

In Rem / In Personam Judgments

Within the space of six months the Judicial Committee of the Privy Council – the highest appellate court from the Courts of the Isle of Man – dealt with the interesting legal concepts of In Rem/In Personam judgments.

Whilst it is easy to see how Lawyers would be interested in the Manx Court's ultimate appellate level analysing these issues, the exotic factual matrix of both matters *Cambridge Gas Transport Corporation v. The Official Committee of Unsecured Creditors of Navigator Holdings Plc* ("Cambridge") and *Pattni v. Ali and Dinky International SA* ("Pattni") and their impact upon shareholders in Manx companies make the usual territory of lawyers more user friendly for anyone interested in issues affecting shares in Manx companies.

For lawyers and non lawyers, a brief definition, or two, might help:

A judgment "in personam" can be defined as a judgment that defines, positively, claims against competing individuals in respect of a particular matter, or to compel the performance of a particular act – for example, the discharge of a debt, or the payment of an award for damages for breach of contract, or requiring that a particular aspect of a contract is performed.

A judgment "in rem" amounts to a determination of the status of a particular matter or an individual's rights in respect of a certain matter, but is conclusive not only between the competing parties but also as against the world. Put another way (as Lord Hoffman did in Cambridge) both in rem and in personam Judgments, are; "Judicial determinations of the existence of rights; in the one case rights over property and in the other rights against a person."

These brief definitions flow from some fairly complex legal concepts and on occasion difficult to follow judicial reasoning, starting with a decision of the English Court in 1750 (*Penn v. Baltimore*) where an English Court decided that whilst it had no jurisdiction to deal with the question of title to foreign land, it did have jurisdiction to deal with an action to enforce a contract between competing parties.

The facts of Cambridge focused on hundreds of millions of dollars worth of debt and the ownership of a fleet of gas tankers and connected to Chapter 11 Insolvency Proceedings in New York and connected proceedings in the Isle of Man. Pattni focussed on, amongst other issues, the legal principles connected to a decision of a High Court in Kenya relating to the ownership of the Duty Free outlets in Kenya's two largest international airports!

The Cambridge decision has recently been the subject of an article in this paper on the 21st November [page 9 Business News]. In Cambridge, a distinction between a Judgment in rem and a Judgment in personam within the context of insolvency proceedings was raised. Bankruptcy was seen as being "different" and was defined as being an "administrative or procedural process, not concerned with the contested establishment of rights but with the collective execution of rights that have already been

determined “The reasoning of Lord Hoffman in the Cambridge matter is, with respect, quite a step forward.”

“Bankruptcy” for these purposes it can be taken as personal bankruptcy or corporate insolvency is different. In the Navigator matter the appealing company who was concerned that its Manx shares would be taken from it, had neither participated in or submitted to, the jurisdiction of the American Courts in the Chapter 11 Insolvency proceedings.

Whilst the facts of the Cambridge and the arguments involved within the proceedings were of course much more involved than this brief note can show, it is interesting to note that, of course, the shareholder of shares in a Manx company is fixed with the relevant law and procedure, under Isle of Man law, that governed those shares.

Lord Hoffman, in Cambridge, says in effect that such a shareholder is also then fixed by decisions of the company, as an understanding of the true nature of the shares. The shareholder has no independent property other than as a member of the company.

In the context of “bankruptcy” the Manx Court should give effect to a confiscation Order in respect of Manx shares, made by a foreign Court, of shareholding (property) belonging to an individual, or a company, who did not submit to that foreign Court and who is not therefore subject to the personal jurisdiction of that foreign Court.

This “clarification” in the law must be set against the general proposition (more Latin I am afraid – a concept called “lex situs”) that only a Court in a country where the relevant shares are located should be competent to resolve issues as to the ownership of those shares being litigated about i.e. generally only at a Manx Court should determine issues as to the legal and beneficial ownership of Manx shares. This no longer is the case it would appear, in issues of bankruptcy.

Pattni however was not a bankruptcy case. In Pattni, the Privy Council – in the shape of Lord Mance - suggested an advancement in the analysis of the in rem and in personam judgments, which can be seen as blurring (or possibly explaining or clarifying using, entirely recognisable logic!) the distinction between the two.

Having travelled through the High Court in Kenya, the High Court in the Isle of Man, the Staff of Government Division in the Isle of Man and ultimately ending up in the Privy Council, within 6 months after Cambridge, Pattni fell to be decided.

It is often the case that a media report can describe a legal proceeding as “a case which has everything” and a spin is put on a particular case simply designed to grab the headlines. However, such a description would appear to be entirely justified in Cambridge. One of the individuals involved in the proceedings claimed (and still claims) to have been deported during the course of the Kenyan proceedings, and another individual was arrested (and subsequently acquitted) on suspicion of a double murder. Allegations of forgery in relation to the share sale documentation have been made, and remain to be determined.

Set against that background, the actual legal issues which troubled the Privy Council may appear rather tame, but they are potentially of wide ranging significance and look to underline once more the truly international nature of the Isle of Man as a jurisdiction in which do business and which in turn reflects the international nature of the litigation that comes before the Manx Courts.

Back to “legalese”:-

In *Pattni* the Court had to determine whether or not a Judgment of the Kenyan Court was in fact in rem or in personam Judgment because it related to shares in an Isle of Man company.

Looking at the definitions above an initial reading may suggest that a Kenyan Court, in a non bankruptcy scenario must have lacked the jurisdiction to make any Order that dealt with the ownership of shares of anything other than a Kenyan company.

However, where the Kenyan Court had made a determination, as it did in this case, as to findings of a genuine agreement and a breach of that agreement following payment of the full purchase price then the beneficial ownership of the relevant shares must have long since past. Contrary to the findings of the Isle of Man High Court and Staff of Government Division, the Privy Council expressed the opinion that all the Kenyan Court was looking to do in declaring matters relevant to those shares, was to give effect to the findings of an agreement and its breach, by requiring certain specific obligations upon the party found to be in breach to transfer the relevant shares.

The development in the law which this decision brings is that potentially, - at least Lord Mance suggests this - that a foreign Judgment which formerly would be characterised as a Judgment in rem and which was therefore criticised as being a Judgment outside of the foreign Courts judicial competence to make or it dealt with shares in a foreign corporation, could none the less still be an acceptable judicial determination between the actual parties involved in those proceedings so that matters were conclusively determined between the persons involved in the litigation (“in personam”) albeit, not a final determination of all rights in respect of the shares as against anyone else in the world or as being a final declaration as to the precise status of those shares (“in rem”).

The significance of this reasoning for not only the Isle of Man, but all common law jurisdictions will, of course, only truly be understood with the passage of time, and it remains also to be seen whether the Courts in the Isle of Man, and elsewhere look, to develop further this approach which Lord Mance has now raised.

Whereas, previously, Judgments perhaps could be wholly disregarded if they were considered bad because a foreign Court looked to over reach its jurisdiction by making declarations as to shares of a company incorporated elsewhere, to the extent that that entire Judgment could be disregarded as a Judgment in rem there appears now to be a position whereby although the Judgment remains to be fundamentally flawed as a Judgment in rem, it can still operate effectively to prevent the individual parties who are the subject to that foreign Court’s decision from suggesting that that foreign Court

could not bind them with their having participated and submitted in and to the jurisdiction of that foreign Court.

Previously a potential participant in foreign Court proceedings may have elected, or may through inadvertence have decided, not to participate in proceedings in a foreign Court, that might touch upon issues of legal and beneficial ownership in shares in a company registered elsewhere. Where such litigation takes place in the context of insolvency, they may experience the “difference” described by Lord Hoffman.

The absence of active participation, or submission, to a foreign Court’s jurisdiction may not preclude that foreign Court’s determination ultimately being effective in the home jurisdiction of the shares.

Equally, where, thus far, an argument could be put with confidence that if a foreign Court sought to make a determination even with the active participation of all the relevant parties that ordinarily would amount to a Judgment in rem that would be bad because of jurisdictional over reaching by that foreign Court, parties previously looking to rely upon that position may now find that insofar as the rest of the world may be concerned, the Judgment has another effect which may result in it still, potentially, being a conclusive determination as between them.

The unsuccessful Appellants in Cambridge were represented in the Isle of Man by Andrew Corlett – acorlett@simcocks.com and Christopher Arrowsmith – carrowsmith@simcocks.com, and the successful Appellants in the Pattni are represented in the Isle of Man by Christopher Arrowsmith and Nicola Kane – nkane@simcocks.com.

The Isle of Man and in rem/in personam had a busy year in 2006. It remains to be seen what 2007 brings for all other common law jurisdictions....

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This document is intended to provide a general overview and should not in any way be construed as legal advice. Always seek specific advice in respect of any particular issue.

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