model Law text itself). Article 27 then gives examples of ways in which co-operation may be given. These articles do not depend on the foreign administration having been recognised domestically as a foreign main or non-main proceeding.

Article 21 applies only if there has been such recognition (in Rubin, there had been recognition of the US bankruptcy in the UK). The opening words of article 21 are these:

“Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, ...”.

Lord Collins concluded that neither the co-operation provisions in article 25 nor the provisions of article 21 concerning the grant of “any appropriate relief” allowed the making of an order enforcing the foreign judgment.

There were two reasons for this. First, his Lordship said, it would be surprising if the Model Law was intended to deal with the matter of enforcing foreign judgments merely by implication when recognition and enforcement of foreign judgments in civil and commercial matters had been the subject of intense but unsuccessful international negotiation at the Hague Conference on Private International Law. Second, he was of the opinion that the Model Law articles were concerned with matters of a procedural nature only.

The conclusion about the co-operation provisions in article 25 27 was, in my respectful opinion, clearly correct. What article 25 envisages is some form of collaboration, joint enterprise or agreed parallel or complementary action of two or more courts in relation to the exercise of the independent jurisdiction of each. This is made clear by the article 27 examples. All those examples contemplate action by one court either at the other’s request or in accordance with some plan subscribed to by both. It is not possible to think that one court can “cooperate with” another without that other being aware, or that “co-operation” with a foreign court that had rendered a money judgment would occur when the local court made an order enforcing the foreign judgment.

But I do confess to unease about the restrictive approach that the Supreme Court took to article 21. As I have said, that article starts off by stating the general proposition that, after a foreign proceeding has been recognised, the local court has

¹¹ Cross-Border Insolvency Regulations 2006 (UK) Sch 1.

¹² Cross-Border Insolvency Act 2008 (Cth).

power to “grant any appropriate relief” where to do so is necessary to protect the assets of the debtor or the interests of the creditors. Had the provision stopped there, an order of the English court that the judgment debtors under the United States or Australian judgment pay the judgment sum might be thought to have been available. An order of that kind would unquestionably have enhanced the assets available for creditors in the insolvency. But the Model Law provision does not stop at the point of giving power to “grant any appropriate relief”. The word “including” follows, together with seven paragraphs describing particular kinds of orders, none of which refers explicitly to the enforcement of a judgment of the court of the country of the foreign main proceeding.

In the *Chow Cho Poon* case¹³ which I decided in April 2011, I said in *obiter* and without realising that I was entering realms of controversy, that article 21 could be used by a foreign representative to seek an order of the local court for a purpose such as securing assets in the local jurisdiction or enforcing in the local jurisdiction an order of the foreign court. I was there assuming that such enforcement would, virtually by definition, be viewed as something that was necessary to protect the assets of the debtor or the interests of the creditors.

UNCITRAL published in February 2012 a document entitled “The UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective”¹⁴ developed by a panel of judges over a period of several years. The general comment on article 21 in that document is as follows:

“Post-recognition relief under article 21 is discretionary. The types of relief listed in article 21, paragraph (1), are those most frequently used in insolvency proceedings: however the list is not exhaustive. It is not intended to restrict the receiving court unnecessarily in its ability to grant any type of relief that is available and necessary under the law of the enacting State to meet the circumstances of a particular case.”

This suggests a broad and flexible operation of article 21. But the Supreme Court’s approach seems to be that article 21 allows only orders of the seven kinds in the paragraphs (a) to (g) that follow the word “including”. It would be unfortunate if that approach came to prevail.

A preference recovery judgment of the court of the principal jurisdiction reflects a decision on an issue going to the constitution of the pool of assets to be administered and distributed under the law of that principal jurisdiction. The Model Law, as in force in the United Kingdom and elsewhere, by no means sets its face against preference recovery as an adjunct to a recognised foreign main proceeding. In fact, it facilitates such recovery. Under article 23, a foreign representative whose administration has been afforded foreign main recognition in the United Kingdom can have direct access to preference recovery proceedings under that country’s own insolvency legislation.

¹³ Re *Chow Cho Poon (Private) Ltd* [2011] NSWSC 300; (2011) 80 NSWLR 507.

¹⁴ Adopted by General Assembly resolution A/RES/66/96 of 9 December 2011

In the *New Cap* case, therefore, the Australian liquidators could have obtained foreign main proceeding recognition in the UK (I leave aside the special rules about insurance companies) and, from that base, launched a recovery action against the Lloyd's syndicate in London under UK statute law. Had the defendants been in the United States, the liquidators would have been in an even more flexible position. Under s 1521(a)(7) of the United States Bankruptcy Code¹⁵ – which is the US version of the last paragraph of article 21 – the liquidators could have brought avoidance proceedings in a United States court and possibly under Australian law, as in the *Condor* case.¹⁶

Thus, liquidators in a winding up initiated in Country A and recognised as a foreign main proceeding in Country B under the Model Law as enacted in Country B, may obtain a preference recovery judgment against defendants in Country B under the avoidance laws of Country B or even perhaps under the avoidance laws of Country A. If that is so, it does seem somewhat anomalous that the Model Law as enacted in Country B does not allow recognition and enforcement of a preference recovery judgment obtained against those same defendants in Country A.

Perhaps we have to read between the lines to find the reason for the cautious approach. Countries that have enacted the Model Law have done so on the express basis that its regime of assistance and support for foreign administrations will be applied regardless of the foreign country concerned and the attributes of its legal system. The enacting country's courts must take as they find them insolvency administrations from the whole spectrum of nations from "A" for Afghanistan to "Z" for Zimbabwe. But as Professor Briggs says in another recent article¹⁷, a judgment of the US Bankruptcy Court or the Supreme Court of New South Wales is one thing, but what of a judgment of "a Russian court, made in the process of liquidating a company driven into the nightmare of insolvency by the outlawry of its patron-oligarch?"

An example of that kind of value judgment may be found in the 2012 United States decision of the *Vitro* case¹⁸. The US court declined to make an order under the US version of article 21 enforcing in that country a plan of reorganisation sanctioned by a Mexican court. Its reason for doing so was incompatibility with the type of relief available under US bankruptcy law. At the same time, however, the court went out of its way to refer to matters which it obviously found disturbing, such as direct payments to supporting employee creditors, frequent informal meetings between litigants and the Mexican tribunal, hidden inter-company transfers and expressly permitted insider voting. The distinct impression is that the US court, while espousing comity and internationalism, had no confidence that the Mexican administration would produce fair results.

Unease of that kind is almost instinctive, I suppose, in the case of a foreign judgment by default, where the successful plaintiff has had no contradictor.

¹⁵ 11 USC s 1521(a)(7).

¹⁶ *Fogarty v Petroquest Resources Inc* 601 F 3d 319 2010.

¹⁷ Adrian Briggs, "In For a Penny, In For a Pound", [2013] 1 *Lloyd's Maritime and Commercial Law Quarterly* 26

¹⁸ *In re Vitro S.A.B. de CV*, 701 F 3d 1031 2012.

The grant of article 21 relief is always discretionary. One would think that any concerns about the quality of the foreign judgment or the legal system that produced it could be adequately dealt with upon the application under article 21 for an order enforcing it. The judgment debtor would almost certainly be present to identify every conceivable argument why the foreign judgment was unsound and unjust and ought not be enforced.

Finally, I want to say a few words about two cases from non-Model Law jurisdictions where more innovative resort has recently been had to the common law power of assistance despite the decision in *Rubin* and *New Cap*.

The first is the January 2013 decision of Jones J of the Grand Court of the Cayman Islands in *Picard v Primeo Fund*¹⁹. The second is the April 2013 decision of Kawaley CJ of the Supreme Court of Bermuda in *Re Saad Investments Company Ltd*²⁰. In both those cases, it was decided that the scope of the assistance available at common law includes a power to entertain a preference avoidance action under local law – so that a foreign liquidator coming to Cayman or Bermuda can, by reference to the local court’s common law power of assistance, bring a preference avoidance action under Cayman or Bermuda law.

Kawaley CJ cited the decision of Jones J. Both of them quoted from the judgment of Proudman J in the Chancery Division in *Schmitt v Deichman*²¹ delivered two weeks before the Supreme Court gave judgment in *Rubin* and *New Cap*. Proudman J said that the common law power of assistance “includes doing whatever the English court could have done in the case of a domestic insolvency”. That smacks of unreconstructed *Cambridge Gas* jurisprudence.

In the Caribbean decisions there is due deference to the Supreme Court’s decision in *Rubin* and *New Cap* but, it appears, tacit non-acceptance of the view that common law assistance is confined to avenues already established.

¹⁹ *Picard* (as Trustee for the liquidation of the Business of Bernard L Madoff Investment Securities LLC) v *Primeo Fund* (In Official Liquidation) (Grand Court of the Cayman Islands, Cause No FSD 275 of 2010, 14 January 2013, Andrew Jones J)

²⁰ [2013] SC (Bda) 28 Com. An appeal was dismissed in November 2013: *PricewaterhouseCoopers v Saad Investment Co Ltd* [2013] CA (Bda) 7 Civ.

²¹ [2012] EWHC 62 (Ch); [2013] Ch 61