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Enforcing foreign insolvency judgments: *New Cap Re*

English cross-border insolvency law may be broadly divided into five components, namely the EU regime (such as Council Regulation (EC) 1346/2000 on insolvency proceedings ('EU Insolvency Regulation')), the Cross Border Insolvency Regulations 2006, s 426 of the Insolvency Act 1986 ('IA 1986'), the statutory judgment enforcement regime (such as the Foreign Judgments (Reciprocal Enforcement) Act 1933 ('1933 Act')), and the common law. With this menu of options, it becomes crucial for insolvency practitioners to apprehend the interaction between the options, in particular their hierarchical structure and the extent to which they operate in parallel.

The Court of Appeal decision in *New Cap Reinsurance Corporation v Grant* [2011] EWCA Civ 971 has to some degree clarified the interaction between s 426 of IA 1986, the 1933 Act and the common law. Although the Court of Appeal reached the correct outcome, it missed an opportunity to put the law on a sounder footing.

Indeed the Court of Appeal decision largely affirms this commentator's views on the first instance decision (see Look Chan Ho, 'Statutory and common law enforcement of foreign insolvency judgments' (2011) 26:5 JIBFL 254). This article builds on the previous commentary and attempts to show where the Court of Appeal's reasoning could have been improved.

This feature argues that the enforcement in *New Cap Reinsurance Corporation v Grant* of an Australian insolvency judgment is correct, although several aspects of the decision call for revision, in particular the unquestioning acceptance of *Rubin v Eurofinance* being binding.

THE FACTS AND DECISION IN *NEW CAP*

The material facts are as follows. In April 1999, New Cap Reinsurance Corporation Ltd ('Company'), an Australian reinsurer, became subject to Australian liquidation. About three months prior to its liquidation, the Company made two payments to the appellants in this appeal who were Lloyd's Names pursuant to a commutation agreement. In July 2009, upon the application of the liquidator of the Company, the New South Wales Supreme Court held the appellants liable to repay the sums received from the Company because the Company's payments to the appellants constituted unfair preferences under Australian insolvency law. Note that the appellants did not participate in the Australian proceedings:

> '[T]he [appellants] have filed no appearance. They are resident outside Australia and did not seek to take part in the proceedings. In correspondence with the liquidator's solicitors, the defendants have made it clear that they do not submit to the jurisdiction of this court': *New Cap Reinsurance Corporation v A E Grant* (2009) 72 ACSR 638 at [22].

The liquidator of the Company then issued proceedings seeking to enforce the Australian judgment against the appellants in England, relying on s 426 of IA 1986 and the common law in light of *Rubin v Eurofinance* [2010] EWCA Civ 895; [2011] Ch 133. The appellants resisted on the grounds that the matter should be dealt with under the 1933 Act. At first instance, Lewison J ruled in favour of the liquidator, holding that the court had power at common law and under s 426 to assist the Australian court. Lewison J also held the 1933 Act inapplicable to orders made in insolvency proceedings at all.

The appellants thus brought the present appeal. The appellants argued that the judge was wrong about the 1933 Act, that he was wrong about s 426, and that the common law jurisdiction should not allow the making of the order for payment which the judge made. They were, however, willing to be sued by the liquidator in England and the proceedings could pursuant to s 426 be tried according to Australian law.

By a respondent's notice the liquidator also contended that, if the 1933 Act did apply, the Australian order, if registered, would not be liable to be set aside.

While substantially overruling Lewison J's reasoning, the Court of Appeal (through Lloyd LJ) reached the same outcome and concluded the following:

'(i) The 1933 Act does apply to judgments under which a sum of money is payable made in insolvency proceedings by a recognised court, subject to the terms of the order by which the court is recognised.

(ii) The [Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994 ("Australian Order")] recognised the relevant Australian courts in terms such that any judgment of such a court which falls within the definition in section 11(1) of the 1933 Act is a judgment to which Part I of the Act applies. The use of the phrase "civil or commercial matter" in the [Australian] Order does not limit the class so as to exclude money judgments issued in insolvency proceedings.

(iii) If the New South Wales order had been registered, or were to be registered, it could not now be set aside under section 4(1)(a)(ii) because of the effect of the Court of Appeal's decision in *Rubin*.

(iv) Section 426 of the Insolvency Act 1986 can also be used to seek assistance with a view to the enforcement of a money judgment issued in foreign insolvency proceedings. That is not excluded by section 6 of the 1933 Act.

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(v) The judge's exercise of his discretion under section 426 was not at fault, and the position in that respect is not altered by my conclusion as to the application of the 1933 Act.
(vi) Because the judgment is registrable under the 1933 Act, section 6 of that Act would prevent the liquidator from enforcing it by bringing an action on it at common law.
(vii) It is unnecessary to consider or decide whether the court's common law power to assist a foreign liquidator is exercisable where the statutory power is available.
(viii) It is also unnecessary to consider the effect of the declaration in paragraph 1 of the New South Wales order taken together with section 8 of the 1933 Act.
(ix) I would uphold the judge's order as made under section 426.

Thus the decision of the Court of Appeal in *Rubin* is directly relevant in two ways. First, on the basis that the New South Wales order is registrable under the 1933 Act, it would preclude a successful application to set aside registration under section 4(1)(a)(ii) of the Act. Secondly, if the position at common law were relevant in any other way, the jurisdiction of the New South Wales court would be recognised because of the decision. The decision does not affect the position under section 426 as such' (at [83]-[84]).

COMMENTARY

In order to evaluate the Court of Appeal's reasoning, this article proceeds to consider first, the decision in *Rubin* and why the court's reasoning there is hard to sustain; secondly, why *Rubin* is probably not a binding precedent; thirdly, the application of the 1933 Act to insolvency matters; fourthly, the application of the 1933 Act to Australian insolvency judgments; fifthly, the use of s 426 in enforcing foreign insolvency judgments; and sixthly, the interaction between the 1933 Act, s 426 and the common law.

A CRITIQUE OF *RUBIN*

The factual background in *Rubin* was stated concisely in the Court of Appeal judgment in the present case as follows:

> 'The claimants [in *Rubin*] were appointed by the New York [bankruptcy] court as joint receivers and managers of a trust fund which was subject to insolvency proceedings in New York, and as representatives of the trust to seek assistance from the English court to enforce the judgment of the New York court against persons resident in England. The New York court gave judgment against the defendants on grounds corresponding to preference claims, where the defendants were not resident in New York, had not submitted to the jurisdiction of the court, and did not defend the proceedings. The claimants then applied to the English court for various relief, including the recognition of the New York insolvency proceedings and of themselves as representatives of the trust (under the UNCITRAL rules and the Cross-Border Insolvency Regulations 2006), and also for the enforcement of the money judgments as orders of the English courts': *New Cap Reinsurance Corporation v Grant* [2011] EWCA Civ 971 at [65].

The first instance judge refused enforcement of the money judgment on the basis that it was an *in personam* order which could not be enforced where the defendants had not submitted to the jurisdiction of the New York court. But the Court of Appeal allowed the claimants' appeal, departing from established law on the enforcement of foreign judgments *in personam*:

> 'The English courts will not enforce the judgment of a foreign court against a defendant who does not reside within the jurisdiction of that court, has no assets within that jurisdiction and does not appear before that court, even though that court by its own local law has jurisdiction over him': *Henry v Geoprosco International* [1976] QB 726, 746 (CA).

The Court of Appeal justified its departure from authorities on the footing that the US monetary judgment was not a judgment *in rem* or *in personam* because the judgment avoided antecedent transactions under US bankruptcy law and bankruptcy proceedings were neither *in rem* nor *in personam*, following *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; [2007] 1 AC 508 ('*Navigator*').

This commentator has expressed a critique at some length elsewhere that the reasoning in *Rubin* leaves much to be desired (see Look Chan Ho, 'Recognition Born of Fiction – *Rubin v Eurofinance*' [2010] JIBLR 579). Below is an update and summary of the critique.

First, the Court of Appeal apparently did not appreciate that *Navigator* is in fact inconsistent with *Pattni v Ali* [2006] UKPC 51; [2007] 2 AC 85. In *Navigator*, the issue was the characterisation of a US bankruptcy court order vesting the shares in an Isle of Man company in the creditors' representatives. The Privy Council held that the US bankruptcy court order was neither *in rem* nor *in personam*. However, in *Pattni v Ali*, the Privy Council emphasised the nature of a judgment *in rem* thus: 'in order for a judgment to have in rem effect …, the determination must be a determination regarding the status or disposition of property which is to be valid as against the whole world' (at [23]). Given the Privy Council's emphasis in *Pattni v Ali*, it is hard to avoid the conclusion that the US court order in *Navigator*, by vesting the shares in the creditors' representatives, was an adjudication upon the disposition of the shares, thus an adjudication *in rem* relating to the shares. Especially after *Pattni v Ali*, the innominate classification of bankruptcy proceedings in *Navigator* is highly suspect.

Secondly, the Court of Appeal overlooked a persuasive authority confirming the orthodox position that foreign bankruptcy orders are treated as judgments *in rem*. In *Swycher v Vakil* [2004] EWCA Civ 444, Chadwick LJ recognised a Portuguese bankruptcy order as 'a judgment in rem – being a judgment which affects the status of the bankrupt in relation to his assets' (at [33]).

Thirdly, according to *Navigator*, the justification for the innominate classification of bankruptcy proceedings is that '[t]he purpose of

bankruptcy proceedings … 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' (at [14]). In *Rubin*, the US judgment made the defendants liable to pay a sum of money to the debtor out of the defendants' own funds. To insist that the US judgment nevertheless did not involve any determination of rights and liabilities appears to defy principle, logic and common sense.

Fourthly, the innominate classification of bankruptcy proceedings in *Navigator* is in truth fictional and, hence, objectionable. 'Legal fictions, of their nature, conceal what is going on. They are a pretence. They represent an unacknowledged departure from existing principle': *OBG v Allan* [2007] UKHL 21; [2008] 1 AC 1 at [228].

Fifthly, the Court of Appeal in *Rubin* was apparently unaware of US and other comparative authorities confirming the *in personam* nature of the US judgment. A case in point is the Irish case of *Re Flightlease (Ireland)* [2006] IEHC 193 concerning the enforceability in Ireland of a Swiss judgment setting aside a fraudulent preference under Swiss insolvency law. Thus at issue was the application of the conflict of laws rules on the recognition of judgments. The Irish High Court, after referring to statements in the previous editions of Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, 2006) about a bankruptcy proceeding not being *in personam*, applied English conflict of laws rules and set out the correct classification of the Swiss avoidance judgment in the following pellucid terms:

> 'It is clear that a proceeding in bankruptcy is not, in itself, an action against an individual. Indeed the bankruptcy itself (whether individual or corporate) involves the collecting in of the assets of the insolvent individual or entity and their distribution in accordance with the appropriate rules … In a corporate insolvency a liquidator may claim that the company is owed money by a third party …
>
> There can be little doubt that even if such claims by or against the insolvent person or entity are determined, as a matter of procedure, within the insolvency process, orders made as a result of such claims could not, by that fact alone, lose their status as judgments *in personam* … It is the insolvency process itself, involving the gathering in of assets and their distribution in accordance with the appropriate insolvency law, that is the process which is not properly regarded as *in personam*. Determinations made, whether within or outside that process, concerning the entitlements or liabilities of the insolvent person or entity are not … properly characterised as being a proceeding in bankruptcy or insolvency in the sense in which that term is used in the above passage [in *Dicey, Morris and Collins*] …
>
> It is clear … that in order for Swissair to succeed it will be necessary for the Swiss court to be satisfied that the transaction in favour of Flightlease was carried out for the purposes of effecting what, in the analogous jurisdiction of the courts in Ireland in respect of liquidations, might be seen as similar to a fraudulent preference …
>
> While some weight must be attached to the fact that the relevant proceedings could only have arisen in the event of an insolvency it seems to me that greater weight must be attached to the nature of the order to be made …
>
> It is the character of such an order that seems to me to be the principle factor in determining whether it can properly be described as *in personam*. Notwithstanding, therefore, the fact that the particular circumstances giving rise to the making of the order in the Swiss proceedings could only occur in the event of the company concerned being the subject of insolvency proceedings, I am nonetheless satisfied that any order which might be made should properly be characterised as an *in personam* order and its enforceability should, therefore, depend on the application of the appropriate rules for the recognition of *in personam* orders at common law' ([2006] IEHC 193 at [3.2], [3.3], [3.5]–[3.7]).

Indeed, in *Global Distressed Alpha Fund 1 v PT Bakrie Investindo* [2011] EWHC 256 (Comm); [2011] 1 WLR 2038, Teare J rightly described the Court of Appeal in *Rubin* as 'enforc[ing] a judgment *in personam* which had been given in New York against the defendants' (at [21]).

RUBIN AND *STARE DECISIS*

The Court of Appeal apparently proceeded throughout on the basis that *Rubin* is a binding decision and the appellants did not seem to have contended the contrary:

> 'Like Lewison J, we are bound by [*Rubin*] … There are material differences between this case and [*Rubin*], but Mr Knowles QC for the syndicate recognised that the decision of the judge and of this court might be affected by that binding authority' (at [6]).

Nevertheless, it is respectfully suggested that the case for *Rubin* being non-binding is strongly arguable.

Before considering why *Rubin* is probably not a binding authority, it may be helpful to note some key objectives of the doctrine of precedent:

> 'The purpose of the rules about precedent is to produce certainty': *Actavis UK v Merck & Co* [2008] EWCA Civ 444; [2009] 1 WLR 1186 at [83].
>
> 'The fact that stare decisis is not absolute – that it gives us not certainty but only *some* certainty in the law – is its primary virtue': Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008), p 160 (original emphasis).
>
> 'The rules as to precedent reflect the practice of the courts and have to be applied bearing in mind that their objective is to assist in the administration of justice. They are of considerable importance because of their role in achieving the appropriate

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degree of certainty as to the law. This is an important requirement of any system of justice. The principles should not, however, be regarded as so rigid that they cannot develop in order to meet contemporary needs': *R v Simpson* [2003] EWCA Crim 1499; [2004] QB 118 at [27].

Thus the precedent rules do develop from time to time; see, for instance, *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311 at [66] (emphasis added):

'The principle promulgated in *Young* [1944] KB 718 was, of course, laid down at a time when there were no international courts whose decisions had the domestic force which decisions of the [European Court of Human Rights] now have, following the passing of the [Human Rights Act 1998], and in particular section 2(1)(a). In my judgment, *the law in areas such as that of precedent should be free to develop*, albeit in a principled and cautious fashion, to take into account such changes.'

Traditionally the Court of Appeal is obliged to follow one of its previous decisions unless one of the following three circumstances exists: first, where the later court is confronted by two conflicting prior decisions requiring a choice to be made (in which case it is free to choose between them); secondly, where the later court comes to the conclusion that the earlier decision, although not expressly overruled, cannot stand with a subsequent decision of the House of Lords; and thirdly, where the later Court comes to the conclusion that the earlier decision was given *per incuriam*: *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA).

For present purposes, we need not consider other recent exceptions to stare decisis accepted in *Actavis UK v Merck & Co* and *R (RJM) v Secretary of State for Work and Pensions*.

Rubin ought not to bind the Court of Appeal for two reasons. First, as *Rubin* conflicts with other Court of Appeal authorities (eg *Henry v Geoprosco International*), a subsequent Court of Appeal is free to choose which one to follow.

Secondly, as *Rubin* is contrary to authority, principle, logic and common sense, it can be categorised as decided *per incuriam*:

'[D]ecisions, even of fairly recent origin, of the Court of Appeal … are not immune from being overruled by [the Court of Appeal] if we are satisfied that *the reasoning does not bear analysis*. Such decisions may be treated as having been decided per incuriam … [T]he circumstances in which a decision may be treated as being per incuriam may have become somewhat more *generous and flexible* than might have been perceived as being fifty years ago': *Tan v Sitkowski* [2007] EWCA Civ 30; [2007] 1 WLR 1628 at [64]-[65] (Neuberger LJ) (emphasis added).

'At essence the strength of precedent rests on the robustness of the decision-making process of the court that established the precedent … Therefore where precedent has been based on the presumed correctness of a decision which when examined anew is found to be wanting in legal rigour, precedent is substantially weakened and is more susceptible to reconsideration and possible overrule': *Combined Beneficiaries Union Incorporated v Auckland City COGS Committee* [2008] NZCA 423 at [49].

It follows that the Court of Appeal in the instant case merely proceeded on an innocent basis that *Rubin* is binding. Sceptics might insist that it would not be possible to persuade the Court of Appeal that *Rubin* is not binding, but one should not forget that '[n]ot a few rules of law went unnoticed until someone had the courage and intelligence to identify them, yet they are now taken for granted' (*R Griggs Group v Evans* [2004] EWHC 1088 (Ch); [2005] Ch 153 at [30]). The unquestioning acceptance of *Rubin*'s bindingness does the law a disservice.

THE 1933 ACT AND INSOLVENCY

This commentator's previous article has expressed the view that the 1933 Act clearly applies to insolvency matters for the following reasons.

First, we begin with the Foreign Judgments (Reciprocal Enforcement) Committee Report (Cmd 4213) (December 1932) ('Report') which led to the enactment of the 1933 Act. Annexed to the Report was a draft Foreign Judgments (Reciprocal Enforcement) Bill which became the 1933 Act almost verbatim. Also annexed to the Report were three draft conventions with Belgium, Germany and France intended to be applied by the 1933 Act. These draft conventions merit some consideration.

The draft Convention for the Reciprocal Enforcement of Judgments with Belgium provided in art 3(1) that:

'Judgments in *civil and commercial matters* given by any superior court in the territory of one high contracting party, and executory in the country of the original court, … shall, in the courts of the territory of the other, be recognised … unless: (a) In the case in question the jurisdiction of the original court is not recognised under the rules of Private International Law with regard to jurisdiction observed by the court applied to …' (emphasis added).

Article 4(3) of the draft convention with Belgium provided that:

'In the case of judgments given in [inter alia bankruptcy proceedings, or proceedings for the winding up of companies or other bodies corporate], the jurisdiction of the original court shall be recognised in all cases where such recognition is in accordance with the rules of Private International Law observed by the court applied to.'

Similarly, the draft Convention for the Reciprocal Enforcement of Judgments with Germany provided in art 3(1) that:

'Judgments in *civil and commercial matters*, given after the date of the entry into force of the present convention by any superior

court in the territory of one high contracting party, shall be recognised in the courts of the territory of the other, … unless: (a) In the case in question, the jurisdiction of the original court is not recognised under the law concerning foreign judgments of the court applied to …' (emphasis added).

Article 4(4) of the draft convention with Germany provided that:

'In the case of judgments given in [inter alia bankruptcy proceedings, or proceedings for the winding up of companies or other bodies corporate], the jurisdiction of the original court shall be recognised in all cases where such recognition is in accordance with the law concerning foreign judgments of the court applied to.'

In contrast, the draft Convention for the Reciprocal Enforcement of Judgments with France provided in art 2(3)(b) that 'the provisions of the present Convention do not apply to … judgments in bankruptcy proceedings or proceedings relating to the winding up of companies or other bodies corporate'.

It is thus clear that the draft Bill was intended to encompass insolvency matters, subject to express exclusion in the convention in question. This was made abundantly clear by the explanation of the draft Bill annexed to the Report:

'The committee has examined these [draft conventions] and is of the opinion (a) that all the obligations assumed by His Majesty under these conventions can be fulfilled if an Act of Parliament is passed in the terms of the Bill …

The Convention with France contains … limitations … which do not occur in the other conventions … [U]nder Article 2(3)(b) … judgments in matters of family law and status …, bankruptcy and winding up of companies are excluded altogether from the scope of the convention (subject to the general provision of Article 2(4) that their exclusion is not intended to prejudice the application to them of the municipal law for the time being in force)' (paras 17 and 23 of Annex V to the Report).

Indeed the Committee 'drafted not only a Bill but also a series of conventions which, in the opinion of the Committee, might suitably be made with France, Belgium and Germany' (*Hansard*, HL Deb 14 February 1933 vol 86 c674).

Secondly, the scheme and intention of the draft Bill have been reflected in the 1933 Act and its application to various countries. Some examples will suffice to drive the point home.

The Convention between the UK and Belgium for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters (scheduled to the Reciprocal Enforcement of Foreign Judgments (Belgium) Order in Council 1936 (SI 1936/1169)) ('UK/Belgium Convention') provides in art 3(1):

'Judgments in *civil and commercial matters*, given by any superior court in the territory of one High Contracting Party, and executory in the country of the original court, … shall, in the courts of the territory of the other, be recognised … unless: (a) In the case in question the jurisdiction of the original court is not recognised under the rules of Private International Law with regard to jurisdiction observed by the court applied to …' (emphasis added)

Article 4(3) of the UK/Belgium Convention provides:

'In the case of judgments given [inter alia bankruptcy proceedings, or proceedings for the winding up of companies or other bodies corporate], the jurisdiction of the original court shall be recognised in all cases where such recognition is in accordance with the rules of Private International Law observed by the court applied to.'

Other conventions within the scheme of the 1933 Act following the same approach include (a) the Convention between the UK and the Republic of Austria providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (scheduled to the Reciprocal Enforcement of Foreign Judgments (Austria) Order 1962 (SI 1962/1339)), (b) the Convention between the UK and Israel for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters (scheduled to the Reciprocal Enforcement of Foreign Judgments (Israel) Order 1971 (SI 1971/1039)), and (c) the Convention between the UK and the Republic of Italy for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters (scheduled to the Reciprocal Enforcement of Foreign Judgments (Italy) Order 1973 (SI 1973/1894)).

In contrast, there are some conventions applied by the 1933 Act which expressly exclude insolvency matters, such as the Convention between the UK and France for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters (scheduled to the Reciprocal Enforcement of Foreign Judgments (France) Order in Council 1936 (SI 1936/609)). Article 2(3)(b) of the convention provides that 'the provisions of the present Convention do not apply to … judgments in bankruptcy proceedings or proceedings relating to the winding up of companies or other bodies corporate'.

Thirdly, it is plain that the reference to 'civil and commercial matters' in various international conventions is apt to comprehend insolvency matters, unless insolvency is expressly excluded. Indeed it is precisely because the UK/Belgium Convention involved insolvency matters that it had to be disapplied by art 44(1)(i) of the EU Insolvency Regulation.

Fourthly, Lewison J referred to a statement in the Report purportedly negativing the 1933 Act's intention to cover insolvency. It is important to set out the statement in full to understand its context:

'Foreign judgments *in rem*, whether in matters of personal status or in respect of property, are of course (if the conditions necessary

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> for their recognition are fulfilled) recognised as judgments *in rem* and not as conclusive merely between the parties. It is not necessary for our present purpose to consider the effect in England of foreign judgments in bankruptcy proceedings or in proceedings connected with the administration of the estates of deceased persons or other similar classes of judgments' (para 4 of the Report).

The above statement has to be understood as confirming the orthodox understanding of judgment *in rem* and judgment *in personam*.

Declarations in relation to matters of personal status such as marriage, divorce, parentage, legitimacy, legitimation and adoption are all judgments *in rem*: *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin) at [42].

A bankruptcy order, like matters of personal status, is *in rem*, not *in personam*:

> '[T]he jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate; but has no power to determine what *is* the bankrupt's estate. If the question be a legal one it must be tried at law; and if it be an equitable one, it must be decided in this Court. But when you have determined what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the Court in bankruptcy': *Halford v Gillow* (1842) 60 Eng Rep 18, 20 (original emphasis)

> 'A claim *in personam* may be defined positively as a claim brought against a person to compel him to do a particular thing, eg the payment of a debt or of damages for a breach of contract or for tort, or the specific performance of a contract; or to compel him not to do something, eg when an injunction is sought … It may be well, though hardly necessary, to add that a claim *in personam* does not include a proceeding for divorce or judicial separation, for a declaration of nullity of marriage or of legitimacy, or a *proceeding in bankruptcy* or regarding the custody of children, or an application to set aside an arbitral award': (Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, 2006), p 306 (emphasis added).

> '[An English] bankruptcy order affects the debtor's status, and is conclusive *in rem* at common law': The Honourable Mr Justice KR Handley, *Spencer Bower and Handley: Res Judicata* (4th edn, 2009), p 160 (footnote omitted).

When the Report said it was not considering the effect in England of foreign judgments in bankruptcy proceedings, it was merely a preclude to the fact that the draft Bill would not prescribe the jurisdictional grounds on which foreign bankruptcy judgments (along with matters of personal status) ought to be recognised. In contrast, the draft Bill set out the various jurisdictional bases for the recognition of foreign judgments *in personam* (now found in s 4(2)(a) of the 1933 Act). That is why s 11(2) of the 1933 Act (following the draft Bill) defines 'action in personam' as not including 'any matrimonial cause or any proceedings in connection with any of the following matters, that is to say, matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy, or guardianship of infants'. The target of the definition of 'action in personam' in s 11(2) is s 4(2)(a) which is the only place where 'action in personam' is used in the 1933 Act. Section 11(2) merely confirms the existing common law position about judgments *in personam* and is not an indication that insolvency matters should fall outside the scope of the 1933 Act altogether. Had the 1933 Act really intended to exclude insolvency matters completely, it surely would have done so in the definition of 'judgment' in s 11(1).

The Report was content to leave the recognition of foreign bankruptcy judgments less regulated because the mischief at the time was the difficulty of enforcing English judgments *in personam* abroad (see para 2 of the Report). That is why the Report did not view the exclusion of insolvency and matters of personal status from the draft convention with France as raising any concern:

> 'It is seldom … that any necessity of enforcing such judgments abroad arises except perhaps as regards the costs payable under them, and this limitation does not affect at all the classes of actions which are in the present connexion most important from the practical point of view (i.e. commercial actions)' (para 23 of Annex V to the Report).

The Report thus shows beyond doubt that it was the Committee's intention to cover insolvency matters also. It follows that the 1933 Act does apply to insolvency matters, unless the relevant bilateral convention excludes insolvency expressly.

The Court of Appeal's reasoning in the instant case is essentially along the same lines:

> 'Despite Mr Moss' submissions about the Report and the draft Conventions, I find nothing in their terms which indicates that insolvency proceedings were regarded as altogether outside the scope of the proposed system of registration. Perhaps the clearest point is that, if that were so, the comment on the Anglo-French convention would have been in different terms. It would not have said that the need to enforce such orders rarely arises but rather that such judgments were not intended to be within the scope of the new Act at all. The only reference to bankruptcy proceedings in the text of the Report itself is that in paragraph 4. I take the words "for our present purpose", in that context, to refer to the purpose of reviewing the present position as regards the recognition and enforcement of foreign judgments in England, not the context of the Committee's proposals as a whole. If insolvency proceedings were regarded as altogether outside the scope of the proposed Act, this would be a very oblique way of saying so.
>
> Accordingly I reject the submission that reading the Report shows that the Act was not intended to apply to judgments in

insolvency proceedings. It is at worst equivocal and unclear. If there is anything that provides a clear indication it is the comment on the Anglo-French Convention which suggests that the exclusion in that case of insolvency proceedings is a narrowing of the ordinary scope of the provisions as proposed …

[T]he 1933 Act appears to apply to a money judgment made by a recognised court, even if it was made in insolvency proceedings, and was of a kind that can only be made in such proceedings… It seems to me that both the Report and the draft Conventions point towards, rather than away from, the [1933] Act applying in such a case.' (at [33]-[34] and [71]).

THE 1933 ACT AND AUSTRALIAN INSOLVENCY JUDGMENTS

The 1933 Act extends to Australian judgments by virtue of the Australian Order. Scheduled to the Australian Order is the Agreement between the UK and Australia for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters ('UK/Australian Agreement').

As the UK/Australian Agreement does not expressly exclude insolvency matters, Australian insolvency judgments perforce fall within the 1933 Act. There is thus no doubt that the Australian judgment in the present case is a judgment within art 4(a) of the Australian Order.

The Court of Appeal's reasoning is essentially along the same lines:

'I conclude that "civil or commercial matters", in the context of the [Australian] Order does not exclude insolvency proceedings. As between two common law jurisdictions it might not be obvious why this particular phrase should be used to define the class of the judgments to which the 1933 Act is to apply in each country. The reason for its use in this instance is evidently because of the reference to the Brussels Convention, and the use of the derogation allowed by article 59 of that Convention. I would hold that the class of judgments to which the [Australian] Order makes the 1933 Act apply is, in this respect, any order (for the payment of money, of course) in any proceeding that a common law jurisdiction would call civil proceedings. That therefore does not exclude orders for payment made in insolvency proceedings. Since I have concluded that the 1933 Act extends to such proceedings, it seems to me that it would be counter-intuitive to find that the [Australian] Order applied less widely than the 1933 Act permits, as regards the class of relevant judgments' (at [47]).

Further supporting the Court of Appeal's reasoning is the Advocate General's opinion in *Seagon v Deko Marty Belgium* (Case C-339/07) [2009] 1 WLR 2168 describing an action to avoid antecedent transactions under insolvency law as a 'civil action'.

Accordingly, the Australian judgment here is *prima facie* capable of registration and enforcement under s 2 of the 1933 Act, unless the registration is liable to be set aside. For present purposes, the relevant ground for setting aside a registration of the Australian judgment is that the Australian court 'had no jurisdiction in the circumstances of the case' (s 4(1)(a)(ii) of the 1933 Act).

The Court of Appeal said as much:

'[T]he New South Wales order, having been made in civil proceedings by a recognised court, and being for the payment of a sum of money, is a judgment to which Part I of the Act applies, and would therefore be registrable. If it were registered, it would be open to the syndicate to apply to have the registration set aside. The only relevant ground would be that the courts of New South Wales had no jurisdiction in the circumstances' (at [25]).

Whether or not the Australian court had jurisdiction turns on whether the Australian judgment falls within s 4(2)(a) ('a judgment given in an action in personam') or s 4(2)(c).

Closely mirroring the common law position, s 4(2)(a) provides in essence that a foreign court is to be regarded as having jurisdiction where the defendant was resident in the foreign jurisdiction when proceedings were instituted and where the defendant had submitted to the foreign jurisdiction. The jurisdictional prerequisites in s 4(2)(a) are exhaustive: *Societe Cooperative Sidmetal v Titan International* [1966] 1 QB 828; *Morgan v Brierley Holdings* [2009] NZHC 1158.

In the case of s 4(2)(c), the foreign court shall be deemed to have had jurisdiction 'if the jurisdiction of the [foreign] court is recognised by the law of the [English] court'.

The Court of Appeal held as follows:

'Section 4(2) sets out the circumstances in which the courts of the country of the original court are to be deemed to have had jurisdiction. It deals first, at (a), with a judgment given in an action in personam. Section 11(2) provides that an action in personam is not to be treated as including a variety of proceedings, including proceedings in connection with bankruptcy or the winding up of companies. Therefore the New South Wales order is not, for this purpose, within section 4(2)(a). Section 4(2)(b) deals with an action of which the subject matter was immovable property, or an action in rem where the subject matter was movable property. That is not this case.

Section 4(2)(c) is as follows:

"in the case of a judgment given in an action other than any such action as is mentioned in paragraph (a) or paragraph (b) of this subsection, if the jurisdiction of the original court is recognised by the law of the registering court."

Since the New South Wales order is not within either of paragraphs (a) or (b), it appears to fall within paragraph (c), and the question is therefore whether English law would recognise

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the jurisdiction of the New South Wales court. At that point the *Rubin* decision would become relevant' (at [20]-[22]).

The judgment does not indicate any contrary argument by the appellants and indeed throughout the oral hearing the Court of Appeal proceeded on the premise that the Australian judgment could not fall within s 4(2)(a).

With profound respect, the Court of Appeal's conclusion may well be incorrect, for these reasons.

Section 11(2) excludes 'any matrimonial cause or any proceedings in connection with any of the following matters, that is to say, matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy, or guardianship of infants'. As mentioned above, s 11(2) merely confirms the existing common law position about judgments *in personam* and all the excluded matters have an *in rem* flavour. It may thus follow that s 11(2) merely excludes judgments *in rem* that do not fall within s 4(2)(b) which deals only with 'a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property'. If s 11(2) merely excludes judgments *in rem* from s 4(2)(a), the exclusion is an exercise *ex abudanti cautela*.

One might retort that, even if it is correct that the subject-matter of the exclusion in s 11(2) has an *in rem* flavour and the Australian judgment is ordinarily *in personam*, the Australian judgment still falls within s 11(2) because it is 'in connection with' the winding up of a company. 'The words "in connection with" … are widely regarded as being as wide a connecting link as one can commonly come across': *Campbell v Conoco (UK)* [2002] EWCA Civ 704; [2003] 1 All ER (Comm) 35 at [19]. (Cf. Philip St J. Smart, *Cross-Border Insolvency* (2nd edn. Butterworths, 1998), p 402.)

However, statutes are to be interpreted purposively and contextually. The words used are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the legislation, its object and Parliament's intention:

> 'The majority in the Court of Appeal held that it was a sufficient answer to the appellants argument to construe the words "in connection with" as meaning "having to do with"... It may be that in some contexts the substitution of the words "having to do with" will solve the entire problem which is created by the use of the words "in connection with". But I am not, with respect, satisfied that it does so in this case … *[T]he phrase is a protean one which tends to draw its meaning from the words which surround it. In this case it is the surrounding words, when taken together with the words used in the Amending Order of 1991 and its wider context, which provide the best guide to a sensible solution of the problem which has been created by the ambiguity*': *Coventry and Solihull Waste Disposal v Russell* [1999] 1 WLR 2093, 2103 (HL) (emphasis added).

> 'Expressions such as "relating to", "in relation to", "in connection with" and "in respect of" are commonly found in legislation but invariably raise problems of statutory interpretation. *They are terms which fluctuate in operation from statute to statute* … The terms may have a very wide operation but they do not usually carry the widest possible ambit, for they are *subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear*': *Hatfield v Health Insurance Commission* (1987) 15 FCR 487, 491 (emphasis added).

> 'The words "in connection with" have been accepted as capable of describing a spectrum of relationships between things, one of which is bound up with or involved in another … However, … the question that remains in a particular case is what kind of relationship will suffice to establish the connection contemplated by the statute. That requires a *value judgment about the range of the statute*': *Health Insurance Commission v Freeman* [1998] FCA 1340; (1998) 158 ALR 267, 273 (emphasis added, internal quotation omitted).

> '[The meaning of "in connection with"] in a particular case must be determined by the context in which it is used and the object or purpose of the instrument in which it appears': *J P Morgan Australia v Consolidated Minerals* [2011] NSWCA 3 at [48].

Therefore, sometimes it is necessary to reject a broad construction of the words 'in connection with':

> '[T]he phrase "in connection with" … cannot be taken on its face value and must be purposively interpreted … [T]he phrase … must be given a meaning that is consistent with the context and intention underlying … the Act itself. In the circumstances, I would reject a broad reading of 'in connection with' and hold that that phrase must be read consistently with the phrase 'for the purpose of …': *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co, Ltd* [2006] SGHC 152; [2006] 4 SLR(R) 451 at [64] and [71] (Singapore High Court).

Three reasons suggest that the words 'in connection with' should be construed narrowly so that s 11(2) covers actions *in rem* only. First, if a foreign monetary judgment falls within s 4(2)(a), one can say for certain whether it is capable of enforcement in England. If a foreign monetary judgment falls within s 4(2)(c), its enforceability in England becomes largely unregulated. It is hard to see why a foreign monetary judgment avoiding antecedent transactions under foreign insolvency law should face the uncertainty of enforceability in England. Consider for instance the position of a Belgian monetary judgment under Belgian insolvency law falling within s 4(2)(c). Would it be consistent with the legislative purpose of the 1933 Act that the enforceability in England of such judgment should be largely uncertain from 1936 when the UK/Belgium Convention took effect until 2002 when the EU Insolvency Regulation took effect? Although the EU Insolvency Regulation has dealt with EU countries, the 1933 Act continues to apply to insolvency judgments rendered in other jurisdictions, such as Israel. Note that the

1933 Act's 'principal purpose … was to facilitate the enforcement here of rights given by foreign judgments to recover sums of money': *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, 616 (HL).

Second, if the words 'in connection with' are interpreted widely so that s 11(2) catches an action to avoid antecedent transactions under foreign insolvency law, one would nevertheless probably conclude that certain actions, though closely connected with foreign insolvency proceedings, fall outside s 11(2) and thus within s 4(2)(a), such as an action against the directors of an insolvent debtor for unjust enrichment or breach of fiduciary duties which caused the insolvency. Indeed *Rubin* tacitly acknowledged that such action would not fall within the concept of 'bankruptcy proceedings'. Now, how likely is it that the 1933 Act would confer certainty on some foreign monetary judgments which are closely associated with foreign insolvency proceedings by including them in s 4(2)(a), whilst denying the same certainty to 'pure' insolvency judgments (eg under the law of unlawful preference) by relegating them to s 4(2)(c)?

Third, this commentator's approach finds support in *Societe Cooperative Sidmetal v Titan International* [1966] 1 QB 828 which confirms that s 4(2)(c) 'excludes *all* actions in personam' (p. 850 (emphasis added)). This approach 'gives a more natural and proper effect to the language used', and 'it would be a futile waste of labour on the part of the draftsman to have specified with such care the five conditions appropriate to category (a) if any action in personam which fails to satisfy those conditions nevertheless could fall into category (c) with precisely the same consequences as if it had come within category (a)' (p. 850).

As a matter of authority, principle and policy, it is suggested that much can be said for viewing s 11(2) as excluding judgments *in rem* only. Thus much can be said for the Australian judgment in the present case falling within s 4(2)(a). As the Court of Appeal did not give any detailed reason for its conclusion and if the appellants also did not voice any opposition, the judgment should not be taken as a strong authority on this point.

SECTION 426 AND JUDGMENT ENFORCEMENT

As mentioned above, one of the liquidator's arguments is that the Australian judgment should be enforced in England pursuant to s 426.

Unsurprisingly, the appellants questioned the scope of s 426, but the Court of Appeal rejected the appellants' position. In order to see the full context, it is worth setting out the relevant passages at some length:

> 'At the time when the 1933 Act was passed the Bankruptcy Act 1914 was in force. Under section 121 any order made by a court having bankruptcy jurisdiction in any part of the UK was enforceable in any other part of the UK as if the order had been made by the court required to enforce it.
>
> Section 122 made a more extensive provision, both in territorial terms and as regards its substantive effect. Relevant courts in the UK "and every British court elsewhere having jurisdiction in bankruptcy or insolvency … shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy"…
>
> Mr Knowles submitted that section 121 was concerned with recognition and enforcement and that section 122 was concerned with other matters, and not with recognition or enforcement. Certainly section 122 is not concerned with the direct and automatic process of enforcement which is the subject of section 121. He pointed out that section 122 applies as between courts in the different parts of the UK as well as within the British Empire, and argued that if that section covered enforcement it would, in that respect, duplicate section 121…
>
> Apart from the extension of [section 426] to corporate insolvency and to designated foreign courts, this provision is substantially the same as section 122. Both section 122 and, even more so, section 426 have been used in a variety of ways… The syndicate's position is that section 426 should be used by the liquidator to bring proceedings in England which, by virtue of section 426(5), could be decided according to Australian law…
>
> Mr Knowles argued that, just like section 122, section 426(4) and (5) are not concerned with, and do not provide for, recognition or enforcement. On Mr Moss' argument there would be a degree of overlap between sections 121 and 122 and between subsection (1) and subsections (4) and (5) of section 426. However, just because the latter is much more extensive than the former, it does not seem to me that one should necessarily conclude that the latter cannot apply to a request for assistance by way of enforcement. One might readily imagine a case in which a liquidator wishes to obtain assistance from a UK court in a variety of ways which would or might include enforcement of a judgment for a sum of money but also other relief beyond the scope of the 1933 Act. There may also be cases in which section 426 could be relevant to a foreign country to which the 1933 Act does not apply.
>
> In principle, therefore, I agree with Mr Moss that section 426(4) could include a request for assistance by way of enforcement…
>
> I would … reject Mr Knowles' argument that section 426 does not extend to providing assistance by way of the enforcement of a foreign judgment made in insolvency proceedings' (at [48]-[50], [56]-[58] and [72]).

In this commentator's view, the court's rejection of the appellants' arguments is well-founded.

In the first place, one should bear in mind the role of legislative history:

> 'Legislative archaeology has its place in statutory interpretation, but its role is limited. Where a statutory provision, when read in

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> its immediate statutory and practical context, has a meaning which is tolerably clear as a matter of language, and not unreasonable or unfair in terms of its consequences, it seems to me that little is to be gained, and much may be lost (in terms of time, expense and eventual confusion) by going into the genesis and development of the provision in earlier legislation': *Scottish Widows v HM Revenue & Customs* [2011] UKSC 32 at [123] (Lord Neuberger).

In the present case, the consideration of the genesis of s 426 is probably redundant because the statutory words are tolerably clear as a matter of language. Section 426 is under the rubric of 'Co-operation between courts' and s 426(4) gives English courts a discretionary power to 'assist [other] courts having the corresponding jurisdiction'. It is hard to see why, as a matter of language, co-operation and assistance would not extend to enforcing a foreign judgment.

Indeed, although not cited by the court, the Australian decision in *Re Chow Cho Poon (Private) Limited* [2011] NSWSC 300 supports the court's conclusion. The Australian decision, in the context of the Australian enactment of the UNCITRAL Model Law on Cross-Border Insolvency ('Model Law'), concerned the concept of co-operation with foreign courts and foreign representatives under art 25 of the Model Law. The Australian court held thus:

> 'I am not prepared to think that this court, by acceding to the liquidator's application without any request by (or, as far as is known, even knowledge of) the Singapore court, would "cooperate with" the Singapore court – with emphasis on the preposition "with". "Cooperate" means literally "work with" or "act with". What art 25 envisages is some form of collaboration, joint enterprise or agreed parallel or complementary action of two or more courts in relation to the exercise of the independent jurisdiction of each. This is made clear by the art 27 examples. It is not possible to think that one court can "cooperate with" another without that other being aware' (*Re Chow Cho Poon (Private) Limited* [2011] NSWSC 300 at [59]).

On this test, to enforce a foreign judgment upon a foreign court's request would seem to fall within the concept of co-operation with the foreign court. Here the English court is the recipient of a letter of request issued by the Australian court and enforcing the Australian judgment would mean the English court co-operating with the Australian court. It follows that the English court would also be thereby assisting the Australian court. Therefore, the notion of providing assistance by way of enforcing a foreign judgment seems absolutely sound.

INTERPLAY OF THE 1933 ACT, S 426 AND COMMON LAW

New Cap provides a case study on how the 1933 Act, s 426 and the common law interact with each other. How these three regimes operate together hinges on whether the Australian judgment comes within s 4(2)(a) or s 4(2)(c) of the 1933 Act. The position in principle is as follows.

If the Australian judgment is within s 4(2)(a), then the common law represented by *Rubin* should have little role to play. Section 6 of the 1933 Act appears to bar any common law operation because it is 'an express prohibition on enforcement at common law of a judgment which could in principle be registered under the [1933] Act': *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [113]. The common law may supplement the 1933 Act, but not trump it (cf. *Re Stanford International Bank* [2009] EWHC 1441 (Ch); [2009] BPIR 1157 at [104]-[105]).

Section 6 of the 1933 Act should also bar any enforcement action under s 426. One might now object that there is a conflict between s 6 and s 426. However, it is suggested that the two statutes can operate in harmony. A brief review of the legislative history will illuminate the harmony.

The 1933 Act built on the Administration of Justice Act 1920 ('1920 Act'). As the learned judge in the present case rightly pointed out, the judgment enforcement system under the 1920 Act 'plainly existed in parallel with section 122 of the Bankruptcy Act 1914' (at [12]), the predecessor of s 426.

The 1920 Act also applies to insolvency monetary judgments; see, for instance, Smart, *Cross-Border Insolvency*, pp 402-403.

Accordingly, when the 1933 Act was enacted, there were already parallel statutory regimes dealing with cross-border insolvency. As the first instance judge also acknowledged, the 1933 Act 'left section 122 … in place' ([2011] EWHC 677 (Ch) at [23]). Thus the co-existence of the 1933 Act and s 426 is by legislative design. The co-existence would be harmonious if s 426 deals only with insolvency matters falling within s 4(2)(c) of the 1933 Act and matters falling outside the 1933 Act.

Section 4(2)(c) of the 1933 Act may perhaps cover the recognition of foreign insolvency discharge or the recognition of the appointment of a foreign liquidator in order to facilitate the liquidator's obtaining possession of assets in England (cf. *Re Chow Cho Poon (Private) Limited* [2011] NSWSC 300), working in tandem with s 8 of the 1933 Act.

We now turn to the position where the Australian judgment falls within s 4(2)(c) of the 1933 Act. In this scenario, both s 426 and the common law represented by *Rubin* would have a substantive role in confirming the jurisdiction of the Australian court. However, if *Rubin* cannot stand, it would be a heavy factor against exercising any discretion under s 426 to confirm the Australian court's jurisdiction.

It is important to note that even where s 426 or *Rubin* applies to confirm the jurisdiction of the Australian court, the Australian judgment has to be enforced by way of registration under the 1933 Act. The Australian judgment should not be enforced independently pursuant to s 426 and *Rubin*.

With the above position in principle in mind, we turn to the Court of Appeal's holding.

The Court of Appeal held correctly that s 6 of the 1933 Act precludes a common law enforcement of the Australian judgment:

> 'The main purpose of section 6 of the 1933 Act is to exclude the use of the common law remedy in relation to a judgment which is registrable…

> It follows from the application of the 1933 Act that it is not open to the liquidator to proceed at common law for the recovery of the sums payable under the foreign judgment…' (at [62] and [76])

However, the Court of Appeal held that the 1933 Act and s 426 operate in parallel:

> 'What section 6 of the 1933 Act excludes, in relation to a judgment to which Part I of the 1933 Act applies, is proceedings (other than by way of registration) "for the recovery of a sum payable under a foreign judgment". What the liquidator sought, and has achieved, by these proceedings is to obtain an English judgment for the equivalent amounts, which, if it stands, he can then enforce directly. If he had obtained the registration of the judgment under the 1933 Act, he would then be able to enforce the New South Wales judgment as if it were an English judgment. The two results are not quite the same in legal terms, though their economic effects are no doubt the same or very similar…
>
> Under the 1933 Act registration is a matter of entitlement, subject to the statutory conditions being satisfied. There is no element of discretion in the process either of registration or of setting aside a registration, except in the limited field of the one discretionary ground for setting aside, under section 4(1)(b). There is a time limit for registration under section 2(1), namely 6 years after the date of the judgment or, if it was appealed, 6 years after the last judgment in the appeal proceedings. There are other conditions for registration, as well as the provisions about setting aside a registration. By contrast, section 426 is a discretionary provision, although it has been held that this is a discretion which ought to be exercised in favour of giving effect to the request, so long as it would be proper to do so. If the section does extend to assistance by way of enforcement of a money judgment, and if the 1933 Act also applies to such a judgment made in insolvency proceedings in the particular foreign country, it would be relevant to the exercise of the discretion to consider both why the office-holder had not used the 1933 Act and, if he had done so, what the result would have been. In principle it seems to me that it would be likely to be wrong to use section 426 to enforce a judgment of a kind to which the 1933 Act applied, made in a country to which both provisions apply, if that Act could not be used, for example because more than 6 years had gone by since the date of the judgment.
>
> [I]f the 1933 Act is applicable but has not been used, the court would need to know why it was not used. If, for example, it had been available but was not any more because of lapse of time, that might be a strong factor against the use of the discretionary power to help the office-holder to get round the requirements of the 1933 Act …
> I do not consider that section 6 of the 1933 Act excludes the application of section 426 for such a purpose. I do not regard an application to the English court for assistance by way of enforcement of a foreign judgment for the payment of money in insolvency proceedings to be the same as "proceedings for the recovery of a sum payable under a foreign judgment" so as to be prohibited by section 6 of the 1933 Act if Part I of that Act does apply … If successful, the application under section 426 may have the same effect, but it is a very different kind of jurisdiction, not least because of the element of discretion. For that reason I find no difficulty in the co-existence, before 1986, of the 1933 Act (as I would construe it) and section 122 of the Bankruptcy Act 1914, and, since then, of the 1933 Act and section 426 …
>
> Thus, I conclude that, in principle, both the 1933 Act and section 426 apply in the present case' (at [60]-[61], [72], [74] and [76]).

With great respect, the reasoning above does not seem convincing and is rather hard to follow.

The court seems to make a distinction between on the one hand 'proceedings for the recovery of a sum payable under a foreign judgment' prohibited by s 6 and on the other an application to the English court for assistance by way of enforcement of a foreign judgment under s 426. It is hard to see how this hair-splitting distinction makes sense. Here the Australian letter of request 'asked for … assistance primarily by ordering that the syndicate should pay to New Cap the sums of money ordered respectively by the relevant part of the New South Wales order' (at [4]). This then led the liquidator to issue a s 426 application. In these circumstances, was the liquidator not issuing proceedings for the recovery of a sum payable under the Australian judgment?

The court's justification for the hair-splitting distinction seems to be that '[w]hat the liquidator sought, and has achieved, by these proceedings is to obtain an English judgment for the equivalent amounts, which, if it stands, he can then enforce directly' (at [60]). But this justification cannot hold water for the same reason why a common law enforcement is banned by s 6. As acknowledged by the court, to enforce a foreign judgment at common law, the judgment creditor would bring 'an action in the English courts on the foreign judgment. If successful, this led to the making of an English order for the corresponding amount' (at [63]). In other words, simply getting an English judgment reflecting the foreign judgment does not get round s 6.

The fact that the court has a discretion under s 426 cannot detract from the nature of the English proceedings brought by the applicant, namely the recovery of a sum payable under the foreign judgment.

Now, assuming the Court of Appeal was right that the 1933 Act and s 426 operate in parallel, it is hard to see the need for the gloss that before exercising its discretion under s 426, the court would want to know why the 1933 Act had not been used. The gloss does not seem consistent with the Court of Appeal's remarks below:

> '[I]t must be remembered that Part I of the 1933 Act may apply to countries to which section 426 does not apply, and vice versa. There may, therefore, be jurisdictions in relation to which one or

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other of the statutory regimes applies but not both. From that point of view the interests of a liquidator or other office-holder as a judgment creditor would be favoured by a wider interpretation of both provisions' (at [59]).

If the 1933 Act and s 426 are to co-exist as alternative routes to judgment enforcement, they must function as true alternatives. But the Court of Appeal adopted a half-way house by saying 'it would be likely to be wrong to use s 426 to enforce a judgment of a kind to which the 1933 Act applied, made in a country to which both provisions apply, if that Act could not be used, for example because more than 6 years had gone by since the date of the judgment' (at [61]).

Note that concurrent, alternative remedies are found and permitted in almost all areas of law. For example, where a concurrent duty of care in tort exists as between the two parties to a contract for services or for the supply of goods and services, the party in breach could be sued either in contract or in tort so that the innocent party could take advantage of the more favourable limitation position in tort: *Henderson v Merrett Syndicates* [1995] 2 AC 145 (HL). It follows that, if the 1933 Act and s 426 are to function as alternative remedies, the mere fact that a foreign judgment cannot be registered under the 1933 Act for instance because it is more than six years old cannot control the court's discretion under s 426.

The effect of the court's holding is that the 1933 Act and s 426 co-exist in theory, but the latter is subordinated to the former in fact, as demonstrated by how the court exercised its discretion in the present case:

'[I]t would have been open to the liquidator to register the judgment under the 1933 Act, and that judgment could not have been set aside. It would be possible to take that factor into account by not giving assistance under the section, leaving the liquidator to take the necessary steps under the 1933 Act. Equally, having got to the present position, it would be appropriate to take the situation under the 1933 Act into account, not least in order to ensure that nothing relevant under that Act was being avoided by the use of section 426. But in the absence of any such factor, the fact that … the judgment could be registered under the 1933 Act, and that such registration could not be set aside because the New South Wales court would be regarded as having had jurisdiction, might be a powerful factor in the present case in favour of giving the liquidator the assistance which he seeks under section 426' (at [81]).

It is respectfully suggested that there is no statutory warrant for the court's approach.

Although in this commentator's view the Court of Appeal was incorrect to uphold the first instance judge's decision on s 426, it reached the correct outcome under the 1933 Act (assuming the Australian judgment falls within s 4(2)(c) of the 1933 Act).

As mentioned above, if the Australian judgment falls within s 4(2)(c) of the 1933 Act, the common law represented by *Rubin* would have a substantive role in confirming the jurisdiction of the Australian court. Granted that *Rubin* was accepted to be binding, the Australian judgment must be registrable under the 1933 Act and the registration cannot be set aside. The Court of Appeal must be correct to conclude thus:

'If the liquidator had obtained the registration of the New South Wales order under the 1933 Act, it would be open to the syndicate to apply to have that registration set aside, under section 4. The only ground that would be relevant is section 4(1)(a)(ii), namely that the courts of New South Wales had no jurisdiction in the circumstances of the case. That, however, is concluded against the syndicate at the level of this court by the effect of *Rubin*…' (at [77]).

Hence the Court of Appeal also noted the following:

'It is not immediately easy to see what advantage the syndicate would gain if the 1933 Act applied to the New South Wales order, since the liquidator could immediately apply for the registration of the order, and then enforce it in England' (at [12]).

CONCLUSION

The common law regime on the recognition and enforcement of foreign insolvency judgments calls for intellectual improvement. *Rubin* made a quantum leap in practice, but its intellectual underpinning is very much open to question. The rules of precedent are such that *Rubin* need not be binding on the Court of Appeal because there are now conflicting Court of Appeal decisions and *Rubin* may be fairly characterised as *per incuriam*. But one sees only an unsophisticated acceptance of *Rubin* in the present case.

The Court of Appeal correctly held that the 1933 Act applies to Australian insolvency judgments.

Contrary to the Court of Appeal's view, it is suggested that the Australian judgment in the present case should be a judgment *in personam* within s 4(2)(a) of the 1933 Act, in which case neither s 426 nor *Rubin* is relevant to its enforceability in England.

Assuming the Court of Appeal was correct that the Australian judgment falls within s 4(2)(c) of the 1933 Act, it must be correct that the Australian judgment could not be enforced independently under *Rubin* because of s 6 of the 1933 Act.

However, while the Court of Appeal correctly held that s 426 could entail assistance by way of enforcement of a foreign judgment, it erroneously permitted such assistance in respect of the Australian judgment. The distinction between on the one hand 'proceedings for the recovery of a sum payable under a foreign judgment' forbidden by s 6 and on the other an application to the English court for assistance by way of enforcement of a foreign judgment under s 426 is as unintelligible as it is statutorily unsound.

Finally, if *Rubin* and the scope of s 4(2)(c) of the 1933 Act stand unchallenged, the actual outcome of the Court of Appeal decision must stand unchallengeable. ■