Volume 3

Welcome to the Autumn edition of our Insolvency Bulletin.

The big news story this time around has to be the decision of the Supreme Court in *Rubin*, with its apparent retreat from the concept of "modified universalism" endorsed by Lord Hoffmann in the *Cambridge Gas* and *HIH* cases. Professor Paul Omar (Professor of International and Comparative Law here at Nottingham Law School) wrote in the latest INSOL Electronic Newsletter that "in the final analysis, the Supreme Court has appeared to bring a halt to the rush of common law courts adopting the *Cambridge Gas* principle, at least as far as the United Kingdom is concerned. This may only amount to a momentary suspension and, like King Canute's attempt to hold back the tide, may prove eventually unsuccessful. For the moment though, it may be viewed as bringing an unnecessary complication to the lives of office holders who will now be compelled to litigate outside the confines of the natural jurisdiction of the bankruptcy courts they originally anticipated would apply."

This judgment is particularly interesting in the light of one of the questions raised by Mr Justice Norris in his speech to the INSOL Joint International Conference held at Nottingham Trent University in June. The final question he posed to academics was as follows: "whenever there is an academic or judicial colloquium the cry goes up that there should be greater cooperation between the courts of different jurisdictions: but must this be hammered out on a case by case basis by individual judges forging their own protocol? Is it not possible to identify some principles by reference to which it can be determined that some issues will be decided in one jurisdiction rather than another (but recognised in all jurisdictions), or procedures and routes of appeal created to permit joint decisions?". No doubt much debate will now ensue! The text of the speech is now available on the Centre's website.

So that's it from us all for this term. In the meantime, we wish you all the very best for the festive season ahead!

Paula

Paula Moffatt

1 CROSS BORDER

Rubin & another v Eurofinance SA and others; New Cap Reinsurance Corporation (in liquidation) & another v AE Grant and others [2012] UKSC 46

Executive summary

By a majority of 3:2, the Supreme Court held that the common law does not permit the recognition and enforcement of foreign judgments in insolvency proceedings and, obiter, that *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26* had been wrongly decided. The *Rubin* appeal was allowed and the *New Cap* appeal was dismissed.

Facts

Appeals were brought before the Supreme Court in respect of two cases: *Rubin v Eurofinance SA* ("*Rubin*") and *New Cap Reinsurance Corporation v Grant* ("*New Cap*").
The issue raised in both cases was whether, and in what circumstances, an order or judgment of a foreign court to set aside a prior transaction, such as a transaction at an undervalue or a preference, ("avoidance proceedings") should be recognised and enforced by the English courts at common law. A further question was raised as to whether enforcement could be effected under the UNCITRAL Model Law (implemented in England by the Cross-Border Insolvency Regulations 2006 (the "CBIR")) or section 426 of the Insolvency Act 1986 ("section 426"), which applies to a limited number of countries including Australia.

In the *Rubin* case, the foreign court was the US Bankruptcy Court for the Southern District of New York (the "US Court"). A judgment of the US Court in respect of fraudulent conveyances and transfers valued at US $10 million had been enforced in England at common law.

In the *New Cap* case, the foreign court was the New South Wales Supreme Court (the "Australian Court"). A judgment in respect of unfair preferences valued at US$8 million was enforced under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the "1933 Act") and, alternatively, under section 426. In this case, the Court of Appeal had been bound by the earlier decision in *Rubin*.
In both cases, it had been accepted or found that the parties against whom judgment was given were not present in the relevant foreign country, nor were they resident (which was a requirement if the 1933 Act were to apply in the Australian court) and nor did they submit to its jurisdiction.
The common law rule (the "Dicey Rule" as stated in *Dicey, Morris & Collins, Conflict of Laws* 15th edition, 2012) is that a foreign court has jurisdiction to give a judgment *in personam* which is capable of being enforced or recognised if the judgment debtor was (i) present in the foreign country at the time proceedings began; or (ii) submitted to its jurisdiction by voluntarily appearing in the proceedings.
This meant that if the judgments in each appeal were to be regarded as judgments *in personam* within the Dicey Rule, then they would only be enforced in England at common law if the judgment debtors were present (or in the case of the 1933 Act, resident) in the foreign country when the proceedings began, or had submitted to its jurisdiction. It had, however, been accepted in the Court of Appeal in both cases that these conditions did not apply to judgments or orders in foreign insolvency proceedings, with much reliance being placed on the decisions in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26* and *HIH Casualty and General Insurance Ltd [2008] UKHL 21*.

The decision of the Court of Appeal that a foreign insolvency judgment could be enforced in England and Wales at common law against a defendant not subject to the jurisdiction of the foreign court under the Dicey Rule was delivered by Lord Justice Ward and was unanimous. He had accepted that the judgment was an *in personam* judgment, but he had determined that the Dicey Rule did not apply to foreign judgments in avoidance proceedings because they were central to the collective enforcement regime in insolvency and were governed by special rules.

Decision

The leading judgment was given by Lord Collins, with whom Lords Walker and Sumption agreed. The *Rubin* appeal was allowed and the *New Cap* appeal was dismissed.

The position at common law
Lord Collins considered the reasoning of the Court of Appeal in reaching its conclusion in *Rubin* that a foreign insolvency judgment could be enforced as a matter of common law, outside the ambit of the Dicey Rule.

He considered that the question was one of policy. Should a more liberal rule than the Dicey Rule apply to avoidance judgments in the interests of universality in bankruptcy proceedings? He held that it should not. The dicta of Lord Hoffmann in *Cambridge Gas* and *HIH* did not justify the conclusion reached by the Court of Appeal. Its decision did not constitute an incremental development of existing principles, but a radical departure from substantially settled law (para 128). The formulation of a rule which identified those courts which were to be regarded as courts of competent jurisdiction had the hallmarks of legislation, which was a matter for the legislature and not for judicial innovation.
In the context of international insolvency law, the development of the law relating to the enforcement of foreign judgments had not been left to the judiciary; recent examples of new rules for the enforcement of judgments such as those found in the EC Insolvency Regulation and the UNCITRAL Model Law had been developed as a result of lengthy negotiation and consultation.

The extension of the rules relating to the recognition and enforcement of foreign judgments through judge-made law would be detrimental to UK businesses. Foreigners with bona fide dealings with the US might be faced with a choice of bearing the costs of defending enormous claims in the US or not defending them and being at risk of having a default judgment enforced abroad.

It was unlikely that any serious injustice would be caused if the court decided not to allow a departure from the Dicey Rule. *Cambridge Gas* had been wrongly decided. In that case, the property in question was situated on the Isle of Man and was not, therefore, subject to the *in rem* jurisdiction of the US Bankruptcy Court. Consequently, there was no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man.

The position under the CBIR
Lord Collins went on to consider whether the judgment should be enforced through the CBIR on the grounds that Article 21 CBIR allows the court to grant appropriate relief to protect the assets of the debtor or the interests of the creditors. The issue was whether Article 21 gave the court the power to grant any type of relief available including the recognition and enforcement of foreign judgments, even though this was not specifically mentioned.

He noted that the question of the recognition and enforcement of judgments in civil and commercial matters (but not insolvency matters) had been the subject of intense international negotiations[1], which had ultimately failed because of an inability to agree on recognised international bases of jurisdiction. It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. He held that the Model Law was not designed to provide for the reciprocal enforcement of judgments.

1 At the Hague Conference on Private International Law

The position under section 426
Section 426(4) requires the UK courts with insolvency law jurisdiction to assist corresponding courts in any other part of the UK or any relevant country or territory. Australia is a “relevant country”. There was nothing, however, in section 426(4) that provided a procedure for the enforcement of foreign judgments.

The position under the 1933 Act
Lord Collins considered whether the syndicate in *New Cap* had submitted to the jurisdiction of the Australian court. He concluded that, in fact, it had: the court at first instance had only considered the syndicate’s refusal to submit to the Australian court in the context of the preference claims, whereas the syndicate had participated in the liquidation and so had submitted to the jurisdiction of the Australian court. In his view, the syndicate should not be allowed to benefit from the Australian insolvency proceedings without the burden of complying with the orders made in that proceeding.
Once submission to the Australian jurisdiction was established, the issue then arose as to whether the enforcement of the judgment should fall under the common law or under the 1933 Act. The Reciprocal Enforcement of Judgments (Australia) Order 1944 (SI 1994/1901) extended the 1933 Act to Australia for the reciprocal enforcement of judgments in civil and commercial matters. As the expression “civil

and commercial matters" included insolvency proceedings, the 1933 Act applied to the Australian judgment so that enforcement should be by way of registration under the 1933 Act.

The judges' opinions
Lords Sumption and Walker agreed with Lord Collins.

Lord Mance agreed with Lord Collins except with regard to the statement that *Cambridge Gas* was wrongly decided: he remarked that this was an "incidental observation" as the issue had not been argued before the Supreme Court. Lord Mance preferred to reserve his opinion on this matter and concluded that *Cambridge Gas* was, on any view, distinguishable. Lord Clarke dissented. Like Lord Mance, he considered that *Cambridge Gas* was distinguishable rather than wrongly decided. He preferred the reasoning of Ward LJ in the Court of Appeal. In his opinion, the Dicey Rule did not apply to foreign judgments in avoidance proceedings because they were central to the collective enforcement regime in insolvency and were governed by special rules.

Comment

So where does this leave Lord Hoffmann's "golden thread" of modified universalism which has (allegedly) been "running through English cross-border insolvency law since the 18th century" (*HIH Casualty & General Insurance Ltd* [2008] 1WLR 852 at para 30)?

The comments made by Lord Hoffmann in *HIH* were *obiter* and so were not generally approved. Nor did they need to be, as that case was decided by reference to section 426 and so the position at common law was not in issue. His remarks did not go unnoticed, however, and the extent to which judicial co-operation should take place under the auspices of the common law has become a matter of debate, particularly in the light of international insolvencies that are the fall out from the banking crash. Lord Hoffmann's remarks in *HIH* were a logical development of his comments in *Cambridge Gas* (para 16) where, speaking for the Privy Council, he stated that "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…".

It is, of course, one thing to speak for the Privy Council and bind the common law courts[2], but it is quite another to speak for the Supreme Court and bind the UK courts. Commonwealth jurisdictions will remain bound by the decision in *Cambridge Gas* whereas the UK courts will not.

2 As I had to remind myself, the Judicial Committee of the Privy Council is the court of final appeal for UK overseas territories and Crown dependencies and for those Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee.

The Supreme Court decision appears to be a retreat from modified universalism: insolvency cases are not "special", and so do not fall outside the scope of the traditional Dicey Rule. As a matter of English law, the recognition and enforcement of judgments of foreign courts must now be a matter for the legislature to address if it feels it necessary to do so. It may well be the case that the legislature will not feel so inclined: it may take the view that the mechanisms found in the CBIR, the EU Insolvency Regulation and section 426 are sufficient.

The Practical Law Company commentary on this case (available at: http://uk.practicallaw.com/5-522-1292?q=rubin) suggests that to see this case as a retreat from modified universalism may be a misconception: the principle can still apply within the existing framework of jurisdiction rules. It notes that "Although this is a relatively significant change of direction for English cross-border insolvency law, its impact should not be over-emphasised…. This said, one has to be resigned to the fact that the development of further international rules on enforcement in the context of international insolvency proceedings will, inevitably, be achingly slow".

There is much to explore in this case that hasn't been dealt with here and there will, no doubt, be much debate in the months ahead. For a more detailed analysis of this case, see the article by Professor Paul Omar[3] in the INSOL International Electronic Newsletter, November 2012, Issue 11.

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BCL Trading GmbH v ERSTE Befektetisi Zrt [2012] EU ECJ C-527/10 (5 July 2012)

Executive summary

Article 5(1) of the Insolvency Regulation was held to apply to main insolvency proceedings which had been opened in Austria prior to the accession to the European Union of the Republic of Hungary ("Hungary") and where the debtor had assets in Hungary on the accession date.

Facts

A preliminary ruling was sought from the European Court of Justice in the context of a dispute between a Hungarian Bank ("ERSTE Bank") and BCL Trading GmbH ("BCL") which had its registered office in Austria. Insolvency proceedings were begun against BCL in Austria on 5 December 2003 and published in February 2004. The issue was whether Article 5(1) of EC Regulation No 1346/2000 (the "Insolvency Regulation") applied in this case, because the Austrian insolvency proceedings had opened before 1 May 2004, being the date on which the Republic of Hungary ("Hungary") had acceded to the European Union.

In 1998, Postabank és Takarékpénztár Rt ("Postabank") had issued a letter of credit in favour of BCL. BCL later assigned the letter of credit to several banks. Postabank refused to pay the banks the amount assigned and so the banks brought a claim for payment. In 2003, BCL gave a guarantee in respect of the letter of credit secured on Postabank shares. This constituted a "security deposit" as a matter of Hungarian law.

Following BCL's insolvency, the Hungarian court ordered the Hungarian state to acquire the Postabank shares at a fixed amount on the grounds that they represented a controlling influence over Postabank. The shares were acquired and an amount representing the value of those shares was paid into the Hungarian court in 2005.

ERSTE Bank brought an action against BCL, claiming that it had a right over the proceeds. ERSTE Bank also requested that secondary insolvency proceedings be opened against BCL in Hungary.
The Hungarian court accepted that the Insolvency Regulation applied, but dismissed the application for secondary proceedings on the grounds that BCL had no establishment in Hungary for the purposes of Article 3(2).

In 2009, the Hungarian court ruled that Austrian insolvency law applied to the insolvency proceedings and its effects. Under Austrian law, it was not possible for ERSTE Bank to bring an action against BCL as BCL was in liquidation. The Hungarian court therefore ordered that the case be removed from the register. ERSTE Bank appealed to the Hungarian Court of Appeal which confirmed the first instance decision and held that it was a matter of Austrian law as to whether ERSTE Bank could obtain a declaratory judgment that it had rights over the security deposit paid into court.

ERSTE Bank appealed seeking an annulment of the order removing the case from the register and asking the court to reconsider the opening of secondary proceeding against BCL. It also argued that the Insolvency Regulation did not apply because the judgment opening insolvency proceedings against BCL in Austria had been handed down before Hungary had acceded to the EU which, therefore, made it impossible to view BCL as being in liquidation in Hungary in accordance with the Insolvency Regulation. The Hungarian court applied to the European Court of Justice for a preliminary ruling as to the application of Article 5(1) of the Insolvency Regulation. Did Article 5(1) apply in the context of civil proceedings which related to the existence of rights *in rem* (here, in respect of the security deposit) where the country in which the security was deposited was not a Member State of the European Union at the time the insolvency proceedings were opened in another Member State, but was a Member State by the time the application initiating the proceedings was submitted?

Decision

The court held that the Austrian proceedings were governed by the Insolvency Regulation as they had begun in December 2003 and, according to Articles 43 and 47, the Insolvency Regulation applies to all proceedings commenced after 31 May 2002. It also noted the effect of Articles 16(1) and 17(1), namely, that a judgment opening insolvency proceedings in one Member State must be recognised in all Member States from the time that it becomes effective without any further proceedings.

Hungary acceded to the European Union on 1 May 2004. From that date, the Hungarian courts were required to recognise any judgment opening insolvency proceedings (Article 16(1)). The Hungarian courts were, therefore, required to recognise the main proceedings opened in the Austrian courts. Article 4(1) of the Insolvency Regulation enables the court with jurisdiction to determine which law should apply. This means that, with regard to main and secondary proceedings, the law of the Member State within the territory of which proceedings are opened (the *lex concursus*) is applicable to the insolvency proceedings and their effects. Article 5(1), however, applies where rights *in rem* are concerned, so that the *lex situs*, i.e. the law of the Member State in which the assets are situated, applies. In this case, Hungarian law must determine the ownership of the security deposit.

Comment

This case is helpful as it clarifies the position for countries acceding to the European Union. The ECJ determined that the Hungarian courts were required to recognise the Austrian insolvency proceedings, even though they had begun before Hungary had acceded to the European Union, “in order to maintain the cohesion of the system established by the [Insolvency] Regulation and the effectiveness of insolvency proceedings” (para 45).

The case also contains some useful reminders. The first is that the *lex concursus* applies to all matters relating to the opening, the conduct and the closure of insolvency proceedings (the court cited *Eurofood IFSC* at para 33, *MG Probud Gdynia* at para 25 and *Rastrelli* at para 16 in this context). The second reminder is of the importance of the reasons for excepting rights *in rem* from this rule. The creation of security interests is crucial to the granting of credit. A lender who takes security for a loan needs certainty as to what will happen in the event that the borrower company becomes insolvent; specifically, it needs to know that it will have priority rights over the security on the borrower’s insolvency. This issue becomes increasingly important in multi-national transactions as there is a risk that local laws in other jurisdictions than the lender’s may not work to protect the lender’s security. To achieve this, under the Insolvency Regulation, security interests are managed at a local level. The court explained the principle as follows: “[t]he proprietor of the right *in rem* should, therefore, be able to continue to assert his right to segregation or separate settlement of the collateral security” (para 25) thus ensuring that his “legitimate expectations” (para 24) are protected. It is for this reason that the law of the Member State in which the asset is situated (the so-called *lex situs*) will apply.

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2. STRUCTURED FINANCE

Kaupthing HF v Kaupthing Singer & Friedlander Limited (in administration) [2012] EWHC 2235

Executive summary

A claim brought by an Icelandic holding company against its English subsidiary would not be a claim provable in the English administration since it was not in liquidation at the relevant time and so could not rely on the remedy sought.

Facts

Kaupthing HF ("KHF") was the holding company of Kaupthing Singer & Friedlander ("KSF"). KHF was incorporated in Iceland, which is a member of the European Economic Area ("EEA") whilst KSF was incorporated in England.

Both KHF and KSF carried on the business of banking and were credit institutions for the purposes of Directive 2001/24/EC on the reorganisation and winding up of credit institutions (the "Directive"). The Directive was implemented in England as the Credit Institutions (Reorganisation and Winding-up) Regulations 2004 (the "2004 Regulations") and in Iceland as the Financial Undertakings Act 2002 (the "FUA"). The FUA was subsequently amended in 2011 (the "2011 Amendment").

In 2004, KHF issued €4,000 million bonds under a note programme. The bonds were governed by English law and were due to mature in June 2014.

In May 2008, KHF entered into two transactions with KSF. In each case, KHF bought €5 million bonds from KFS for approximately €4.4 million and €4.3 million respectively (the "Bond Payments").
KSF went into administration in October 2008 under s359 Financial Services and Markets Act 2000. This meant that Schedule B1 to the Insolvency Act 1986 and the 2004 Regulations applied to KSF. KHF went into liquidation in Iceland in November 2010. The solicitors of KHF notified KSF that, under Articles 132 and 142 of the Icelandic Bankruptcy Act (the "IBA"), the Bond Payments should be rescinded so that KSF repaid KHF. Any proceedings involving the rescinding of payments, however, required the permission of the English court.

The court had to consider first, whether KHF should be given permission to continue either or both of the proceedings started by KHF in Iceland and England to recover the Bond Payments; and second, whether KHF was entitled to prove in the KSF administration for the amount of the Bond Payments. The issue was whether KSF had incurred any obligation to KSF on 8th October when it went into administration, bearing in mind that KHF did not go into liquidation until November 2010. This was in issue, because the IBA remedy sought was only available to a company in liquidation.

Decision

The judge held that, as at 8 October 2008, KHF had no rights under Articles 132 and 142 of the IBA capable of being exercised in respect of the Bond Payments. Further, the claim made by KHF against KSF in both Iceland and England would not, if established, constitute a provable debt in the administration of KSF.

The judge accordingly made a declaration to the effect that neither the claims against KSF made by KHF in Iceland nor any similar claims made in England would, if successful, give rise to any debt provable in the administration of KSF in England. The court gave permission for KHF to continue the proceedings it had brought against KSF in Iceland on condition that, except for set-off in Iceland, KHF would not seek to enforce any order it obtained through that action. Third, the court refused KHF permission to institute similar proceedings against KSF in England.

Comment

The Insolvency Regulation excludes credit institutions from its remit. Credit institutions are covered separately, by the Directive, which was incorporated in England as the 2004 Regulations and in Iceland as the FUA. This meant that the English administration of KSF and the Icelandic liquidation of KHF were to be recognised in the home states of the other. The law of the respective home states was to be applied to the administration of KSF and the liquidation of KHF.

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3. ADMINISTRATION

In the matter of Globespan Airways Limited (formerly in administration now in liquidation) [2012] EWCA Civ 1159

Executive summary

The Court of Appeal unanimously held that a para 83 conversion of an administration to a creditors' voluntary liquidation does not take effect until the registrar registers the conversion notice.

Facts

Globespan Airways Limited ("Globespan") went into administration on 17 December 2009 for a period of one year only. Towards the end of the administration period, the three administrators wished to convert the administration to a creditors voluntary liquidation ("CVL") in accordance with para 83 of Schedule B1 to the Insolvency Act 1986.

This required the administrators to give a conversion notice to the registrar. The administrator must "send" the notice (para 83(3)); the registrar must, "on receipt" register it (para 83(4)); the administrator must "file" a copy of the notice with the court (para 83(5)(a)); and, on "registration" of a notice under [83(3)] the administrator's appointment ceases to have effect and the company shall be wound up (para 83(6)(a)).

The administrators signed a conversion notice on 13 December 2010, but it was rejected by the registrar because it did not contain the address of the liquidators. It did contain the address of the administrators and so the judge at first instance held that the first conversion notice complied with para 83 and so should have been registered.

Two further conversion notices were filed, with the third being registered on 4 February 2011. The administrators, however, had ceased to hold office on 17 December 2011 and so had no power to file the second and third conversion notices. If the first conversion notice had been duly processed by the registrar, they would have had no need to file the second and third conversion notices. The effect would have been that the CVL would have started in December 2010 rather than February 2011. At first instance, the judge held that the correct date for the start of the CVL was 14 December 2010 and that the register should be rectified to show that date.

The Registrar appealed on the grounds that the approach taken by the judge at first instance was incorrect and that the conversion notice could not take effect until registered by the registrar.

Decision

The Court of Appeal unanimously upheld the appeal. Arden LJ held that on a true interpretation of para 83(6), the conversion date (being the date on which an administration is converted to a CVL) is the date on which the registrar registers the conversion notice. In the present case this was 4 February 2011 and was the date on which the CVL of Globespan commenced. She also held that the term of office of the administrators was extended until that date and that the records relating to Globespan maintained by the registrar be amended accordingly.

Comment

Lady Arden noted at the outset that the provisions of para 83 used several similar, but distinct terms, such as "receipt", "file" and "registration". Although there was likely to be no real difference between the time at which filing and receipt occur, the terms denoted distinct concepts. Similarly, the natural meaning of "receipt" and "registration" covered different events. When the judge at first instance had held that conversion took place on receipt, he had given a meaning to the word "registration" that was not its ordinary meaning.

The intention of the provisions was to provide a seamless transition from administration to liquidation: on the first instance interpretation, this had not been achieved. The intention of Parliament that the transition should be seamless also meant that it was appropriate to extend the administrators' term of office until registration took place. A gap between administration and liquidation would not assist creditors as it would lift the moratorium. Lady Arden therefore took the view that para 83 could be interpreted so that there was an implied term that the office of the administrators could be extended in appropriate circumstances.

The interpretation of the judge at first instance was also inconsistent with the policy behind the provisions of the Companies Act 2006 and the Insolvency Act 1986 which require publicity to be given to the liquidator's appointment: effectively, the liquidator could be appointed before his name appeared on the company file. The evidence suggests that, realistically, there is likely to be a three day time gap between receipt and registration and this period is also important as it enables the registrar to verify the information if necessary.

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4. DEFECTIVE APPOINTMENTS

In the matter of BXL Services and in the matter of the Insolvency Act 1986 [2012] EWHC 1877 (Ch)

Executive summary

The law on defective appointments can now be taken to be settled at first instance, following Norris J in *Virtualpurple* and Arnold J in *Re Ceart Risk Services Ltd.*

Facts and decision

The company, which was a charitable company limited by guarantee, became insolvent. The directors resolved to appoint joint Administrators on 23 January 2012. The directors had the power to do so under para 22 of Schedule B1 to the Insolvency Act 1986.
There was no other person entitled to appoint an administrator or administrative receiver and so no notices of intention to appoint needed to be served under para 26(1) of Schedule B1. No notice in the prescribed form was given to the company, however, as was required by para 26(2) of Schedule B1. The court had to consider whether this failure to serve notice on the company in the prescribed form invalidated the appointment of the administrator.

The judge considered the cases on defective appointments (see Summer edition). He noted that the conflict between *Virtualpurple* and *Msaada* had been resolved at first instance by Arnold J in *Re Ceart Risk Services Ltd [2012] EWHC 1178 (Ch)* who followed the reasoning of Norris J in *Virtualpurple*. In that case, a purposive rather than a literal construction of Schedule B1 had been adopted so that the failure to obtain prior consent did not invalidate the appointment.

Arnold J's approach had coincided with Judge Purle's own decision in *Assured Logistics*. Judge Purle favoured the approach of Norris J, but held that, even if he did not, it would be his duty to follow *Virtualpurple* in the light of Arnold J's considered approval of that decision unless and until reversed by the Court of Appeal.

In the matter of Euromaster Ltd [2012] 2356 (Ch)

Executive summary

The appointment of an administrator outside the ten day period prescribed by para 28(a) of Schedule B1 to the Insolvency Act 1986 meant that their appointment was an irregularity rather than a nullity and so could be remedied.

Facts

In April 2012, the directors of Euromaster Limited ("Euromaster") were advised to restructure the company by way of a pre-packaged administration in accordance with SIP 16. On 2 May 2012, the directors resolved to appoint the Administrators.

Lloyds TSB Bank plc (the "Bank") held a qualifying floating charge ("QFC") over the assets of Euromaster, although at the date of the resolution to appoint the Administrators there was no indebtedness to the Bank secured by the charge.

Para 22 of Schedule B1 to the Insolvency Act 1986 required the directors to give the Bank, as a QFC holder, five business days' notice of their intention to appoint the Administrators. A copy of the notice was required to be filed with the court as soon as reasonably practicable in accordance with para 27 and this was done on 3 May 2012.

Para 28 sets out a time limit of ten business days from the date on which a notice of intention to appoint is filed, after which a para 22 appointment may not be made.
The Bank notified Euromaster on 17 May that it did not intend to appoint administrators itself. On 18 May, a notice of appointment was filed at court appointing the Administrators. The Administrators immediately entered into an asset sale agreement.

It subsequently came to light that the Administrators had been appointed on the eleventh business day after the notice of intention to appoint had been filed.

The issue arose as to whether the appointment of the Administrators was a nullity or an irregularity and consequences for past actions in either case.

Decision

The judge considered that in determining whether an appointment made in breach of para 28 (a) had no legal effect because it was a nullity or (b) had some conditional effect because it was defective or irregular and could be cured, was a matter of construction.

He examined the rationale for the ten day limit after which a para 22 appointment may not be made. He concluded that it could be explained by the interim moratorium: the interim moratorium comes into existence once a notice of intention to appoint is filed and affects creditors who were unaware of the proposed appointment. The interim moratorium gives the directors a fair opportunity to consider how the insolvency of the company should be addressed in the event that a QFC holder chooses not to appoint under para 14, and a fair opportunity is identified in Schedule B1 as a period of ten days.
The judge went on to consider the consequences of exceeding the ten day period and held that the inadvertent appointment one day outside the ten day period was not a nullity, but merely an irregularity. Insolvency Rule 7.55 then applied. Rule 7.55 provides that no insolvency proceedings shall be invalidated by any formal defect… or irregularity unless the court… considers that substantial injustice has been caused… and cannot be remedied by any order of the court." This was the approach that had been taken by HHJ Purle QC in *Re Assured Logistics Solutions Ltd* [2011] EWHC 3029 (Ch) and with which the judge agreed.

He therefore made a declaration that (i) the Administrators were in office and would continue to be so, subject to any application being brought under Rule 7.55; and (ii) that no prior acts of the Administrators would be invalidated by the defect in their appointment.

Comment

This is a clearly reasoned judgment from Mr Justice Norris that builds on previous cases to try to find the best solution to yet another case of a defective appointment.
The judge saw the issue as one of construction and made some interesting comments on the fine distinction between a “nullity” and an “irregularity”. Generally, the concept of a nullity will be closely confined.

In *Re Pritchard* [1963] 1 Ch 502 it was confirmed that RSC Order 70 applied “to all defects in procedure unless it can be said that the defect is fundamental to the proceedings.” The Court of Appeal went on to say that “A fundamental defect will make it a nullity. The court should not readily treat a defect as fundamental…”.

The judge took the view that this was a statement of principle about procedural rules of wider application than its immediate context. Generally, non-compliance would not make proceedings void, rather, they would be considered irregular. If irregular, they could be set aside, amended or dealt with in any manner that the court thought fit.

He also considered that considerable weight should be given to the fact that the whole point of appointing administrators out of court was to streamline the process of business rescue. To this end, he reiterated his remarks in *Re Virtualpurple Professional Services Limited* [2011] EWHC 3487 (Ch) that “it is highly undesirable to have a multiplicity of circumstances in which the appointment of an administrator is automatically invalidated”. (at para 26).

As a separate matter, the judge refused to make an order waiving the defect in the Administrators’ appointment. Although it was unlikely that any general creditor would wish to challenge the appointment, he did not consider it appropriate to make this order as the creditors were not party to the application before him. Although the judge would have been able to dismiss an application brought by a creditor under Rule 7.55, he would not have been able to prevent such an application from being brought in the first place.

COMPANY DIRECTORS' DISQUALIFICATION

In the matter of Asegaai Consultants Limited and 43 other companies all in creditors' voluntary liquidation and in the matter of the Company Directors Disqualification Act 1986 [2012] EWHC 1899 (Ch)

Executive summary

In rare cases, a liquidator may have standing to bring an application under section 4 of the Company Directors Disqualification Act 1986 ("CDDA") provided that the liquidator has no ulterior motive, the application is brought with the consent of the creditors and the Secretary of State considers it to be in the public interest.

Facts

The defendant, M, had qualified as a chartered accountant in 1990 and had become a licensed insolvency practitioner in 1997. In 2003, he entered into discussions about the possibility of becoming the liquidator for 100 companies established and run by Safe Solutions Management Services Limited (the SSL Companies). The SSL Companies provided tax-savings schemes to individuals coming to work in the UK on a temporary basis. Essentially, the individuals provided their services through personal service companies (PSCs) each of which would employ up to ten participants who would become shareholders in the PSC. Each participant would be paid the minimum wage, less deductions for PAYE and National Insurance. The balance of earnings would then be distributed by way of dividend, after the deduction of an administration charge and corporation tax on the PSC's profits. This arrangement was, at the time, lawful.

In 2004, M's insolvency licence was temporarily withdrawn by the Institute of Chartered Accountants of England and Wales, but he successfully appealed against the decision and it was reinstated by February 2006. As a result, M did not take on any further PSC liquidations. The Claimants took over as liquidators of the SSL Companies at the request of HM Revenue & Customs ("HMRC"), which had been investigating the SSL Companies since March 2005.

The Claimants alleged that, during his time as liquidator of the SSL Companies, M had remitted monies that he had dishonestly obtained to an offshore vehicle based in Mauritius. They alleged that M had claimed £750 from each company for "additional work" and this money had been passed on to the offshore vehicle for M's sole benefit. They also alleged that M had failed to take steps in the liquidation to ensure that corporation tax and National Insurance contributions owed by the SSL Companies to HMRC were recovered.

They sought that M be disqualified under section 4 of the Company Directors Disqualification Act 1986 (the "CDDA").

Decision

The judge found that M was an unreliable witness and concluded that the payments of £750 had been made on the basis that the money would, ultimately, be passed to M. He also concluded that the Claimant's contention that "it was as plain as a pikestaff that those behind [the SSL Companies] were trying to avoid paying tax" was upheld and that the retention of funds by the companies was at the expense of HMRC.

M was disqualified for twelve years.

Comment

This case is interesting because it concerns first, the disqualification of a liquidator of a company rather than a company director; and second, a CDDA application being brought by a liquidator. It also provides a useful example of the application of the guidance on disqualification periods given by the Court of Appeal in *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164.

Section 4 of the CDDA gives the court discretion to disqualify a "person" who, under part (b) has been guilty while an officer, liquidator, receiver or administrative receiver either of fraud or of any breach of duty owed in that capacity. The court can then make an order for a specified period during which that individual is prohibited from becoming a company director, from forming or managing company and from acting as an insolvency practitioner.

The judge considered the circumstances in which a disqualification order might be brought. In *Re Adbury Park Estates Ltd* [2003] BCC 696, the judge refused an application on the grounds that the applicant had no standing to bring the application and also that it had no merit. It is clear from *Re Adbury* that "if a disinterested person thinks that a liquidator's conduct warrants disqualification" it is a matter for the Secretary of State (at p698). The judge also distinguished those directors who are unfit from those who make mistakes "the conduct... has to be, if not fraudulent, at least very serious".
In the present case, the judge considered that the Claimants, as liquidators of the SSL Companies had standing to bring the case on the grounds that liquidators, like the Secretary of State and the Official Receiver, have a public interest role. He relied on *In re Pantmaenog Timber Company Ltd* UKHL 49 where Lord Walker of Gestingthorpe (para 77) had remarked that "winding up has… a dual purpose. One purpose is the orderly settlement of a company's liabilities and the distribution of surplus funds, priori to the company being dissolved. The other is the investigation and the imposition of criminal or civil sanctions in respect of misconduct on the part of persons… who may be shown to have abused the privilege of incorporation with limited liability… the second function serves a wider public interest."
The judge in the present case was clearly mindful that it would be a "relatively rare" case in which a liquidator would bring a section 4 CDDA application. First, because any such application would cost money and this would usually be to the detriment of the funds available for creditors; and second, because the Secretary of State may take the view that such an application would not be in the public interest.

Neither of these points were in issue. HMRC had provided funding for the application. In addition, the Insolvency Service had referred to the fact that, although unable to join the proceedings as co-Claimant, the Secretary of State "[supported] in principle the disqualification in the public interest of anyone responsible for the wrongdoing the [Claimants] allege" (para 31).

The judge took the view that the present case was "particularly serious", a term used by the Court of Appeal in *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 in their guidance as to which offences merited a disqualification period of over ten years. Although the sums in this case were not enormous (£27,000), M's conduct was deemed to be "grossly improper" and was "not confined to an isolated incident or incompetence… [M] dishonestly caused sums to be paid for his benefit over an extended period".