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An Irish Perspective on Insolvency Co-operation: The Re Flightlease Case

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Introduction

The cross-border insolvency framework in Ireland contains a number of provisions in both corporate and personal insolvency (the latter also referred to as bankruptcy). However, apart from the situation of proceedings now covered by the European Insolvency Regulation 2000 (‘EIR’), the situation of other judgments seeking recognition and enforcement and/or other forms of assistance appears to be bleak. Historically, although cross-border provisions were available in personal insolvency from an early date, assistance pursuant to these remained at the discretion of the court, which was not always forthcoming. In fact, it is of note that, despite the replacement of this early legislation by a more recent statute dealing with personal insolvency, assistance via orders in aid is only forthcoming on a mandatory basis for courts in the United Kingdom, the Isle of Man and the Channel Islands, while, for other courts, it is predicated on whether ‘reciprocal facilities’ are offered by the courts in a jurisdiction whence a request comes. The equivalent provisions in corporate legislation, dealing with the extension of winding up and examinership on the basis of requests for orders in aid, remain dead letters, due to no orders being in existence specifying which countries are to be extended assistance. As the UNCITRAL Model Law on Cross-Border Insolvency Proceedings 1997 (‘Model Law’) is also without effect in Ireland, such assistance that may be forthcoming has to be on the basis of the common law and its principles.

In this, the courts in Ireland have had a mixed history as to whether assistance is provided, although, given the paucity of cases, it may be unsafe to generalise as to whether the courts in Ireland are pro-cooperation or more reticent about granting recognition and assistance. A number of cases have in fact produced a positive result for cooperation. In Re Drumm, an Irish court held that an order in aid assisting a United States bankruptcy could be made on a number of factors being shown: the degree of equivalence between the foreign system and that in existence in Ireland, the existence of likely reciprocity between the courts as well as satisfaction of the broader tests for recognition based on comity as well as the inherent undesirability of there being a multiplicity of proceedings. This seems to reflect the positions in Re Bolton, an early case where the Irish courts came to the aid of bankruptcy proceedings taking place in South Africa, as well as in Banco Ambrosiano, where assistance via the recognition of foreign office holders and their entitlement to funds located in Ireland was forthcoming.

More recently, however, a trio of cases appear to illustrate a difficulty inherent in the nature of cooperation at common law with the judges in various courts seemingly at odds about whether cooperation should be forthcoming in particular fact situations. This article deals primarily with the Irish Supreme Court decision on Re David K. Drumm (13 December 2010) (unreported), cited in Quinn, above note 4, at 134 and referred to in the Fairfield Sentry and Mount Capital cases below.

Notes

1 See Re: Gibbons (1960) Irish Jurist 60, where the discretion was exercised against granting aid under section 71, Bankruptcy (Ireland) Act 1872 (a United Kingdom statute enacted for Ireland).
2 Section 142, Bankruptcy Act 1988 (Ireland). The reference to the courts in the United Kingdom has now been removed by the European Communities (Personal Insolvency) Regulations 2002 (SI 334/2002) consequent on the EIR coming into force in Ireland. It does not appear, however, that any orders have been made specifying which other countries would satisfy the reciprocity requirement.
3 Section 250, Companies Act 1963 (Ireland); section 36, Companies (Amendment) Act 1990 (Ireland) respectively. The Companies (Recognition of Countries) Order 1964 (SI 42/1964) was made specifying the United Kingdom for the purposes of the former provision. This was rendered of no effect by the European Communities (Corporate Insolvency) Regulations 2002 (SI 333/2002).
5 Re David K. Drumm (13 December 2010) (unreported), cited in Quinn, above note 4, at 134 and referred to in the Fairfield Sentry and Mount Capital cases below.
6 Re Bolton [1920] 2 IR 324.
7 Banco Ambrosiano v Ansbacher & Co [1987] IRLM 669. This was of course a pre-EIR case.
in *Re Flightlease*, which also illustrates some of the problems that might arise in the classification of judgments pertinent to insolvency causes. It also highlights the possible role of the common law in permitting the enforcement of judgments and the extension of assistance to foreign courts and office-holders in the absence of an express statutory assistance framework or where such a framework is not available for use in the circumstances of the case, as appears to be the case in Ireland. The role of the courts in developing the common law in such instances has a rich pedigree and was given a fresh lease of life by the Privy Council in the *Cambridge Gas* case. In *Re Flightlease*, however, the Irish Supreme Court in Ireland declined to follow the persuasive precedent in *Cambridge Gas*, holding that amendments to the statutory framework were necessary to enable cross-border co-operation. This aspect of the judgment has apparently been the subject of approval in the United Kingdom case of *Rubin*, ostensible heralding an era of more restrictive cross-border cooperation within the British Isles. However, two later decisions of the Irish High Court, *Fairfield Sentry* and *Mount Capital*, will also be referred to, owing to the qualification they bring to the applicability of the judgment of the Irish Supreme Court, possibly resulting in a reorientation of the position in favour of restoring a more positive view of cooperation at common law.

The facts

The facts arise from the insolvency of Flightlease (Ireland) Limited (‘Flightlease’), a company incorporated in the Irish Republic on 21 November 1997, principally to carry out aircraft leasing activities for the purposes of companies within the Swissair Group. This it did by leasing seven aircraft to an Italian company for the purpose of operating a Zurich-Venice route. The Italian company was a creditor of Swissair, Flightlease and other companies in the group in respect of services supplied. Upon the Italian company entering into arrears with respect to its obligations (including the lease payments to Flightlease), moneys due from the lease arrangements were collected centrally by the ultimate holding company of the group with view to being distributed between the entitled creditors. Eventually, a sum of CHF 8 million was remitted on 20 September 2001 to Flightlease. Its creditors in turn entered into a wind down agreement with its liquidators on 22 December 2003 for the orderly distribution of the company’s assets in accordance with the terms of that agreement, although formal appointment of the liquidator pursuant to an Extraordinary General Meeting of the company apparently did not take place till 13 July 2004.

In the liquidation that ensued, Swissair submitted on 23 May 2005 a claim for the moneys that had been transferred to the company, which proof of debt was rejected on 18 October 2005. Swissair had open to it an appeal under section 280 of the Companies Act 1963 (Ireland), which permitted the court to determine any matter arising in the context of a winding up, but chose instead to pursue a claim before the Zurich Commercial Court, instituting proceedings without notice to the liquidators and whose existence was not revealed until after rejection of the proof of debt. The basis for these proceedings, which arose because of the subjection of Swissair itself to insolvency proceedings, was Articles 288 and 331 of the Swiss Debt Enforcement and Bankruptcy Law, which operated to enable a clawback claim seeking to recover an unlawful preference. Service of the Swiss proceedings was made on the company on 31 January 2006. The liquidators filed an originating motion in the High Court in Dublin seeking an order enabling them to distribute the company’s assets without reference to the claim before the Swiss courts or, in the alternative, to require Swissair to appeal under Irish law. This was made on the basis that Irish conflicts of law rules provide that whether a claim is provable in insolvency proceedings is a matter falling to be determined in Ireland under the appropriate procedural rules. In response, Swissair contended that the Swiss court, as the appropriate forum, had jurisdiction to hear and determine their claim.

Both parties sought a ruling on a preliminary point before the Supreme Court as to whether the Swiss judgment, if obtained, would be recognised and enforced by the courts in Ireland. The liquidators of the company wished to ascertain this to know whether they should participate in the Swiss proceedings, rather than risk a submission to jurisdiction by appearing if this were not necessary, while Swissair wished to know whether recognition and enforcement would be forthcoming so as to decide whether to pursue the claim before the Swiss

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8 *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation) v Eurofinance SA & Ors* [2012] IESC 12 (23 February 2012). All recent cases noted here and below are available from the BAILII website at: <www.bailii.org>.


10 *Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others* [2012] UKSC 46 (24 October 2012).


13 There are two judgments in the case, the majority judgment, given by Mr Justice Finnegan, which is regrettably unparagraphed, and the separate, but concurring, judgment of Mr Justice O’Donnell, which is.
courts. Following arguments based on an exchange of pleadings, the High Court identified that the preliminary point raised four issues:

(i) Whether, under the common law, such a judgment would be excluded from recognition and enforcement by virtue of its arising from a proceeding in insolvency or whether it was in substance a claim in personam?

(ii) If the answer to this was the latter, whether the order of the Swiss court could be recognised and which test would apply to such recognition, that in Dicey’s Rule 36 or that of a ‘real and substantial connection’ as applied by some other common law courts (especially those in Canada)?

(iii) Whether on the facts the appropriate test, whichever it was, was met in the instant case and could be invoked to permit recognition?

(iv) Whether it was material to the recognition issue that Swissair had not used their right of appeal under section 280 of the Companies Act 1963 (Ireland)?

In the High Court, the trial judge had determined that the claim by Swissair was an action in personam and its enforceability depended on the common law rules pertaining to recognition and enforcement. In so doing, the trial judge did not accept the submission by the counsel for Flightlease that the order to be sought in Swiss proceedings, subject to some exceptions, would be excluded from enforcement in Ireland under the common law in that it would be deemed as arising from a proceeding in bankruptcy. The trial judge held that the order was not so closely connected to the proceedings in insolvency that it ought automatically to be prevented from being recognised, but that it could be properly categorised as an in personam order. In the context of recognition and enforcement, the trial judge also held that Dicey’s Rule 36 represented the prevailing law in Ireland and that the Irish courts ought not to accept the ‘real and substantial connection’ test as developed in Canada, whose jurisprudence had been amply cited to the court. This would be, to the court, a ‘relatively significant alteration’ to the common law as understood and applied in Ireland and was neither supported by the limited jurisprudence in which the Canadian test had been cited in Ireland nor by the academic commentary. On that basis, an alteration to the law would undermine the predictability on which parties would have based their transactions and decisions as to whether or not to participate in proceedings in another jurisdiction. Furthermore, the court should not usurp the legislative function by altering common law principles in such a radical way, as opposed to permitting its ‘orderly evolution’, and that no consensus existed to give effect to any proposal for a change to the Canadian test. Under Dicey’s Rule 36, therefore, the trial judge found that none of the limbs of the rule applied and that, therefore, the Swiss judgment, were it to be obtained, could not be enforced at common law. It was not necessary to determine the third or fourth issues as a result.

The judgment

The tenor of the judgments in the Supreme Court, two of which were issued, one by Mr Justice Finnegan (with whom the other justices concurred) and one by Mr Justice O’Donnell, is to uphold the findings made by the trial judge and to determine that the Swiss proceedings were in substance in personam proceedings to which Dicey’s Rule 36 would apply insofar as it determined the recognition and enforcement of any judgments emanating from foreign courts, in this case those in Switzerland. Both judges were of the view that to move to a different test, such as the ‘real and substantial connection’ propounded in Canada, would require legislation. Thus, it could not fall within the role of the judges to redefine the terms of recognition and enforcement in a way that radically departed from the common law position in Ireland. Mr Justice Finnegan set out the findings of the trial judge on this point, with which he entirely concurred, namely that it did not appear that other common law courts had accepted the evident shift that had occurred in Canada with respect to the proper test for common law recognition and enforcement. In any event, such a shift was not without its criticism in the academic commentary. Furthermore, in the absence of a consensus representing a natural evolution of the common law towards such a test, the courts should not undermine the predictability point by engaging in unilateral alterations, particularly where this would amount to legislation and would not be in keeping with how the common law in other comparable jurisdictions has evolved.

It is noteworthy that Mr Justice O’Donnell, although in agreement with the tenor of the majority judgment, was also of the view that Dicey’s Rule 36 ‘had

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14 Collins et al. (eds), Dicey, Morris and Collins’ Conflicts of Law (14th edn, Sweet and Maxwell, London, 2010). The rule permits enforcement if (a) the judgment debtor was present in the foreign country; (b) the judgment debtor claimed or counterclaimed in the foreign proceedings; (c) the judgment debtor (as defendant) submitted voluntarily to the jurisdiction of the foreign court; or (d) the judgment debtor had agreed prior to the commencement of proceedings to submit to the jurisdiction of the foreign court.

15 More specifically, the rule in Beals v Saldanha [2003] 1 SCR 416.

little to recommend it at a policy level’, save that it was well known and hence predictable. In fact, he stated that the rule has not remained in petriﬁed form, citing some instances of change, and the argument might consequently be made that to narrow the grounds for enforcement of judgments in a way that ran counter to the trend of globalisation and international cooperation would not be consonant with a sense of justice. Furthermore, the harmful effect of such narrow rules has already been palliated by the existence of international conventions and it would be wholly unreal for litigants to believe themselves sheltered by the deﬁciencies in Dicey’s Rule 36 from all enforcement unless they could guarantee that no state, other than Ireland, would refuse to enforce the judgments that have been obtained. Incidentally, to maintain the rule artiﬁcially would be ‘discordant’ and not in keeping with modern developments. It would be, in the judge’s view, to confer favourable treatment on the Irish liquidators by entitling them to ignore proceedings brought elsewhere, while increasing the risk of proliferation of proceedings and incidental depletion of the debtor’s estate. Although the judge admitted that the arguments forming a challenge to the merits of the rule have considerable force, he did not think that adopting the Canadian ‘real and substantial connection test’ would offer more in terms of merit and could rather lead to more uncertainty and unpredictability. In fact, while the test might have merit in the speciﬁc constitutional dimension of Canada’s federal system where a high degree of trust is present between courts in the provinces, the consequent reduction in predictability and possible retroactive effect were cogent grounds for not adopting what would amount to a ‘fundamental reorientation’ of the law.

Cambridge Gas was cited to the High Court in the context of an alternative contention by the company’s liquidators that the judgment in Swiss proceedings could be regarded as being a judgment in the context of liquidation proceedings, but which could not then be enforced because of the prohibition at common law applicable in Ireland. Addressing this issue, the trial judge accepted that the common law in Ireland deﬁned an action in personam as one against a person with view to enforcing the doing of a particular thing. In this light, the judge viewed proceedings in insolvency as not in themselves proceedings against an individual, but instead the collecting in of the assets of that individual for distribution to entitled parties. Proceedings for the determination of liabilities and entitlements of the debtor as against third parties might fall to be dealt with within insolvency proceedings as a matter of procedural convenience, but could also be done through separate proceedings. Swissair’s contention in response to the liquidators was to agree that the relief sought by invoking the relevant provisions of the Swiss Debt Enforcement and Bankruptcy Law was analogous to the collection and distribution of assets and was thus bound up with the mechanism for collective execution. In fact, applying the principles in Cambridge Gas, insolvency proceedings would be neither in rem nor in personam, but sui generis in their own category. Furthermore, the principles in that case would, if followed in the Irish courts, also require recognition and enforcement at common law of judgments incidental to that process. The trial judge did not accept this, holding that the substance of the order, even allowing that it arose from a claim analogous to the Irish law in relation to fraudulent preferences, was that it required the payment of a liquidated sum and was thus more akin to a judgment in personam.

The Supreme Court agreed with this contention. Mr Justice Finnegan holding that Cambridge Gas represented a ‘signiﬁcant development’ in the law of the United Kingdom and was in fact highly dependent on the statutory framework that existed in that jurisdiction. He stated that the common law in Ireland was similar to that represented by the case of Re Lines Brothers, cited in Cambridge Gas, in which the collective enforcement procedure could be distinguished from matters incidental to it, which might include claims that were in rem or in personam in nature and that might only arise because there were insolvency proceedings in existence, in the course of which it might become necessary to determine these issues. To the judge’s mind, the principle derived from the facts of Cambridge Gas, in which an in personam order for the transfer of shares was enforced, pursuant to a Letter

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17 Ibid., at paragraph 4.
18 Ibid., at paragraph 5.
19 Ibid., at paragraph 6.
20 Ibid., at paragraph 7.
21 Ibid., at paragraph 8.
22 Ibid., at paragraph 10.
23 Ibid., at paragraphs 11-12.
24 It was of course a Privy Council case on appeal from the Isle of Man, although it had the status of persuasive precedent in the United Kingdom and was followed in that jurisdiction in a number of cases, including in Re Phoenix Kapitalholding Gmbh, Schmitt v Dietmann & Ors [2012] EWHC 62 (Ch) and of course Rubin in the Court of Appeal (Rubin and Anor v Eurofinance SA and Ors [2010] EWCA Civ 895). It is uncertain as to what the judge meant by the ‘statutory framework’, as the recognition in the Isle of Man of the American judgment was done at common law.
of Request in the context of insolvency proceedings, by invoking the principle of universality, was a step too far. In this, the judge’s view was that the American courts would not have had jurisdiction to determine the issue and would not have been able to make an order that could have been enforced apart from within the insolvency context. Similarly, the subsequent development in Rubin, following the precedent of the Cambridge Gas case, where the same principle of universality was invoked to enable the enforcement of a judgment in personam for the purposes of bankruptcy proceedings, despite the defendants’ lack of submission to the jurisdiction, was an undesirable precedent to follow. In the judge’s view, it was preferable to ‘await development of a broad consensus’ before developing the common law. In any event, even in the presence of such a consensus, which the judge held not yet to exist, the judge regarded the possibility of effecting such a change as falling more properly within the province of the legislature. As such, the judgment was, as the trial judge had characterised, one not arising exclusively in the context of bankruptcy proceedings, but in personam in nature and therefore amenable to enforcement only in line with the strictures of Dicey’s Rule 36.

Interestingly, although broadly accepting the view that the judgment was in personam in nature, Mr Justice O’Donnell was prepared to take a more liberal perspective to insolvency co-operation. Making the point that it was highly desirable that there be a central location for the consideration and determination of issues, the judge expressly stated that he did not want to entirely rule out the development of an insolvency principle at common law that drew from that outlined in Cambridge Gas. In fact, although he would prefer if the development would occur pursuant to international agreement and domestic legislation, he does not rule out the development taking place within the common law were it to be necessary. As the issue was not argued in any great detail in the appeal, the judge would leave it to be resolved another day, perhaps in proceedings re-remitted to the High Court, where it could be the subject of ‘focussed argument in the context of all the conditions then prevailing’.

Post-Flightlease developments

Fairfield Sentry was decided very shortly after Re Flightlease, although apparently not in knowledge of the latter as it does not cite the Supreme Court judgment. The facts arose out of the Madoff investment scandal, which saw the company being used as a feeder fund to channel investments that ultimately made substantial losses, with the defendants in the instant proceedings being two of the investors and a bank holding sums deposited with the company. There were a number of issues in the case, notably whether garnishee orders obtained by the investors could be enforced against the deposit-holding bank, but, more importantly for the purposes of this article, whether the order of the Eastern Caribbean Supreme Court winding up the company and appointing a liquidator should be recognised. Giving judgment on the latter issue, Mrs Justice Finlay Geoghegan held that, on the plaintiff’s submission that the courts had an inherent jurisdiction at common law to recognise a liquidation and give assistance to a foreign liquidator, there did not appear to be any difference between the common law in Ireland and the United Kingdom on this point. Agreeing with the comments of the trial judge in Re Drumm, the judge referred to the ‘underdeveloped state of the common law’, a phrase appropriated from the judgment in Cambridge Gas, to illustrate the state of the law in Ireland and the paucity of judgments on the point. Nevertheless, the judge was satisfied that at common law an inherent jurisdiction existed, relying on the principle of universality of proceedings. Noting also the precedent in Ambrosiano Bank, the implicit recognition given to the capacity of the liquidators to act so as to pursue funds held by the debtor company in Ireland seemed not to give rise, according to the judge, to any particular issue. Although the judge accepted that there might be differences in the rules governing personal and corporate insolvencies, quoting the continuation of Lord Hoffmann’s observation in Cambridge Gas that ‘unifying principles ... have not been fully worked out’, the judge agreed nonetheless with the view in that case that the principle

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26 Referring to proceedings before the Court of Appeal.
27 Pointing incidentally to the fact that Rubin was not universally approved by commentators and was, in any event, the subject of an appeal to the Supreme Court.
29 Ibid., at paragraph 9.
30 Fairfield Sentry, at paragraphs 2-6.
31 Ibid., at paragraph 22.
32 Above note 5.
33 Cambridge Gas, at paragraph 19.
34 Fairfield Sentry, at paragraph 23.
35 Above note 7.
36 Fairfield Sentry, at paragraph 24.
37 Cambridge Gas, at paragraph 19.
of universality is of equal application. Adherence to the principle could be made by the Irish courts giving effect and recognising the winding up order as well as the liquidator’s appointment and entitlement to maintain proceedings in Ireland with respect to the disputed funds.

In *Mount Capital*, reference is made explicitly to both *Fairfield Sentry* and *Re Flightlease*. The case involved two companies in winding up before the courts in the British Virgin Islands, having made substantial losses of the order of USD 200 million. Orders had been made by the Eastern Caribbean Supreme Court in that jurisdiction placing the companies in winding up and appointing liquidators. The liquidators wished to obtain access to documents said to be held by the company’s auditors and to question employees of management companies located in Ireland with which the companies had entered into administration agreements. On an *ex parte* application, Ms Justice Lafferty accepted the contention made by affidavit that the British Virgin Islands legislation and Irish legislation showed similarities in the types of remedies the liquidators could pursue before the courts and that an equivalence existed between the statutes with respect to the orders that could be sought. Referring to the judgment in *Cambridge Gas*, the judge recited a summary of the facts before referring to the *sui generis* classification the Privy Council adopted and the underlying principle of universality, which enabled courts to assist other courts, and, in the absence of prejudice to the creditors, that there could be no discretionary reason for withholding the assistance. Referring also to *Re Phoenix*, the judge repeated the propositions in that case that the common law contains a power for the courts to recognise and assist an overseas administrator in insolvency and that assistance can include whatever a domestic court could have done in the case of a domestic insolvency, while also noting that insolvency proceedings are collective in nature for the enforcement of rights and that proceedings to avoid antecedent transactions are central to the purpose of insolvency.

The judge continued by accepting that the principle in *Cambridge Gas* applies in Ireland, having been accepted in *Re Drumm* and *Fairfield Sentry*. The judge thought it significant that, in the latter case, the trial judge had characterised the requests for recognition of the winding up and appointment of the liquidator as matters for recognition simple and not enforcement, there having been no application for enforcement, excepting insofar as the order also permitted the liquidator to maintain proceedings in the name of the plaintiff company within the jurisdiction, which the trial judge also believed to be an issue for recognition rather than enforcement in the true sense of that term. This was a distinction that the judge thought particularly significant, especially in the context of the analysis that followed as to what *Re Flightlease* actually decided as well as the criticisms that case expressed with respect to *Cambridge Gas*. A brief recital of the facts in that case preceded an exposition of the observation by Mr Justice Finnegan on the effect of the order in Swiss proceedings, namely to require the repayment of a sum of money upon a finding of liability, the nature of which was to render the judgment of an *in personam* nature, to be contrasted with the collective execution that is insolvency proceedings. For the judge, the fact that the liquidators were not seeking to establish a liability to pay a sum of money distinguished the application in the instant case from the situation in *Re Flightlease*. The judge also recited the view taken in *Re Flightlease* that matters which are incidental to the procedure and not concerned exclusively with collective enforcement are to be regarded as either *in personam* or *in rem* orders that are then subject to conflicts of law rules on recognition and enforcement, which is incidentally a criticism and repudiation of the view in *Cambridge Gas*.

Further criticisms are adverted to as the judge recounted the reproaches that she saw in the Supreme Court judgment in relation to the scope of assistance in the United Kingdom which would in the Irish court’s view enable British courts to make orders in circumstances where foreign judgments *in personam*

### Notes

38 *Fairfield Sentry*, at paragraph 25, citing *Cambridge Gas*, at paragraph 20.
39 Ibid., at paragraph 26.
40 *Mount Capital*, at paragraphs 1.1, 2.1-2.5.
41 Ibid., at paragraphs 3.1-3.5, citing section 245, Companies Act 1963 (Ireland) and sections 284-285, Insolvency Act 2003 (British Virgin Islands).
42 Ibid., at paragraphs 4.1-4.4.
43 Above note 24.
44 *Mount Capital*, at paragraph 4.5.
45 Above note 5.
46 *Mount Capital*, at paragraph 4.6, the facts and judgments being recited at length in paragraphs 4.7-4.11.
47 Ibid., at paragraph 4.11.
48 Ibid., at paragraph 4.12-4.13.
49 Ibid., at paragraph 4.14.
50 Ibid., at paragraph 4.15. This view is also later taken up by the United Kingdom Supreme Court in *Rubin* (see below).
in similar terms could not be recognised.\textsuperscript{51} This is followed by an account of the higher court’s disapproval of the judgments in \textit{Rubin} and \textit{Re HIH},\textsuperscript{52} the former for the fact that it attempts to follow \textit{Cambridge Gas} and the latter for the “uncertainty” it brings to the law in the United Kingdom, a fact rendering it unsuitable as a precedent for the Irish courts in the absence of a consensus more generally among the common law courts that the rules should change.\textsuperscript{53} The judge underlined, however, that the liquidators were not seeking to have anything like a foreign judgment \textit{in personam} recognised, again a matter of some importance.\textsuperscript{54} For the judge, this meant that the ratio of \textit{Re Flightlease} was limited to a situation where enforcement was sought of an order in bankruptcy proceedings amounting to a liability to pay a debt and did not apply to a recognition application such as that brought by the liquidators.\textsuperscript{55}

In any event, it would, for the judge, be inappropriate to grant an order for enforcement on an \textit{ex parte} application, although in the absence of any perceptible prejudice to creditors, an order granting recognition and leave to the liquidators to defend the company’s interests could be made and that the court had an inherent jurisdiction to grant such an order where satisfaction that recognition was being sought for a legitimate purpose.\textsuperscript{56}

The decision in \textit{Re Flightlease} has also been influential in the final determination of \textit{Rubin} before the United Kingdom Supreme Court later in 2012. \textit{Rubin} was a conjoined hearing on appeals in two different cases (\textit{Rubin} and \textit{New Cap}), both articulated around the question of whether judgments related to insolvency matters could simply be applied without regard to the rules at common law on the recognition and enforcement of judgments. In deciding as it did, the Supreme Court appeared to have expressly disavowed the more extensive formulation of the duty to assist at common law seen in the case of \textit{Cambridge Gas}. The Supreme Court also made clear its view on whether there were boundaries to the ability of the common law to continue to create rules in the absence of statutory intervention and seems to have accepted limits similar to those expressed by the Irish Supreme Court. In an impeccably reasoned section of the judgment, the Supreme Court first articulated the proposition that there could be no separate treatment for insolvency judgments unless a court was prepared to hold this, although it did state that, in its view, the type of judgments at issue here (avoidance actions) were central to the insolvency process. This was because they were not designed to establish rights, but to enforce existing rights ascertained during the collective process.\textsuperscript{57} Although the common law rules had not received express recognition from the Supreme Court or its predecessor, the House of Lords, the court was not prepared to go so far as other jurisdictions, the example given being Canada, where the common law rules have been abandoned in favour of a more expansive rule stating that judgments given out of the jurisdiction against a person should be enforced if the subject matter of the action had a real and substantial connection with the jurisdiction in which the judgment was being given.\textsuperscript{58}

Citing the Irish Supreme Court in \textit{Re Flightlease} approvingly, especially the view that the rule should not be changed in the absence of a consensus between common law countries,\textsuperscript{59} the court declined to hold that the policy should change so as to introduce a more liberal rule for judgments in the context of insolvency proceedings for two reasons. The first was that, although it might be easy to distinguish between avoidance claims and other types of claims, it was difficult to distinguish between claims of an avoidance-type made in the context of insolvency proceedings and those lying outside, the example given being a judgment against a creditor for the repayment of a preferential payment, which could occur outside the context of an insolvency.\textsuperscript{60} The second was that, for there to be a separate rule, the courts would need to develop two new jurisdictional rules to find the requisite nexus between the insolvency and foreign court as well as between the judgment debtor and the foreign court, which would involve a radical departure from existing settled law.\textsuperscript{61} This would raise in particular the problem of reciprocity, which in the case of texts, such as the UNCITRAL Model Law

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\textsuperscript{51} Ibid., at paragraph 4.16.
\textsuperscript{52} \textit{Re HIH Casualty and General Insurance Ltd} [2008] 1 WLR 852.
\textsuperscript{53} \textit{Mount Capital}, at paragraphs 4.17-4.18.
\textsuperscript{54} Ibid., at paragraph 4.16.
\textsuperscript{55} Ibid., at paragraph 5.1.
\textsuperscript{56} Ibid., at paragraphs 5.2-5.4. Such an order would in addition not usurp the statutory power to recognise states for the purposes of any cooperation provision (paragraph 5.5), but leave would be granted to any party on whom notice was served by the liquidators post-recognition to appeal the order as it affected them (paragraph 6.1).
\textsuperscript{57} \textit{Rubin}, at paragraph 106. This view is significantly different to that taken in \textit{Re Flightlease}.
\textsuperscript{58} Ibid., at paragraphs 109-110. Limitedly, the rule in England and Wales has changed, but only in the context of family law: \textit{Indyka v Indyka} [1969] 1 AC 33. The latter case was also noted in \textit{Re Flightlease} as having been cited to, but not adopted by, the Irish Supreme Court in \textit{KD v Mc} [1985] IR 697.
\textsuperscript{59} Ibid., at paragraphs 111-112.
\textsuperscript{60} Ibid., at paragraph 116.
\textsuperscript{61} Ibid., at paragraph 117.
on Cross-Border Insolvency Proceedings and the European Insolvency Regulation, have been resolved by patient negotiation and diplomacy. The creation of judge-made rules to deal with these problems would in addition trespass on the privileges of the legislature, as was also the view in Re Flightlease, and would bring no benefits to United Kingdom businesses who might have to actively defend foreign proceedings where the proceedings were connected to insolvency because of the risk that a more expansive rule would pose in terms of recognition and enforcement. The section ended with the court emitting the view that Cambridge Gas was wrongly decided on the basis that the company was not subject to the in personam jurisdiction of the insolvency court, nor was the subject matter within its in rem jurisdiction.

Summary
This is a case which shows the necessity of invoking the common law in aid of insolvency proceedings in the absence of an appropriate statutory framework for cross-border co-operation, as is the case in Ireland. Unfortunately, it also illustrates the limits of the common law, faced with the reluctance of judges to trespass on what they see as being the legitimate province of the legislature. Cambridge Gas undoubtedly represented a departure for the common law in that it reclassified judgments in the insolvency context as being sui generis, whatever their substance, and thus amenable to being recognised and enforced in aid of insolvency proceedings in compliance with the principles of universality and unity. Of particular note as one of the cases which have followed the position in Cambridge Gas is Re Phoenix, where an order under section 423 of the Insolvency Act 1986 (United Kingdom) seeking to set aside a transaction defrauding creditors was held available pursuant to a Letter of Request emanating from the insolvency context and then applying the persuasive precedent of Cambridge Gas to enforce it may have been two steps too far for the Irish court, needing as it did to overturn the weight of the common law as applied in that jurisdiction and effectively create a new rule for the recognition of insolvency judgments. If, as Mr Justice O’Donnell contemplated was possible, the Irish courts were prepared to do so, then change could come swiftly to that jurisdiction. If, on the other hand, as Mr Justice Finnegan preferred, change would have to come through legislative action, then cross-border instances at common law in Ireland might have to wait a while to achieve a framework comparable to their counterparts in the rest of the British Isles.

It is interesting that the dissent from Cambridge Gas in the Re Flightlease case and the cautious view it emitted seem also to have found favour with the United Kingdom Supreme Court, although it should also be recalled that the minority judgments in the conjoined appeal before the Supreme Court, one concurring (Lord Mance) and one dissenting (Lord Clarke), both sought to limit the impact of the case on the rule in Cambridge

Notes
62 Ibid., at paragraph 128.
63 Ibid., at paragraph 129.
64 Ibid., at paragraph 130.
65 Ibid., at paragraph 132.
66 Above note 24.
67 Seagon v Deko Marty Belgium NV (C-339/07) [2009] ECR I-00767. This line of reasoning has been followed in other cases, such as SCT Industri AB i likvidation v Alpenblume AB (C-111/08) [2009] ECR I-05655 and German Graphics Graphische Maschinen GmbH v van der Schee (C-292/08) [2009] ECR I-08421. none of which seem to have been cited to the Irish Supreme Court.
68 Cambridge Gas is of course law in the Isle of Man, but is also highly persuasive precedent in Jersey and Guernsey, given the role of the Privy Council as highest court for those jurisdictions and also, in Jersey, because it was followed in Re Montrow International Ltd 2007 JLR Note 40. It has also been followed in other Commonwealth courts: Bank of Western Australia v Henderson (No 3) [2011] FMCA 840 (obiter) (Australia); Williams v Simpson Civ 2010-419-1174 (12 October 2010) (New Zealand); Re Founding Partners Global Fund Ltd (No 2) [2011] SC (Bda) 19 Com (Bermuda).
Gas, holding that at the very least the cases could be distinguished.69 It should also be noted that, in Re Flightlease itself, Mr Justice O'Donnell was prepared to take a more liberal perspective to insolvency co-operation and expressed the view that an insolvency principle derived perhaps from the Cambridge Gas case could be developed in Ireland with further arguments being adduced before the court in an appropriate fact situation. Furthermore, what Re Flightlease actually decided has apparently been qualified subsequently by the Fairfield Sentry and Mount Capital cases and limited to situations of enforcement, leaving the common law in that jurisdiction seemingly freer to develop in the case of recognition applications. This suggests that the debate in Ireland on the scope of common law assistance is not yet over and the day may come when the restrictions on common law enforcement in Re Flightlease might be revisited, together perhaps with the status of judgments emanating from insolvency proceedings and whether, in particular, avoidance actions are central to the collective process or merely incidental matters. In the meantime, it will also be interesting to see what other common law courts, who have adopted the principle in Cambridge Gas, will do when such prominent members of the common law family as the United Kingdom and Ireland have apparently repudiated its precepts and brought a halt in these jurisdictions to the development of common law assistance principles.

69 Rubin, at paragraphs 178, 192.