BRIEFING

Picard v Primeo: The Cayman Court considers assistance in a post-Rubin world

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Modified Universalism

The dicta of Lord Hoffman in *Cambridge Gas*[1] and *HIH*[2] supporting the application of the principle of "modified universalism" have provided a foundation for the recent trend in the law relating to international insolvency towards greater assistance provided to foreign insolvency proceedings.

In summary, the principle of modified universalism is that there should be a unitary bankruptcy proceeding in the court of the bankruptcy's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.

In practice, domestic courts follow this principle by recognizing foreign officeholders that are empowered by foreign law to act on behalf of an insolvent company. Central to this principle is the idea that such recognition, *"carries with it the active assistance of the court"* and that in providing such assistance, *"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."* In theory, the principle should ensure fairness between creditors, so that there would be no advantage to creditors located in a jurisdiction where more assets are located.

Decision in Cambridge Gas

In pursuit of modified universalism, the Privy Council in *Cambridge Gas* held that an order made in US insolvency proceedings could be enforced by a domestic court, notwithstanding the absence of *in rem* jurisdiction by the US Court over the subject matter of that order (shares in an Isle of Man company).

In practice, this development led to considerable uncertainty. People who were sued abroad did not know whether the foreign courts' judgments would be enforced against them in the domestic courts, notwithstanding their non-participation in the foreign proceedings. This made it very difficult for litigants to decide whether or not to participate in such proceedings.

Rubin v Eurofinance

In its October 2012 judgment in *Rubin*[3] the Supreme Court held (4-1) that, notwithstanding *Cambridge Gas*, foreign insolvency judgments fell to be treated in the same manner as all other foreign judgments. Such judgments would not be enforceable if made against persons who were not subject to the jurisdiction of the foreign court.

In this manner, the Supreme Court rejected the approach first adopted by the Privy Council in *Cambridge Gas*, by holding that:

a. insolvency judgments were either *in personam* or *in rem* and did not fall into a third sui generis category of their own; and

b. the proposition that insolvency judgments were part of collective proceedings to enforce rights and not to establish them did not justify the application of broader rules governing the enforcement of such judgments.

In arriving at its decision, the Supreme Court recognized that it was dealing with the application of the principle of modified universalism. In particular, Lord Hoffman's dicta in *Cambridge Gas* and *HIH* were examined at length and the Supreme Court

[1] [2007] 1 AC 508

[2] [2008] 1 WLR 852

[3] [2012] UKSC 46

concluded that if the law was to be reformed to give effect to such policy considerations, it would be for the legislature and not the judiciary to bring about such reform.

Limits of 'active assistance'

Having reached the above conclusions, the Supreme Court also held, by a 3-2 majority, that the Privy Council's decision in *Cambridge Gas* had been wrong.

It is unclear to what extent, if at all, that finding might have a knock-on effect of the scope of active assistance that can be provided by domestic courts to foreign insolvencies and their officeholders. The Cayman Islands Grand Court has been the first court to consider such issues, in its 14 January 2013 decision in *Picard and another v Primeo Fund (In Official Liquidation)*[4].

Picard v Primeo: Facts

This case involved a Cayman Islands company that had invested initially directly and subsequently indirectly into Bernard L. Madoff Investment Securities LLC ("BLMIS"), a company incorporated in and operating from New York. BLMIS was the vehicle through which Bernard L. Madoff ("Madoff") perpetrated the world's largest Ponzi scheme, until his arrest in December 2008.

Irving H. Picard was appointed as the SIPA Trustee (the "Trustee") of BLMIS on 15 December 2008. His appointment was recognized in the Cayman Islands by an order made on 5 February 2010, which confirmed that he was the only person entitled to act on behalf of BLMIS in the Cayman Islands.

In light of the appeal pending in *Rubin*, the Trustee appears to have taken the view that it was not a safe strategy simply to pursue avoidance claims against foreign entities inside the US, obtain default judgments against those entities and then seek to enforce those judgments overseas relying on *Cambridge Gas* principles.

Whilst the Trustee had obtained default judgments against other entities, he pursued a different strategy in relation to Primeo Fund. He commenced proceedings in the Cayman Islands seeking to bring avoidance claims against Primeo pursuant to US and Cayman Islands law.

He then sought a preliminary ruling as to whether the Cayman Court could assist the US bankruptcy by allowing him to bring those claims directly in the Cayman Islands, either pursuant to Part XVII of the Companies Law (which governs cross-border insolvency cooperation) or at common law.

Part XVII of the Companies Law

The Cayman Court considered the wording of the Companies Law. It held that section 241 of the Law listed all the relief which it could order and that section 242 listed the matters it must take into account when deciding whether or not to do so.

The Cayman Court noted that the forms of relief listed at section 241(1) did not include an order to apply the avoidance provisions of either domestic or foreign law in support of a foreign bankruptcy proceeding. Accordingly, it held that the Companies Law did not provide it with the power to allow the Trustee to bring such avoidance claims in the Cayman Islands.

Common law

The Cayman Court then went on to analyze the position at common law. Specifically, it considered whether it could actively assist the US bankruptcy proceedings by allowing the Trustee to bring avoidance claims in Cayman.

The Cayman Court determined that it did have the jurisdiction to allow the Trustee to bring Cayman law (but not US law) avoidance claims, stating:

"... I have come to the conclusions, not without some hesitation, that this Court does have jurisdiction at common law to apply the avoidance provisions of Cayman Islands insolvency law in aid of the BLMIS liquidation whether it would have had jurisdiction to make a winding up order."

In reaching this conclusion, the Court considered both *Cambridge Gas* and *Rubin*. Notwithstanding the unqualified finding in *Rubin* that *Cambridge Gas* had been wrongly decided, the Court distinguished *Rubin* from *Picard* and applied *Cambridge Gas*.

[4](January 2013, unreported)

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The Court also held that, for the purpose of the avoidance claims, BLMIS would be treated as having been the subject of a liquidation proceeding under Cayman Islands' law as at the date of the foreign bankruptcy proceeding. This was despite the fact that there was, *prima facie*, no jurisdiction to make a winding up order against BLMIS in the Cayman Islands. The Court held that this approach was both consistent with the general principle of modified universalism and that it did not depart from or thwart the objective behind those statutory avoidance provisions.

Comment

In reaching its decision, the Cayman Court held that majority of the Supreme Court in *Rubin* had not rejected the underlying proposition set out in *Cambridge Gas* that recognition at common law carried with it the active assistance of the domestic court. It went on to hold that in *Rubin* Lord Collins had left open the possibility that a foreign office holder would be entitled to pursue domestic avoidance claims at common law.

This conclusion is surprising. In *Rubin*, Lord Collins stated that:

"The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign officeholder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation..."[5]

It is notable that Lord Collins did not state that such common law assistance cases have included orders allowing avoidance claims to be brought by foreign office holders. Nor did the Supreme Court endorse or mention the approach taken by the English High Court case of *Schmitt v Deichmann*[6], in which a foreign administrator was allowed to pursue English avoidance claims.

Moreover, whereas Lord Collins listed several alternative claims the parties might have brought within the English courts[7], including bringing avoidance claims under the Insolvency Act 1986 pursuant to article 23 of the Model Law, he did not mention the possibility of bringing such claims at common law.

More generally, the Cayman Court appears to have been unmoved by the Supreme Court's warning that innovations in this area of law were a matter best left to the legislature rather than the Court. This is despite the Cayman Court's observation in respect of Part XVII of the Companies Law (which only came into effect as recently as 1 March 2009) that:

"... it would not have been surprising if the Legislature had included within section 241(1) a power to make orders for the purpose of setting aside preferential payments or the fraudulent dispositions of property comprised in the debtor's estate. On the other hand, if this had been the Legislature's intention, I think it is surprising that it is not stated expressly."

As a result of this decision, the Cayman law position appears to be that any company incorporated in the Cayman Islands can be subject to a Cayman law avoidance action brought by the recognized officeholder of a company incorporated overseas. It is not necessary for the same foreign courts to offer reciprocity to office-holders appointed in the Cayman Islands.

This is a complex area of law in which policy considerations militate in different directions. Both parties have sought to appeal the decision to the Cayman Islands Court of Appeal and it will be interesting to see what approach it takes to these cutting edge issues.

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[5]All these orders could be made in the Cayman Islands under Part XVII of the Companies Law

[6][2012] 2 All ER 1217

[7]Paragraph 131