Case No: A2/2011/0901

Neutral Citation Number: [2011] EWCA Civ 971
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
MR JUSTICE LEWISON
[2011] EWHC 677 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th August 2011

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE LLOYD
and
LORD JUSTICE MCFARLANE

- -

IN THE MATTER OF NEW CAP REINSURANCE CORPORATION LIMITED (IN LIQUIDATION)

- -

Between:

(1) NEW CAP REINSURANCE CORPORATION LTD (IN LIQUIDATION) **(2) JOHN RAYMOND GIBBONS**	**Claimants** **Respondents**
- and -	
(1) A E GRANT AND OTHERS AS MEMBERS OF LLOYD'S SYNDICATE 991 FOR THE 1997 YEAR OF ACCOUNT **(2) A E GRANT AND OTHERS AS MEMBERS OF LLOYD'S SYNDICATE 991 FOR THE 1998 YEAR OF ACCOUNT**	**Defendants** **Appellants**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- -

Robin Knowles CBE Q.C. and Ms Blair Leahy (instructed by **Edwards Angell Palmer & Dodge LLP**) for the **Appellants**
Gabriel Moss Q.C. and Barry Isaacs Q.C. (instructed by **Mayer Brown International LLP**) for the **Respondents**

Hearing date: 18th July 2011

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Judgment

Lord Justice Lloyd:

Introduction

1. This appeal is about whether Mr Gibbons, liquidator of New Cap Reinsurance Corporation Ltd (New Cap), can enforce in England an order which provides, among other things, for the payment of sums of money by the Defendants to New Cap, which he obtained in the courts of New South Wales. There are three possible bases for doing so. Lewison J rejected one but held that he could and should allow the liquidator's request under one of the others, and that alternatively, he could and would have done so under the third. His judgment is at [2011] EWHC 677 (Ch). He gave permission to appeal to the Defendants.

2. New Cap is an Australian reinsurance company. The Defendants are the members of a Lloyd's syndicate, in respect of each of two successive years of account. The syndicate placed reinsurance with New Cap. New Cap paid sums to the syndicate by way of commutation of its liabilities. Soon afterwards New Cap went into liquidation. The liquidator brought proceedings in New South Wales to set aside and recover the payments made to the syndicate as being a preference, on the basis that New Cap had been insolvent when they were made. The syndicate did not accept service of the proceedings, they had not submitted to the jurisdiction of the New South Wales court by agreement, and they did not take part in the proceedings, although they made points which seemed to them relevant in correspondence with the liquidator's solicitors, and they had taken part in the liquidation by, for example, submitting proofs of debt. The court allowed the proceedings to continue against the syndicate on the basis of an order for substituted service. It first decided the issue of insolvency, which was relevant to claims against other parties as well as to those against the syndicate. Then, having held that New Cap was insolvent at the relevant time, it decided the issue of preference, not by default but on evidence adduced by the liquidator. Having decided that point against the syndicate, Mr Justice Barrett made the order which is at the centre of this appeal.

3. By his order dated 11 September 2009 (which I will call the New South Wales order), the court declared that the two payments were voidable transactions under the relevant legislation. It then ordered the relevant syndicate members to pay two sums to New Cap, with interest. It provided for interest after judgment on each such sum. It ordered the defendants to pay the plaintiffs' costs. It also ordered the sending to the English court of a letter of request seeking the assistance of the English court.

4. The letter of request was sent accordingly, dated 20 October 2009. It sets out relevant aspects of the facts and the history of the litigation. It recorded that the court had been shown that, in order to discharge the liquidator's obligations under the relevant Australian legislation, and in particular to get in the assets for the benefit of creditors, it was just and convenient that the letter of request should issue. By the letter the court requested the English court to exercise its jurisdiction under the Insolvency Act 1986, section 426, to act in aid of and assist the New South Wales court. It asked for that 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. Alternatively it asked that the liquidator be allowed to bring proceedings in the English court to set aside the payments as preferences, those proceedings to be

determined according to Australian law. Alternatively the English court was asked to give such other relief as it might consider just.

5. The Claimants, that is to say Mr Gibbons as liquidator and New Cap itself, then issued proceedings in the Companies Court seeking the relief indicated in the letter of request, originally pursuant to section 426 alone, and then by amendment alternatively under common law. The case came before Lewison J on 14 and 15 March 2011, and he gave judgment on the afternoon of 15 March.

6. A recent decision of this court featured in the argument before him and before us, namely *Rubin v Eurofinance SA* [2010] EWCA Civ 895, [2011] 2 WLR 121 (*Rubin*). Like Lewison J, we are bound by that decision. It is inconsistent with some of the arguments on which the syndicate wish to rely. It is, however, subject to an appeal to the Supreme Court of the United Kingdom, and is due for hearing there, we were told, next spring. There are material differences between this case and that, but Mr Knowles Q.C. for the syndicate recognised that the decision of the judge and of this court might be affected by that binding authority. With that in mind, he wishes to have the chance of bringing this case to their Lordships, if permission be granted, and to have it heard at the same time as the appeal in *Rubin*. That influenced Lewison J in granting permission to appeal. It has also led to an earlier listing of the appeal than might otherwise have been arranged.

The three possible routes to enforcement

7. Foreign judgments could (and in some cases still can) be enforced at common law, by the bringing of an action on the judgment.

8. However, the position under the common law jurisdiction and procedure has been superseded, in relation to some foreign countries, by the Foreign Judgments (Reciprocal Enforcement) Act 1933. The Act has been applied to Australia by an order which I will discuss later. The Act establishes a procedure for the registration of a foreign judgment, for judgments so registered to be enforceable in the same way as judgments of English courts, and for the judgment debtor to be able to apply to set aside the registration.

9. As mentioned already, however, the provision to which the Claimants had recourse was section 426 of the Insolvency Act 1986. That does not deal in terms with enforcement in the UK of orders of courts outside the UK. It provides for assistance to be afforded by UK courts exercising insolvency jurisdiction to courts elsewhere in the UK or in other relevant countries, of which Australia is one.

10. Lewison J decided that he could and should make the orders sought under section 426. He held that the 1933 Act did not apply to orders made in insolvency proceedings, so that it would not have been open to the liquidator to register the New South Wales order under that Act. He also held that the common law jurisdiction would enable him to make the same order as he would make under section 426. He therefore made orders for payment as requested by the New South Wales court.

11. For the syndicate, Mr Knowles argued that the judge was wrong about the 1933 Act, that he was also wrong about section 426, and that the common law jurisdiction should also not allow the making of the order for payment which the judge made. His

clients' position is not that they are immune from proceedings by the liquidator or by New Cap, but that such proceedings should be brought in England where, under section 426, they could be tried according to Australian law.

12. 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. However Mr Knowles went on to submit that if the order were registered, the registration should be set aside, though he accepted that whether an application to set it aside succeeded would be affected by the status of the *Rubin* decision.

13. By a Respondent's Notice the Claimants contend that, if the 1933 Act does apply, the order, if registered, would not be liable to be set aside. On their behalf Mr Moss Q.C. argued that, if we were to decide that the 1933 Act does apply to orders made in insolvency proceedings, we ought not to postpone a decision as to registrability and, if registrable, whether registration could be set aside.

14. Having considered the written and oral submissions addressed to us by Counsel, I am persuaded that this is not a case in which it is appropriate simply to wave the case on towards their Lordships in Parliament Square, on the basis that it all depends on the fate of *Rubin*. I will attempt to grapple with all the various arguments on each of the three possible ways of enforcing a foreign judgment providing for the payment of a sum of money given in insolvency proceedings. Each of the three aspects is interrelated with one or more of the others, so I will discuss them all before coming to a conclusion on any.

The 1933 Act

15. Section 1 of the 1933 Act allows for Orders in Council to be made by which Part I of the Act is declared to extend to a foreign country, by which specified courts of that country are to be recognised courts for the purposes of Part I of the Act, and the judgments of those courts, or judgments of a specified class, are to be judgments to which Part I of the Act applies. Such an Order may be made if substantial reciprocity will be assured as regards the enforcement in that country of similar judgments given in similar courts in the UK. An Order was made in 1994 (the 1994 Order) as regards Australia which recognises the relevant New South Wales court. The issue on the 1994 Order is whether the class of judgment to which it applies does or does not include orders in insolvency proceedings.

16. Section 1(2) of the Act sets out conditions which a judgment of a recognised court must satisfy, such that, if it does, it is a judgment to which Part I of the Act applies. Among other things (so far as relevant) a sum of money, not being for taxes, fines or penalties, must be payable under the judgment. "Judgment" is defined for the purposes of the Act in section 11(1). It means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party.

17. Subject to the question whether the New South Wales order is within the category of judgments specified in the 1994 Order, the New South Wales order is within that

definition and satisfies the requirements to be a judgment to which Part I of the Act applies. It was made in civil proceedings and a sum of money is payable under it.

18. Section 2 of the Act provides for a judgment creditor to be able to apply to the High Court, within a specified time, to have the judgment registered, subject to provisions of no relevance to the issues on this appeal. If it is so registered, and subject to the provision about setting the registration aside, it is enforceable as if the original judgment had been a judgment made in the registering court, entered on the date of registration. If only part of the judgment is properly registrable, the judgment may be registered in respect of that part but not the rest: subsection (5).

19. Setting aside registration is dealt with by section 4. The points that matter for the purposes of this appeal are these. There are mandatory grounds and there is also a discretionary ground, though the latter is not relevant for present purposes. The mandatory grounds follow the grounds on which enforcement would have been refused at common law. Only the second is relevant to our case, but it is useful to see the full range. They can be summarised as follows:

    i) The judgment is not one to which Part I of the Act applies, or it was registered in contravention of the Act.

    ii) The courts of the country of the original court had no jurisdiction in the circumstances of the case.

    iii) The judgment debtor, being the defendant in the proceedings in the original court, did not receive notice of the proceedings in sufficient time to enable him to defend the proceedings and did not appear, even if process was duly served on him under the law of the country of the original court.

    iv) The judgment was obtained by fraud.

    v) The enforcement of the judgment would be contrary to public policy of the country of the registering court.

    vi) The rights under the judgment are not vested in the person by whom the application for registration was made.

20. 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.

21. 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."

22. 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 the jurisdiction of the New South Wales court. At that point the *Rubin* decision would become relevant.

23. Section 6 of the 1933 Act is as follows:

> "No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom."

24. The only other provision of the Act which I need to mention falls outside Part I. Section 8 is described in Dicey, Morris & Collins, The Conflict of Laws, 14th ed, at para 14-183, as "a tortuously drafted provision". It provides that a judgment to which Part I of the Act applies, or would have applied if a sum of money had been payable under it, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court of the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action, and may be relied on by way of defence or counterclaim in any such proceedings. This is subject to qualifications in section 8(2), including that, if the judgment is not registered, it is not binding if it is shown that if it had been registered (whether it could have been or not) the registration would have been set aside on any one of certain grounds, including non-recognition of the jurisdiction of the original court. Mr Moss argued that, even if his clients would face difficulties in other respects, by virtue of this section the declaration made by the New South Wales order was binding on the syndicate, and the judge's order for payment could be justified as giving effect to the rights so declared.

25. From that survey of the provisions of Part I of the Act, therefore, and leaving aside for the moment the question on the 1994 Order, it appears that the 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. Under section 4(2)(c) that turns on whether the courts of New South Wales would be recognised by English law as having jurisdiction. Mr Moss submitted that this question would have to be resolved in favour of the Claimants, because of the decision in *Rubin*. I will discuss that decision in due course.

26. Mr Moss contended, however, that despite its apparent generality, Part I of the 1933 Act does not apply to orders in insolvency proceedings. He relied on three arguments: the first is based on the text of the Greer Report which led to the passing of the Act, the second relied on the terms of three draft reciprocal Conventions which were annexed to the report, and the third concerns section 122 of the Bankruptcy Act 1914, the predecessor of section 426 in the 1986 Act.

27. The Report of the Foreign Judgments (Reciprocal Enforcement) Committee, Cmnd. 4213 (1932) presided over by Greer LJ, had annexed to it a draft Bill which is substantially in the terms of the 1933 Act as enacted. The report starts with a review of the then present position. That is an interesting survey, from which it is clear that one of the mischiefs to be addressed by the arrangements made by the Act was that foreign judgments were enforceable in England more readily than English judgments were abroad. Reciprocal arrangements were contemplated (and had reached draft form as regards some foreign countries), for which it was desirable that a new statutory regime should replace the common law rules. Thus the "substantial grievance", of which the Committee spoke in its paragraph 2 summarising their recommendations and the reasons for them, was on the part of businessmen in England as to the difficulty of enforcing abroad the judgments of the English courts (see also paragraph 14 of the Report). At the end of that paragraph, the Committee said this:

> "So far as the position in England is concerned, the change suggested by the Committee is one of procedure rather than of substance, and involves no radical alterations of the present position."

28. In its paragraph 4, at the beginning of the survey of the present position, the Committee described the position as regards the enforcement in England of foreign judgments. It described first the position of ordinary judgments as between two parties – in personam actions. Then it dealt with foreign judgments in rem. After that it said:

> "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."

29. The Committee described the principles that it had adopted at paragraph 18 of the Report. The object in view was to secure the recognition and enforcement of English judgments in foreign countries. Reciprocity of treatment was essential, and the model of the Administration of Justice Act 1920 Part II (which provided a system as between countries in the British Empire) was to be followed, but it might be worthwhile accepting minor alterations for the sake of obtaining agreement with foreign countries for satisfactory bilateral conventions. At paragraph 21 it made the point that the class of judgments which was infinitely the most important from a practical point of view in this context was judgments in commercial actions. The principal object of the arrangements proposed was to secure greater recognition of British judgments of this class. It went on:

> "Minor limitations in the scope of the conventions, introduced on account of the requirements of the particular foreign country, need not be regarded as excluding substantial reciprocity, especially if these limitations do not concern judgments in commercial actions but other classes of judgments of such a kind that the need for their recognition or enforcement abroad is unlikely to arise frequently in practice,

> and if they are unlikely to affect judgments in commercial proceedings."

30. Mr Moss made two particular points on this material. The first was that the Committee did not regard itself as proposing any change of substance, but only of procedure. Secondly, the reference to bankruptcy proceedings in paragraph 4 showed, according to him, that the Committee was simply not dealing with proceedings of that kind.

31. The Report had annexed draft Conventions with Belgium, France and Germany. In the case of the Belgian and German Conventions, reference was made to judgments in "civil and commercial matters" as being mutually recognised. The circumstances in which the original court should be regarded as having jurisdiction were also set out. In each of these two cases the provisions in this respect were expressly declared not to apply to judgments in a number of kinds of proceedings, including judgments in bankruptcy proceedings or proceedings for the winding-up of companies or other bodies corporate. As regards judgments in the excluded classes of proceeding, the jurisdiction of the original court was to be recognised where it was in accordance with the rules of private international law observed by the court applied to. In the case of the French Convention, which, by article 2.2, were to apply only to judgments in civil and commercial matters, article 2.3 provided:

> "Nevertheless 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."

32. The notes to the draft Conventions in the Report comment on this exclusion from the scope of the Anglo-French Convention, as being a limitation which does not occur in the other conventions. The following is said about it:

> "It is seldom however 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)."

33. 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.

34. 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.

35. Mr Moss' other argument about the 1933 Act turns on section 122 of the Bankruptcy Act 1914. It is more sensible to address that later, together with its successor provision, section 426 of the Insolvency Act 1986.

The 1994 Order

36. The Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994 designated the New South Wales Supreme Court as a recognised court for the purposes of Part I of the 1933 Act. New South Wales had previously been covered by an order under the Administration of Justice Act 1920 Part II. We were not shown the position under that Act and order. There might, I suppose, be scope for an argument in favour of continuity, or at any rate that the later position would not have been intended to be narrower than the earlier, but that is speculation.

37. The 1994 Order gave effect to an agreement between the Governments of the UK and Australia providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters. Article 4(a) specified as judgments to which Part I of the 1933 Act applied:

> "any judgment, decree, rule, order or other final decree for the payment of money [except for taxes etc and maintenance] given by a recognised court in respect of a civil or commercial matter".

38. The Order was made, among other powers, under section 9(2) of the Civil Jurisdiction and Judgments Act 1982, which gave effect to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the Brussels Convention). Article 8(b) declared that article 3 of the bilateral agreement was a provision by which the UK assumed an obligation of a kind provided for in article 59 of the Brussels Convention. Article 59 allows a Contracting State to the Brussels Convention to derogate from its terms in certain limited respects as regards judgments given in other Contracting States against defendants resident in a third state.

39. Mr Moss' submission on the 1994 Order, which the judge accepted, is that "civil or commercial matters" does not include insolvency proceedings. He argued that the phrase had, at any rate by 1994, a settled and recognised meaning, as used in the Brussels Convention, and that this does not include insolvency.

40. It is true that the Brussels Convention does not apply to insolvency proceedings, as to which there is a separate European instrument, Regulation 1346/2000 on Insolvency Proceedings. Article 1 of the Brussels Convention is as follows:

> "This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
>
> The Convention shall not apply to
>
> 1. The status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession.
>
> 2. Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.
>
> 3. Social security.
>
> 4. Arbitration."

41. That shows plainly that insolvency proceedings are not within the scope of the Brussels Convention. It does not seem to me to show at all clearly that, but for the express exclusion, no proceedings within the context of insolvency proceedings would be within the ambit of civil or commercial matters.

42. The phrase "civil or commercial matters" was in use long before the Brussels Convention, as is shown, for example, by its use in the three draft Conventions annexed to the Greer Report. Lord Goff of Chieveley shows, in his speech in *Re State of Norway's Application (Nos. 1 and 2)* [1990] 1 AC 723 at 795G and 796G, that the phrase was used as early as the Foreign Tribunals Evidence Act 1856. Mr Moss pointed out that the issue in that case had nothing to do with insolvency proceedings or with the 1933 Act. It was about whether the Evidence (Proceedings in Other Jurisdictions) Act 1975, made to give effect to the Hague Convention of 1970, could be used in aid of proceedings in Norway in which liability to Norwegian tax was at stake. So it is not directly in point. Nevertheless, Lord Goff's speech in that case seems to me to provide a useful illumination of the issue, as so often in his observations on issues of international and comparative law. Among other useful comments, I note the following at page 797B, about the use of the phrase in the 1856 Act:

> "Here we find the first mention in an Act of Parliament, at least in this context, of the expression "civil or commercial matter." It is plain that here the word "matter" is used as referring to the relevant proceedings; because in section 1 the "matter" is required (consistently with the long title and section 2 of the Act) to be *pending* before the foreign court or tribunal. This reinforces the natural inference that, in section 1 of the Act, the expression "civil matter" is being given no restricted meaning, and would be understood in this country as referring to civil, as opposed to criminal, proceedings. It is true that this gives no weight to the words "or commercial" so far as the law of this country is concerned: but it is not surprising to find these words added in relation to a jurisdiction which will be invoked by

> courts or tribunals in foreign countries, many of which differentiate between civil and commercial matters."

43. After a most interesting review of the legislation and conventions relevant in that case, and of the writings of relevant commentators, Lord Goff said this at page 803D:

> "In these circumstances, it must in any event be very difficult to identify, by reference to civil law systems, any "internationally acceptable definition" of the expression "civil or commercial matters." Even if it were appropriate to define the expression in the Act of 1975 with reference to the text of the 1970 Hague Convention, no internationally acceptable definition could be derived from that source."

44. He also observed, at 803F, that he obtained no assistance from the Brussels Convention. For one thing, he said, it excludes certain specific matters "thus delineating the 'civil and commercial' matters to which it applies".

45. As a result of that review, he held that "the words "civil or commercial matters" in the Act of 1975 cannot be construed with reference to any internationally acceptable meaning": page 803H. Instead, he decided that jurisdiction under the 1975 Act could only be established if the relevant proceedings were proceedings in a civil or commercial matter under the laws of both the requesting state and the state whose court was addressed by the request. Illustrating how that test should be applied, he said this at page 805C:

> "Let me take, as an example, a request by a court in a Commonwealth country. The court of the requesting state would (like any court in this country) never think that it was required to delve into a distinction founded only upon the substance of the relevant proceedings. It would simply say to itself: in our country, unlike some other countries, we do not draw any distinction between civil and commercial matters, and so we can ignore that; these are plainly civil proceedings, because they are not criminal proceedings; therefore we can apply for assistance from the English court under section 1 of the Act of 1975. I have no doubt that the English court would find such an approach entirely acceptable; and if it is acceptable in relation to a court in a Commonwealth country, I cannot see why any different approach should be adopted in relation to a request for assistance from a Norwegian court."

46. On the same topic, but from a different standpoint, in 1989 a Special Commission on the Hague Convention noted that:

> "In the 'grey area' between private and public law, the historical evolution would suggest the possibility of a more liberal interpretation of these words [i.e. civil or commercial matters]. In particular, it was accepted that matters such as bankruptcy, insurance and employment might fall within the scope of this concept."

See F.A. Mann, (1990) 106 LQR 354, and Dicey, Morris & Collins, The Conflict of Laws, 14th ed, at paragraph 8-081.

47. For my part, even without the assistance of Lord Goff's observations, but all the more with his help, I conclude that "civil or commercial matters", in the context of the 1994 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 1994 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 1994 Order applied less widely than the 1933 Act permits, as regards the class of relevant judgments.

The insolvency legislation

48. 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.

49. 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". Moreover an order of the court seeking aid, with a request to another such court, was to enable the latter court, in regard to the matters directed by the order, to exercise such jurisdiction as either the requesting court or the requested court could exercise in similar matters within their respective jurisdictions.

50. 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. That is true but it is clear that the scope of section 122 is much wider, even if it were to include asking for assistance by way of enforcement.

51. For his part Mr Moss contended that, given the generality of section 122, there was no reason why it should not include assistance by way of, or with a view to, enforcement.

52. The 1914 Act applied only to bankruptcy, not to corporate insolvency. When insolvency law came to be reviewed by the Cork Committee in 1982, this was thought to be unsatisfactory. The Committee recommended that the provisions governing the position within the UK be extended to winding-up proceedings. Although it was

beyond their terms of reference they also expressed the hope that the scope of the provisions might also be extended to other countries with which reciprocal arrangements could be made.

53. The result was what is now section 426 of the Insolvency Act 1986. Under that section the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 has been made, under which Australia is one of the relevant countries.

54. Section 426(1), with sub-sections (2) and (3), replaces section 121 of the 1914 Act, dealing with enforcement within the UK of any order made by a court in the exercise of jurisdiction in relation to insolvency in any part of the UK. Section 426(4) and (5) replace section 122. They are as follows:

> "(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.
>
> (5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction."

55. A relevant country or territory is defined as including any country or territory designated for the purposes of the section by a statutory instrument. Insolvency law has a specific and extended meaning, but the details do not matter for our purposes. It includes setting aside a preference.

56. Apart from the extension of the provision 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. We were not shown or told of any case (before the present) in which either has been used directly and specifically to obtain a local order to enforce a foreign judgment for the payment of money made in insolvency proceedings. 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. The power has been used extensively in some of the recent complex international corporate insolvencies, including that of BCCI: see *Re Bank of Credit and Commerce International SA (No 9)* [1994] 2 BCLC 636. Other examples shown to us included: *Hughes v Hannover Rückversicherungs-Aktiengesellschaft* [1997] 1 BCLC 497 (a request from a Bermuda court for worldwide injunctive anti-suit relief); *England v Smith* [2000] BPIR 28 (part of the Bond Corporation insolvency – a request for the examination of an accountant associated with the company's former auditors); *Duke Group Ltd v Carver* [2001] BPIR 459 (also a request for the examination of witnesses) and *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 W.L.R. 852 (a request for the remission of the net funds held by provisional liquidators appointed in England to the liquidator in the main liquidation in Australia).

57. 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.

58. In principle, therefore, I agree with Mr Moss that section 426(4) could include a request for assistance by way of enforcement.

59. Mr Knowles' next argument was that, if he is right about the 1933 Act, section 6 precludes the use of any other method of enforcement, and is therefore incompatible with a reading of section 426(4) as extending to assistance by way of enforcement. For his part Mr Moss argues that, if so, this is a reason for holding that the 1933 Act does not apply to judgments in insolvency proceedings. It may be that, if the 1933 Act does apply to judgments made in insolvency proceedings, there is the less need for section 426 to extend to enforcement, though it 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 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. This, therefore, bring us back to the question which I left open earlier in this judgment, as to the scope of the 1933 Act.

60. 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.

61. 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.

62. 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 is therefore convenient to move to a discussion of the common law position at this stage.

Enforcement of foreign judgments at common law

63. Before the 1933 Act was passed, and ignoring for the moment both section 122 of the Bankruptcy Act 1914 and the Administration of Justice Act 1920, it was possible for the judgment creditor under a foreign judgment to enforce it in England by bringing 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. This is still open to a creditor in a case which is not covered by the 1933 Act, the Civil Jurisdiction and Judgments Act 1982 or the European Judgments Regulation. As I have said, the recommendation of the Greer Committee, and the purpose of the 1933 Act, was to displace this procedure where reciprocal arrangements could be made with a foreign country which would be given effect under the 1933 Act. We were not shown any case of a foreign order for the payment of money made in insolvency proceedings being sought to be enforced at common law in this way. The comments of the Greer Committee suggest that no great need was perceived for such enforcement at that time. If the 1933 Act applies to the New South Wales order, it cannot be enforced at common law, because of section 6.

64. However the common law is able not only to recognise and enforce a foreign judgment for the payment of money, in this way. It can also recognise and provide assistance to foreign insolvency proceedings: see the decision of the Privy Council in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508. This is where *Rubin* becomes relevant.

Rubin v Eurofinance SA

65. Neither the 1933 Act nor section 426 was relevant to *Rubin*. The judgment in question was issued by a New York court, to which neither of these statutory provisions has been extended. The claimants were appointed by the New York 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. The judge accepted that both the proceedings and the claimants' representative position should be recognised. However, he refused recognition or 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.

66. The Court of Appeal allowed the claimants' appeal, and dismissed that of the defendants against the recognition of the foreign proceedings and the claimants. Having reviewed relevant authority and commentary, Ward LJ (with whom Wilson LJ and Henderson J agreed) said this at paragraphs 61 and 62:

> "61. Having regard to all of the above matters and having given long consideration to everything urged upon us by Mr Staff, I am driven to conclude that:
>
> > (1) The ordinary rules for enforcing, or more precisely not enforcing, foreign judgments *in personam* do not apply to bankruptcy proceedings.
> >
> > (2) Bankruptcy proceedings include the mechanisms provided by sections 238 and 239 of the Insolvency Act 1986, and the equivalent provisions in the United States which allow for the office holder/legal representative to bring actions against third parties for the collective benefit of all creditors. These mechanisms are integral to and are central to the collective nature of bankruptcy and are not merely incidental procedural matters.
> >
> > (3) I am reinforced in my view that the orders with which we are concerned are part of the bankruptcy proceedings because in *In re HIH Insurance* Lord Hoffmann himself said in paragraph [19]:
> >
> > > "Furthermore, the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme."
> >
> > (4) Albeit that they have the indicia of judgments *in personam*, the judgments of the New York court made in the Adversary Proceedings, are nonetheless judgments in and for the purposes of the collective enforcement regime of the bankruptcy proceedings and as such are governed by the *sui generis* private international law rules relating to bankruptcy and are not subject to the ordinary private international law rules preventing enforcement of judgments because the defendants were not subject to the jurisdiction of the foreign court. This is a desirable development of the

> common law founded on the principles of modified universalism. It does not require the court to enforce anything that it could not do, *mutatis mutandis,* in a domestic context.
>
> (5) Whether viewed from an analysis of the United States Code and/or the Insolvency Act or as part of the matter of common law, the Adversary Proceedings must be recognised as a foreign main proceeding. Having been duly authorised in the foreign proceedings, the appellants must be recognised as foreign representatives. I would dismiss the cross-appeal accordingly.

62. There remains the question of enforcement of the judgments against the respondents. I accept the general principle of private international law that bankruptcy, whether personal or corporate, should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets. That is the law stated in *Cambridge Gas* and *HIH Insurance* and I would follow it. Add to that the further principle that recognition carries with it the active assistance of the court which should include assistance by doing whatever this Court could have done in the case of domestic insolvency. As Lord Hoffmann said in *Cambridge Gas* at [22]:

> "The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

In my judgment that assistance extends to enforcing against the respondents the orders made by the New York court. Applying the common law, I would therefore allow the appeal. "

67. Thus the Court of Appeal held that, as regards orders in insolvency proceedings, at any rate those of a kind which can only be made in such proceedings (as distinct, for example, from an ordinary claim that could have been advanced by the insolvent entity, e.g. for repayment of a loan), the jurisdiction of the foreign court is not to be determined on the principles applied to in personam claims and judgments, but on the basis that the jurisdiction of the court conducting, or supervising, the unitary insolvency proceeding in the court of the bankrupt's domicile should receive recognition world-wide, and at any rate in the English courts. It also held that, if so recognised, the foreign insolvency proceedings should be assisted by, for example, the enforcement of a judgment for the payment of money made in the course of the foreign insolvency proceedings.

68. In the present case Lewison J said that he could and would use section 426, but that the effect of *Rubin* seemed to him to be that the common law power to assist was also available in parallel with the statutory power. Of course, in *Rubin* itself section 426 was not available, so I am not sure that it could be taken as a binding decision that the common law power can be exercised in a case to which section 426 does apply. What the judge did not have to consider, of course, was what is the effect if the 1933 Act applies as well.

69. *Rubin* is, at any rate, a decision as to the basis on which the jurisdiction of a foreign court should be recognised where the order of that court is made in insolvency proceedings and is of a kind which is specific to such proceedings, of which an order based on setting aside a preference is a paradigm example.

Jurisdictions: discussion

70. Having reviewed the various jurisdictions to which reference was made, and the considerations relevant to each, it is time to see how they interact, and to work out which of them applies to the present case and which does not.

71. As I have indicated, the 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. I do not accept Mr Moss' arguments based on the Greer report or the draft Conventions annexed to it. It seems to me that both the Report and the draft Conventions point towards, rather than away from, the Act applying in such a case. Nor do I accept Mr Moss' argument that the terms of the Act show that the judgments to which it applies are what one might call ordinary claims for debt or damages, rather than orders based on insolvency jurisdiction, such as setting aside a preference. I find the terms of the Act to be entirely neutral as to the basis on which the judgment requiring the payment of a sum of money was made.

72. However, I would also 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. If the 1933 Act does apply to such an order then, in a case in which the foreign jurisdiction is recognised for the purposes of both statutes, it may not be necessary for the office-holder to use section 426 for enforcement purposes. But there might be cases in which it would be appropriate, for example if other relief is also to be sought. Moreover, if 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.

73. Mr Knowles submitted that the section should not be read as applying to enforcement because it is at the stage of enforcement that issues of jurisdiction need to be addressed most rigorously. I agree with him to this extent, that if the section is to be used to help the office-holder enforce a foreign judgment, then any relevant issue of jurisdiction must be taken into account in relation to the statutory discretion. In a case in which the 1933 Act also applies, that would be achieved by ensuring that the criteria relevant under that Act are satisfied.

74. 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. I have mentioned some of the relevant considerations at paragraphs [60] to [62] above. 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, nor do I find it surprising that the Greer Committee did not mention section 122.

75. In relation to the application of the 1933 Act, I therefore respectfully disagree with Lewison J, as I also do on the scope of the 1994 Order, on which we have the benefit of Lord Goff's observations about "civil and commercial matters", which the judge did not. Applying what Lord Goff said, especially in the passage quoted at paragraph [45] above, to the 1994 Order and to the bilateral agreement between two common law jurisdictions which is at issue here, it seems to me that it should be understood as extending to all of what a common law jurisdiction would regard as civil proceedings, and therefore as including insolvency proceedings. The particular phrase was used in order to be able to invoke the derogation from the Brussels Convention permissible by article 59 of that Convention, not in order to apply the 1933 Act to a special and artificially narrow category of judgments, rather than to all judgments to which it was capable of being applied under the Act.

76. Thus, I conclude that, in principle, both the 1933 Act and section 426 apply in the present case. 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, but that is not what he is seeking to do by these proceedings.

Could a registration under the 1933 Act be set aside?

77. 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*, subject to the pending appeal in that case. No more needs to be said about that.

The exercise of the discretion under section 426

78. The judge based his decision primarily on section 426. Having held that the power was available, and should be exercised in favour of the liquidator and of assisting him as the New South Wales court had requested, unless it would be improper to do so, he said this at paragraphs 34 and 35:

> "34. In the present case, the respondents had ample opportunity to participate in the Australian proceedings. They chose not to do so formally but tried to secure the best of both

> worlds by arguing their case in correspondence which was then placed before the Australian court. The Australian court considered the liquidator's application in painstaking detail. The respondents have also participated out of court in the insolvency by voting on various matters and by submitting proofs of debts.
>
> 35. Mr. Knowles says that his clients are willing to be sued in England and have a good defence on the merits; but the seat of the insolvency is Australia and I do not accept that Lloyd's syndicates are hampered in conducting proceedings in Australia. Moreover, even if Mr. Knowles is right about the 1933 Act, his clients are still bound by the declaration with the result that these defences could not be run. Like Ward LJ in *Rubin*, I have little sympathy for the respondents' position. They took their chance and the law has moved against them."

79. Mr Knowles submitted that the judge had given no weight, or far too little, to the fact that the syndicate did not submit to the jurisdiction of the New South Wales court, and was not otherwise subject to that jurisdiction, and that the liquidator could have sued the syndicate in England under section 426, in proceedings which could have been decided in accordance with Australian law. Part of Mr Moss' response to that was that the syndicate's participation in the insolvency process in New South Wales, including by submitting proofs of debt and attending creditors' meetings, amounted to a submission to the jurisdiction of the court under whose supervision that insolvency was conducted. He showed us *Ex parte Robertson, In re Morton* (1875) 22 Eq 733, a decision of Sir James Bacon, Chief Judge in Bankruptcy, on appeal from the Newcastle-on-Tyne county court. The insolvency proceedings in that court related to merchants carrying on business in Newcastle, who had had dealings with a supplier of potatoes based in Scotland, who had no residence or place of business in England. He was owed money by the debtors, but had received money from them, in part payment, at about the time of the petition. He submitted a proof of debt for the balance, and was paid a dividend on the proved debt. He was then sued to recover the sum originally paid to him, as a preference, to which he objected on the grounds that there was no jurisdiction to proceed against him in England. Sir James Bacon held that he had submitted to the jurisdiction by having "come in under the liquidation", because he had put in his proof and received a dividend.

80. As a matter of decision, that shows that the English court regarded itself as having jurisdiction over the foreign defendant in such circumstances. We do not know what attitude the Scottish court took, or would have taken (before the enactment of section 121 of the 1914 Act), to the enforcement in its jurisdiction of the English judgment. The New South Wales court regarded itself as having jurisdiction over the syndicate, because of its finding that the causes of action arose in New South Wales so that service of the originating process outside of New South Wales (including by substituted service), was authorised by the relevant Court rules. It does not follow from that position that the English court should accept that position.

81. Moreover, Lewison J did not decide the present case on the basis that the syndicate had submitted to the jurisdiction of the New South Wales court, although he did refer to the syndicate having participated in the liquidation. It seems to me that, on the

basis on which he did proceed, it is impossible to regard his reasoning as erroneous in any way. The case stands differently in one respect before us, on the reasoning that I have set out above, because it 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 (if I am right) 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.

82. Accordingly, I express no view as to the relevance of *Ex parte Robertson, In re Morton* but I would reject Mr Knowles' contention that Lewison J was at fault in the exercise of the discretion under section 426. Nor do I regard it as making a difference in that respect that, unlike him, I have come to the conclusion that the 1933 Act does apply to the judgment.

Conclusion

83. To summarise, therefore, I find the position to be as follows.

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 1994 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 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.

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.

84. 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.

85. For the reasons summarised above, I would dismiss the syndicate's appeal, albeit deciding in favour of the liquidator partly on different grounds from those of the judge.

86. Mr Knowles submitted that, whatever view we formed on the 1933 Act, we should leave the position in that respect to be resolved in proceedings which might follow if and when the liquidator applied to register the judgment under that Act. It seems to me that this would not be a sensible approach. I make no assumption as to whether this case might be thought fit for an appeal to the Supreme Court of the United Kingdom, and if so whether it should be accelerated to be heard together with *Rubin;* all the more so, I make no assumption as to the outcome of the appeal in *Rubin* or of any appeal in the present case. But it seems to me that it would not be at all sensible to leave the position under the 1933 Act at large, to await possible future proceedings for registration, and for setting aside such registration. Subject to submissions from Counsel in the light of the reasoning and conclusions expressed in our judgments, and even though the liquidator has not in fact sought to register the New South Wales order, it seems to me that it would be sensible to reflect our conclusion in declarations that the order is a judgment to which Part I of the 1933 Act (as applied by the 1994 Order) applies, at any rate as regards paragraphs 2, 3 and 4 of the order, and is capable of registration accordingly, and that if it were registered such registration would not be liable to be set aside, or at any rate not under section 4(1)(a)(ii).

Lord Justice McFarlane

87. I agree.

Lord Justice Mummery

88. I also agree.