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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re: Chapter 11  
:  
THE CONSUMERS TRUST, Case No. 05 – 60155 (REG)  
:  
Debtor.  
:  
----- X

**SUPPLEMENTAL POST-CONFIRMATION STATUS REPORT**

TO: THE HONORABLE ROBERT E. GERBER,  
UNITED STATES BANKRUPTCY JUDGE:

The Consumers Trust, the above-captioned debtor and debtor-in-possession (the “Debtor”), hereby files this supplemental post-confirmation status report and respectfully represents as follows:

1. This status report supplements the Post-Confirmation Status Report filed on July 19, 2010 in order to advise this Court of the Debtor's recent success in connection with its appeal to the High Court of Justice Court of Appeal (Civil Division) in London, England (the “Court of Appeal”).

## Background

2. As this Court is aware, the Debtor and the Committee previously obtained default and summary judgment against, inter alia, Adrian Roman, Justin Roman, Nicholas Roman and Eurofinance, S.A. – each of whom reside in England (the “Judgment”). Thereafter, the Debtor’s U.K. counsel filed with the High Court of Justice, Chancery Division, Companies Court, in London (the “High Court”) a recognition application pursuant to the Great Britain’s Cross-Border Insolvency Regulations 2006 (the “CBIR”) in order to obtain the High Court’s assistance in enforcing the Judgment. Adrian Roman, Justin Roman and Nicholas Roman opposed the recognition application and enforcement of the Judgment.

3. On July 31, 2009, the High Court rendered its decision recognizing this bankruptcy case, including the adversary proceeding that gave rise to the Judgment (the “Adversary Proceeding”), as a foreign main proceeding under the CBIR, but ultimately determined that enforcement of the Judgment in the U.K. was not appropriate. In reaching its decision, the High Court found the principal of universalism in insolvency proceedings (i.e., ensuring a uniform and fair system for distributing the assets of an insolvent estate with assets in more than one jurisdiction among those who have a claim to them) was unrelated to how, or in what jurisdiction, a claim against third parties is established. The High Court determined that the Judgment went beyond simply enforcing rights between creditors, but was an *in personam* judgment against third parties who had not submitted themselves to the jurisdiction of the US Bankruptcy Court.

4. Thereafter, the Debtor appealed the High Court’s decision to the Court of Appeal regarding the High Court’s refusal to enforce the Judgment. Adrian Roman, Justin Roman and Nicholas Roman cross-appealed arguing that the adversary proceeding was not an insolvency

proceeding and should not have been recognized as a foreign main proceeding. Oral argument before a panel of three justices occurred on January 27 and 28, 2010. During oral argument, the Debtor elected to limit its appeal of the enforcement issue to those portions of the Judgment that were based on avoidance theories.

### **The Decision of the Court of Appeal**

5. On July 30, 2010, the Court of Appeal issued its decision affirming the High Court's recognition of the bankruptcy case including the Adversary Proceeding under the CBIR and agreeing to enforce the Judgment as it related to counts 3 and 5 of the complaint in the Adversary Proceeding (fraudulent transfer claims). In reaching its conclusion about enforcement of the Judgment, the Court of Appeal found that the principle of universalism applies and that the Judgment, insofar as it relates to avoidance actions which it recognized were a common feature of many insolvency regimes, was neither *in personam* nor *in rem*, but was a third category – a judgment in aid of an insolvency regime. Finding that the defendants admitted to having been served and having been given the opportunity to appear before the bankruptcy court and defend, and that they chose not to do so after taking legal counsel, there was no reason not to enforce the Judgment. A copy of the decision from the Court of Appeals is attached.

### **Next Steps**

6. While the Court of Appeal found in the Debtor's favor and denied leave to appeal to the Supreme Court (the final court of appeal in the UK), its judgment contains a stay to give the defendants the opportunity to file for a discretionary appeal to the Supreme Court. Assuming the Supreme Court refuses to hear an appeal, the Debtor and the Committee intend to seek enforcement of the Judgment against the defendants in England. If the Supreme Court agrees to hear the appeal, the stay of enforcement of the Judgment will remain in effect pending the

outcome. Status reports will be filed on or about January 15, April 15, July 15 and October 15 of each year until a final decree has been entered and more frequently where new developments warrant.

**Notice**

7. This report has been filed with this Court and will be posted on the website maintained by the Committee. Additionally, copies of this report will be served upon (i) the Committee; (ii) the Office of the United States Trustee; and (iii) all parties who have filed notices of appearance in this case.

Dated: New York, New York  
August 4, 2010

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Neutral Citation Number: [2010] EWCA Civ 895

Case No: A2/2009/1942

**IN THE HIGH COURT OF JUSTICE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION (COMPANIES COURT)**  
**MR NICHOLAS STRAUSS QC (SITTING AS A DEPUTY JUDGE OF THE**  
**CHANCERY DIVISION)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30th July 2010

**Before:**

**LORD JUSTICE WARD**  
**LORD JUSTICE WILSON**  
and  
**MR JUSTICE HENDERSON**

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**Between:**

(1) David Rubin  
(2) Henry Lan  
(Joint Receivers and Managers of The Consumers Trust) Appellants  
- and -  
(1) Eurofinance SA  
(2) Adrian Roman  
(3) Justin Roman  
(4) Nicholas Roman Respondents

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**Tom Smith** (instructed by Dundas & Wilson LLP) for the appellant  
**Marcus Staff** (instructed by Brown Rudnick LLP) for the respondent

Hearing dates: 27 and 28th January 2010  
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**Approved Judgment**

## **Lord Justice Ward:**

### *The issues*

1. As the issues have been refined in this Court, there are now essentially two questions for our determination:
  - (1) should foreign bankruptcy proceedings, here Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of New York, including the Adversary Proceedings, be recognised as a foreign main proceeding in accordance with the UNCITRAL Model Law on Cross-Border Insolvency (“the Model Law”) as set out in schedule 1 to the Cross-Border Insolvency Regulations 2006 (“the Regulations”) and the appointment therein of the appellants, Mr David Rubin and Mr Henry Lan, as foreign representatives within the meaning of Article 2(j) of the Model Law be similarly recognised; and
  - (2) should the judgment or parts of the judgment of the U.S. Bankruptcy court of 23 July 2008 against the respondents, Mr Adrian Roman, his sons, Justin and Nicholas Roman, and Eurofinance S.A., for payment of various sums of money in excess of \$8 million be enforced as a judgment of the English court in accordance with CPR Parts 70 and 73?
2. On 21st July 2009 Mr Nicholas Strauss Q.C., sitting as a Deputy Judge of the Chancery Division, answered the first question affirmatively but he dismissed the application for enforcement of the New York judgment. With permission given by the judge, the appellants appeal against the dismissal of their claim for enforcement of the New York judgment and the respondents cross-appeal against the orders for recognition of the main foreign proceedings and the foreign representatives there.

### *The facts*

3. Eurofinance S.A. created The Consumers Trust (“TCT”) under a deed of trust made on the 25th day of March 2002 whereby the settlor paid the Original Trustees £1 to be held on trust for the benefit of the beneficiaries. The beneficiaries were the consumers (members of the public or otherwise) who successfully participated in the sales promotion, (“Promotions”), owned and operated by the settlor. The Original Trustees were two solicitors practising in Harrow, Mr Richard Caplin and Mr Wesley Harrison, and two accountants practising in Barnett, Mr Andrew Davis and Mr Dennis Bonley. Eurofinance is a British Virgin Islands company which was originally wholly owned by Mr Adrian Roman but is now owned by a Seychelles registered company. The trustees were to hold the capital and income of the trust for the beneficiaries and subject thereto for the settlor. The law of England and Wales was to be the proper law of the trust and the trust fund and all rights in respect of the trust were subject to the jurisdiction of and were to be construed according to the laws of England and Wales.
4. The scheme – it is tempting to call it the scam – operated in this way. TCT was established to carry on a sales promotion scheme in the United States and Canada. The promotion, also known as the Cashable Voucher Programme, was entered into with participating merchants in the United States and Canada who, when they sold products or services to their customers, offered those customers a cashable voucher

promising a rebate of up to 100% of the purchase price for the product or service to be paid in three years time provided that certain conditions were followed. In order to succeed the customer had to overcome inertia and then, as the Deputy Judge explained:

“... navigate a complex and obscure process involving both memory and comprehension tests. The assessment of whether they had succeeded was carried out in a pedantic manner. The low success rate is evidenced by the fact that, even though the trustees only received some 6% of the face value of the vouchers, they nevertheless had nearly £10 million in bank accounts in the United States and Canada by the time the scheme folded in 2005.”

The anticipated success of the Promotions for the respondents - and the judgment against them is an indication of the magnitude of profit - was the known very high probability that very few of the customers would ever succeed in this memory test.

5. The Promotions were financed by the merchants paying to TCT 15% of the face amount of each cashable voucher issued by that merchant during that week. TCT retained only 40% of these payments, which, given that the merchants were transferring 15% of the face value of the voucher, meant that only 6% of the face value would be retained by TCT for payment of the cashable vouchers if ever they were redeemed. That money was retained in bank accounts in America. The balance of the 15% paid to TCT was distributed to other parties in the scheme. About half of it was paid to Eurofinance and so effectively to Adrian Roman. The remainder was paid to others involved in the operation of the programme, such as solicitors, accountants and American lawyers. From 2002 Nicholas and Justin also began to receive about 2%.
6. The reason, or at least one of the main reasons, why TCT's business came to a halt was that proceedings were brought by the Attorney-General for the state of Missouri under Missouri's consumer protection legislation, which resulted in a settlement involving a payment by the trustees of US\$1,650,000 and \$200,000 in costs. The word spread. It soon became clear that further proceedings were likely in other states. Similar schemes had suffered similar fates. It was time to seek relief from the Bankruptcy Court and so Eurofinance decided to institute proceedings under Chapter 11 of the United States Bankruptcy Code.
7. The first step was to seek the appointment of the appellants, Mr David Rubin and Mr Henry Lan, as Receivers which application was granted by Lewison J. on 11 November 2005. Then on 5th December 2005, the appellants caused TCT to present a voluntary petition for relief in New York under Chapter 11 and TCT was placed into insolvency proceedings in New York as virtually all of the 60,000 creditors, mainly the customers who held unredeemed vouchers, were in the United States or Canada, as were the assets. Another reason for proceeding in New York was that a trust such as TCT is treated in the United States as a separate legal entity under the classification of “business trust” even though it has no separate legal personality for any other purpose and is not a legal person under English law.

8. On 3rd October 2006 various orders were made on behalf of the debtor against Mr Adrian Roman including an order for his examination but he did not comply with those orders and was held to be in contempt on 10th January 2007. In May or June 2007 the Receivers settled TCT's potential claims against the solicitor trustees for \$3.2 million.
9. A Joint Plan of Liquidation under Chapter 11 of the Bankruptcy Code was prepared and on 25th September 2007 Lewison J. ordered that the Receivers should be at liberty to seek approval of the plan from the United States Bankruptcy Court. Under the Plan of Liquidation the appellants were given the exclusive power to commence, prosecute and resolve all causes of action against potential defendants including the respondents. It was duly approved in New York on 24th October 2007, the Receivers being appointed as the Legal Representatives of the debtor (TCT) with authority to prosecute all causes of action against potential defendants.
10. On the same day the appellants were appointed Foreign Representatives of the debtor. Judge Gerber, the United States bankruptcy judge, made that appointment:

“specifically to (i) make application to the High Court of Justice, Chancery Division (the “High Court”) in London for recognition of this Chapter 11 case as a Foreign Main Proceeding under the CBIR [the Cross-Border Insolvency Regulations of 2006]; (ii) to seek aid, assistance and co-operation from the High Court in connection with the Chapter 11 case, and, in particular to seek the High Court’s assistance and co-operation in the prosecution of litigation which may be commenced in this court, including relief, regarding service of process, discovery, and *the enforcement of judgments of this court that may be obtained against persons and entities residing or owning property in Great Britain ...*” with the emphasis added by me.
11. On 3rd December 2007 proceedings (known as “the Adversary Proceedings”) were brought in the United States Bankruptcy Court against a number of parties including the respondents and ten claims were made for the recovery of (i) the overall indebtedness of TCT which had been set by the U.S. Court at \$160 million and (ii) monies paid to Eurofinance and others from the monies received by the Trustees from the merchants. The defendants to the Adversary Proceedings were the respondents to this appeal and other entities which had been involved with the Cashable Voucher Programme. It is not in dispute that the respondents were served personally. They took advice on questions of jurisdiction and specifically on the enforcement of any order made in New York and in the light of that advice the respondents deliberately took the decision not to submit to the jurisdiction of the New York court and not to defend the proceedings brought against them.
12. In the result, on 22nd July 2008 Default and Summary Judgment was entered against the respondents and orders were made in the appellants’ favour on the ten counts of the Complaint. Although the appellants sought to enforce the whole of that order in the court below, including the judgment for \$160 million, they have rowed back considerably before us and in this appeal the appellants seek to enforce only orders 3, 4 and 5 which gave judgment in these terms:

“3. Plaintiffs have judgment on counts IV (Unjust Enrichment and Restitution), VI (Fraudulent Conveyance Under State Fraudulent Conveyance Laws), VII (Fraudulent Transfers under 11 U.S.C. § 548(a)) and X (Liability of Transferees of Avoided Transfers under 11 U.S.C. § 550) of the Complaint, against the defendants in the following amounts:

Eurofinance S.A. and Adrian Roman, jointly and severally  
\$8,377,504.76

Nicholas Roman \$432,338.86

Justin Roman \$238,514.31

CP Promotions, Limited \$1,315,542.27

4. Plaintiffs have judgment on count IV of the Complaint (Unjust Enrichment and Restitution) against defendants Eurofinance S.A. and Adrian Roman, jointly and severally, in the additional amount of \$1,850,000.

5. Plaintiffs have judgment on counts VIII (Fraudulent Transfers Under 11 U.S.C. § 548(b)) and X (Liability of Transferees of Avoided Transfers Under 11 U.S.C. § 550) of the Complaint against defendants Adrian Roman, Nicholas Roman, Eurofinance S.A. and CP Promotions, Limited, in the following amounts:

Eurofinance S.A. and Adrian Roman, jointly and severally  
\$1,120,461.98

Nicholas Roman \$21,119.16

CP Promotions, Limited \$164,231.10.”

During the course of the appeal Mr Tom Smith, for the appellants, effectively abandoned his claim to enforce paragraph 4 of that order, these fines and costs having already been paid by the trustees.

13. In his judgment, Judge Gerber concluded that the court had:

“1. Subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334. This proceeding asserts causes of action arising under Title 11, U.S.C., and/or arising in or related to the above-caption case under Title 11, U.S.C. This proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b).

...

3. The exercise of personal jurisdiction over Defendants is consistent with the Constitution and the laws of the United

States. This Court has statutory “long-arm” personal jurisdiction over defendants under Bankruptcy Rule 7004(f).”

14. On 3rd November 2008 the appellants applied to the Chancery Division under the Cross-Border Insolvency Regulations 2006 (a) for an order recognising the proceedings in the US bankruptcy court for the Southern District of New York as “a foreign main proceeding” and (b) the enforcement against the respondents of the US Bankruptcy Court’s order of 22 July 2008 as a judgment of the English courts in accordance with CPR Part 70 and 73.

*The Model Law on Cross-Border Insolvency*

15. The United Nations Commission on International Trade Law adopted the UNCITRAL Model Law on Cross-Border insolvency on 30th May 1997. With certain modifications to adapt it for application in Great Britain, it was given the force of law in Great Britain by virtue of Regulation 2 of the Cross-Border Insolvency Regulations 2006. As the Guide to the Enactment of the Model Law makes plain, the purpose and origin of the Model Law is to offer help:

“(b) determining when a foreign insolvency proceeding should be accorded ‘recognition’ and what the consequences of recognition may be ...

(d) permitting courts in the enacting State to co-operate more effectively with foreign courts and foreign representatives involved in an insolvency matter.”

16. Article 1 sets out the scope of the application of the Model Law and provides:

“This Law applies where –

(a) assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign proceeding; ...”

17. Article 2 contains the following relevant definitions:

“(f) “foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;

(g) “foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests; ...

(i) “foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;

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

18. Article 9 stipulates that;

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

19. An application for recognition of a foreign proceeding must be brought under Article 15 which permits a foreign representative to apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed. Article 15 sets out how the application is to be made and specifies in paragraphs 2 and 3 certain documents that must be filed in support of it. The decision to recognise a foreign proceeding is governed by Article 17 which provides:

"1. Subject to article 6, [which allows the court to refuse to take an action if it would be manifestly contrary to public policy] a foreign proceeding shall be recognised if –

(a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2;

(b) the foreign representative applying for recognition is a person or body within the meaning of sub-paragraph (j) of article 2;

(c) the application meets the requirements of paragraphs 2 and 3 of article 15; and

(d) the application has been submitted to the court referred to in Article 4.

2. The foreign proceeding shall be recognised –

(a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; ..."

20. Article 21 makes provision for the relief that may be granted upon recognition of a foreign proceeding as follows:

"1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including –

(e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or other person nominated by the court; ...

(g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, ...”

21. Article 23 provides:

“1. Subject to paragraphs 6 and 9 of this Article, upon recognition of a foreign proceeding, the foreign representative has standing to make an application to the court for an order under or in connection with sections 238, 239 ... of the Insolvency Act 1986.

...

9. Nothing in paragraph 1 of this Article shall apply in respect of any preference given, floating charge created, alienation, assignment or relevant contributions (within the meaning of section 342A(5) of the Insolvency Act 1986 made or other transactions entered into before the date on which this law comes into force.”

22. In the chapter dealing with cooperation with foreign courts and foreign representatives, Article 25 provides:

“1. In matters referred to in paragraph 1 of Article 1, the court may cooperate to the maximum extent possible with foreign courts of foreign representatives, either directly or through a British insolvency officeholder.”

Article 27 provides for the forms of cooperation:

“Co-operation referred to in articles 25 and 26 may be implemented by any appropriate means, including -

(a) Appointment of a person or body to act at the direction of the court;

(b) Communication of information by any means considered appropriate by the court;

(c) Co-ordination of the administration and supervision of the debtor's assets and affairs;

(d) Approval or implementation by courts of agreements concerning the co-ordination of proceedings;

(e) Co-ordination of concurrent proceedings regarding the same debtor.”

23. The law came into force on 4th April 2006 but the preponderance of the activity covered by the US judgment precedes that date. It is for that reason that the foreign representative took action in New York rather than to apply for relief here.

*The judgment*

24. Dealing first with the recognition application, the Deputy Judge was satisfied that the conditions for recognition set out in Article 17 had been fulfilled: the US bankruptcy proceedings were clearly a “foreign proceeding”, the applicants were duly appointed “foreign representatives” and the necessary documents required by Article 15(2) and (3) had been supplied. Since it was common ground that the centre of main interests was New York, the proceedings should be recognised as foreign main proceedings. He rejected the submission that TCT was not an “insolvent corporate entity” because it was not a separate legal entity as a matter of English law. There is no cross-appeal against that finding. Mr Marcus Staff for the respondents submitted that the applicants might be foreign representatives for the original Chapter 11 proceedings but not for the adversary proceedings. The judge rejected that argument holding that although the adversary proceedings had a separate case number, they were part of the insolvency proceedings which began on 24th October 2007. He held:

“44. ... In my view this is a straightforward example of receivers being authorised, as part of the insolvency proceedings, to pursue claims for the benefit of the insolvent estate with a view to distributing the proceeds amongst the creditors.”

25. It was then submitted that the adversary proceedings were not foreign proceedings within the meaning of Article 2(i). The judge held that bringing adversary proceedings against debtors of the bankrupt was clearly part of collecting the bankrupt’s assets with a view to distributing them to creditors and that the adversary proceedings were, moreover, always part of the Plan which the Bankruptcy Court approved. The adversary proceedings were an integral part of the Chapter 11 insolvency proceedings. As he said at [47],

“... the short answer is that the adversary proceedings are part and parcel of the Chapter 11 insolvency proceedings.”

He granted recognition accordingly.

26. On the application for enforcement of the judgments Mr Francis Tregear Q.C. who then appeared for the appellants relied strongly on the decision of the Privy Council in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26, [2007] 1 A.C. 508. This case is central to the arguments presented to us and it may be useful to set the background now. A Mr Giovanni Mahler with some others decided to invest in a shipping business. A complex structure was set up. Vela Energy Holdings Ltd (“Vela”) was a Bahamian company which (through an intermediate wholly owned Bahamian subsidiary) owned all the issued share capital in Cambridge Gas, a Cayman Island company. Cambridge Gas owned, directly or indirectly, at least 70% of the issued share capital of Navigator Holdings (“Navigator”). Through its subsidiary management company Navigator owned and managed a group of four Isle of Man

companies each of which owned a gas transport vessel flying a Liberian flag. The enterprise was heavily leveraged on the New York bond market. The venture was a failure. The investors ran out of credit. The business was heavily insolvent. The investors petitioned for relief in New York under Chapter 11 of the US Bankruptcy Code with a view to negotiating a plan of reorganisation with the creditors. Vela put forward a plan under which the assets of the business, that is to say the ships, would be sold, nominally by auction but in fact to Mr Mahler and his associates, the “Vela interests”. This plan did not appeal to the bond holders who put forward their own plan under which the assets of Navigator would be vested in the creditors and the equity interests of the previous investors extinguished. The Bankruptcy Court rejected the Vela plan and approved the creditors’. The mechanism which the plan used to vest the assets in the creditors was to vest the shares in Navigator in the creditors’ committee which would enable the creditors to control the shipping companies and implement the plan. The New York court was of course aware that such a provision could not automatically have effect under the law of the Isle of Man and the order confirming the plan therefore recorded the intention of the court to send a letter of request to the High Court of Justice of the Isle of Man asking for assistance in giving effect to the plan and the confirmation order.

27. The proceedings in the High Court of the Isle of Man commenced with the Committee of Creditors petitioning for an order vesting the shares in their representatives. They were met by a cross-petition by Cambridge Gas resisting the application on the basis that Cambridge Gas, as a separate legal entity registered in the Cayman Islands, had never submitted to the jurisdiction of the New York court. An order of that court could therefore not affect its rights of property in shares in the Isle of Man. As the Privy Council observed, this submission bore little relation to economic reality. Cambridge Gas’ claim that it had not submitted to the jurisdiction was “technical in the highest degree”.
28. In the High Court Cambridge Gas’ objection succeeded, the deemster finding that notwithstanding Vela’s participation, Cambridge Gas had not submitted to the New York jurisdiction with the result that the New York court had no personal jurisdiction over Cambridge Gas. He held that the plan constituted a judgment *in rem* purporting to change the title to property outside the jurisdiction, contrary to established principles of private international law. The Court of Appeal, reversing the deemster, held that upon its true construction, the New York order was not a judgment *in rem* but a judgment *in personam* in proceedings in which Navigator, by its voluntary petition, had submitted to the jurisdiction of the New York court. At common law the Manx court should assist the foreign court dealing with the bankruptcy of a company over which that court had jurisdiction. In the Privy Council it was held that the bankruptcy proceedings were neither judgments *in rem* nor judgments *in personam* and the rules of private international law concerning the recognition and enforcement of judgments did not apply. It was an order to provide a mechanism for collective execution against the property of the debtor by creditors whose rights were admitted or established and as such was to be given effect to by the Manx court.
29. In the court below Mr Nicholas Strauss Q.C. held at [58] that what the New York Bankruptcy Court had done was “to establish the debtor’s rights as against third parties in what is undoubtedly a judgment in personam.” In his opinion:

“Cambridge establishes the opposite proposition to that advanced by the applicants. At common law, an English court could not accede to a request by a foreign insolvency court to enforce a judgment in personam contrary to the rules of English private international law.” ”

30. His conclusion was:

“62. ... the principle of universalism is directed at ensuring so far as possible a uniform and fair system for distributing the assets of an insolvent estate with assets in more than one jurisdiction as between those who have a claim to them. It has nothing whatsoever to do with how or in what jurisdiction a possible asset of the insolvent estate consisting of a claim against third parties is to be established.”

31. Turning to the provisions of the Model Law he held that there was no suggestion anywhere that it was intended to replace the rules of private international law in any enacting State. Article 21(e) would not assist the applicant. The judgment had to be, but was not, located in Great Britain. The court’s only discretion was to permit the foreign representative to realise the assets, including the judgment debt. All the court could do was authorise the foreign representative to bring an action on the judgment or to bring a fresh claim here. Permitting the foreign representative to enforce the judgment of a New York bankruptcy court directly in this country would not constitute “co-operation” within the meaning of Article 27. Even if he had a discretion he would decline to exercise it. For those reasons he dismissed the claim for enforcement.

### *Discussion*

32. As I indicated above, the Privy Council’s decision in *Cambridge Gas* has played a central part in the argument addressed to us. Both sides rely on it. It links the appeal and the cross-appeal. Let me explain how.

### *The issue on the appeal: can the judgment be enforced?*

33. There is a stark difference of approach. Mr Marcus Staff for the respondents takes his stand on rule 36 in the 14th ed. of Dicey Morris and Collins’ *The Conflict of Laws* in the chapter on foreign judgments, the jurisdiction of foreign courts at common law and jurisdiction *in personam*:

“Rule 36 – Subject to rules 37-39 [which have no application to this case], a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment *in personam* capable of enforcement or recognition in the following cases:

*First Case* – If the judgment debtor was, at the time the proceedings were initially instituted, present in the foreign country.

*Second Case* – If the judgment debtor was claimant, or counter-claimed, in the proceedings in the foreign court.

*Third Case* – If the judgment debtor being a defendant in the foreign case, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.

*Fourth Case* – If the judgment debtor being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.”

34. The rationale for that rule is evolving. At first enforcement was founded on the doctrine of comity. Then Parke B. explained in *Williams v Jones* (1845) 13 M.W. 628, 633:

“where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.”

35. That appears to be the modern position. Slade L.J. giving the judgment of the Court in *Adams v Cape Industries Plc* [1990] 1 Ch. 433 said at p. 513:

“Two points at least are clear. First, at common law in this country foreign judgments are enforced, if at all, not through considerations of comity but upon the basis of the principle explained thus by Parke B. in *Williams v Jones* ...

Secondly, however, in deciding whether the foreign court was one of competent jurisdiction, our courts will apply not the law of the foreign court itself but our own rules of private international law. As Lindley M.R. put it in *Pemberton v Hughes* [1899] 1 Ch. 781, 791:

“There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction in the sense explained above – i.e., over the subject matter or over the persons brought before them ... But the jurisdiction which alone is important in these matters is the competence of the court in an international sense – i.e., its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country.”

36. Slade L.J. extracted these further principles at p. 517/8 and 519:

“First, in determining the jurisdiction of the foreign court in such cases, our court is directing its mind to the competence or otherwise of the foreign court ‘to summon the defendant before it and to decide such matters as it has decided.’ see *Pemberton v Hughes* [1899] 1 Ch. 781, 790 per Lindley M.R. Secondly, in the absence of any form of submission to the foreign court, such competence depends on the physical presence of the defendant in the country concerned at the time of suit.

...

... we would, on the basis of the authorities referred to above, regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory. So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts.”

37. I note, but only *en passant*, that the Canadian Supreme Court has decided that international comity and the prevalence of international cross-border transactions and movement has called for a modernization of the private international law and that the test of a real and substantial connection should apply equally to the recognition and enforcement of foreign judgments: see *Beals v Saldanha* [2003] 3 S.C. R. 416.
38. The judgments in paragraphs 3 and 5 of the Default and Summary Judgment entered against the respondents by the New York Bankruptcy Court on 22nd July 2008 are final and conclusive judgments for definite sums of money and are on the face of the orders judgments *in personam*. It is common ground that the respondents were not resident in New York when the proceedings were instituted, nor did they submit to the jurisdiction of the New York court by voluntarily appearing in the proceedings. At first blush the respondents would seem to have an impregnable defence.
39. Not so, submits Mr Tom Smith for the appellants. Lord Hoffmann’s speech in *Cambridge Gas* read with his speech in *In Re: HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 W.L.R. 852 provides the escape. These cases establish, he submits, the proposition that rule 36 does not apply to cross border insolvency because, by virtue of the principles of universality and assistance, the English court must recognise and enforce the exercise of jurisdiction of a foreign court, not over the person himself, but over the foreign insolvency proceeding itself and all that forms a part of that proceeding. *Cambridge Gas* needs careful analysis to see whether it supports this proposition.

*The issue on the cross appeal: must the foreign proceedings be recognised?*

40. This depends on Article 17 of the Model Law. As required by Article 17.1(c) the application was submitted to the proper court referred to in Article 4, namely the Chancery Division of the High Court. The application was accompanied by the documents required by paragraphs 2 and 3 of Article 15. There is no suggestion that

the orders of the New York court are contrary to public policy. So, as provided for in Article 17:

“a foreign proceeding shall be recognized if: -

(a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2;

(b) the foreign representative applying for recognition is a person or body within the meaning of sub-paragraph (j) of article 2.”

41. Concentrating for the moment on whether the foreign proceeding falls within the definition in sub-paragraph (i) of article 2 it is not in dispute that the approval given to the Plan of Liquidation under Chapter 11 of the United States Bankruptcy Code is a collective judicial proceeding because it is concerned with collecting and distributing the debtor’s assets. It was obviously made pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by the foreign court for the purpose of reorganisation or liquidation. The nub of the dispute between the appellants and the respondents is whether the Adversary Proceedings are, as the judge held, part and parcel of the main insolvency proceeding and so within the definition in sub-paragraph (i) or whether they are a separate proceeding, not being one which forms part of a collective judicial proceeding concerned with collecting and distributing the debtor’s assets, but one which serves a wholly different purpose, namely to establish the debtor’s rights against third parties.
42. Mr Staff submits that the judge was correct in finding at [58] of his judgment that the New York Bankruptcy Court was simply establishing the debtor’s rights as against third parties in what was undoubtedly a judgment *in personam*. His error, submits Mr Staff, lay in his failure to appreciate the difference between the Adversary Proceedings and the insolvency proceeding. The dichotomy identified by Lord Hoffmann in *Cambridge Gas* is between a collective proceeding to enforce rights and a proceeding to establish rights. He relies on paragraph 15 of Lord Hoffmann’s speech:

“... bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them.”

Once again *Cambridge Gas* is at the forefront of the dispute.

### *Cambridge Gas*

43. It will be recalled that the New York court had approved the plan to vest Navigator’s shares in the representatives of the creditors’ committee and the New York court accordingly sent a letter of request to the High Court of Justice of the Isle of Man asking for assistance in giving effect to that plan and the confirmation order. Cambridge Gas intervened asking the court not to recognise or enforce the terms of the plan on the basis that it had never submitted to the jurisdiction of the New York court. The Manx courts differed whether the New York proceedings should be seen as a judgment *in rem* or a judgment *in personam*. I must now quote at length from

Lord Hoffmann's judgment and I will highlight the passages which have received prominence in the arguments addressed to us:

“12. Mr Howe's argument for Cambridge was straightforward. The New York order was either a judgment in rem or in personam. If it was in rem, then as everyone agrees, it could not affect the title to shares in the Isle of Man. On the other hand, if it was in personam, it was only binding upon persons over whom the New York court had jurisdiction. The fact that Navigator had submitted to the jurisdiction was irrelevant. The Court of Appeal, having found that the judgment was in personam, then proceeded to enforce it against the wrong persona. Cambridge was the relevant persona because the order purported to deprive Cambridge of its property. On the finding that Cambridge did not submit to the jurisdiction, there was no basis upon which the order of the New York court could bind it. Cambridge was a Cayman company whose sole business was to own shares in the Isle of Man. It had nothing whatever to do with New York.

13. *Mr Howe's submissions as to the rules of private international law concerning the recognition and enforcement of judgments in rem and in personam are of course correct. If the New York order and plan had to be classified as falling within one category or the other, the appeal would have to be allowed. But their Lordships consider that bankruptcy proceedings do not fall into either category.* Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.

14. *The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established.* That mechanism may vary in its details. ...

15. ... *The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them.* Of course, as Brightman LJ pointed out in *In Re Lines Bros Ltd* [1983] Ch 1, 20, it may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution. There are procedures by which these questions may be tried summarily within the bankruptcy

proceedings or directed to be determined by ordinary action. *But these again are incidental procedural matters and not central to the purpose of the proceedings.*

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

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

18. As Professor Fletcher points out (*Insolvency in Private International Law* (1st ed. (1999), p. 93) the common law on cross-border insolvency has for some time been "in a state of arrested development" ...

...

20. Corporate insolvency is different in that, even in the case of moveables, there is no question of recognising a vesting of the company's assets in some other person. They remain the assets of the company. But the underlying principle of universality is of equal application and this is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the Transvaal case of *In Re African Farms Ltd* [1906] TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, "*recognition which carries with it the active assistance of the court*". *He went on to say that active assistance could include:*

*'A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to*

*such conditions as the courts may impose for the protection of local creditors, or in recognition of the requirements of our local laws.'*

21. Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan. As there is no suggestion of prejudice to any creditor in the Isle of Man or local law which might be infringed, there can be no discretionary reason for withholding such assistance.

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

...

24. In the present case it is clear that the New York creditors, by starting proceedings to wind up the Navigator companies and then proposing a scheme of arrangement under section 152 of the Companies Act 1931, could have achieved exactly the same result as the Chapter 11 plan. ...

25. The jurisdiction is extremely wide. All that is necessary is that the proposed scheme should be a "compromise or arrangement" and that it should be approved by the appropriate majority. Why, therefore, should the Manx court not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man? Mr Howe accepts that if the plan had provided that all the assets of Navigator, that is to say, the shares in the management company and the ship-owning companies, should be transferred to the representatives of the creditors, he could have had no objection. But he says that because the plan achieved the same economic effect by transferring the shares in Navigator, it was beyond the jurisdiction of the Manx court to give effect to it. The Navigator shares were not the same thing as the assets of Navigator. They were separate items of property belonging to a person who was not a party to the bankruptcy proceedings. The plan might just as well have attempted to confiscate the

assets of any other citizen who had nothing to do with the bankruptcy.

26. Their Lordships consider that this argument is based upon a misunderstanding of the nature of shares in a company. ... *So a share is the measure of the shareholder's interest in the company: a bundle of rights against the company and the other shareholders.* As against the outside world, that bundle of rights is an item of property, a chose in action. *But as between the shareholder and the company itself, the shareholder's rights may be varied or extinguished by the mechanisms provided by the articles of association or the Companies Act.* One of those mechanisms is the scheme of arrangement under section 152. *As a shareholder, Cambridge is bound by the transactions into which the company has entered, including a plan under Chapter 11 or a scheme under section 152.* It is the object of such a scheme to give effect to an arrangement which varies or extinguishes the rights of creditors and shareholders. Thus, in the case of an insolvent company, in which the shareholders have no interest of any value, the court may sanction a scheme which leaves them with nothing. ... The protection for the shareholders is that the court will not sanction a scheme, even if adopted by the statutory majority, if it appears unfair. And no doubt the discretion to refuse assistance in the implementation of an equivalent plan which has been confirmed in a foreign jurisdiction would be exercised on similar lines. But no such question arises in this case. Although it must be accepted that Cambridge did not technically submit to the jurisdiction in New York, it had no economic interest in the proceedings and ample opportunity to participate if it wished to do so. It would therefore not be unfair for the plan to be carried into effect. Their Lordships therefore consider that the Court of Appeal was right to order its implementation.”

44. In *HIH Insurance* winding up orders were made in New South Wales and a letter of request was issued to the High Court in London pursuant to section 426(4) of the Insolvency Act 1986 asking that the English provisional liquidators be directed to remit assets in England to the Australian liquidators for distribution. The judge and the Court of Appeal declined to make the direction on the ground that the scheme for *pari passu* distribution in the Australian liquidation was not substantially the same as under English law in that the Australian scheme gave preference to insurance creditors to the prejudice of other creditors. That decision was reversed by the House of Lords. Lord Hoffmann, with whom Lord Walker of Gestingthorpe agreed, said this:

“6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy

(whether personal or corporate) should be 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.

7. This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas* ... para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of "modified universalism": see also Professor Ian Fletcher, *Insolvency in Private International Law*, 2nd ed. (2005) pp. 15-17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.

...

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

The other members of their Lordships' House decided the case pursuant to section 426(4) of the Insolvency Act 1986. Nevertheless Lord Hoffmann's views carry great weight, as always.

### *The battle lines*

#### *First, what does Cambridge Gas decide?*

45. The Board itself has given an answer. In *Pattni v Ali* [2006] UKPC 51, [2007] 2 A.C. 85 Lord Mance gave the judgment of the Board which included Lord Bingham of Cornhill and Lord Carswell who had sat on *Cambridge Gas* and Lord Walker who was in *HIH Insurance*. Their Lordships said:

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

46. Mr Staff is more deeply analytical and submits that a close look at what the Board concluded, and how it did so, is essential to a proper understanding of this ground-breaking case. He submits that the case is authority for the proposition that where in foreign bankruptcy proceedings the court has made an order in furtherance of the “collective execution against the property of the debtor by the creditors” (see [14]), and where there is no other problem as to jurisdiction, it is an order in respect of which the English court has the jurisdiction at common law to provide judicial assistance to a person who has been “empowered under the foreign bankruptcy law to act on behalf of the insolvent company” (see [20]), and that such assistance includes whatever the English court could have done in the case of a domestic insolvency. He may well be right. Then he directs his attention to what *Cambridge Gas* order does not decide. The case is not authority for any principle or rule of private international law about personal jurisdiction nor are the rules for the enforcement of judgments affected by this decision: judgments *in personam* made in bankruptcy proceedings must still be treated as all other judgments *in personam* and enforced according to established rules. He relies on paragraphs [12] and [13] where counsel in the case was advancing the argument that if the judgment of the New York court there was *in personam*, it was only binding on persons over whom the New York court had jurisdiction. Lord Hoffmann said:

“[Counsel’s] submissions as to the rules of private international law concerning the recognition and enforcement of judgments in rem and in personam are of course correct.”

Mr Staff’s bull point is that because the orders with which we are concerned are orders binding on the respondents for the payment of various sums of money, they are classically judgments *in personam*. Therefore they cannot be enforced. This is a powerful argument. If it is correct, it is the end of the case. I am much troubled by it.

47. Mr Smith’s answer is to urge us to read the next sentence:

“*But* their Lordships consider that bankruptcy proceedings do not fall into either category.”

The critical decision I now have to take is to decide how far this reservation goes. Mr Staff does not dispute that a separate category in private international law exists for bankruptcy proceedings. The case turns now on what is meant by and what falls within “bankruptcy proceedings”: if a judgment *in personam* is made in and as part of bankruptcy proceedings as those proceedings are to be properly characterised, then does Rule 36 still apply or does the special character of the bankruptcy proceedings prevail?

*What are bankruptcy proceedings?*

48. Lord Hoffmann defines bankruptcy at [15]:

“The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them.”

Mr Staff argues that the Adversary Proceedings serve the purpose of establishing the rights of the debtor against third parties and have nothing to do with enforcing the rights of the creditors against the bankrupt by ensuring that all the debtor's assets are distributed to its creditors.

49. He says this is long established settled law. In *Halford v Gillow* (1842) 13 Sim 44, 50 the Vice-Chancellor, Sir L. Shadwell said:

“... the 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.”  
(The emphasis is his).

Of course that is correct so far as it goes. “Ordinary” claims by or against the bankrupt, which will inevitably affect the size of his estate, will be tried in the Queen's Bench or Chancery Division. But *Halford v Gillow* was not dealing with claims brought against third parties under the Miscellaneous Provisions of Part VI of the Insolvency Act 1986 providing for adjustments of prior transactions under section 238, where the company has entered into a transaction with any person at an undervalue, and section 239, where the company has given a preference to any person. These are not ordinary claims which may be brought by any (interested) party. They are special bankruptcy claims maintainable only at suit of the office-holder i.e., the administrator or liquidator. Mr Staff accepts the general equivalence of such claims with the relief which was granted in New York under section 544 of the U.S. Bankruptcy Code dealing with fraudulent conveyance and section 548 dealing with the receipt of less than the reasonable equivalent value.

50. Thus the issue narrows down to whether these avoidance provisions which can only be brought by the representative of the bankruptcy in the bankruptcy court are to be characterised as part of the bankruptcy proceedings, i.e., part of the collective proceeding to enforce rights and not to establish them. The appellants contend that the “mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established” (see [14]) necessarily includes the mechanism for enabling recovery of assets which have been dissipated or dealt with prior to insolvency in a manner prejudicial to the interests of creditors (or a particular class of creditors), because provisions of this nature are invariably features of any developed system of insolvency. The respondents contend that the purpose of the bankruptcy proceedings is to ensure that the debtor's assets are distributed to its creditors: the rights being enforced are those of the creditors against the bankrupt which exclude the enforcement of the bankrupt's rights against persons who are not creditors (which could result in a judgment *in rem* or *in personam*). The respondents' case relying on paragraph [15] of *Cambridge Gas* is that the Adversary Proceedings and the claims brought in them are “incidental procedural matters and not central to the purpose of the proceedings”.

51. In judging between these rival contentions, I have found it most useful to look to the guidance from UNCITRAL, the learned commentators on the law and the comparable position in the European Union.

*Signposts to the right answer*

52. In Section F (Avoidance Proceedings) of the *Legislative Guide on Insolvency Law (2005)* UNCITRAL:

“148. Insolvency proceedings (both liquidation and reorganization) may commence long after a debtor first becomes aware that such an outcome cannot be avoided. In that intervening period, there may be significant opportunities for the debtor to attempt to hide assets from creditors, incur artificial liabilities, make donations or gifts to relatives and friends or pay certain creditors to the exclusion of others. There may also be opportunities for creditors to initiate strategic action to place themselves in an advantageous position. The result of such activities, in terms of the eventual insolvency proceedings, generally disadvantages ordinary unsecured creditors who were not party to such actions and do not have the protection of a security interest.

...

150. Many insolvency laws include provisions that apply retroactively from a particular date (such as the date of application for, or commencement of, insolvency proceedings) for a specified period of time (often referred to as the “suspect” period) and are designed to overturn those past transactions to which the insolvent debtor was a party or which involved the debtor’s assets where they have certain effects. These effects include reducing the net worth of the debtor (e.g. by gifting of its assets or transferring or selling assets for less than their fair commercial value); or upsetting the principle of equal sharing between creditors of the same rank (e.g. by payment of a debt to a particular unsecured creditor or granting a security interest to a creditor who is otherwise unsecured when other unsecured creditors remain unpaid and unsecured). Many non-insolvency laws also address these types of transaction as being detrimental to creditors outside insolvency. In some cases, the insolvency representative will be able to use those non-insolvency laws in addition to the provisions of the insolvency law.

151. It is a generally accepted principle of insolvency law that *collective action* is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment. Provisions dealing with avoidance powers are designed to support these *collective*

*goals*, ensuring that creditors receive a fair allocation of an insolvent debtor’s assets consistent with established priorities and preserving the integrity of the insolvency estate.” (I have added the emphasis).

53. The *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency* is an informed commentary. It draws attention to the preamble to the Model Law:

“The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

...

(d) Protection and maximization of the value of the debtor’s assets.”

The *Guide* discusses the “main features of the Model Law” and sets the background, with the emphases added by me:

“13. The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws have by and large not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, *impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets*

...

14. Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude. The modern, interconnected world makes such fraud easier to conceive and carry out. The cross-border co-operation mechanisms established by the Model Law are designed to confront such international fraud.

...

19. When the European Union Convention on Insolvency Proceedings enters into effect, it will establish a cross-border insolvency regime within the European Union for cases where the debtor has the centre of its main interests in a State member of the Union. The Convention does not deal with cross-border insolvency matters extending beyond a State member of the European Union into a non-member State. Thus, the Model Law offers to States members of the European Union *a*

*complementary regime* of considerable practical value that addresses the many cases of cross-border cooperation not covered by the Convention.

20. With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State. This is manifested in several ways:

...

(b) The Model Law presents to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law;

...

21. The flexibility to adapt the Model Law to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation and for the benefits to the enacting State in adopting modern, generally acceptable international practices in insolvency matters.”

54. In *The Law of Insolvency* 4th ed. Professor Fletcher writes:

“**26-001** In this examination of the effects of the winding-up on the rights of creditors and other interested parties, it is as well to recall that *the fundamental principle upon which winding up is based is the collective nature of the proceedings*. The objective underlying the relevant legal provisions is to ensure that an orderly regime is imposed upon all interested parties, so that none of them individually may enhance his position by exploiting some fortuitous circumstance which may yield an unfair advantage ...

**26-002** The implications of the principle of collectivity can be very far reaching. Not only are the creditors’ individual rights and remedies “frozen” from the moment of formal commencement of the liquidation procedure, but also there is the possibility that transactions which took place a considerable time before that moment can be impeached on account of what has subsequently transpired. There is a consistent jurisprudential thread running through the law of corporate insolvency, maintaining that the interests of creditors are elevated to a position of paramount importance from the time when the company becomes insolvent, even though at that stage no formal proceedings have been initiated. *It is therefore seen as an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors must be*

*amenable to adjustment or avoidance.*” (The emphasis is mine.)

55. Professor Roy Goode in his Principles of Corporate Insolvency Law writes:

“**11-01** However, the *principle of equity* among creditors that underlies the *pari passu* rule of insolvency law will in certain conditions *require* the adjustment of concluded transactions which but for the winding up of the company would have remained binding on the company, and the return to the company of payments made or property transferred under the transactions or the reversal of their effect.”

“**11-03** The conditions of avoidance vary according to the particular ground of avoidance involved but are for the most part dictated by a common policy, namely to protect the general body of creditors against a diminution of the assets available to them by a transaction which confers an unfair or improper advantage on the other party. All but two of the grounds of avoidance known to insolvency law involve the unjust enrichment of a particular party at the expense of other creditors, whether they are preferential creditors or ordinary unsecured creditors. Once this crucial point is grasped much of the legislative structure falls into place. The unjust enrichment may affect other creditors in one of two ways. It may reduce the company’s net asset value, as where it involves a transfer of the company’s property to another party (whether or not a creditor) at a wholly inadequate price or a purchase of property by the company at an inflated price; or it may, without disturbing the company’s net asset position, involve payment or transfer to a particular creditor in satisfaction or reduction of his debt, thereby giving him a preference over other creditors in disregard of the priority position of preferential creditors or, if there remains enough to pay them in full, then in breach of the *pari passu* principle of distribution among ordinary unsecured creditors. *The avoidance provisions may thus be seen as necessary to ensure equality of distribution, at least among classes of creditors.*” (Again the emphasis is added by me.)

#### *The view from Europe*

56. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters transposed into EU law the 1968 Brussels Convention which it supplanted. By Article 2(d) it expressly excludes

“bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons ...”

Insolvency proceedings are separately dealt with by Council Regulation (EC) No. 1346/2000 of 29 May 2000 which applies to “collective insolvency proceedings

which entail the partial or total divestment of a debtor and the appointment of a liquidator”, see Article 1(1). Those proceedings are listed in Annex A and in the United Kingdom they include winding up by or subject to the supervision of the court, creditors’ voluntary winding up, administration, voluntary arrangements under insolvency legislation and bankruptcy or sequestration. It is interesting to see how this dichotomy between civil judgments and bankruptcy is being resolved. In *Gourdain v Nadler* (Case 133/78) [1979] E.C.R. 733 the European Court of Justice said at p. 744:

“As far as concerns bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, according to the various laws of the contracting parties relating to debtors who have declared themselves unable to meet their liabilities, insolvency or the collapse of the debtor’s creditworthiness, which involve the intervention of the courts culminating in the compulsory ‘liquidation des biens’ in the interest of the general body of creditors of the person, firm or company, or at least in supervision by the courts, it is necessary, if decisions relating to bankruptcy and winding up are to be excluded from the scope of the Convention, that they must derive directly from the bankruptcy or winding up and be closely connected with the proceedings for the ‘liquidation des biens’ or the ‘règlement judiciaire’. In order to answer the question referred to the court by the national court it is therefore necessary to ascertain whether the legal foundation of an application such as that provided for in Article 99 of the French code is based on the law relating to bankruptcy and winding up as interpreted for the purposes of the Convention.”

57. In *UBS A.G. v Omni Holdings A.G.(in liquidation)* [2000] 1 W.L.R. 916, 922, Rimer J., as he then was, said:

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

which an insolvency regime for the company is a prerequisite, would be within the paragraph (2) exception. Such claims derive directly from the insolvency.”

58. In *Re Ultra Motorhomes International Ltd, Oakley v Ultra Vehicle Design Ltd (in liq.)* [2005] EWHC 872 (Ch) [2006] BCC 57, 68 Lloyd L.J. (sitting as a Judge of the Chancery Division) said, but one should note that it is obiter dicta:

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

59. These may be straws in the wind but the wind blowing from my Lords, Lloyd and Rimer L.J.J. blows strongly.

*What about the Model Law itself?*

60. As I have set out above (see [24] and [25]) Mr Nicholas Strauss Q.C. was quite clear and emphatic that the Adversary Proceedings were part and parcel of the Chapter 11 Insolvency Proceedings. In my judgment he was right for the reasons he gave. Mr Staff contends that the analysis is flawed because the judge wrongly concentrated upon and construed the New York law whereas the Cross-Border Insolvency Regulations 2006, being part of our domestic law, require “foreign proceeding” to be construed as a matter of English law. Mr Staff is only half right. The Regulations do indeed provide that the UNCITRAL Model Law shall have the force of law in Great Britain but the Model Law thus enacted includes Article 8 on Interpretation:

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

The striking similarities conceded by the respondents between sections 238 and 239 of the Insolvency Act 1986 and sections 547 and 548 of the American Code, and thus between these aspects of our law and the equivalent parts of the American law, justify a harmonised interpretation. That satisfies me that the judge fell into no error in reaching the conclusion that the Adversary Proceedings are part and parcel of the insolvency proceedings.

*Conclusions*

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 worldwide 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.

63. Having reached that conclusion, it is unnecessary to decide whether to cooperate with the New York Court by enforcing its judgment under the 2006 Regulations. What troubles me is that the specific forms of cooperation provided by Article 27 do not include enforcement. Indeed there is no mention anywhere of enforcement yet the Guidance clearly had it in mind. On the other hand cooperation “to the maximum extent possible” should surely include enforcement, especially since enforcement is available under the common law. I would prefer to express no concluded view about the point since it is unnecessary to my decision.
64. I see no unfairness to the respondents in upholding the judgments of the New York court. The respondents were fully aware of the claims being brought against them. After taking advice they chose not to participate in the New York proceedings. They took their chance that it would be difficult to bring proceedings here, possibly because TCT as a trust is not amenable to winding up; possibly because the greater part of the transactions impugned in New York could not have been attacked here because the repugnant activity took place before 4th April 2006 when the Regulations came into effect. Whatever their reasons, they made an informed judgment. I have no sympathy for them when it transpires that they were wrong.
65. In the result I would allow the appeal and dismiss the cross-appeal.

**Lord Justice Wilson:**

66. I agree.

**Mr Justice Henderson:**

67. I also agree.