Cambridge Gas Transport Corporation v. The Official Committee of Unsecured Creditors (of Navigator Holdings Plc and others)
Privy Council Appeal No 46 of 2005
The High Court of Justice of the Isle of Man
16 May 2006

[2006]UKPC 26

2006 WL 1546603

Present at the hearing:— Lord Bingham of Cornhill Lord Hoffmann Lord Hutton Lord Rodger of Earlsferry Lord Carswell
Delivered the 16th May 2006

Analysis

Judgment of the Lords of the Judicial Committee of the Privy Council Delivered the 16th May 2006

Judgment
[Delivered by Lord Hoffmann]

In 1997 four European businessmen decided to invest in a shipping business. The lead appears to have been taken by a Mr Giovanni Mahler, a Swiss resident who had about 10% of the equity. The investors borrowed some US $300m on the New York bond market and ordered five gas transport vessels with which they commenced trading at the beginning of 2001. Unfortunately the venture was a failure. Freight rates were lower than expected and the ships never earned enough to cover even the interest on the loans. At the end of 2003 the investors ran out of credit. The business was heavily insolvent. They petitioned for relief in New York under Chapter 11 of the US Bankruptcy Code , which allows insolvent companies, under supervision of the court and cover of a moratorium, to negotiate a plan of reorganisation with their creditors. In March 2004 the Federal Bankruptcy Court for the Southern District of New York confirmed a plan approved by virtually all the outside creditors and ordered that it be carried into effect. Essentially, the plan was for the assets to be taken over by the creditors.

This is a simple enough story, though unhappy, and the only complications arise out of the corporate structure adopted by the investors. The business was, as is frequently the case, held through offshore companies incorporated in various jurisdictions. The ships, registered in Liberia, were owned and managed by a group of Isle of Man companies, each ship owned by a separate subsidiary of a management company and all the shares in the management company held by a holding company, Navigator Holdings plc. It will be convenient to refer to the group as "Navigator" and the shares in the holding company as the shares in Navigator.

Navigator was in turn held through a web of companies incorporated in other off-shore jurisdictions, of which it is for present purposes necessary to mention only two: Cambridge Gas Transport Corporation ("Cambridge"), a Cayman company which owns, directly or indirectly, at least 70% of the issued share capital of Navigator, and Vela Energy Holdings Ltd ("Vela"), a Bahamian company which (through an intermediate wholly owned Bahamian subsidiary) owns all the issued share capital in Cambridge. Mr Mahler is a director of Vela, Cambridge, the Navigator companies and various other associated off-shore companies.

The use of a scheme of arrangement agreed by a statutory majority of creditors to replace what would otherwise be the liquidation of an insolvent company has existed in England (in somewhat rudimentary form) since the Joint Stock Companies Arrangement Act 1870 . The 1870 Act is reproduced in the Isle of Man as section 152 of the Companies Act 1931 and remains the only form of arrangement between a company and its creditors available in that jurisdiction. Chapter 11 is considerably more sophisticated and will ordinarily allow the management of the insolvent company to remain in control (as "debtor in possession") until a plan of reorganisation has been approved by the court. The debtor has a priority right to propose a plan; if this is rejected or the priority period expires, other parties in interest may put forward a different plan. In this case, the debtor 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, who were referred to as "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

 © 2025 Thomson Reuters.

the previous investors extinguished. The judge rejected the Vela plan and approved the creditors' plan.

The mechanism which the plan used to vest the assets in the creditors was to vest the shares in Navigator in their representatives. That would enable the creditors to control the shipping companies and implement the plan. So clause 22 provided:

> "Immediately upon entry of this confirmation order, title to the old common stock [of Navigator] shall automatically vest in the interim shareholders [the creditors' committee] without any further act by any person or under any applicable law, regulation, order or rule. The Interim shareholders shall then, in their capacities as shareholders of [Navigator], take all necessary steps under the laws of the Isle of Man or otherwise to 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. 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". Such a letter was duly sent.

The Committee of Creditors then petitioned the High Court for an order vesting the shares in their representative. They were met by a cross-petition by Cambridge, the wholly owned Cayman subsidiary of Vela in which, it will be remembered, most of the shares in Navigator were vested, asking the court not to recognise or enforce the terms of the plan. The basis of the cross-application was that Cambridge, 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.

This submission bore little relation to economic reality. The New York proceedings had been conducted on the basis that the contest was between rival plans put forward by the shareholders and the creditors. Vela, the parent company of Cambridge, participated in the Chapter 11 proceedings and arranged the finance which was to have been the cornerstone of the shareholders' plan. It is therefore not surprising that the New York court did not trouble to ask whether the voluntary petition presented by Navigator had the formal consent of its own stockholder company when that company was the creature of the real parties in interest who were actively participating in the proceedings. For Cambridge, which was no doubt administered by lawyers in Cayman on the instructions of Mr Mahler, the claim that it had not submitted to the jurisdiction was technical in the highest degree. Mr Mahler was, it appears, a director of Cambridge as well as Vela and the Navigator companies, although he himself was not entirely sure about the full extent of his directorships. Given the intricate corporate structure of the Vela interests, this is quite understandable. He was, as he explained in a deposition "not a person who goes into details."

The other remarkable feature about the position which Cambridge has taken and persisted in before the High Court, the Court of Appeal and now the Privy Council, is that the shares in Navigator which it complains have been confiscated by the exorbitant extra-territorial reach of the US Bankruptcy Court are completely and utterly worthless. Navigator's petition disclosed debts of some US $390m and assets of $197m. The Board is therefore left to wonder about the purpose of this litigation. Mr Howe, in his brave and able submissions for Cambridge, said that drawing attention to these matters was a jury point. The shares might be worthless now, perhaps in the foreseeable future, but some day freight rates might rise sufficiently to float the business and make the shares valuable property. An alterative possibility is that the purpose is to wreck or delay implementation of the confirmed plan in an attempt to drive the creditors back to the negotiating table and secure better terms.

Before the High Court, Cambridge's objection succeeded. The Deemster found as a fact that although Vela had participated in the bankruptcy proceedings in New York, its subsidiary Cambridge had not submitted to the New York jurisdiction. This finding is somewhat surprising but was upheld by the Court of Appeal and the creditors' committee, faced with concurrent findings of fact, have not

 © 2025 Thomson Reuters.

appealed against it. So the New York court had no personal jurisdiction over Cambridge. The Deemster then held that clause 22 of the plan, as confirmed by the court's order, was a judgment in rem purporting to change the title to property outside the jurisdiction. According to general principles of private international law, judgments in rem can affect only property within the court's territorial jurisdiction. The judgment could therefore not be recognised.

The Court of Appeal, reversing the Deemster, held that upon its true construction, the New York order was not a judgment in rem. It was a judgment in personam in proceedings in which Navigator, by its voluntary petition, had submitted to jurisdiction of the New York court. At common law, the Manx court has a broad discretionary jurisdiction to assist a foreign court dealing with the bankruptcy of a company over which that court had jurisdiction. It could and should assist by vesting the Navigator shares in the creditors' committee to enable the implementation of the plan.

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.

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.

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. For example, in personal bankruptcy in England, the assets of the bankrupt are vested in a trustee for realisation and distribution to creditors. So the mechanism operates by divesting the bankrupt of his property. In corporate insolvency, on the other hand, the insolvent company continues to be owner of its property but holds it in trust for the creditors in accordance with the provisions of the Insolvency Act 1986 : see Ayerst v C & K (Construction) Ltd [1976] AC 167 . In the case of personal bankruptcy, the bankrupt may afterwards be discharged from liability for his pre-bankruptcy debts. In the case of corporate insolvency, there is no provision for discharge. The company remains liable but when all its assets have been distributed, there is nothing more against which the liability can be enforced: see Wight v Eckhardt Marine GmbH [2004] 1 AC 147 , 155–156. At that point, the company is usually dissolved.

But these are matters of detail. 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.

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. For example, in Solomons v Ross (1764) 1 H Bl 131n a firm in Amsterdam was declared bankrupt and assignees were appointed. An English creditor brought garnishee proceedings in London to attach £1200 owing to the Dutch firm but Bathurst J, sitting for the Lord Chancellor, decreed that the bankruptcy had vested all the firm's moveable assets, including debts owed by English debtors, in the Dutch assignees. The English creditor had to surrender the fruits of the garnishee proceedings and prove in the Dutch bankruptcy.

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.

As Professor Fletcher points out (Insolvency in Private International Law (1999 OUP) at p. 93) the common law on cross-border insolvency has for some time been “in a state of arrested development”, partly no doubt because in England a good deal of the ground has been occupied by statutory provisions such as section 426 of the Insolvency Act 1986 , the European Council Regulation on Insolvency Proceedings (1346/2000/EC) and the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030), giving effect to the UNCITRAL Model Law. In the present case, however, we are concerned solely with the common law.

The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out. For example, the rule that English moveables vest automatically in a foreign trustee or assignee has so far been limited to cases in which he was appointed by the court of the country in which the bankrupt was domiciled (in the English sense of that term), as in Solomons v Ross , or in which he submitted to the jurisdiction: Re Davidson's Settlement Trusts (1873) LR 15 Eq 383 . It may be that the criteria for recognition should be wider, but that question does not arise in this case. Submission to the jurisdiction is enough. In the case of immovable property belonging to a foreign bankrupt, there is no automatic vesting but the English court has a discretion to assist the foreign trustee by enabling him to obtain title to or otherwise deal with the property.

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 Re African Farms 1906 TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, “recognition 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.”

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.

 © 2025 Thomson Reuters.

What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply "the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction." 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.

Mr McQuater QC for the creditors placed some reliance upon the court's power, under section 101 of the Companies Act , to order rectification of the share register. But that power cannot provide an independent justification for transferring shares into the names of the representatives of the creditors. It is exercisable when "the name of any person is, without sufficient cause, entered in or omitted from the register". Thus the power is exercisable only if the company ought to have entered the representatives of the creditors in the register as shareholders. But for that purpose it is necessary to show that by the law of the Isle of Man the company was obliged to do so. And the source of such an obligation can be found only in an order of the court, pursuant to its common law power of assistance, which requires the company to make such an entry. The argument based on section 101 is therefore circular. The prior question is whether the court has power to declare that the Chapter 11 plan should be carried into effect.

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. The Manx statute provides:

> "(1) Where a compromise or arrangement is proposed between a company and its creditors … the court may on the application of the company or any creditor or member of it or, in the case of a company being wound up, of the liquidator … order a meeting of the creditors … to be summoned in such manner as the court directs.
>
> (2) If a majority in number representing three-fourths in value of the creditors … agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on all creditors … and also on the company and, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."

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 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.

Their Lordships consider that this argument is based upon a misunderstanding of the nature of shares in a company. In the classic definition of Farwell J (Borland's Trustee

 © 2025 Thomson Reuters.

v Steel Brothers [1901] 1 Ch 279 , 288), “a share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second”. In the case of fully paid shares, the question of liability does not of course arise. 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: see Re Oceanic Steam Navigation Co Ltd [1939] Ch 41 . The scheme may divest the company of its assets and leave the shareholders with shares in an empty shell. It may extinguish their shares and recapitalise the company by issuing new shares to others for fresh consideration. Or it may, as in this case, provide that someone else is to be registered as holder of the shares. Whatever the scheme, it is, by virtue of section 152 , binding upon the shareholders when it receives the sanction of the court. 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.

They will humbly advise Her Majesty that the appeal should be dismissed with costs.

Crown copyright

2006 WL 1546603

End of Document © 2025 Thomson Reuters.