24 October 2012

PRESS SUMMARY

Rubin and another (Respondents) v Eurofinance SA and others (Appellants) and New Cap Reinsurance Corporation (In Liquidation) and another (Respondents/Cross Appellants) v A E Grant and others as Members of Lloyd's Syndicate 991 for the 1997 Year of Account and another (Appellants/Cross Respondents) [2012] UKSC 46
On appeal from [2010] EWCA Civ 895; [2011] ECW Civ 971

JUSTICES: Lord Collins Lord Walker, Lord Mance, Lord Clark, Lord Sumption.

BACKGROUND TO THE APPEALS

The two appeals concern whether, and if so, in what circumstances, an order or judgment of a foreign court in proceedings to set aside prior transactions, such as preferences or transactions at an undervalue (avoidance proceedings), will be recognised and enforced in England and Wales. The appeals also raise the question of whether enforcement may be effected through the international assistance provision of the UNCITRAL Model Law implemented by the Cross-Border Insolvency Regulations 2006, which apply generally, or the assistance provisions of s.426 of the Insolvency Act 1986 ("the Insolvency Act"), which applies to a limited number of countries, including Australia.

In *Rubin* a judgment of the US Federal Bankruptcy Court for the Southern District of New York in default of appearance for around US$10m in respect of fraudulent conveyances and transfer was enforced in England at common law. In *New Cap*, bound by the prior decision in Rubin, a default judgment of the New South Wales Supreme Court for about US$8m in respect of unfair preferences under Australian law was enforced under the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("1933 Act") and, alternatively, pursuant to the Insolvency Act.

In both appeals the parties against whom the judgments were made were neither present in the foreign country nor had they submitted to the jurisdiction. Since both judgments were in personam, the essential issue was whether the existing principles were applicable or whether the Court should adopt separate rules for judgments in personam in avoidance proceedings, where the judgments were central to the purposes of the insolvency proceedings or part of the mechanism of collective execution.

JUDGMENT

The Supreme Court by a majority of 4:1 (Lord Clarke dissenting) allowed the appeal in *Rubin* holding that there should not be special rules for avoidance judgments but dismissed the appeal in *New Cap* on the ground that the Syndicate submitted to the jurisdiction of the Australian Court. Lord Collins gave the leading judgement.

REASONS FOR THE JUDGMENT

Broadly, under both the common law and the 1933 Act, a foreign court has jurisdiction to give a judgment in personam capable of recognition and enforcement against the person whom the judgment was given if the person (i) was present in the foreign court when 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 the proceedings.

As a matter of policy, the Court did not agree that, in the interests of the universality of bankruptcy and similar procedures, there should be a more liberal rule for judgments given in foreign insolvency proceedings for the avoidance of transactions. [**115**] A different rule for avoidance proceedings would mean courts would have to develop two aspects of jurisdiction: a requisite nexus between the insolvency and the foreign court and a requisite nexus between the judgment debtor and the foreign court. [**117**] Such a change would not be an incremental development of existing principles but a radical departure from substantially settled law, and more suitable for the legislature than judicial innovation. The restricted scope of the existing rules reflects the fact that there is no expectation of reciprocity on the part of foreign countries. [**128-29**] Expanding the principal would also be detrimental to United Kingdom businesses without any corresponding benefit. [**130**] Nor would any serious injustice result from adhering to the traditional rule. There were several other avenues open to officeholders. *Rubin*, for example, could have been founded on proceedings by trustees in England for the benefit of creditors under an express trust, and avoidance claims by the liquidator of an Australian company may be the subject of a request by the Australian court under the Insolvency Act. [**131**] Lord Collins (with the agreement of Lord Walker and Lord Sumption) held that the earlier Privy Council decision in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 was wrongly decided as there was no basis for the recognition of the US Bankruptcy order in the Isle of Mann in that case. [**132**] Whilst agreeing it was distinguishable, Lord Mance reserved judgment on whether it was wrongly decided. [**178**]

As for enforcement under the Cross Border Insolvency Regulations 2006, there was nothing expressly or by implication in the UNICTRAL Model Law that applied to the recognition or enforcement of foreign judgments against third parties. [**142-44**]

In relation to *New Cap*, Lord Collins concluded that the Syndicate had submitted to the jurisdiction of Australia having chosen to prove in New Cap's Australian insolvency proceedings. It should not be allowed to benefit from the insolvency proceeding in this way without the burden of complying with orders made in that proceeding. [**156-167**] In these circumstances, the 1933 Act would apply to the Australian judgment and enforcement should be by way of registration under the 1933 Act rather than by the common law. In view of the conclusion that the Syndicate submitted to the Australian jurisdiction, the issue of enforcement under the Insolvency Act did not arise. However, Lord Collins expressed the opinion that the relevant subsections of the Insolvency Act were not concerned with enforcement of judgements having examined their construction and the statutory history. [**152-154**]

Lord Clarke dissented on the *Rubin* appeal. He relied on the principle that avoidance orders made by a foreign courts in bankruptcy proceedings (personal or corporate), which the court has jurisdiction to entertain, were enforceable if it could fairly be said to have been made in personam or in rem. [**193**] It was possible to have a rem order incidental to bankruptcy proceedings but which is enforceable at common law, provided that the bankruptcy court has jurisdiction in the bankruptcy [**195-6**]. Avoidance orders are central to bankruptcy proceedings. To allow for their enforcement was in keeping with the principle of modified universalism requiring English courts, so far as is consistent with justice and UK public policy, to co-operate with the courts in the country of the principal liquidation to ensure a company's assets are distributed to the creditors under a single system of distribution [**199**]. This would be worked out on a case by case basis depending on the facts of the particular case. [**200-1**]

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
www.supremecourt.gov.uk/decided-cases/index.html