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The Snipping of the Golden Thread and the Sacking of the Temple of Universalism

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The Snipping of the Golden Thread and the Sacking of the Temple of Universalism

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Acknowledgement

INSOL International is very pleased to present the 26th Technical Paper under its Technical Papers Series titled “The Snipping of the Golden Thread and the Sacking of the Temple of Universalism” written by John Verrill of Chadbourne & Parke LLP, London.

Until recently – the principle of unity and universality was very much part of English international insolvency law particularly when recognising and enforcing foreign insolvency judgments.

The UK Supreme Court has now decided that the principles that apply to the recognition and enforcement of foreign insolvency judgments are the same as those applicable to civil law judgments and that no distinction should be made thus declining to extend the concept of universalism to insolvency judgments.

This paper discusses the Supreme Court’s decision and its consequences in context. We hope that our members will find the authors analysis and arguments thought provoking and useful in practice.

INSOL International sincerely thanks John Verrill for writing this excellent paper.

July 2013

The Snipping of the Golden Thread and the Sacking of the Temple of Universalism[1]

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> *"...the principle of (modified) universalism ... has been the golden thread running through English cross-border insolvency law since the eighteenth century"* Lord Hoffmann[2]

In the *Rubin* appeal,[3] which raised important questions about the approach of the English courts to cross-border insolvencies (a subject of growing practical importance at a time of rapid globalisation of both markets and companies) The Supreme Court of the United Kingdom has reached some surprising and disappointing conclusions. The purpose of this paper is to try to put the judgment and its consequence in context.

A. Background

David Rubin and his partner Henry Lan ("Rubin") are Receivers appointed by the English court who were subsequently the appointed foreign representatives of insolvency proceedings commenced in relation to The Consumers Trust ("TCT") (an English law bare trust) under Chapter 11 of the United States Bankruptcy Code in the Southern District of New York (Case No. 05-60155). TCT carried on a scheme known as the "*cashable voucher program*" which was shut down in the face of proceedings brought by the authorities of a number of States in the United States. Although TCT is governed by English law, all of its activities were carried on in the United States and to some extent in Canada.

In the course of the Chapter 11 insolvency proceedings, the Receivers brought adversary proceedings against Adrian Roman, his two sons and his corporate vehicle Eurofinance SA (the settlor of TCT) ("Roman et al"), *inter alia*, to recover monies transferred to them by TCT prior to it going into insolvency proceedings. Roman et al made a conscious decision not to participate in the New York proceedings. The United States Bankruptcy Court for the Southern District of New York ("the Bankruptcy Court") gave judgment against Roman et al on 22 July 2008 ("the Judgment"). The question which arose for determination on the appeal from the English court of Appeal[4] to the United Kingdom Supreme Court was whether the relevant parts of the Judgment could be recognised and enforced against Roman et al in England and Wales.

Roman et al sought to resist the recognition and enforcement of the Judgment in the UK on the grounds that, since they did not appear in the New York proceedings, then the US Bankruptcy Court did not have jurisdiction over them in accordance with English rules of private international law as set out in what was rule 36 of *Dicey, Morris & Collins*[5]. Roman et al said that, as a result, the Judgment, which they argued to be a judgment *in personam*, cannot be enforced against them in the UK. In effect, their position was that, notwithstanding they received substantial payments from an entity which carried on most of its activities in the United States and was in insolvency proceedings in the US, they were entitled to remain in the UK and to ignore the proceedings brought by the Receivers and that they could resist recognition and enforcement of the Judgment.

It was argued that this approach is not only unattractive but unrealistic in the modern world of globalised trade and business and cross-border insolvency proceedings. The English Court of Appeal found, Roman et al to be wrong. As the Judicial Committee of the Privy Council (a Judicial panel made up of UK Supreme Court Justices to deal with appeals from Commonwealth jurisdictions) explained in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc*[6] (*"Cambridge"*) (an Isle of Man case), orders

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1 The opinions and comments expressed in the paper upon the judgment are my own unless indicated. However the account of the arguments put by the Respondents to The Supreme Court draws heavily on the skeleton argument from both the Court of Appeal and the UKSC itself to which Tom Smith and Robin Dicker QC both of South Square contributed. Mistakes are those of the author.
2 In Re HIH Casualty and General Insurance Ltd: McGrath v Riddell (Conjoined Appeals) [2008] UKHL 21
3 Rubin & Anor v Eurofinance SA & Ors; New Cap Reinsurance Corporation (In Liquidation) & Anor v AE Grant & Ors (Conjoined Appeals)[2012] UKSC 46 (24 October 2012)
4 Rubin & Anor (Joint Receivers and Managers of the Consumers Trust) v Eurofinance SA & Ors [2010] EWCA Civ 895 (30 July 2010).
5 Dicey, Morris & Collins, Conflict of Laws (14th edition, 2006), as "Dicey's Rule 36.", Now Rule 43 (15th edition 2012).
6 [2007] 1 A.C. 508 P.C.

made in insolvency proceedings are classified as neither judgments *in personam* nor judgments *in rem* for the purposes of recognition and different principles govern the recognition and enforcement of such orders. The question arises what damage has the Supreme Court done to the enlightened approach of the Privy Council in *Cambridge*?

The relevant principles, as far as cross-border insolvency proceedings are concerned, arising from *Cambridge* appeared to be that:

(1) wherever possible, there should be a single insolvency proceeding in relation to an insolvent debtor which takes place in one jurisdiction and which has universal effect;

(2) to this end, the English court should recognise and wherever possible grant active assistance to such a foreign insolvency proceeding.

It was argued for Rubin that such assistance encompasses recognising and enforcing judgments and orders of the foreign court given in the course of the foreign insolvency proceeding. In Rubin, the US Bankruptcy Court requested the assistance and co-operation of the English courts through recognition of its judgments. The relevant parts of the Judgment in respect of which recognition and enforcement is sought were "*part and parcel*" of the Chapter 11 proceedings[7]. In accordance with the principles governing the grant of assistance to foreign insolvency proceedings, these parts of the Judgment ought to be recognised and enforced in the UK.

It was argued that the Court of Appeal was therefore correct to find that the court had jurisdiction at common law to recognise and enforce the relevant parts of the Judgment in the US Bankruptcy Court against Roman et al in their home jurisdiction, England. Having established the existence of this jurisdiction, there was no basis for contending that the court should not then exercise its obvious discretion to permit recognition and enforcement.

In addition to the jurisdiction at common law, it was argued that the court also has jurisdiction under the Cross-Border Insolvency Regulations 2006 ("the CBIR") to recognise and enforce the relevant parts of the Judgment. The CBIR have enacted into English law the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law") which is the UK equivalent of Chapter 15 of the US Bankruptcy Code. Although the Court of Appeal did not need to, and did not, decide this point, it appears to have preferred the view that there was also jurisdiction under the CBIR to recognise and enforce the Judgment[8].

The Rubin Respondents argued that there is jurisdiction under the CBIR to recognise and enforce the relevant parts of the Judgment, and this represents an alternative route to the recognition and enforcement of the Judgment at common law.

B. Detailed Facts

The background to the appeal concerned a scheme (or "scam" as it was described in the Court of Appeal[9]) established by Roman et al, and which operated in the United States (and Canada).

TCT

The scheme was operated through a trust, The Consumers Trust ("TCT"), established by the terms of a trust deed dated 25 March 2002 governed by English law. The settlor of the trust was the First Appellant, Euro-finance SA ("Eurofinance"). Eurofinance was a British Virgin Islands company which was wholly owned by Adrian Roman. The trustees of the trust were two solicitors and two accountants; all based in Harrow, England ("the Trustees"). As a result of separate actions the Trustees compromised their liability for breach of trust in consideration of the payment of several millions of dollars to the Receivers.

[7] Court of Appeal ("CA") Judgment para. 46
[8] CA judgment, para. 63
[9] Para 4 CA Judgment – in fact it had all the hallmarks of a Ponzi scheme.

The scheme

The purpose for which TCT was established was to carry on a sales promotion scheme in the United States and Canada, known as a cashable voucher program, created by Adrian Roman ("the Scheme").

Under the Scheme, arrangements were entered into with participating merchants in the United States and Canada. When the merchants sold products or services to customers, they offered their customers a cashable voucher promising a rebate of up to 100% of the purchase price for the product or service to be paid in three years. However, in order to obtain this payment, the consumers had to satisfy what the Deputy Judge at the first lower court hearing described as "*a complex and obscure process involving both memory and comprehension tests*"[10]. These tests were themselves assessed in a pedantic manner by those administering the scheme, the Trustees and Roman's two sons. In the New York proceedings it was described as a memory test designed to help you forget.

Under the arrangements, the participating merchants paid 15% of the face amount of vouchers issued by them to TCT to their sales prices and account for the uplift to TCT to fund the scheme[11]. Of these funds paid to TCT, only 40% was retained by the Trustees[12]. Of the remaining 60%, about half was paid to Eurofinance, and thus to Adrian Roman[13]. The balance was used for payments to various entities involved in the operation of the programme. From mid-2002 the Third and Fourth Appellants, Justin Roman and Nicholas Roman (Adrian Roman's adult children), also began to receive payments representing approximately 2% of the merchant payments[14].

Given that the Trustees only retained 6% of the face value of the issued vouchers, the success of the Scheme was necessarily predicated on the consumers either forgetting to redeem the vouchers or being unsuccessful in navigating the process required to be followed in order to obtain payment. The success of this strategy is evidenced by the fact that when the Scheme folded in 2005 the Trustees held nearly US$10 million in bank accounts in the United States and Canada.

Unsurprisingly, however, the Scheme attracted the attention of the authorities in the United States. The Scheme started to come to grief when it came to the attention of the Attorney-General for the State of Missouri who in January 2005 commenced proceedings against the Trustees, Eurofinance, Adrian Roman and others under Missouri consumer protection legislation[15]. In August 2005, the proceedings were settled on payment by the Trustees of US$1,650,000 together with US$200,000 in costs to the Missouri Attorney General[16]. This was in breach of the trusts establishing TCT, since the trust deed contained no indemnification of the TCT trustees.

The Attorney Generals of other States were also concerned by the Scheme and it became clear that further proceedings were likely.

Appointment of receivers and Chapter 11 proceedings

As a result, in November 2005 Adrian Roman caused Eurofinance to apply for the appointment of receivers to TCT to protect trust property which was at extreme risk of dissipation as claims came home to roost in the USA. On 14 November 2005 Rubin and Lan were appointed as Receivers by order of Mr Justice Lewison. On 5 December 2005, the Receivers then caused TCT to present a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code ("Chapter 11").

TCT was placed into Chapter 11 proceedings in New York as virtually all of its 60,000 creditors were located in the United States or Canada as were its assets[17]. The Scheme itself was

[10] [2009] EWHC 2129 (Ch), [2010] 1 All ER (Comm) 81, [2009]: Judgment para 7
[11] CA judgment, para 5
[12] CA judgment, para 5
[13] CA judgment, para 5
[14] CA judgment, para 5
[15] CA judgment, para 6
[16] CA judgment, para 6
[17] CA judgment para. 7

operated principally in the United States and also in Canada. In order better to ground jurisdiction in a US Bankruptcy Court which is used to hearing the cases of foreign applicants, the funds of TCT were moved from the Blue Ridge Bank of Missouri to JP Morgan in New York prior to filing.

On 24 October 2007 the US Bankruptcy Court approved a Plan of Liquidation for TCT, as did the English court as required by the order appointing the Receivers. On the same date Rubin and Lan as Receivers of TCT were appointed as foreign representatives in order to seek recognition of the Chapter 11 proceedings as foreign main proceedings under the CBIR in the UK. The order of the Bankruptcy Court specifically mandated the Receivers:

> *"to seek aid, assistance and cooperation from the High Court in connection with the Chapter 11 case, and, in particular, to seek the High Court's assistance and cooperation in the prosecution of litigation which may be commenced in this court, including relief regarding service of process, discovery, and the enforcement of judgments of this Court that may be obtained against persons and entities residing or owning property in Great Britain."* (emphasis added)

Adversary proceedings

On 3 December 2007 proceedings were commenced by the Receivers and the Official Committee of Unsecured Creditors of TCT before the Bankruptcy Court ("the Adversary Proceedings"). In the Adversary Proceedings claims were made, *inter alia*, for the recovery of monies paid to Eurofinance, Adrian, Justin and Nicholas Roman from the monies received by the Trustees from the merchants. Roman et al were served personally with the proceedings[18], but deliberately took the decision not to defend the proceedings.

As a result, the Adversary Proceedings were not defended at all. On 18 July 2008 the Bankruptcy Court granted the Receivers' motion for default and summary judgment and on 22 July 2008 default and summary judgment was entered by the Bankruptcy Court against Roman et al.

As to the Judgment, the relevant parts in respect of which the Receivers sought recognition and enforcement before the Court of Appeal were:

(1) Under paragraph 3, judgment was granted to recover the funds received by TCT from merchants which were paid out to the defendants[19].

    This order was made pursuant to causes of action in respect of unjust enrichment / restitution, fraudulent conveyance under State fraudulent conveyance laws, fraudulent transfer under Chapter 11 (11 USC section 548(a)) and avoidable transfer under Chapter 11 (11 USC section 550).

(2) Under paragraph 5, judgment was granted on the amounts transferred to the defendants within one year prior to the commencement of the TCT bankruptcy case including Roman et al[20].

This order was made pursuant to causes of action in respect of fraudulent transfer under Chapter 11 (11 USC section 548(b)) and avoidable transfer under Chapter 11 (11 USC section 550).

As explained further below, the relief granted in the Judgment under paragraphs 3 and 5 reflect claims arising under the US insolvency legislation (i.e. sections 548 and 550 of Chapter 11) is directly analogous to the relief which would have been available to an office-holder under English insolvency law[21] if TCT had been subject to an analogous insolvency proceeding in England.

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[18] CA judgment, para. 11.
[19] In the following amounts: Eurofinance/Adrian Roman US$8,377,504.76; Nicholas Roman US$432,338.86; Justin Roman US$238,514.31.
[20] In the following amounts: Eurofinance/Adrian Roman US$1,129,461.98; Nicholas Roman US$21,119.16. The sums ordered to be paid under paragraph 5 are also included within the sums ordered to be paid under paragraph 3.
[21] In particular, relief to set aside the transfers of funds made from TCT would have been available under section 238 (transactions at an undervalue) and/or section 423 (transactions defrauding creditors) of the Insolvency Act 1986

Application for recognition and enforcement

On 3 November 2008 the Receivers made an application to the High Court for recognition of the Chapter 11 proceedings in relation to TCT as foreign main proceedings under the CBIR and for relief permitting the enforcement of the Judgment. At first instance, the Deputy Judge (Nicholas Strauss QC) made an order recognising the Chapter 11 proceedings under the CBIR, but declined to make an order recognising and enforcing the Judgment. On appeal by the Receivers, the Court of Appeal (Ward, Wilson LLJ, Henderson J)[22] overturned the latter order and ordered that paragraphs 3 and 5 of the Judgment be recognised and enforced in England. The Court of Appeal dismissed the cross-appeal of Roman et al against the order recognising the Chapter 11 proceedings.

C. UK Bases for Recognising and Assisting Foreign Insolvency Proceedings

Under English law, there are four main juridical bases for assisting insolvency proceedings in other jurisdictions:

(1) Section 426 of the Insolvency Act 1986 provides a statutory power to assist corporate as well as personal insolvency proceedings in countries specified in the Act or designated for that purpose by the Secretary of State. All the countries to which it currently applies are common law countries or countries sharing a common legal tradition with England[23].

(2) The EC Regulation on Insolvency Proceedings ("the Insolvency Regulation")[24] applies to insolvency proceedings in respect of debtors with their centres of main interests (COMI) within the European Union (excluding Denmark)[25].

(3) The Cross-Border Insolvency Regulations (CBIR) came into force on 4 April 2006 implementing the Model Law. The Model Law provides for a wide range of assistance to foreign courts and office-holders. The Model Law has, so far, been implemented by 19 countries and territories around the world, including the United States and Great Britain[26].

(4) At common law the court has power to recognise and grant assistance to foreign insolvency proceedings.

As explained in the Explanatory Memorandum which accompanied the CBIR, Great Britain is accordingly "*in the unique position of having a suite of statutory procedures available in cross-border insolvency cases, as well as the flexibility of the common law*".

The different sources of the power to assist foreign insolvency proceedings complement and supplement each other, and are not mutually exclusive[27]. The Explanatory Memorandum explains that the underlying policy is to seek to engage in a genuine process of co-operation in international insolvency matters[28]. The stated policy aim is ultimately to reduce the costs in recovering assets from overseas, and thereby to increase funds available for distribution to creditors.

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[22] Supra

[23] The Cooperation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, S.I. 1986/2123 designated Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Montserrat, New Zealand, St Helena, Turks and Caicos Islands, Tuvalu and the Virgin Islands. The Cooperation of Insolvency Courts (Designation of Relevant Countries) Order 1996, S.I. 1996/253 designated South Africa and Malaysia. The Cooperation of Insolvency Courts (Designation of Relevant Countries) Order 1998, S.I. 1998/2766 designated Brunei Darussalam.

[24] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

[25] There are further European instruments which deal with the position of insurance companies and credit institutions: see Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings, Directive 2001/24/EC on the reorganisation and winding up of credit institutions, the Insurers (Reorganisation and Winding Up) Regulations 2004, SI 2004/353 and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004, SI 2004/1045. In each case, the legislation provides for a single insolvency proceeding to take place in the insurer's or credit institution's home Member State. The EU Member States are Austria Belgium Bulgaria Cyprus* Czech Republic Denmark Estonia Finland France Germany Greece Hungary The Irish Republic Italy Latvia Lithuania Luxembourg Malta The Netherlands Poland Portugal Romania Slovakia Slovenia Spain (but not the Canary Islands) Sweden The UK (but not the Channel Islands) Although Gibraltar is part of the EU, it is outside the Community customs territory.

[26] The countries are: Australia (2008), British Virgin Islands (2005), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000) and the United States of America (2005).

[27] For example, Article 7 of the Model Law provides that nothing in the Law limits the power of the court or a British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain.

[28] Paragraph 7.2.

In the Rubin case, the Receivers' application, which concerned an insolvency proceeding in the State of New York, was founded on the common law and the CBIR.

In particular, the Receivers contended that the court had power under English law to assist the Chapter 11 proceedings in New York by recognising and enforcing paragraphs 3 and 5 of the Judgment at common law and / or pursuant to the provisions of the CBIR.

It was argued before the Supreme Court that both the common law and the CBIR represented free-standing independent routes to the recognition and enforcement of the relevant parts of the Judgment in *Rubin*.

The appeal in the *Rubin* case was joined with the appeal in *New Cap Re*. That appeal also raised issues relating to the Foreign Judgments (Reciprocal Enforcement) Act 1933 and section 426 of the Insolvency Act 1986. Neither of these statutes was applicable in the *Rubin* case since the judgments of the courts of the United States are not subject to the 1933 Act and the United States is not a designated country or territory for the purposes of section 426.

D. The Position at Common Law

The nature of insolvency

Part of the argument put to the Supreme Court was that when analysing the developing principles governing the recognition of, and the giving of assistance to, foreign insolvency proceedings, it was first necessary to appreciate the particular characteristics of insolvency that makes the giving of such recognition and assistance desirable if not essential.

Insolvency obviously arises where a debtor has insufficient assets or liquid funds to meet the claims of his creditors. The primary purpose (and global feature) of all insolvency law is to replace the free-for-all, which would arise on the pursuit by individual claims of their own claims, with a statutory regime. Under that regime, creditors' rights and remedies are suspended (in whole or in part) and a mechanism is provided for the orderly collection and realisation of assets and the distribution of the net proceeds of those assets amongst creditors in accordance with the statutory scheme of distribution[29].

To this end, it remains a fundamental principle that the debtor's assets are to be distributed amongst his creditors on a *pari passu* basis. The very first insolvency law statute in England, enacted in 1542, provided that the debtor's assets were to be sold in order to pay creditors "*a portion, rate and rate alike, according to the quantity of their debts*"[30]. This principle remains central to the modern version of the statutory scheme and to those in other jurisdictions.

There are a number of implications of the requirement for a *pari passu* distribution amongst creditors which are also relevant:

(1) First, in order to achieve a proper and fair distribution of assets amongst creditors, it will often be necessary to avoid prior transactions in order to recover assets for purposes of adding to the estate and then distributing the resulting fruit to creditors. It is for this reason that such avoidance mechanisms are invariably a feature of any scheme of insolvency.

(2) Secondly, where a debtor has assets and liabilities across different jurisdictions, a true *pari passu* distribution can only realistically be achieved if there is a single insolvency proceeding which takes place in one jurisdiction and which applies to all the debtor's assets and to all his creditors; wherever situated, international insolvency practitioners have dubbed this "universality".

(3) Thirdly, conversely, where there are multiple local insolvency proceedings in relation to a debtor in different jurisdictions, it is unlikely that an overall *pari passu* distribution will be achieved. This is because some creditors may do better than others depending on the relevant amounts of assets subject to, and claims submitted in, the various different insolvency proceedings.

[29] Sir Roy Goode, *Principles of Corporate Insolvency Law*, 4th ed., 1-08.
[30] Statute of Bankrupts, 34 & 35 Hen. VIII, c.4.

For this reason, as stated by the Privy Council in *Cambridge*[31]:

> "*The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated* ..."

However, as the Privy Council explained, the ideal of universality of bankruptcy has historically not always been achieved in practice. The common law of cross-border insolvency has for some time been "*in a state of arrested development*"[32]. It is the decision in *Cambridge*, followed by that of the House of Lords in *McGrath v Riddell, Re HIH Casualty and General Insurance Ltd*[33] *("HIH")*, which has reinitiated this process of development.

The Development of Cross-border Insolvency Law

Although, prior to *Cambridge*, the law of cross-border insolvency was in a state of "*arrested development*", it can nevertheless be said that the principle of universality of insolvency has established origins in English law[34]. As the opening paragraphs of this paper state, it has been described as the golden thread running through English cross-border insolvency law since the 18th century[35].

In a number of cases, the courts have sought to apply this principle by exercising their powers so as to allow effect to be given universally to insolvency proceedings under the law of the insolvent's incorporation[36].

The most powerful illustrations of this, because they involve declining to give effect to rights recognised as a matter of English law, are the cases in which common law courts have refused to allow execution to issue on a debtor's local assets when the debtor was subject to insolvency proceedings in another jurisdiction in which the creditors could participate.

The earliest reported case of this type is *Solomons v Ross*, which was cited with approval by the Privy Council in *Cambridge* at paras. 16-17. There are other examples in other jurisdictions. In *Modern Terminals (Berth 5) Ltd v States Steamship Company*[37] the Hong Kong Court stayed execution of a judgment because the debtor (a Nevada company) had petitioned for protection under Chapter 11 of the US Bankruptcy Code. To allow execution, they held, would obstruct the legitimate claims of the law of the United States to achieve a universal resolution[38]. In *CCIC Finance Limited v Guangdong International Trust & Investment Corporation* HCA[39] the Hong Kong court followed the decision in *Modern Terminals*, observing:

> "*The concept of comity of nations is not of itself reason to turn away a litigant with a bona fide claim that should otherwise be granted on the merits. But where a foreign jurisdiction is actively and openly pursuing a liquidation in which it says it intends to treat all creditors, domestic and foreign, alike, and then patently does so, it is not, I believe, for the courts of Hong Kong to interfere with that process*."

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[31] Para 16 per Lord Hoffmann.
[32] *Cambridge* para 18
[33] [2008] 1 W.L.R. 852
[34] The origins of the principle go back at least to the 18th century case of *Solomons v Ross* (1764) 1 H Bl 131n (also reported at (1839) Wallis Irish Chancery Reports 59). In that case a firm based in Amsterdam was declared bankrupt, and assignees were appointed by the Dutch court. An English creditor brought garnishee proceedings in London to attach £1,200 owing to the Dutch firm, but the English court held that the bankruptcy had vested all the firm's moveable assets, including debts owed by English debtors, in the Dutch assignees. The English creditor had to surrender the fruits of the garnishee proceedings and prove in the Dutch bankruptcy. Accordingly, as long ago as 1764, the English court was prepared to recognise the extra-territorial effects of a foreign bankruptcy in England, so as to require creditors based in England to prove in the foreign bankruptcy. Since the evidence before the English court showed that English creditors would be treated equally in the Dutch bankruptcy, there was no reason why the English court should not recognise, and give effect to, the Dutch insolvency proceeding.
[35] *HIH* para 30.
[36] As well as the decision in *Cambridge*, the court has for example appointed the foreign office-holder as receiver of the foreign debtor's English assets: *Bergerem v Marsh* [1921] B&CR 195, *Re Kooperman* [1928] B&CR 189 and has ordered the examination or production of documents: *Re Impex Services Worldwide Ltd* [2004] BPIR 564 (an Isle of Man case).
[37] [1979] HKLR 515
[38] Similarly, in *Re Cavell Insurance Company Ltd* (21 Feb. 2005 (2005) CanLII 4094 and 23 May 2006 (2006) CanLII 16529) the Canadian courts recognised an order of the English Court convening a meeting of creditors to consider a proposed scheme of arrangement, and gave effect to it by staying proceedings in respect of the company's Canadian assets.
[39] No. 15651 of 1999, 31 July 2001

In this context, it is important to recognise there is nothing objectionable in principle with giving effect to a foreign insolvency proceeding in relation to an individual creditor or officer of the insolvent company. A creditor who contracts with a foreign company must take the law of the place of incorporation as the governing system of insolvency (*Firswood Ltd v Petra Bank*[40]). This is *a fortiori* in the case of directors and officers of a foreign company.

Similarly, English law has always ascribed a universal effect to its own insolvency proceedings. It assumes that they will take effect in relation to all of the insolvent's assets no matter where they are located in the world: *Mitchell v Carter*[41]. But, by the same token that it seeks universal effect for its own procedures, English law has also recognised the *universalist* aspirations of foreign courts conducting insolvency proceedings in respect of a debtor within their jurisdiction. Consequentially, at an early stage of the development of the law of corporate insolvency, the potential conflict between the locally effective winding-up of an overseas company in England, and a universal winding-up in the country of the debtor's incorporation was resolved by a judge-made principle which treated the English proceedings as ancillary to the principal winding-up: see *Re International Tin Council*[42].

Greater recognition of the value of judicial comity in relation to cross-border insolvency has also come with the increasing incidence of complex international insolvencies in recent years[43].

(1) In *Banque Indosuez SA v Ferromet Resources Inc*[44] Hoffmann J made clear that the English court would grant assistance to support insolvency proceedings taking place in relation to the debtor in the United States:

> "*This court … will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under Ch 11*."

(2) In *Credit Suisse Fides Trust v Cuoghi* [1998] Q.B. 818 C.A., 826 Millett LJ said:

> "*In other areas, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention … It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."*

This context demonstrates that, even prior to the decision of the Privy Council in *Cambridge* and the speeches of Lords Hoffmann and Walker in *HIH,* the principles underlying the common law of cross-border insolvency law were being recognised and applied by the courts. It is, however, in these two recent cases that the principles have begun to be fully articulated and developed although they have not yet been fully worked out[45]. The question now is to what extent has the Supreme Court stifled the development of a principle of assistance in cross-border bankruptcy cases.

Cambridge Gas

In *Cambridge*, a group of insolvent Isle of Man companies (Navigator) were in insolvency proceedings under Chapter 11 in the United States. A request was made by the United States Bankruptcy Court to the Isle of Man court to give assistance to the Chapter 11 proceedings by

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[40] [1996] CLC 608, 618E-F Per Schiemann LJ: "*… the creditor has to contract with a company whose domicile is Jordan and therefore has to take Jordanian law as governing the priorities in the distribution of the company's assets; the system of priorities contains nothing surprising or at odds with English public policy*."

[41] [1997] 1 BCLC 673, 686-7 (Millett LJ)

[42] [1987] Ch. 419, 446-447 (Millett J)

[43] In addition, see *Re Bank of Credit and Commerce International SA (No 2)* [1992] BCLC 579 where Sir Nicolas Browne-Wilkinson V-C emphasised the importance of co-operating with the principal liquidation of the bank taking place in Luxembourg (where it was incorporated)

[44] [1993] BCLC 112, 117

[45] *Cambridge* para. 19. The process of development of the common law is part of its essential nature. "*The genius of the common law is its capacity to develop*" (*Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 A.C. 122 at para. 33 per Lord Mackay). See also *R v Governor of Brockhill Prison, Ex parte Evans (No. 2)* [2001] 2 A.C. 19 at p.48 per Lord Hobhouse: "*The common law develops as circumstances change and the balance of legal, social and economic needs changes. New concepts come into play; new statutes influence the non-statutory law. The strength of the common law is its ability to develop and evolve*". (Emphasis added)

giving effect at common law to a reorganisation plan which had been promulgated in the Chapter 11 proceedings and confirmed by the bankruptcy court. Under the terms of the plan, the shares in the top Navigator company (Navigator Holdings plc) were to be transferred to a representative of the creditors – in essence, a "*debt for equity*" swap.

A shareholder objected to the recognition of the plan and confirmation order under which its shares would be transferred to the creditors. It argued that the order of the New York bankruptcy court confirming the plan was either a judgment *in rem* or a judgment *in personam*, and that in either case it was not capable of being recognised in the Isle of Man. The Privy Council rejected this argument: the bankruptcy proceedings did not fall into the category of either judgments *in rem* or judgments *in personam* (para.13).

The principle of universality required that, ideally, there should be a single insolvency with universal effect in which all creditors are required and entitled to prove (para.16). Lord Hoffmann continued (para.17):

> *"[17] This doctrine may owe something to the fact that 18th and 19th century Britain was an imperial power, trading and financing development all over the world. It was often the case that the principal creditors were in Britain but many of the debtor's assets were in foreign jurisdictions. Universality of bankruptcy protected the position of British creditors. Not all countries took the same view. Countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors. But universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view."*

These principles were sufficient to confer upon the court jurisdiction to assist the foreign insolvency proceeding by giving effect to the plan (para. 21). Accordingly, although the plan and the confirmation order in *Cambridge prima facie* had the indicia of being either a judgment *in rem* or a judgment *in personam*, the Privy Council nevertheless concluded that they were correctly characterised as an order made in bankruptcy proceedings and were to be recognised and given effect to accordingly.

HIH

HIH concerned four Australian insurance companies, which were being wound up in Australia and in respect of which provisional liquidators had been appointed in England. The question was whether the English court had power to direct remittance of assets collected in England to Australia, notwithstanding that there were differences between the English and Australian statutory regimes for distribution, which meant that some creditors would benefit from remittance whilst some creditors would be worse off. The House of Lords overturned the decisions of the judge at first instance and of the Court of Appeal and unanimously directed that remission should take place.

The decisions of two of their Lordships (Lords Scott and Neuberger[46]) were based exclusively on the statutory power to assist foreign insolvency proceedings contained in section 426 of the Insolvency Act 1986, but Lord Hoffmann (with whom Lord Walker agreed) also considered that such a power existed at common law.

Lord Hoffmann characterised the principle of universality as a principle of English private international law that, where possible, there should be a unitary insolvency proceeding in the courts of the insolvent's domicile which receives worldwide recognition and which should apply universally to all the bankrupt's assets (at para.6):

> *"Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be*

[46] Speaking extra-judicially, Lord Neuberger has since commented that, having revisited the matter, he considers that there is considerable attraction in the approach of Lords Hoffmann and Walker: '*Insolvency, internationalism and Supreme Court judgments*', speech by Lord Neuberger to the Insolvency Lawyers Association, 16 November 2009.

unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets."

Applying that principle to the facts in *HIH* meant that remission of the English assets to the Australian principal liquidations should be directed. Lord Hoffmann stated (para.30):

"The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

Principle of active assistance

As to the extent of the assistance which can be granted at common law, in *Cambridge* the Privy Council approved the statement in *Re African Farms* that recognition of a foreign insolvency proceeding *"carries with it the active assistance of the Court*".

The court can grant such assistance by doing whatever it could have done in the case of an equivalent domestic insolvency. As the Privy Council stated in *Cambridge* (para.22):

"At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

This emphasises that the purpose of recognition is to avoid the need for multiple proceedings and to give the foreign office holder such remedies as he would have been entitled to if equivalent insolvency proceedings had been commenced in England and Wales, without actually requiring him to commence such proceedings.

The approach in *Cambridge*, whereby the court may grant assistance at common law in support of foreign insolvency proceedings, has been followed in subsequent cases without difficulty:

(1) In *Larsen v Navios International Inc*[47] the company, Atlas Bulk Shipping, had been made the subject of a bankruptcy order in Denmark. A debtor of the company subsequently acquired by way of assignment claims against the company which it sought to rely on by way of set-off to defeat the claims of the company. As a matter of Danish law, the post-insolvency assignment set-off was prohibited and, if Atlas had been in English insolvency proceedings, the set-off of claims acquired after commencement of the insolvency proceedings would likewise not be permitted[48]. The court held that relief could be granted under Article 21(1)(g) of the Model Law to prevent the debtor from relying on the set-off in Commercial Court proceedings on the basis that the foreign officeholder was entitled to the relief which would have been open to an English officeholder if proceedings had been opened in England on the date of opening of the foreign proceedings (paras.23, 24). The judge considered that this conclusion was also consistent with the common law position as stated in *Cambridge* and *Rubin* (see paras.29-32).

(2) In *Re Phoenix Kapitaldienst GmbH* [49] the court, applying *Cambridge* and *Rubin*, granted relief at common law to enable the administrator of a company which was in insolvency proceedings in Germany to bring an application for relief in England, pursuant to section 423

[47] [2011] EWHC 878 (Ch)
[48] See rules 2.85 and 4.90 Insolvency Rules 1986.
[49] [2012] EWHC 62 (Ch). This case was probably wrongly decided since the foreign representative was asking the English court to assist in doing something which was not available in his home court.

of the Insolvency Act 1986, to recover alleged fictitious profits paid out by the company to investors.

(3) In *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd*[50] it was common ground between the parties that the principle in *British Eagle*[51], i.e. that parties cannot consistently with public policy contract out of the mandatory provisions of the Insolvency Act 1986, could be applied in support of a foreign insolvency proceeding recognised by the English Court even absent any insolvency process taking place in England[52].

E. The Boundaries of an Insolvency Order

In light of *Cambridge*, *HIH* and the preceding authorities, the guiding principles to be applied in relation to foreign insolvency proceedings seemed to be, firstly, that the English court should seek so far as possible to give effect to the principle of there being a single insolvency proceeding in relation to an insolvent debtor which has universal effect and, secondly, that active assistance should be given to that insolvency proceeding.

Classification of foreign judgments

As in *Cambridge*, the application of these principles may require the court to recognise and enforce an order made in the course of the foreign insolvency proceedings. It is clear from *Cambridge* and the passages cited above, that there is jurisdiction at common law to recognise such orders: the debate now centres upon what that assistance involves. Moreover, the rules governing the recognition of such orders are separate and distinct from the rules governing the recognition and enforcement of judgments *in rem* and judgments *in personam*.

Cambridge had established that there is a third category of judgment, independent of judgments *in rem* and judgments *in personam*. In particular, where the order can be said to form part of the foreign insolvency proceeding, then for the purposes of English rules governing the recognition of foreign judgments it is to be characterised as neither a judgment *in rem* nor a judgment *in personam.* As far as the UK is concerned that principle has been cast into doubt by the judgment of the majority in *Rubin* even though it was *common ground* between the parties in *Rubin* that there is a three-fold classification of foreign judgments as judgments *in rem*, judgments *in personam* and orders which form part of insolvency proceedings ("Insolvency Orders").

As the Privy Council stated in *Cambridge* (paras.13-15):

> *"[13] If the New York order and plan had to be classified as falling within one category or the other, the appeal would have to be allowed. But their Lordships consider that bankruptcy proceedings do not fall into either category*."

The three-fold classification of foreign judgments as judgments *in rem*, judgments *in personam* and Insolvency Orders was also followed by the Privy Council in *Pattni v Ali*[53], (para. 23 per Lord Mance who gave the advice of the Board):

> *"In* Cambridge ... *the Board touched on the concepts of in personam and in rem proceedings, but held that the bankruptcy order with which it was concerned fell into neither category. Its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established."*

Applying this three-fold classification, the question in the *Rubin* appeal was whether the relevant parts of the Judgment in respect of which recognition and enforcement were sought were an Insolvency order.

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[50] [2011] UKSC 38
[51] *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758.
[52] See the decision of the Chancellor in *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWHC 1912 (Ch) at para. 48.
[53] [2006] UKPC 51, [2007] 2 A.C. 85 P.C.

It is worth noting at this point that ten of the highest ranking judges in the UK were apparently content with the classification if not with the principle of assistance, the doctrine of universality, and the golden thread. As also described above in the context of *HIH, three* more judges added their weight to the numbers game in support of *Cambridge,* totalling thirteen supporters of the highest calibre.

Scope of insolvency proceedings

Insolvency proceedings involve the collective enforcement by creditors of their claims against the assets of the insolvent debtor[54]. As the Privy Council stated in *Wight v Eckhardt Marine GmbH* [55] (paras.26-27 per Lord Hoffmann):

> *"[26] … a winding up order is not the equivalent of a judgment against the company which converts the creditor's claim into something juridically different, like a judgment debt. Winding up is, as Brightman LJ said in* In re Lines Bros Ltd[56]*, 'a process of collective enforcement of debts'. The creditor who petitions for a winding up is 'not engaged in proceedings to establish the company's liability or the quantum of the liability (although liability and quantum may be put in issue) but to enforce the liability'.*
>
> *[27] The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced. When the order is made, ordinary proceedings against the company are stayed (although the stay can be enforced only against creditors subject to the personal jurisdiction of the court). The creditors are confined to a collective enforcement procedure that results in pari passu distribution of the company's assets. The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced."*

Accordingly, an insolvency proceeding is not a proceeding in the nature of an ordinary civil action brought by a creditor to establish the liability of the debtor or to establish the quantum of the creditor's claim. Rather, it is a means by which the creditor's claim, and the claims of other creditors, are collectively enforced against the debtor.

The process of collective enforcement takes place as against the debtor's assets. However, the relevant assets of the debtor for these purposes are not merely the assets which the debtor actually retains at the date of commencement of the insolvency. In order to achieve a proper and fair distribution of assets between creditors, it will often be necessary to adjust prior transactions and to recover previous dispositions of property (fraudulent conveyances and preferences) so as to constitute the estate which is then available for distribution.

For this reason, most if not all systems of insolvency law include mechanisms for adjusting prior transactions by the debtor and for recovering property disposed of by the debtor prior to his insolvency to swell the estate available for distribution. For example:

(1) The UNCITRAL Legislative Guide on Insolvency Law (2005) (paras.148-151):

> *"[150] Many insolvency laws include provisions that apply retroactively from a particular date (such as the date of application for, or commencement of, insolvency proceedings) for a specified period of time (often referred to as the 'suspect' period) and are designed to overturn those past transactions to which the insolvent debtor was a party or which involved the debtor's assets where they have certain effects …*

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[54] *Re Lines Bros Ltd* [1983] Ch. 1, 20E-F, per Brightman LJ ("*The liquidation of an insolvent company is a process of collective enforcement of debts for the benefit of the general body of creditors. Although it is not a process of execution, because it is not for the benefit of a particular creditor, it is nevertheless akin to execution because its purpose is to enforce, on a pari passu basis, the payment of the admitted or proved debts of the company. When, therefore, a company goes into liquidation a process is initiated which, for all creditors, is similar to the process which is initiated, for one creditor, by execution.*")

[55] [2004] 1 A.C. 147 P.C.

[56] [1983] Ch 1, 20.

> *[151] It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment. Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor's assets consistent with established priorities and preserving the integrity of the insolvency estate."*
> (emphasis added)

(2) Professor Ian Fletcher, *The Law of Insolvency*, 4th ed. (2009), 26-02:

> *"The implications of the principle of collectivity can be very far reaching. Not only are the creditors' individual rights and remedies 'frozen' from the moment of formal commencement of the liquidation procedure, but also there is the possibility that transactions which took place a considerable time before that moment can be impeached on account of what has subsequently transpired. There is a consistent jurisprudential thread running through the law of corporate insolvency, maintaining that the interests of creditors are elevated to a position of paramount importance from the time when the company becomes insolvent, even though at that stage no formal proceedings have been initiated. It is therefore seen as an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors must be amenable to adjustment or avoidance."*
> (emphasis added)

(3) Professor Sir Roy Goode, *Principles of Corporate Insolvency Law*, 4th ed. (2011):

> *"13-01However, the principle of equity among creditors that underlies the pari passu rule of insolvency law will in certain conditions require the adjustment of concluded transactions which but for the winding up of the company would have remained binding on the company, and the return to the company of payments made or property transferred under the transactions or the reversal of their effect.*
>
> *11-03 The conditions of avoidance vary according to the particular ground of avoidance involved but are for the most part dictated by a common policy, namely to protect the general body of creditors against a diminution of the assets available to them by a transaction which confers an unfair or improper advantage on the other party … The avoidance provisions may thus be seen as necessary both to preserve the company's net asset value and to ensure equality of distribution, at least among classes of creditors."*

As Lord Hoffmann stated in HIH (at para.19):

> *"… the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from the English statutory scheme."*

See also the description given by Millett J in *Re International Tin Council.* [57]

It is important to have in mind that these avoidance provisions arise under insolvency law and may therefore allow the recovery of property even though such dispositions were effective and valid as a matter of the ordinary law of contract and property. In other words, they enable the insolvent estate to be reconstituted by recovering property even though the insolvent debtor may not be entitled to such property as a matter of general law. This is because as a matter of policy insolvency law enables such property to be recovered in pursuit of the overriding goal to treat the creditors of the insolvent debtor equally and fairly.

Accordingly, avoidance provisions by which prior transactions can be adjusted and assets recovered, thus supplementing the estate available for distribution to creditors, are an integral part of the process of collective enforcement represented by an insolvency proceeding.

[57] [1987] Ch. 419, 446.

Contrary to the assertion made by Roman et al, they are central to the purpose of insolvency proceedings. They are essential because they are a necessary means of constituting or reconstituting the estate of the debtor against which collective enforcement then takes place.

Furthermore, it was argued by Rubin that the distinction sought to be drawn by the appellants in the *New Cap* appeal between the collection and the distribution of assets is a false one. Insolvency proceedings are a process of collective enforcement, and that process necessarily involves applying the statutory insolvency scheme in order to constitute the debtor's estate.

The Rubin Case

In the *Rubin* case, paragraphs 3 and 5 of the Judgment were entered pursuant to Count VII (fraudulent transfer under section 548(a) of Chapter 11), Count VIII (fraudulent transfer under section 548(b) of Chapter 11) and Count X (liability of transferees of avoided transfers under section 550 of Chapter 11) of the Complaint[58]. Accordingly, in the case of both paragraph 3 and paragraph 5, the Receivers were entitled to judgment pursuant to sections 548 and 550 of Chapter 11[59].

As to this the US position is that:

(1) Section 548(a), in summary, provides that the trustee may avoid any transfer of an interest of the debtor in property that was made on or within two years of the date of the filing of the petition, where the transfer was made with either an actual intent to defraud or where the debtor received less than a reasonably equivalent value in exchange and the debtor was, *inter alia*, insolvent on the date of the transfer or become insolvent as a result of the transfer.

(2) Section 548(b) likewise provides that the trustee of a partnership debtor[60] may avoid any transfer of an interest of the debtor in property that was made on or within two years of the date of the filing of the petition, where the debtor was insolvent on the date of the transfer or become insolvent as a result of the transfer.

(3) Section 550 provides that, to the extent that a transfer is avoided under section 548, the trustee may recover, for the benefit of the estate, the property transferred or, if the court so orders, the value of such property. The insolvent estate of the debtor includes the property which is recovered under section 550 (section 541(3)).

Section 548 of Chapter 11 is the direct equivalent of section 238 of the Insolvency Act 1986 and section 550 of Chapter 11 is the direct equivalent of section 241.

Before the Court of Appeal, Roman et al conceded the general equivalence of section 548 of Chapter 11 with section 238 of the Insolvency Act 1986[61]. Both the Deputy Judge and the Court of Appeal correctly concluded that the Adversary Proceedings were (in the Deputy Judge's words) "*part and parcel*" of the Chapter 11 proceedings.

Assistance which a domestic office-holder could obtain

The jurisdiction at English common law to grant assistance in support of a foreign insolvency proceeding, according to the Privy Council in *Cambridge*, extends to the relief which could have been granted in the case of an equivalent domestic insolvency.

Accordingly, in *Cambridge* the plan and confirmation order were recognised and enforced, notwithstanding that this had the effect of divesting the existing shareholders of their rights, because equivalent relief could have been obtained by way of a scheme of arrangement under the Manx Companies Act (paras.24-25).

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[58] Paragraph 3 was also entered pursuant to Count IV (unjust enrichment and restitution) and Count VI (fraudulent conveyance under state fraudulent conveyance laws). State fraudulent conveyance laws were applicable pursuant to section 544(b) of Chapter 11: see para. 84 of the Complaint.

[59] For these purposes, it is irrelevant that paragraph 3 of the Judgment was also entered pursuant to Counts IV and VI. This is because the entirety of the relief granted in paragraph 3 could have been granted pursuant to Count VII alone: see paras. 85-86 of the US Complaint.

[60] For these purposes, the Receivers' allegation on advice, was that TCT was in substance a partnership and that Roman et al were general partners.

[61] CA judgment, paras 49, 60.

Applying this test to *Rubin*, in the case of an equivalent domestic insolvency in respect of TCT, the Receivers would have been entitled to equivalent relief to that granted pursuant to paragraphs 3 and 5 of the Judgment. Such relief could have been granted pursuant to sections 238 and / or 423 of the Insolvency Act 1986. Paragraphs 3 and 5 of the Judgment therefore represent remedies to which the Receivers would have been entitled if the equivalent insolvency proceedings had taken place in England.

Collective execution versus determination of or establishment or rights

Roman et al did *not* argue that *Cambridge* was wrongly decided or that it does not properly represent the common law of England and Wales. They sought to narrow the ambit of the decision. They sought to do this by focussing heavily on the description given by Lord Hoffmann in paras. 14-15 of the nature of insolvency proceedings:

> "*The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."*

Roman et al argued that the Judgment in the *Rubin* case determined or established the existence of rights and therefore fell outside the scope of the Chapter 11 insolvency proceeding as described in *Cambridge*. The Receivers disagreed. The Roman approach was argued to be wrong. The *Rubin* reasoning was as follows:

First, it is necessary to identify the distinction which was being drawn by Lord Hoffmann. This distinction was between, on the one hand, proceedings brought by a creditor to establish the liability of the debtor or the quantum of the creditor's claim and, on the other hand, the collective enforcement by the creditor of his claim through the commencement of an insolvency proceeding.

That this is the distinction which Lord Hoffmann was making can be seen most clearly from his speech in *Wight v Eckhardt* at para. 26, referring to the same distinction which was drawn by Brightman LJ in *Re Lines Bros*. The point being made was that, unlike an ordinary civil proceeding brought by a creditor against a debtor in order to establish his claim, an insolvency proceeding is a process whose purpose is to enforce the *creditor's* existing claim rather than to establish or determine the *creditor's* rights on a bilateral debtor / creditor basis.

Secondly, it does not follow that, in the course of an insolvency proceeding, it may not be necessary to establish or determine other rights. The Privy Council expressly recognised that this might well be necessary ("*It may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution.*").

With respect this does not change the fundamental nature of insolvency proceedings as a process of collective enforcement, nor does it mean that, even if avoidance provisions can be said to involve the establishment or determination of rights, they are not to be regarded as falling within the scope of the relevant insolvency proceedings.

As to this:

(1) The rights which fall to be determined in the context of an insolvency proceeding may be *either* insolvency claims (for example, avoidance claims arising under the statutory scheme), *or* ordinary civil claims (for example, claims by the insolvent company to be entitled to recover property to which it has title under the applicable law of property or to collect in a debt).

(2) So far as the former are concerned, as explained above, such claims are an integral part of the process of collective distribution effected through an insolvency proceeding and it is for this reason that such claims and any resulting judgments form part of the insolvency proceeding and may be recognised and enforced pursuant to the principles of universality and assistance described above.

Thirdly, Roman et al in the appeal contended that there was no principled basis to draw a distinction between a claim for the recovery of property to which the debtor is entitled as a matter of ordinary property law and a claim under statutory avoidance provisions. This is also the wrong approach in the view of the Receivers.

(1) The relevant principles were argued to be the principles of universality and assistance identified above, but ultimately the overriding principle is of fairness and equality of treatment of creditors. The Supreme Court notwithstanding, the only way in which such fairness and equality can be achieved is to have a single insolvency proceeding applying to all the debtor's assets in which all creditors participate. If this is to be achieved, then where such insolvency proceeding is taking place abroad it is necessary for the courts here to recognise it. It is not good enough for the Supreme Court to say that a UK resident can take the benefit of fraudulent conveyances and preferential payments and then to opt out of any attempt to recover the fruits of unconscionable behaviour by artificially not submitting to the jurisdiction of any anticipated bankruptcy to avoid being held to account.

(2) Nonetheless (the Supreme Court differs on this point too), there is a fundamental conceptual difference between insolvency claims and other civil claims. In the case of a civil *lis* between two parties (for example, arising under a contract) it will usually be possible for a claimant to seek out and sue the defendant in the country where the defendant is resident. In contrast, an insolvency claim will typically arise under the statutory scheme applicable to the relevant insolvency proceeding. Accordingly, in the case of a foreign insolvency, absent those cases where specific statutory provision has been made[62], it will usually *only* be the foreign court that can hear and determine the claim since it is the only court which has the power to apply the relevant statutory scheme collectively on behalf of the universal creditor community.

(3) In the case of insolvency, in practice it will often if not invariably be the case that the appropriate forum in which proceedings relating to the insolvency should be brought will be the courts of the jurisdiction in which the insolvency proceeding is taking place. If, for example, a company incorporated and with its centre of main interests in New York is in bankruptcy proceedings in New York, then the New York courts would ordinarily be the appropriate forum in which proceedings to set aside antecedent transactions under the applicable insolvency law would be brought[63]. It is not clear why in these circumstances the New York insolvency officeholder should be required to bring separate proceedings making the same claims in other jurisdictions[64], even if he is able to do so[65]. On the contrary, the Privy Council in *Cambridge* made clear that one of the purposes of recognising and assisting a foreign insolvency proceeding was to avoid the need for multiple parallel actions brought by an officeholder (para.22).

(4) The same distinction between ordinary civil claims (for example, for the recovery of property to which the debtor is entitled as a matter of ordinary property law) and insolvency claims (for example, a claim under statutory avoidance provisions where the power derives from the opening of insolvency proceedings) has been drawn in the European legislation which has been deliberately constructed to establish a coherent scheme for the recognition and enforcement of judgments. The architects of this legislation considered that this was a principled and practical way to proceed.

Fourthly, if it was the case that the Judgment in *Rubin* fell outside the scope of the US insolvency proceedings because it determines or establishes the existence of rights, then it is difficult to see why exactly the same would not have been true of the plan and confirmation order of the US court which was recognised and enforced in *Cambridge*, which

[62] i.e. under section 426 of the Insolvency Act 1986 and Article 23 of the Model Law.

[63] *In re Maxwell Communication Corporation* 170 B.R. 800 (US Bankruptcy Court for the Southern District of New York) the question was which system of law should govern the avoidability of pre-insolvency transactions, which the US bankruptcy and district courts resolved by deferring to English law and the English courts based on the finding that England was the centre of the case. This was despite the fact that US creditors would have done better if US rather than English law been applied to the preference issue. See also *Barclays Bank plc v Homan* [1993] BCLC 680 where the English court had earlier refused to grant an anti-suit injunction restraining the US proceedings. In the event, the US court itself declined jurisdiction in favour of England.

[64] In a complex insolvency, where there are multiple defendants to a claim who are resident in different jurisdictions, this would lead to the prospect of multiple different proceedings in different jurisdictions in respect of the same claims.

[65] Conversely, if a company incorporated and with its COMI in England goes into liquidation in England, then England would ordinarily be considered the appropriate forum in which proceedings should be brought, for example, to set aside any antecedent transactions. Even if the defendant was resident abroad, it would be expected that leave for service out of the jurisdiction would be given under the Insolvency Rules 1986 (Re Paramount Airways Ltd [1993] Ch. 223, C.A.; Re Howard Holdings Inc [1998] BCC 549).

at face value involved expropriation of shares. The plan and confirmation order in that case can equally be said to have determined rights, in the sense that the shares held by the existing shareholders were transferred to the creditors notwithstanding that there was in that case no submission to the jurisdiction as the advice recognised.

Relationship with Rule 36 [now 43] of Dicey[66]

It was argued by Rubin that since the relevant parts of the Judgment in *Rubin* are a US Insolvency Order rather than a judgment *in personam*, Roman et al's reliance on what is said to be the effect of rule 36 of *Dicey* was misplaced. Rule 36 of *Dicey* itself follows from[67]:

"*A fundamental requirement for the recognition or enforcement of a foreign judgment in England at common law is that the foreign court should have had jurisdiction according to the English rules of conflict of laws*."

Rule 36 then sets out the principles governing the circumstances in which the courts of a foreign country are considered to have jurisdiction to give a judgment *in personam* which will then be capable of enforcement or recognition in England. In essence, it is necessary for the defendant either to have been present in the foreign country at the time proceedings were instituted or to have submitted to the foreign jurisdiction in some way. Roman et al asserted that they had done neither.

Rule 36, it was argued, does not apply to judgments which fall within the third category identified in *Cambridge* i.e. judgments given in the course of foreign insolvency proceedings and which form part of those proceedings. But this was not accepted by the Supreme Court which rejected any argument that bankruptcy is different or that the principle of assistance in connection with foreign, core insolvency orders was desirable or indeed an ancient principle.

Paradoxically[68] by recognising a foreign insolvency proceeding, the court is accepting that the procedures and mechanisms of the foreign insolvency process will apply to establish the claims of creditors against the debtor, to establish the assets of the debtor and to provide for the collective enforcement of the claims of creditors against the available assets. As under the English statutory scheme, the applicable mechanisms under the foreign insolvency scheme for establishing the assets of the debtor will invariably include provision for enabling the recovery of assets which have been disgorged by the debtor prior to insolvency. As explained above, mechanisms providing for recovery of such assets are invariably a feature of any system of insolvency. But to characterise such core insolvency mechanism as *in personam* to engage the *Dicey Rule* is perverse. It deprives global creditors of a collective not a bilateral remedy and to state also that the policy is to protect British business interests is bizarre.

This is because since the recovery of assets pursuant to the foreign insolvency law for the purpose of facilitating a distribution of assets between creditors is part of the foreign insolvency process, then the foreign court's jurisdiction over such actions stems from its jurisdiction over the insolvency procedure itself. Thus it was argued for Rubin that the *Dicey Rule* is not the relevant basis for determining whether a judgment given in such an action should be recognised in England. The basis for recognition stems from the English Court's recognition of the foreign insolvency proceeding itself, not the bilateral dealing which arguably gave rise to the bankruptcy.

As a hypothesis, in advance of bankruptcy any person in a bilateral dealing with the debtor in Country A can only be visited with the consequences of his dealings can be sued in Country A if he submitted to the jurisdiction of country A. If he does so any judgment from the courts of Country A may be enforced against him at home. If he was not present and did not submit then he is safe, no matter how nefarious his dealings. The Receivers were not seeking to open the floodgates by arguing that any nefarious dealing which became remediable on the opening of insolvency proceedings deserved special assistance, rather they contended that it was only core bankruptcy remedies which were susceptible to assistance.

[66] Dicey Morris and Collins: Private International Law 15th edition October 2012
[67] *Dicey, Morris & Collins*, 14-049.
[68] Lord Collins' judgment is full of paradoxes, see below.

As a matter of principle and policy, the Receivers asserted that there was no proper basis for applying the *Dicey Rule* as the test for recognition of foreign judgments in the insolvency context and in particular:-

First, the effect of applying the *Dicey Rule* mechanically means that a foreign officeholder is deprived of any means of pursing a claim against the defendants in any jurisdiction where they have not submitted to that jurisdiction. This is the outcome which Roman et al in effect argued for in the *Rubin* case. It raises the serious question whether the Supreme Court has provided a wiring diagram for fraudsters.

Secondly, it is likely to be the case that the appropriate forum in which proceedings relating to the insolvency should be brought will be the courts of the jurisdiction in which the insolvency proceeding is taking place, regardless of the location of the actors who move money and manage their business at the click of a mouse in foreign parts.

Thirdly, in the modern, globalised world, the *Dicey Rule* does not represent a sound test for governing the recognition of Insolvency Orders. The origins of the rule appear to have lain in the perceived unfairness to an English defendant in being subject to the jurisdiction of a foreign court unless he was either physically present in the foreign jurisdiction or had submitted to the jurisdiction of the foreign court[69]. In the modern world, it is questionable whether this rationale for the rule remains sound. But that is precisely the rationale invoked by Lord Collins in *Rubin* when he said at paras 128 to 130:

> *"In my judgment, the dicta in Cambridge Gas and HIH do not justify the result which the Court of Appeal reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the Dicey Rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation.*
>
> *A change in the settled law of the 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 (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, "if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it": Owens Bank Ltd v Bracco [1992] 2 AC 443, 489.*
>
> *Furthermore, the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit. I accept the appellants' point that if recognition and enforcement were simply left to the discretion of the court, based on a factor like "sufficient connection," a person in England who might have connections with a foreign territory which were only arguably "sufficient" would have to actively defend foreign proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory. Although I say nothing about the facts of the Madoff case, it might suggest that foreigners who have bona fide dealings with the United States might have to face the dilemma of the expense of defending enormous claims in the United States or not defending them and being at risk of having a default judgment enforced abroad."*

[69] See *Adams v Cape Industries* [1990] Ch. 433 C.A., 517-518, 519 per Slade LJ.

Even in the context of judgments *in personam*, the *Dicey Rule* has been rejected in Canada as being the appropriate test for the recognition of foreign judgments[70]. The United States itself adopts a broader and more flexible test for the recognition of foreign judgments based on the doctrine of comity (*Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895)). In its recent decision in *Re Flightlease (Ireland) Limited* [2012] IESC 12 the Irish Supreme Court followed the *Dicey Rule* because it considered itself compelled to do so, rather than because it considered that the policy basis for rule 36 remained sound[71].

As far as the *Rubin* respondents were concerned, and based upon good if not highly persuasive authority, there appeared to be no good reason why as a matter of policy the criteria for the recognition of a judgment given in proceedings relating to such insolvency should depend on whether or not the defendant submitted to the jurisdiction of the foreign court. That proposition with respect to the Supreme Court is deeply rooted in the Victorian era and has no place in the electronic age; it has more to do with travel by steam than e-commerce.

The Position under the Insolvency Regulation and the Judgments Regulation

In an attempt to persuade the Supreme Court that the common law could adapt itself to modern mores by reference to statutory parallels, the *Rubin* Respondents sought to show that at English common law it is necessary to draw a boundary between ordinary civil proceedings and insolvency proceedings, and to determine which type of actions fall into each category.

This has been a necessary part of the assimilation into UK jurisprudence of the EC Insolvency Regulation for in the European context where there is a pan European Insolvency Regulation affecting all 27 EU States other than Denmark. The outcome of this exercise at the European level is instructive because it provides guidance as to what is both a principled and practical approach for distinguishing between insolvency proceedings and ordinary civil actions ("civil and commercial matters").

The rules governing the recognition of judgments in civil and commercial matters are contained in the Judgments Regulation[72]. However, the Judgments Regulation, like the preceding Brussels Convention, excludes from its scope bankruptcy and proceedings relating to the winding-up of insolvent companies or other legal persons (Article 1.2(b)). In *Gourdain v Nadler*[73] the European Court of Justice ("ECJ") held that if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Brussels Convention "*they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings*" (para. 4).

When the Insolvency Regulation came into force in May 2002, it likewise followed the *Gourdain v Nadler* test in determining which proceedings fall under the scope of the Insolvency Regulation, and not under the scope of the Judgments Regulation.

(1) Accordingly, Article 3(1) of the Insolvency Regulation confers international jurisdiction on the Member State within the territory of which insolvency proceedings are first opened to hear

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[70] *De Savoye v Morguard Investments Limited and Credit Foncier Trust Company* [1990] 3 S.C.R. 1077: LaForest J stated: "*The approach adopted by the English courts in the nineteenth century may well have seen suitable to Great Britain's situation at the time. One can understand the difficulty in which a defendant in England could find himself in defending an action initiated in a far corner of the world in the then state of travel and communication … The approach, of course, demands that one forget the difficulties of the plaintiff in bringing an action against the defendant who has moved to a distant land. However this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly English men who carried on enterprises in far away land. As well there was an exaggerated concern about the quality of justice that might be meted out to British residents abroad; see Lord Reid in The Atlantic Star [1973] 2 All E.R. 175 at p. 181. The world has changed since the above rules were developed in nineteenth century England. Modern means of travel and communications have made many of these nineteenth century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralised political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances our approach to the recognition and enforcement of foreign judgments would appear right for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants."* See also Saldanha & Ors v Frederick H. Beals & Another [2003] 3 S.C.R. 416)

[71] O'Donnell J stated at para. 10: "*In so much therefore as this appeal challenges the intrinsic merits and logic of the rules contained in Rule 36 of the latest edition of Dicey & Morris, then in my view, the argument has considerable force. The principal thing to be said in favour of Rule 36 is that very fact; that it is a rule and is understood as such, that it provides certainty and therefore predictability. These are important values, but if the law on the recognition of foreign judgments was being constructed from scratch, and by reference solely to rules which best accorded with function of private international law rules in the modern era, then I think it is unlikely that a rule as restrictive as that contained in Rule 36 would be adopted.*"

[72] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[73] [1979] ECR 733 Case 133/78.

and determine actions which derive directly from the insolvency proceedings and are closely connected with them: *Seagon v Deko Marty Belgium NV*[74], (para. 21).

(2) Under Article 25 of the Insolvency Regulation, judgments emanating from the Courts of the Member State in which the insolvency proceedings were opened and which derive directly from the proceedings and are closely linked with them are to be recognised in other Member States.

(3) It follows that in the case of an action to set aside a transaction at an undervalue arising in insolvency proceedings, the jurisdiction to hear and determine the action arises under the Insolvency Regulation, not under the Judgments Regulation[75]. Likewise, any resulting judgment will be recognised and enforced under Article 25 of the Insolvency Regulation, and not under the Judgments Regulation.
(emphasis added)

Accordingly, there is a dichotomy between judgments given in actions which directly derive from and are closely connected with an insolvency proceeding (such as avoidance actions or actions for fraudulent or wrongful trading) and which fall within the scope of the Insolvency Regulation, and judgments given in ordinary civil actions (which may include actions brought by an office-holder, but based on the company's ordinary rights rather on insolvency provisions) which fall within the scope of the Judgments Regulation.

English case law dealing with the Insolvency Regulation and the Judgments Regulation has adopted the same approach:

(1) In *UBS AG v Omni Holdings AG (in liquidation)*[76], Rimer J stated:

> *"It is apparent, therefore, that for the paragraph (2) exception [of bankruptcy from civil matters] to apply it is not enough that the claim can be said to relate to the winding-up of an insolvent company: it must derive directly from it. For example, a claim by a liquidator to recover the company's pre-liquidation debts would be a claim which would be made in the course of the winding-up and could therefore in one sense be said to relate to it; but I respectfully agree with Rattee J when he expressed the view in* In re Hayward (decd) *[1997] Ch 45, 54D that such a claim would not be within the paragraph (2) exception so as to take it outside the scope of the [Lugano] convention. It is a claim which would have existed as much before as during the winding-up and so would not be one deriving directly from it. By contrast, I think it probable that (by way of non-exhaustive examples) claims in a compulsory liquidation by a liquidator under section 238 (transactions at an undervalue) or section 239 (preferences) of the Insolvency Act 1986, being claims for which an insolvency regime for the company is a prerequisite, would be within the paragraph (2) exception. Such claims derive directly from the insolvency."*
> (emphasis added)

(2) In *Re Ultra Motorhomes International Ltd, Oakley v Ultra Vehicle Design Ltd (in liq)* [77]Lloyd LJ stated:

> *"42 . . . it has been held that a claim by a liquidator to recover pre-liquidation debts, although made in the course of the winding-up and so, in a sense, relating to it, does not derive directly from it and is therefore not excluded from the Brussels Convention (and therefore now not from the Regulation) by art 1.2(b): see* Re Hayward deceased *[1997] Ch 45, and* UBS AG v Omni Holding AG (in liq) *[2000] 1 WLR 916 [2000] BCC 593. By contrast, proceedings by a liquidator against a debtor or a third party to set aside a transaction as having been effected at an undervalue or on the basis of wrongful or fraudulent trading would be claims deriving directly from the winding-up and therefore excluded from the Brussels Convention and now from the Judgments Regulation."*
> (emphasis added)

[74] [2009] 1 W.L.R. 2168 Case C-339/07.
[75] *Seagon*, para. 28
[76] [2000] 1 WLR 916, 922
[77] [2005] EWHC 872 (Ch), [2006] BCC 57, [2006] BPIR 115

The effect of the common law principles applicable to cross-border insolvency, described above, give rise to the same dichotomy and approach. Thus Insolvency Orders given in actions which arise in the course of a foreign insolvency proceeding (such as in avoidance actions) and which form part of the proceeding are recognised by application of the principles which govern the recognition of the foreign insolvency itself. Judgments *in personam* which are not closely related to the foreign insolvency proceeding, and which do not form part of them are recognised in accordance with the *Dicey Rule* which govern ordinary civil litigation.

Flightlease

In *Re Flightlease (Ireland) Limited*[78] the Irish Supreme Court recently considered the application of *Cambridge* and the *Dicey Rule*. The facts of that case were that an Irish subsidiary of the Swissair group ("Flightlease") had gone into liquidation in Ireland. The parent company ("Swissair") was in liquidation in Switzerland. Proceedings were instituted by Swissair before the Swiss court seeking the repayment by Flightlease of certain monies paid by Swissair prior to it going into liquidation.

The Irish High Court directed the trial of a preliminary issue as to whether a judgment of the Swiss court would be recognised and enforced in Ireland. On appeal, the Irish Supreme Court held that the judgment would not be recognised and enforced. As to this:

(1) Finnegan J declined to adopt the approach in *Cambridge*. He considered that *Cambridge* had effected a change in the common law position and that a similar change in the common law of Ireland should await the establishment of a consensus amongst common law jurisdictions. He did not go quite as far as saying it could only be done through legislation, which ended up being the default position of Lord Collins in *Rubin.* Finnegan J also appears to have considered that the decision in *Cambridge* had resulted from legislative changes in the United Kingdom[79]. On this basis, Finnegan J considered that any order of the Swiss court would be a judgment *in personam*, and that the Irish courts should continue to apply the test in rule 36 of *Dicey* in preference to the real and substantial connection test which had been adopted by, for example the Canadian courts.

(2) O'Donnell J also considered that it was not possible to reject the *Dicey Rule* in favour of the real and substantial connection test. However he questioned whether the *Dicey Rule* remained relevant in the modern context (para.4):

> *"It can be said that the narrowness of Rule 36 in Dicey, Morris & Collins has little to recommend it at a policy level other than the fact that it is rule which is known and therefore predictable ... No matter how thoughtful and impressive some of those individual judgements (and the commentary upon them) may be, it is asking a lot that the outlook of the British empire at its height, with its justifiable pride in its own legal system, and perhaps less justifiable suspicion of others, should provide enduring rules which are well adapted to the circumstances of a world in which international travel is commonplace, and global trade an essential feature of modern economies."*

(3) O'Donnell J also pointed to the desirability, in cases of insolvency, for there to be a central location for the determination of disputes (para.8). Likewise, in his view there was no good reason why a litigant should be able to ignore proceedings brought in the courts of a friendly state whose legal system there was no reason to doubt (para.7). He concluded (para.9):

> *"Accordingly, for my part, I would not wish to entirely rule out the possibility of the development of an insolvency principle as a matter of common law as indeed was discussed by Lord Hoffman in United Kingdom House of Lords in Cambridge Transportation v Unsecured Creditors of Navigator Holdings Plc [2007] 1 AC 508, and Re HIH Casualty and General Insurance Limited [2008] 1 WLR 852 (House of Lords) and in the United Kingdom Court of Appeal in Rubin & Anor v Eurofinance SA [2010] EWCA 895. It would of course be desirable that this situation could be*

[78] [2012] IESC 12

[79] This was wrong since the decision in *Cambridge* concerns the common law, not any legislative instruments such as section 426, the CBIR or the Insolvency Regulation. The Judge may, however, have had in mind that these instruments, which are designed to further assistance and co-operation in international insolvency matters, formed the context in which the decision in *Cambridge* had been made.

> *achieved by international agreement and domestic legislation, but I would not rule out a possible development of the common law, if that appeared necessary. However, that question was not argued in any detail on this appeal. The Cambridge Gas case was referred to only in the context of whether or not any order obtained in the Swiss proceedings would be an in personam judgment. Accordingly I would reserve that question for another day, when it could be the subject of focussed argument in the context of all the conditions then prevailing."*

It is relevant that the Irish Supreme Court recognised that a development of the common law on the basis of the approach taken in *Cambridge* and *Rubin* might well be desirable, particularly given the importance of there being a single forum for the determination of insolvency disputes. Similarly, the Supreme Court recognised the limitations of the approach embodied in the *Dicey Rule*, not because considerations of policy and practicality led to the conclusion that it was the correct approach, but rather because legal certainty and precedent apparently required it. The judgment recognised that the line between insolvency orders and other orders is easy to draw by reference to the EC cases and others, but rather than embrace incremental development of the law to sensible effect, the opportunity was lost for pure policy reasons. It is clear from the passages above, that Lord Collins understood the damage being done[80].

F. Limits of the Jurisdiction

On the facts of *Rubin*, the questions turned on whether the court had jurisdiction in principle to recognise and enforce the relevant parts of the Judgment. If there is such jurisdiction, then there is no reason why the jurisdiction should not be exercised in favour of providing assistance. It is that simple proposition which was cast aside on pure policy grounds.

However, it is important to recognise that where the jurisdiction to assist a foreign insolvency in principle arises (e.g. by recognising a judgment given in that insolvency), then the court may not be bound to grant such assistance: the relief is acknowledged to be discretionary. On the facts of other cases, there may be factors present which are relevant to the question of when the jurisdiction arises and / or whether the discretion to grant assistance should be exercised.

Justice and Public Policy

The principle ought to be that recognition of foreign insolvency "*carries with it the active assistance of the court*": *Re African Farms*; *Cambridge* at para.20. However, this does not mean that the court is bound to provide the assistance sought in every case[81]. The principle of assistance requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution (*HIH*, para. 30). Accordingly, the court would not be required to grant assistance to a foreign insolvency where this was repugnant to domestic standards of justice or to UK public policy. In that regard the judgment of Lord Collins can be seen as insensitive and mechanical in its rejection of the principle of assistance in favour of a rigid rule based upon policy alone.

The foreign insolvency proceeding

There were even before *Rubin* other boundaries to the extent to which the court is required to recognise foreign insolvency proceedings and insolvency orders made in those proceedings.

There are two aspects to this:

(1) First, the nature of the connection required between the debtor and the relevant foreign jurisdiction in which the insolvency proceeding is being conducted such that it is proper for the courts of this jurisdiction to recognise the foreign insolvency proceeding; and

[80] Paras 91 to 93

[81] Cf. the obligation to assist which arises under section 426(4) of the Insolvency Act 1986. In that context, the function of the court is to grant assistance to the foreign insolvency provided that such assistance can properly be granted: *Hughes v Hannover Ruckversicherungs AG* [1997] 1 BCLC 497, 517-518.

(2) Secondly, in cases such as *Rubin* where recognition and enforcement of an Insolvency Order is sought, the nature of the connection required between the foreign insolvency proceeding and that Insolvency Order.

So far as the first aspect is concerned, English law has traditionally recognised insolvency proceedings taking place in the insolvent's place of domicile (*HIH*, para.6). In the case of corporate insolvents, that will usually mean the place of incorporation (*HIH*, para.31). On the facts of different cases, there may however be a basis for applying a different test (*HIH*, para.31, per Lord Hoffmann):

> *"I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings ((EC) No 1346/2000 of 29 May 2000) uses the concept of the "centre of a debtor's main interests" as a test, with a presumption that it is the place where the registered office is situated: see article 3.1. That may be more appropriate."*

On the facts of *Rubin*, no issue arose since, although TCT is an English law trust, the links between TCT and the United States were compelling such that New York was and is the appropriate forum in which the insolvency proceedings in respect of TCT should be conducted.

As to the second aspect, it is also necessary for there to be an appropriate connection between the foreign insolvency proceeding and the Insolvency Order in respect of which recognition and enforcement is sought.

English courts seeking assistance abroad

In the converse position, where there is an English insolvency proceeding and permission is sought to bring proceedings against the defendants outside the jurisdiction, the courts have approached this issue in the following way:

(1) In *Re Paramount Airways Ltd*[82] the administrators of a company in administration in England sought permission to serve section 238 (transaction at an undervalue) proceedings out of the jurisdiction on a bank incorporated in Jersey. In relation to the exercise of the discretion to permit service out of the jurisdiction, the Court of Appeal identified as one of the relevant factors that (241G):

> *"Where a foreign element is involved one of the factors which the court will consider is the apparent strength or weakness of the plaintiff's claim that the defendant has a sufficient connection with England, in respect of the relief sought in the proceedings."*

(2) Similarly, in *Re Howard Holdings Inc*[83] the court identified the fact that the respondent is resident abroad as a relevant factor in deciding whether to give permission to serve out of the jurisdiction (554A-B):

> *"The second element, as it seems to me, is that the court must take account of the fact that the prospective respondent is abroad, and should not be required to answer claims in England unless there is good reason why England is the proper place for those claims to be litigated."*

Accordingly, where recognition and enforcement of a foreign Insolvency Order is sought, it will be necessary for there to be a sufficient connection between the foreign insolvency proceeding and the subject of the Insolvency Order[84]. This is an answer to Roman et al's second principal criticism of the approach of the Court of Appeal in the *Rubin* case. On the facts of the present case, such a sufficient connection is present. Lord Collins ignored this argument.

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[82] [1993] Ch. 223 C.A.
[83] [1998] BCC 549
[84] In many cases this is likely to be satisfied where the courts of the jurisdiction in which the insolvency proceeding was taking place were the only courts in which the action giving rise to the Insolvency Order could be brought.

It is interesting therefore to note that if the facts of the *Rubin* case were reversed such that TCT had carried on the scheme in England and had been placed into insolvency proceedings here and Roman et al were resident in New York, then it could be expected that the English court would have considered that England was the correct forum in which to bring section 238 proceedings to recover payments made to Roman et al and would have given permission to serve proceedings out of the jurisdiction accordingly.

It is implicit in this that the English court would have expected the New York court then to recognise and enforce any judgment of the English court even if Roman et al had remained in New York and had not contested the proceedings. This makes it all the more extraordinary that Lord Collins (para 128) where he seeks to limit what he calls "*dicta" in HIH* and *Cambridge* should state so baldly that:

> *"This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the Dicey Rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation."*

The evidence is that the New York courts would reciprocate as a matter of comity the treatment afforded what the US courts have called *"sister jurisdictions"*[85]. Thus the scope of any discretion is important. Abandoning *carte blanche* any concept of exercising a discretion to make things work is deeply protectionist and tends in the direction of the UK being seen as an ugly sister.

Discretion

The single argument advanced by Roman et al was to the effect that they proceeded on their basis of their understanding of the law and it would be unfair if, because of the way the law has developed, that understanding turns out to have been incorrect. The Judges in the Court of Appeal (rightly) had little sympathy with this argument[86]. Roman et al deliberately decided not to contest the merits and took their chances on resisting the enforcement of any resulting judgment in England. In any event, this argument is incompatible with the general principle that court rulings making findings to the law as it is and only in very exceptional circumstances will such rulings have a prospective effect only[87].

G. Cross-Border Insolvency Regulations 2006 – UNCITRAL Model Law

It was argued by the *Rubin* Respondents that in addition to the position at common law, the relevant parts of the Judgment could also be recognised and enforced under the provisions of the Model Law as implemented by the CBIR.

The Model Law

The CBIR implement the Model Law into English law[88]. The purpose of the Model Law, which was adopted by UNCITRAL in May 1997, is to provide effective mechanisms for dealing with cases of cross-border insolvency by providing a set of model statutory provisions which may be implemented into the domestic laws of countries and territories.

The preamble to the Model Law itself identifies the purpose of the Law as being to provide effective mechanisms for dealing with cases of cross-border insolvency as to promote the objectives of: (a) co-operation between the courts and other competent authorities of states involved in cases of cross-border insolvency; (b) greater legal certainty for trade and investment; (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; (d) protection and maximisation of the value of the debtor's assets; and (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

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[85] *Re Metcalfe & Mansfield Alternative Investments* 421 B.R. 685 (Bankr. S.D.N.Y. 2010) and see belo

[86] CA judgment para. 64. See also *New Cap Re* [2011] EWHC 677 (Ch) para. 35 per Lewison J.

[87] *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 A.C. 680 H.L.(E.).

[88] Regulation 2(1) of the CBIR provides that the Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to the CBIR which contains the Model Law with certain modifications to adapt it for application in Great Britain. The CBIR themselves were made pursuant to section 14 of the Insolvency Act 2000.

The Model Law is accompanied by a Guide to Enactment issued by UNCITRAL ("the Guide to Enactment"). This states (para.1):

> *"The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place."*

The Guide to Enactment also emphasises that the Model Law enables enacting states to make available to foreign insolvency proceedings the type of relief which would be available in the case of a domestic insolvency (para.20(b)):

> *"The Model Law presents to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law."*

Interpretation of the Model Law

Article 8 of the Model Law provides[89]:

> *"In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."*

Accordingly, the way in which the Model Law has been applied in other States will be relevant to the proper interpretation and application of the Model Law in the United Kingdom.

The CBIR further provide that the following materials may be considered in ascertaining the meaning or effect of the Model Law: the Model Law itself, any documents of UNCITRAL and its working group relating to the preparation of the Model Law and the Guide to Enactment[90].

Recognition of the foreign proceedings

Under the scheme of the Model Law as implemented by the CBIR, a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed (Article 15.1). The court is obliged to recognise a foreign proceeding provided that certain requirements are satisfied (Article 17.1). If the foreign proceeding is taking place in the State where the debtor has its centre of main interests (COMI), then it must be recognised as a foreign main proceeding (Article 17.2(a)). Such recognition has certain automatic effects including the imposition of a stay on the commencement or continuation of proceedings against the debtor (Article 20).
For these purposes:

(1) "*foreign proceeding*" means:

> *"a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation".*

(2) "*foreign representative*" means:

> *"a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".*

[89] Similarly, the Guide to Enactment, at para. 21 states: "*The flexibility to adapt the Model Law to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation and for the benefits to the enacting State in adopting modern, generally acceptable international practices in insolvency matters.*"

[90] Regulation 2(2).

As part of their arguments in opposition to the recognition and enforcement of the Judgment, Roman et al sought to advance two arguments which they advanced in the courts below (but which were rejected both by the Deputy Judge and by the Court of Appeal) as to the recognition of the Chapter 11 proceeding in the present case. The first argument relates to the recognition of the Adversary Proceedings. The second argument relates to the recognition of the Receivers as "*foreign representatives*".

Recognition of the adversary proceedings

As to the first argument, Roman et al twice sought to run the argument they ran before both the Deputy Judge and the Court of Appeal that the Adversary Proceedings should not be recognised under the Model Law. Both the Deputy Judge and the Court of Appeal correctly rejected this argument. The argument proceeded on the basis of a misunderstanding as to the nature of the "*proceedings*" which are recognised under the Model Law.

As the definition of "*foreign proceeding*" set out above makes clear, under Articles 15 and 17 of the Model Law, the recognition is of the foreign insolvency process i.e. in the *Rubin* case, the Chapter 11 proceeding itself. The court is not required under the provisions of Article 15 and 17 to grant separate recognition to actions which are then brought within the context of that insolvency proceeding. However, to the extent that such actions do form part of the foreign insolvency proceeding, then the recognition of the foreign insolvency proceeding will necessarily encompass such actions.

In the *Rubin* case, the order made by the Deputy Judge recognised the Chapter 11 proceeding "*including the Adversary Proceedings*"[91]. This followed from the Deputy's Judge's conclusions that "*bringing adversary proceedings against debtors of the bankrupt is clearly part of collecting the bankrupt's assets with a view to distributing them to creditors*" and that "*the adversary proceedings are part and parcel of the Chapter 11 insolvency proceedings*"[92]. The Court of Appeal was of the same view (paras.61(2) and (3)).

Accordingly, the order made by the Deputy Judge recognising the Chapter 11 proceeding was correct.

As to the second argument, Roman et al argued that the Receivers should not be recognised as foreign representatives, at least in so far as such recognition extends to the Adversary Proceedings. This argument it is submitted was and is misconceived. The recognition of the Receivers as foreign representatives is on the basis that they have been authorised in the Chapter 11 proceeding to act as representatives of the Chapter 11 proceeding[93].

Relief that may be granted under the Model Law

The principal question which in fact arose in relation to the Model Law in *Rubin* is whether the court has power to grant relief recognising *and enforcing* the relevant parts of the Judgment.

Article 21 of the Model Law provides that:

> *"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 …"* (emphasis added)

Article 21 then lists a number of forms of relief which may be granted by the court. However, this list is not exclusive and the Guide to Enactment, which is admissible as an aid to construction[94], states (paras.154, 156):

> *"[154]The types of relief listed in article 21, paragraph 1, are typical or most frequent in insolvency proceedings; however, the list is not exhaustive and the court is not*

[91] Order of 31 July 2009, para. 1.
[92] See paras. 46 and 47 of the Judgment.
[93] Order of the Bankruptcy Court of 24 October 2007.
[94] Regulation 2(2)(c).

restricted unnecessarily in its ability to grant <u>any type of relief that is available under the</u> law of the enacting State and needed in the circumstances of the case.

[156] It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 22, paragraph 2, according to which the court may subject the relief granted to conditions that it considers appropriate."

(emphasis added)

Accordingly, the power under Article 21 is to grant any type of relief that is available under the law of the relevant state[95]. Further, the fact that recognition and enforcement of foreign judgments is not specifically mentioned in Article 21 as one of the forms of relief available, does not mean that such relief cannot be granted, as the Guide to Enactment makes clear.

The international approach

Article 8 of the Model Law requires the court to have regard to its international origin and to the need to promote uniformity in its application. This means that it is necessary to take into account how the Model Law has been applied in other jurisdictions.

The courts of the United States, in particular, have taken a broad approach to the application of the Model Law[96]. The Model Law has been implemented into United States law through Chapter 15 of Title 11 of the United States Code ("Chapter 15"). The equivalent provision to Article 21 of the Model Law is section 1521 of Chapter 15.

In *Re Metcalfe & Mansfield Alternative Investments* the Bankruptcy Court ordered that orders made by a Canadian court in relation to a plan of compromise and arrangement under the Canadian Companies' Creditors Arrangement Act be enforced in the United States pursuant to sections 1521(a)(7) and 1507 of Chapter 15.

As to this:

(1) The Bankruptcy Court appears to have had little difficulty with the notion that recognition and enforcement of the Canadian orders fell within the scope of the "*additional assistance*" which could be granted by the United States courts under section 1521(a)(7).

(2) It noted that the grant of post-recognition relief was largely discretionary, but that the court would exercise its discretion consistent with principles of comity and co-operation with foreign courts[97].

(3) It also held that the relief granted in the foreign proceeding and the relief available in an equivalent United States proceeding need not be identical, and that the key determination was whether the procedures used in the foreign jurisdiction satisfied domestic fundamental standards of fairness.

On this basis, the Bankruptcy Court ordered the enforcement in the United States of the Canadian orders. The enforcement order was made in *Metcalfe*, notwithstanding that the Bankruptcy Court itself might not have had jurisdiction to approve a similar plan in an equivalent Chapter 11. To this extent, the decision in *Metcalfe* goes further than both *Cambridge* and *Rubin* in the Court of Appeal: indeed it builds upon the expectation of reciprocity which Lord Collins had held to be an insufficient basis for assistance (para.128-9).

It was argued in *Rubin* that as required by Article 8 of the Model Law, Article 21 of the Model Law should be applied in the same way as the Bankruptcy Court applied section 1521 in

[95] See also para. 159 of the Guide to Enactment.

[96] In addition to the *Metcalfe* case referred to below, see also *Re Condor Insurance Limited* 601 F.3d 319 (5th Cir. Miss. 2010) where the United States court granted relief to enable the liquidator of a Nevis insurance company to bring proceedings in the United States in respect of claims governed by Nevis law. In *In re Atlas Shipping A/S* 404 B.R. 726, 738 (S.D.N.Y. 2009). the Bankruptcy Court granted relief vacating maritime attachments which had been entered by creditors in the New York against the property of two companies in insolvency proceedings in Denmark (including attachments both entered before and after the commencement of the Danish insolvency proceedings), and entrusted the attached funds for administration in the Danish insolvency proceedings.

[97] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 398 B.R. 325, 333 (S.D.N.Y. 2008); *In re Atlas Shipping A/S* 404 B.R. 726, 738 (S.D.N.Y. 2009).

Metcalfe. Accordingly, the relief available under Article 21 should include recognising and enforcing a judgment of the foreign court made in the foreign insolvency proceedings.

The approach under the Model Law, as enacted by the CBIR, is arguably consistent with that at common law. The Court is empowered to grant any appropriate relief which includes, at least, any type of relief that is available under the law of the enacting State.

In *Rubin*, the relief sought reflects relief which would have been available under the English statutory scheme if TCT had been in an insolvency procedure in England. It is therefore a type of relief that is available under English law. Furthermore, the relief sought is in the interests of creditors because it will facilitate the recovery of assets for distribution in accordance with the applicable statutory scheme (i.e. that of Chapter 11) to the creditors of TCT.

Co-operation

In addition to Article 21, Article 25 of the Model Law provides that:

> *"In matters referred to in paragraph 1 of Article 1, the court may co-operate to the maximum extent possible with foreign courts or foreign representatives either directly or through a British insolvency officeholder."*

Article 27 provides that the co-operation referred to in Article 25 may be implemented "*by any appropriate means*" (emphasis added).

The recognition and enforcement of the judgments of a foreign court is the paradigm means of co-operation with that court. Given the very broad terms in which Articles 25 and 27 are framed, the court must be taken to have jurisdiction to co-operate with foreign courts by recognising and enforcing the judgments of those courts. As the Court of Appeal pointed out, co-operation "*to the maximum extent possible*" should surely include enforcement[98].

What is the point of having the tree in your orchard without being able to enjoy the fruit?

H. What the Supreme Court Decided[99]

In both *Rubin* and *New Cap* the English Court was being asked to enforce judgments based on insolvency avoidance powers obtained in default of the appearance of the respective defendants, it having been accepted or found in respect of each of the cases that the judgment debtor was neither present in the foreign country nor submitted to its jurisdiction.

In *Rubin,* as articulated above, the English Court of Appeal (CA) had held that it had power under both English common law principles and under the Cross-border Insolvency Regulations 2006 ("CBIR") to enforce a judgment of the US Federal Bankruptcy Court for the Southern District of New York, in default of appearance, of approximately US $10m in respect of fraudulent conveyances and preference claims.

In *New Cap* the CA (as it was obliged to as a matter of pure precedent) had followed *Rubin* in its analysis of the common law and also found (this point was not relevant in *Rubin* since the subject statutes were not engaged) that the English Court had jurisdiction to enforce a judgment obtained by an Australian liquidator under section 426 IA 1986 and under the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("1933 Act").

As part of its deliberations the Supreme Court also considered the written submissions of Mr Irving Picard, the trustee appointed under the US Securities Investor Protection Act 1970 of Bernard L Madoff Investment Securities LLC, as an interested party in connection with pending proceedings in Gibraltar to enforce US default judgments.

The hearing of the combined appeals involved the Supreme Court considering each of the available gateways through which a foreign insolvency judgment can potentially be recognised and enforced in England (with the exception of Insolvency Regulation), and the Judgments

[98] CA judgment para. 63.

[99] In order to bring a degree of objectivity to the conclusions of this paper reliance has been placed on the excellent Technical Bulletin produced on the subject by the UK Insolvency Lawyers' Association in structuring this section.

Regulation, neither of which were relevant because the insolvency proceedings and relevant debtors all had their centres of main interests outside the EU).

The gateways as already noted comprise the following:

1. S426 IA 86 (relevant to *New Cap*, but not *Rubin*).

2. The CBIR (relevant to *Rubin* – but not to *New Cap* as the matters in issue there took place before the implementation of the CBIR).

3. Recognition under the common law (considered in both appeals).

4. The 1933 Act. (Relevant in *New Cap,* given that Australia is a country within the scope of the 1933.

5. Act, but not relevant in *Rubin*).

The 1933 Act applies to and concerns the enforcement of any judgment for the payment of money in respect of civil and commercial matters by courts in an applicable jurisdiction.

The Supreme Court Decision - Recognition under the Common law

Lord Collins for the majority, approached the issue as one of pure policy and rejected the argument that in the interests of universality of bankruptcy procedures the court should:

> '*devise a rule for the recognition and enforcement of judgments in foreign insolvency proceedings which is more expansive, and more favourable to liquidators, trustees in bankruptcy, receivers and other office holders, than the traditional common law embodied in the Dicey Rule*'.

He held that no such rule presently existed and stated that if such a rule were to be developed, it would have to be a matter for Parliament, after appropriate consultation, and was not the appropriate subject of judge-made law. The rest of the law lords, with the exception of Lord Clarke, agreed.

Lord Collins went further and held that the decision in *Cambridge* was wrongly decided, even though he was not asked to do so, and did not need to do so. to find for the Appellants, Roman et al (Para123):

> **"***It follows that, in my judgment, Cambridge Gas was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man*".

Lord Mance reserved his opinion on whether *Cambridge* was wrongly decided the point had simply not been argued before the Supreme Court and because *Cambridge* was distinguishable given that it concerned shareholdings in an insolvent company rather than *in personam* claims. None of the justices appears to have considered whether it was open to them to determine that *Cambridge* was wrongly decided, of which see the commentary below. Strictly all that was open to them was to overrule *Rubin* in the court of appeal.

Lords Walker and Sumption agreed with Lord Collins' judgment without qualification without either of them producing a reasoned opinion and Lord Clarke issued a short dissenting judgment. Lord Clarke agreed that *Cambridge* was distinguishable, but did not agree with the majority decision that it was wrongly decided. In a minority ruling he considered that the appeal on *Rubin* should be dismissed. He agreed on all other issues with the judgment of Lord Collins.

The Application of the Dicey Rule and Submission to the Jurisdiction

In the context of *New Cap*, and having found that the *Dicey Rule* did apply, Lord Collins went on to consider the question of whether the judgment debtors had submitted to the jurisdiction for the purposes of that rule thus opening them up to enforcement proceedings. He articulated (para 161) the principles by which this issue was to be determined.

> *"The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts".*

As explained above Roman et al had not taken any steps in the clawback proceedings themselves, but Lord Collins went on to consider whether the steps taken by the judgment debtors in the Australian liquidation in NewCap amounted to a submission to the jurisdiction for the purposes of the *Dicey Rule*. The AE Grant syndicates had submitted a proof of debt and proxy form at a meeting of creditors, voted on a scheme of arrangement and had claims to a sum of £650,000 admitted by the office holder (although they had not yet received a dividend pending resolution of the preference claim against them). These steps had all post-dated the entry of the default judgment.

Lord Collins, relying on *Robertson* concluded that, having chosen to submit to the Australian insolvency proceeding by proving in the insolvency, the judgment debtors should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding in its entirety. He commented: (at paras.166 and 167)

> *"The Syndicate objected to the jurisdiction of the Australian court. Barrett J in his judgment of 14 July 2009 accepted that it had made it clear that it was not submitting to its jurisdiction, and he also accepted that as a result the judgment of the Australian court would not be enforceable in England. His judgment is concerned exclusively with the preference claims, and he did not deal with the question of submission by reference to the Syndicate's participation in the liquidation by way of proof and receipt of dividends. He decided that the court had jurisdiction because the New South Wales rules justified service out of the jurisdiction on the basis that the cause of action arose in New South Wales.*
>
> *I would therefore accept the liquidators' submission 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. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding"*[100].

[100] This reliance has been criticised elsewhere by Lexa Hilliard QC of 11 Stone Buildings who argues that Firstly in *Re Robertson* is not a decision of high authority. It was made by the Chief Justice in Bankruptcy on appeal from a county court. Whilst the level of decision-making is not, in itself, a reason for according it little weight, Lord Collins' uncritical application of it in New Cap Re was surprising.
Second, the reasoning of in *Re Robertson* is based on s.72 of the Bankruptcy Act 1869, a predecessor to s.363 of the Insolvency Act 1986. S.363 provides that every bankruptcy is under the general control of the court and that the court has full power to decide all questions arising in any bankruptcy. The insolvency in *New Cap Re* was a voluntary liquidation, not a bankruptcy. There is no s.363 equivalent for voluntary liquidations in the Insolvency Act 1986. On the contrary, unlike a bankruptcy or compulsory liquidation, a voluntary liquidation is not a court-driven process with each application made being part of, and within, that process. In a voluntary liquidation each court application forms a separate set of proceedings. The reasoning, in *Re Robertson* to the effect that the creditor had already become an "active party" to the bankruptcy proceedings by proving and accepting a dividend does easily apply to a voluntary liquidation which is not, in itself, a "court proceeding".
Third, in *Re Robertson* the creditor had already received and accepted a dividend in the bankruptcy by the time the proceedings against him were commenced. The Chief Justice's reasoning in the case is based in part on the proposition that the creditor having accepted a benefit from the bankruptcy proceedings will not thereafter be permitted to challenge the jurisdiction of court in charge of those proceedings. Although the defendant had proved in the liquidation of New Cap Re, the liquidator had held back a dividend that would have otherwise have been payable in partial discharge of the liquidators' costs. It cannot be said, in quite the same way as in *Re Robertson* that the defendant in New Cap Re had accepted a benefit in the liquidation and therefore must accept the burden of submission to the jurisdiction.

In *Robertson* the trustees in bankruptcy then sought to recover from the creditor a payment that had been made to him by the debtor after the petition had been presented, on the basis that it was a void disposition. The creditor argued that he was not subject to the jurisdiction of the English Court. Sir James Bacon CJ held that by proving in the bankruptcy and taking the benefit of a dividend the Scottish creditor had submitted to the jurisdiction of the English court. On the basis of this single ancient judgment Lord Collins held that the defendant in New Cap had submitted to the jurisdiction[101].

The CBIR

The Supreme Court unanimously concluded that as the CBIR includes no express provision dealing with enforcing a foreign judgment against a third party there was no power under the CBIR for the court to do so. Lord Collins commented (at para.143):

> *"It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties".*

Given what is said above about the CBIR having an international dimension it is perhaps regrettable that Lord Collins did not avail himself of the opportunity to review greater depth the opinions of the US Fifth Circuit Court of Appeal in *Re Condor Insurance*[102]. US courts have the power to assist foreign representatives in the enforcement of foreign bankruptcy judgments under Chapter 15 of the US Bankruptcy code. In *Condor* the silence in the US Code itself on the extent of the Model Law was taken as an affirmation of the width of the relief available, not as Lord Collins would have it a restriction[103]. In fact Lord Collins referred to *Condor* in the passage of his opinion dealing with the characterisation of Avoidance laws[104], but seems to have overlooked the inconvenient final conclusion as to the substantive relief inherent in Section 1521 of Ch 15 of the US Code, clearly he was aware of it.

Assistance under s426(4) and (5) IA 86

The decision of the Supreme Court that the judgment debtors in *New Cap* had submitted to the jurisdiction of the Australian Court made its decision on the scope of s426 not strictly part of the reasoning. Nevertheless Lord Collins went on to express a view about the applicability of the section as the matter had been fully argued. In practice his remarks on the scope of s426 (4) and (5), may carry very significant weight. Lord Collins concluded that there was no power for the court to make an order enforcing a foreign insolvency order under s426 (4) and (5). He reached this decision having observed that s426 (1) and (2) dealt with the enforcement of orders from one part of the United Kingdom to another, but that in contrast s426 (4) and (5) made no mention of enforcement. He concluded that if it were to be held that the court had a general power to enforce under s426 (4) this would render s426 (1) and (2) largely redundant.

Fourth, Lord Collins does not attempt to reconcile the principle in *Re Robertson* with the principle that a defendant who submits to the jurisdiction in an ordinary civil claim to contest a particular claim on the merits is not to be treated as submitting to the jurisdiction for the purposes of contesting all claims that the claimant might subsequently wish to bring, by amendment, in the same set of proceedings.

[101] In *Isis Investments Ltd v Oscatello Investments Ltd & Ors* [2013] EWHC 7 Ch. Asplin J. where proofs had been lodged in Isle of Man liquidation proceedings on a contingent basis, refused to characterise the proving process as an election to have all matters determined in the Manx court, and distinguished *Rubin* (para81).

[102] "The UNCITRAL Model Law represents a culmination of a long standing effort by the United States and other countries to develop a uniform system guiding needed cooperation. That the final negotiations included thirty-six UNCITRAL members-including the United States-representatives of forty observer states, and thirteen international organizations evidences its widespread support." 601 F.3d 319 (5th Cir. Miss. 2010)

[103] "The structure of Chapter 15 provides authority to the district court to assist foreign representatives once a foreign proceeding has been recognized by the district court. Neither text nor structure suggests additional exceptions to available relief. Though the language does not explicitly address the use of foreign avoidance law, it suggests a broad reading of the powers granted to the district court in order to advance the goals of comity to foreign jurisdictions. And this silence is loud given the history of the statute including the efforts of the United States to create processes for transnational businesses in extremis." (emphasis added)

[104] Para 97

I. Precedent?

The clash between the Privy Council and the Supreme Court

Following the unanimous advice of the Privy Council in *Cambridge* and the majority opinion of the Supreme Court in *Rubin* is there evidence of a schism at the apex of two important common law judicial hierarchies?

At the heart of the matter is whether the Supreme Court has the judicial capacity to assert that the Privy Council is wrong and what the effect of such an assertion may be. The role of the Privy Council is to hear appeals from Crown Dependencies (Jersey, Guernsey and the Isle of Man) and from the Commonwealth, including some republics[105]. It also hears appeals from overseas territories of the United Kingdom[106]. The Supreme Court judges are all members of the Privy Council in order, in theory, to produce a harmonised system of appeals for what was the British Empire. Appeals from Hong Kong, New Zealand, Australia and Canada are a thing of the past. In *Rubin*, Lord Collins when delivering the opinion of the majority simply concluded [132] that *Cambridge* was wrongly decided.

He did not in any sense address the Privy Council's role as a final appellate court for the jurisdictions noted above. Even though the influence of the Privy Council has dwindled, as a growing number of jurisdictions have introduced final courts of appeal of their own, it still remains an important final court of appeal for some economically important, mainly Caribbean, jurisdictions which have a direct nexus to the Privy Council not the Supreme Court.

As a matter of principle the doctrine of *stare decisis* (binding precedent) can only operate as between courts within the hierarchy of the same judicial system. A decision of a final court of appeal is binding on its intermediate or inferior courts within the same system, and is only persuasive in parallel jurisdictions[107].

The position therefore of Privy Council advices on appeals outside any hierarchy within which it is operating (the Supreme Court for example) is important. Take *Cambridge*, where the Privy Council is the final appellate court for the Isle of Man: its advice will bind the Manx Courts. The advice in respect of another jurisdiction (say *Cayman*) will be persuasive, but possibly more so with the Privy Council at the apex of its appeal system than an opinion of the Supreme Court. The reason that it is persuasive only in Cayman is that in *Cambridge* the Privy Council is not discharging its judicial responsibility as a Cayman Court. See *De Lasala v de Lasala*[108] where Lord Diplock said of the relative compositions of the House of Lords and the Privy Council:

> *"The Board is unlikely to diverge from a decision which its members have reached in their alternative capacity, unless the decision is in a field of law in which the circumstances of the Colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England."*

As to the influence of the House of Lords (now the Supreme Court) in the Colony, as it then was, he said:

> *"Since the House of Lords is not a constituent part of the judicial system in Hong Kong it may be that in justice theory it would be more correct to say that the authority of its decisions on any question of law, even the interpretation of recent common legislation, can be persuasive only. …"*

[105] Antigua and Barbuda, Bahamas, British Indian Ocean Territory, Cook Islands and Niue (Associated States of New Zealand), Grenada, Jamaica, St Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Tuvalu. The Republics are the Republic of Trinidad and Tobago, the Commonwealth of Dominica, Kiribati, Mauritius.

[106] Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Monserrat, Pitcairn Islands, St Helena and dependencies, Turks and Caicos Islands.

[107] From *Picard and Anor v Primeo Fund (In Official Liquidation) (unreported) (14 January 2013)* it appears that The Cayman court's view is that *Rubin* did not decide the question of whether a court would be able, in line with the principle of assistance, to offer at common law a "direct remedy" to the foreign office-holder to enable the pursuit of transaction avoidance claims or other causes of action not necessarily dependent on insolvency law. It appears that the Cayman court has the authority to entertain at common law an action based on the transactional avoidance provisions in Cayman: for such purposes, the court deemed the insolvent company to be the subject of liquidation before the Cayman court.

[108] [1980] AC 546 PC

Logically therefore the "overruling" of *Cambridge* inherent in [132] of Lord Collins opinion is effective only in the UK, and in strict theory only really overrules the Court of Appeal decision in *Rubin* itself. In respect of the wider Privy Council jurisdiction (other than the Isle of Man where *Cambridge* logically remains good law) the Supreme Court opinion is persuasive only.

It is submitted that the observation of Lord Diplock in *De Lasala* regarding the influence House of Lords decisions in Hong Kong that they:

> … *"will have the same practical effect as if they were strictly binding and the courts in Hong Kong would be well advised to treat them as being so."*

is susceptible to scrutiny in a case where both the House of Lords and the Privy Council have, as in *Cambridge* (numerically at least) concluded that *Cambridge* was not wrongly decided.

In *Cambridge* itself Lords Bingham, Hoffmann, Hutton, Rodger and Carswell, (5) sitting as the Privy Council, concluded that the fact that *Cambridge* did not technically submit to the jurisdiction of the New York court was not a bar to the effective enforcement of an order approving a plan of reorganisation which had the effect of expropriating the shares held by Cambridge in Navigator.

In *Pattni v Ali*, another Isle of Man case on appeal to the Privy Council, Lords Walker and Mance with the approval of Baroness Hale (and Lord Carswell again) added their tacit support to the correctness of the *Cambridge* decision. Lord Mance giving the advice adopted the analysis of Lord Hoffmann in *Cambridge* on the concepts of *in rem* and *in personam* proceedings at [23]. The Privy Council did not cast doubt on the *Cambridge* assertion that bankruptcy is different or that lack of submission to the jurisdiction was an issue sufficient bar to enforcement or assistance.

Moreover in HIH[109] Lords Walker, Hoffmann, Scott, Neuberger and Phillips did not question the correctness of *Cambridge*. At issue in HIH was the courts power to remit funds to Australia. Lords Hoffmann and Walker agreed that common law was capable to do that which was requested broadly on the basis of *Cambridge*. Lords Scott and Neuberger disagreed on the Rubin point, but Lord Neuberger has since recanted.

Why did Lord Walker change his mind? What certainty comes from the agreement of ten Judges in their final appellate role agreeing that *Cambridge* is a welcome development of the law only for Lord Walker to recant and Lord Sumption (who had argued the contrary in HIH as an advocate) to side with Lord Collins?

The doctrine of *stare decisis* is based upon precedent which is desirable since, as Lord Nicholls put it in *Re Spectrum Plus Limited*[110]*.*

> ***"People generally conduct their affairs on the basis of what they understand the law to be."***

One of the ways in which the Court of Appeal has historically navigated its way round unconventional decisions is the development of the *per incuriam* doctrine. In short, a decision of the Court of Appeal - or even the House of Lords / Supreme Court ceased to be followed where a tribunal had failed to take into account all the relevant and important statutes and authorities, but this only applies if the defect seriously affected the reasoning in the case and thus the outcome.

J. Comment

The Supreme Court's decision represents a depressing retreat and narrowing of the power of the English courts to assist foreign office holders since the golden age of Lord Hoffman, but perhaps only in so far as enforcement of judgments is concerned. It does not necessarily affect the recognition of the insolvency proceedings themselves or indeed the granting of assistance within those proceedings, but it does apparently severely limit the scope of such assistance having concluded that *Cambridge* is wrongly decided. The Supreme Court has concluded that

[109] [2008] UKHL 21
[110] [2005] UKHL 41

the *Dicey Rule* must be satisfied if a foreign judgment is to be enforced in the case of insolvency proceedings as it must in other contexts: submission to the jurisdiction is a necessary prerequisite. Having found that lodging a proof is a submission, absolutely no clarity is provided as to the nature of other acts amounting to submission. Tantalisingly Lord Collins held that Roman et al had not submitted (paras.168 and 169):

> "*... It would certainly have been arguable that Eurofinance SA had submitted to the jurisdiction of the United States District Court, for these reasons: first, it was Eurofinance SA which applied for the appointment by the High Court of Mr. Rubin and Mr Lan as receivers of TCT specifically for the purpose of causing TCT then to obtain protection under Chapter 11; second, it was Eurofinance SA which represented to the English court that officeholders appointed by the United States court would be able to pursue claims against third parties; third, the judgment of the US Bankruptcy Court states that the court had personal jurisdiction over Eurofinance SA not only because it did business in the United States but also (as I have mentioned above) because it had filed a notice of appearance in the Chapter 11 proceedings (Order 22 of July 2008, paras.42-43).*

But the Rubin appellants did not appear in the adversary proceedings, and it was not argued in these proceedings that Eurofinance SA (or Mr Adrian Roman, who caused Eurofinance SA to make the application) had submitted to the jurisdiction of the US Bankruptcy Court in any other way and it is not necessary therefore to explore the matter further."

Having held without any real argument that lodging a proof was submission for all purposes as regards the *NewCap* debtors, Lord Collins concludes that a much more active engagement of the assistance of the US courts by Roman et al is not submission because they did not appear in the adversary proceeding: this is at best a logical inconsistency.

It is a decision which has quite overtly been taken on policy grounds. There is a reluctant acceptance of the general principle that the English court has power at common law to recognise and grant assistance to foreign insolvency proceedings. Paragraphs 29-34 of the judgment consider the circumstances in which the English court has exercised this common law power (being circumstances ranging from the granting of stays of local proceedings to orders for the examination of debtors) but without embracing the principles fully.

There is now uncertainty as to the precise extent to which the English courts can give assistance, and enforcement of overseas bankruptcy judgments is a moving feast without there necessarily being a very appetizing menu. The lines between assistance and enforcement are now rather blurred and the opportunity to provide welcome clarity and to simplify has been missed, if not eschewed. It will be some time before The Supreme Court will have the opportunity to consider again common law assistance, Section 426, the CBIR, and the 1933 Act in one hearing and to rationalize properly their interaction.

It seems likely and regrettable that parallel proceedings may now more frequently have to be opened in cross-border insolvency cases, unless of course they fall under the Insolvency Regulation or under the European Winding Up Directives for banks and insurance companies.

As far as the 1933 Act is concerned Lord Collins deduced that its main object was to facilitate the enforcement of commercial judgments abroad by making reciprocity easier. He referred to the Report of the Foreign Judgments (Reciprocal Enforcement) Committee (1932) (Cmnd 4213), as an aid to construction. He also referred to an ECJ Judgment *F-Tex SIA v Lietuvos-Anglijos UAB-Jadecloud-Vilma*[111], where the court said that the Brussels I Regulation was "intended to apply to all civil and commercial matters apart from certain well-defined matters" and as a result actions directly deriving from insolvency proceedings and closely connected with them were excluded: para 29, but he observed that the exclusion of bankruptcy proceedings does not affect their character as civil or commercial matters. This is an odd result, since using 2012 ECJ logic to inform the reasoning underlying 1933 legislation for the Commonwealth stretches the concept of persuasive authority too far. Moreover referring as he did to *Condor* in the US but not then progressing to consider its authority on legislation with the same genesis and drafted in the

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same terms (The UNCITRAL Model Law on Cross Border Insolvency) against this background looks a little odd, with respect.

In some respects the most interesting (and dangerous) aspect of the Supreme Court's decision in the context of *New Cap* is the concept of submission to the jurisdiction of a foreign bankruptcy court by filing a proof in the proceedings, and how far this may affect future practices. No general guidance is given about what may amount to submission, save that it is to be 'inferred from all the facts' and has to be considered objectively, or whether lodging a proof is submission for all purposes or has only limited effect.

The danger can be illustrated thus: a trader who has not submitted to the jurisdiction of the US courts has receivables totalling £3million owed which are 4 months overdue from a US debtor. The debtor files for Ch 11 and in the period pre filing, sixty days pre-petition the trader is paid £1million by the debtor. Such sums are automatically recoverable as preferences under section 547 of the US Code. The trader's non-submission to the US jurisdiction on the analysis of the *Dicey Rule* is a complete answer to any recovery claim. Unaware of the position the trader submits a proof for the outstanding balance of £2million thereby, on Lord Collins' analysis, submitting to the jurisdiction and opening himself up to a liability to repay the preferential sum. The paradox of the judgment is that the protection argued for in paras. 128 to 130 of Lord Collins' opinion are potentially fatally eroded by his reliance on *Re Robertson* to hold that submitting a proof is submission to the jurisdiction for all insolvency purposes.

In a restructuring context where compositions are relied upon to bind a minority of dissenting creditors, it will be interesting to see whether reliance on that composition in other jurisdictions may fall foul of being enforced, if the dissenting minority domiciled in the UK does not submit to the jurisdiction. But if they submit a proof?

It is tempting to observe that the opinion of the Court has mapped out for fraudsters an obvious means of not being held to account for their misdemeanours. It is anachronistic that in the electronic age where trading is possible in any number of jurisdictions at the click of a mouse wherever the controlling mind happens to reside for the time being that short of actual submission to the jurisdiction of the English courts he is untouchable.