The Revenue Rule and Cooperation under the Model Law: An Australian Perspective

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Introduction[1]

The activities of individual and entities carrying out transactions on a global basis invariably expose them to taxation. Where transactions are "one-off" or irregular in pattern, the incidence of taxation may be limited to the consequences of those transactions only and whether they attract levies, charges, duties or other forms of tax. Where the scale and frequency of transactions increase, traditional views of jurisdiction predicated on the locus of a company's incorporation or domicile of an individual may even cede their place in many legal systems to a more sensitive test based on where business decisions are made or substantial activity is carried out so as to render otherwise "foreign" companies eligible for treatment as if they were "domestic" ones.[2] In either case, where those entities or individuals become insolvent, the issue of the treatment of tax claims becomes a thorny one. The reason is that, at common law, such claims, also called "revenue claims", have been commonly denied recognition and/or effect, whether in insolvency or otherwise. That has meant that tax authorities have not been able to rely, even where they obtain judgments from competent courts within their own jurisdiction, on the courts of others to enforce those judgments against debtors. Such judgments have also been commonly excluded from the ambit of treaties and legislation on the recognition and enforcement of foreign judgments.[3] The recovery of tax and mutual assistance in revenue matters has depended, therefore, on the entry into double taxation agreements or treaties, a process that is still incremental in nature and painfully slow in covering the world with a net of mutual assistance texts. The fundamental reason for the refusal to assist the taxation authorities of other states comes from the view taken by the courts, for public policy reasons, that to enforce the judgments of foreign revenue authorities, given that these bodies are regarded as emanations of a foreign state, would be tantamount to enforcing the orders of that foreign state. This is especially significant given that revenue laws were, and still are, commonly regarded as falling within the penal and coercive elements of state authority.

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[2] *Unit Construction Company Ltd v Bullock (Inspector of Taxes)* [1960] AC 351.

[3] For example, see the Article 1(1), Brussels Convention 1968 exclusion of "revenue, customs [and] administrative matters", a position replicated in the later Brussels I Regulation No. 44/2001 of 22 December 2000.

The revenue rule is of some considerable vintage in the common law world[4] and is one to which a number of common law jurisdictions adhere, being known in, *inter alia*, Australia,[5] Ireland[6] and the United States.[7] In the United Kingdom, one of the modern iterations of this rule is in the case of *Government of India v Taylor*,[8] the rule being commonly referred to by the name of the case in that jurisdiction and elsewhere. It is also a rule which has on occasions found its way into statutory provisions, including of the recognition and enforcement type noted above, reflecting common law practice. The rule has only been displaced effectively where instruments such as the European Insolvency Regulation, which does not distinguish between debts owed to commercial or public entities, permit the treatment of claims by all creditors within insolvency proceedings and for these proceedings, as well as orders given in consequence of them, to be recognised across the territorial space within which the text applies. Such agreement for the treatment of revenue claims is rare,[9] although there is evidence that exceptions are being made to the rule in some jurisdictions even at common law. An example is the Jersey case of *Re Bomford*,[10] where the court stated that it would be unfair to refuse assistance in the context of a request from a foreign court merely because the tax authorities are the most substantial of a number of major creditors, although it remains the case that where the tax authorities are the only claimant or the only creditor to pursue proceedings, assistance would be refused.[11] Furthermore, in some jurisdictions, the courts, while applying the revenue rule, might assist, out of comity, in the gathering of information to permit foreign state authorities to enforce their revenue laws in their own jurisdiction.[12]

A recent case from the Federal Court of Australia,[13] featuring cross-border proceedings involving the Cayman Islands, has thrown into relief issues of mutual treatment in a situation where both countries apply the revenue rule and there is a tax claim by the relevant authorities in one jurisdiction against the debtor involved in proceedings taking place in the other jurisdiction. In such a case, where the foreign court would not recognise or enforce the

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[4] One of the oldest citations found in the case under comment in this article (from where those in footnotes 5-7 below also come) is the mention of *Planché v Fletcher* (1779) 1 Doug. 251, where Lord Mansfield CJ says “One nation does not take notice of the revenue laws of another” (at 253).

[5] *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338; *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; *Tanning Research Laboratories Inc v O’Brien* (1990) 169 CLR 332.

[6] *Peter Buchanan Ltd and Macharg v McVey* [1955] AC 516.

[7] *Pasquantino v United States* 544 US 349 (2005).

[8] [1955] AC 491.

[9] For one such (limited) exception, see the section 3, Foreign Judgments Act 1991 (Cth) definition of “enforceable money judgment”, which includes judgments involving New Zealand tax and recoverable Papua New Guinea income tax.

[10] *Re Bomford* 2002 JLR Note 34. See also *Radich v Bank of New Zealand* (1993) 116 ALR 676.

[11] *Re Tucker* 1987-88 JLR 473.

[12] *Re State of Norway (Nos 1 and 2)* [1990] 1 AC 723.

[13] *Ackers and Others v Saad Investments Company Ltd; In the matter of Saad Investments Company Ltd (In Official Liquidation)* [2013] FCA 738 (30 July 2013) (“*Re Saad*”), a copy of which is available via the AUSTLII website at: <http://www.austlii.edu/au> (last viewed 19 August 2013).

revenue claim of the relevant tax authorities in proceedings pending before it, the counterpart to the non-enforcement issue is whether there are legitimately any limits to the assistance that is sought by the foreign jurisdiction from the one whose tax authorities are unable to participate in those foreign proceedings. The mutuality issue is also sited in the context of the UNCITRAL Model Law on Cross-Border Insolvency Proceedings 1997 (“Model Law”), under whose provisions assistance is sought and whose purpose is ostensibly to enable cooperation between states in matters of international insolvency. Any potential limitation to the operations of the Model Law has therefore considerable impact on the network of cross-border obligations that has only lately come into operations by means of this text and which is still by no means universal in its application.[14]

The Facts of *Re Saad*

The Saad Investments Company Limited (“Saad”) was incorporated in the Cayman Islands and later the subject of a liquidation order in that jurisdiction, made by the Grand Court on 18 September 2009.[15] It was a member of a group of companies generally engaged in the financial services sector, holding property and assets on behalf of a number of investors. On 20 August 2008, it had entered into a deal with the Queensland Gas Company Limited (“QGC”), an Australian company, for the acquisition by the latter of a block of shares in another Australian company, Sunshine Gas Limited (“Sunshine”). The conditions of the deal saw QGC acquire just under 46.5 million shares held by Saad’s nominee in Sunshine in return for consideration received in the form of shares of QGC at an agreed ratio of QGC shares to Sunshine shares.[16] The Commissioner of Taxation (“Commissioner”) stated that the deal had resulted in Saad making a capital gain from the disposal which fell to be taxed, the amount of which, AUD 83 million, was the subject of a notice of assessment and penalty issued on 27 November 2009.[17] The Commissioner had earlier, on 9 November and on learning that Saad was the subject of the Cayman liquidation order, communicated with the liquidators stating that it was a creditor of the entity and required the supply of a claim form, a list of known creditors together with any directors’ statement of affairs and any further details relating to notices calling for debts to be proved or other information useful to creditors.[18] The liquidators responded on 13 November enclosing copies of the proof and statutory notices, but regretting that financial secrecy precluded them from sharing information on the creditors. They also indicated that a statement of affairs had been sought from the directors, but not received.[19] The Commissioner returned a proof of debt on 3 December 2009 in the assessment and penalty amounts and enquired further what Australian assets had been realised and their location (i.e. whether remitted

[14] The states so far that have adopted the Model Law include Australia, the British Virgin Islands, Canada, Colombia, Eritrea, Greece, Japan, Mauritius, Mexico, Montenegro, New Zealand, Poland, Romania, Serbia, Slovenia, South Africa, South Korea, Uganda, the United Kingdom and the United States.
[15] *Re Saad*, at [6].
[16] Ibid., at [9].
[17] Ibid., at [8].
[18] Ibid., at [6].
[19] Ibid., at [7].

out of Australia).[20] Later correspondence on 2 February 2010 setting out the grounds of the assessment and penalty noted a liquidators' report stating assets held in Australia amounting to AUD 13 million were held by custodians and enquired after the identity of these.[21] The liquidators sent a general notice to creditors on 1 March 2010 advising of a meeting on 24 March and that creditors should furnish a proof of debt on the requisite form to be entitled to attend the meeting, which the Commissioner duly returned on 10 March with a proxy appointment notice.[22]

Matters proceeded to a recognition application heard on 22 October 2010,[23] at which the same judge as in the present proceedings made a number of orders under the Model Law, which was given force in Australia by the Cross-Border Insolvency Act 2008 (Cth), including the recognition, under Article 17 of the Model Law, of the Cayman liquidation proceedings and the appointment of the liquidators in those proceedings.[24] The foreign proceedings were also deemed to be main proceedings as Saad's centre of main interests ("COMI") was held located in the Cayman Islands. The liquidators were also held to be the duly recognised foreign representatives in those proceedings and to have, by virtue of Article 21(1)(g) of the Model Law, the powers available to liquidators under the Corporations Act 2001 (Cth) and subject to its terms. They were entrusted with the administration, realisation and distribution of Saad's assets in Australia.[25] Because of the likelihood of a dispute over the tax claim, the judge also issued the orders subject to undertakings being received from the Commissioner, to the effect that no further assessment notices would be issued without 14 days' written notice to the company and its liquidators, and from the liquidators, who promised not to remit any funds realised and/or recovered outside Australia without similarly giving 14 days' written notice to the Commissioner.[26] The present interlocutory proceedings came to a head when the liquidators served notice on the Commissioner on 21 September 2012 stating their intention to remit funds outwith the jurisdiction,[27] which was followed by a report to the creditors on 5 October stating that a return was expected of between AUD 0.20 and 0.24 subject to the costs of the liquidation and that, as at 31 August of that year, the liquidators had realised between USD 745 and 911 million to meet unsecured liabilities of over USD 3.7 billion. The same report stated that the value of the debtor company's assets in Australia amounted to some USD 7 million.[28]

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[20] Ibid., at [8].
[21] Ibid., at [9].
[22] Ibid., at [10].
[23] Ibid., at [11] (*coram* Rares J).
[24] Reported as *Ackers v Saad Investments Company Ltd (In Official Liquidation)* (2010) 190 FCR 285. Other recognition applications for the *Re Saad* insolvency have been made, including in Bermuda: *Re Saad Investments Company Ltd (In Official Liquidation) and Re Singularis Holdings Ltd (In Official Liquidation)* [2013] SC Bda 28 Com (15 April 2013) (*coram* Kawaley CJ).
[25] *Re Saad*, at [2].
[26] Ibid., at [3].
[27] Ibid., at [12].
[28] Ibid., at [13].

The September notice prompted the application by the Commissioner to the court, particularly as, in the interim, the Commissioner had gathered that Cayman Islands legislation prevented the admission of the tax debts to proof in the company's liquidation in that jurisdiction. Section 139 of the Companies Law (2011 Revision) only allowed for the admissibility of foreign taxes in circumstances where the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) contemplated, which by its section 3(2)(b) excepted "taxes and like charges" from the remit of the recognition regime.[29] As such, the Commissioner could not submit a proof of debt, those documents already presented to the liquidators being of no effect, nor could any judgement in the Commissioner's favour be enforced in the Cayman Islands by being admitted in support of a proof of debt.[30] Furthermore, the risk for the Commissioner was that, if the funds left Australia, the tax claim would remain unsatisfied, whether in whole or in part, because it could not be admitted in the Cayman proceedings with view to receiving a distribution *pari passu* with the other unsecured creditors.[31] The Commissioner put the novel proposition to the court that it should modify the operation of the Model Law as it applied to the case so as to put the Commissioner in the position that an unsecured creditor would have under Australian law and to allow him to claim an amount representing what he would have received in the Cayman proceedings had his proof of debt been capable of admission or what he might have received were Australian proceedings possible.[32]

The Judgement of the Court

The judge puts the question as being, at its simplest, the impact on the collection of a domestic tax debt of the recognition of foreign proceedings under the Model Law.[33] He begins with a recital of the preamble purpose of the Model Law together with some relevant provisions, chiefly Articles 6 (public policy), 8 (interpretation) and 13 (access by foreign creditors), together with a highlight of the revenue rule exclusion in Article 13(2).[34] Articles 20 (effect of recognition), 21 (relief on recognition) and 22 (protection of creditors and third parties) are also referenced.[35] So too is section 16 of the Cross-Border Insolvency Act 2008 (Cth) adopting the Model Law and deeming the stay jurisdiction under Article 20(2) to be the same as that available under section 471B of the Corporations Act 2001 (Cth), which would impose a stay and suspension of any enforcement process in the context of a liquidation in

[29] Ibid., at [14].
[30] Ibid., at [15]. The court also noted at [16] the nature of the revenue rule and gave some examples of its application in other jurisdictions in those cases noted in footnotes 4-7 above.
[31] Ibid., at [4]. Tax debts had lost their priority status in Australia under the Taxation Debts (Abolition of Crown Priority) Act 1980 (Cth). In the United Kingdom, they were also downgraded in reforms introduced in the Enterprise Act 2002, but which also brought in a top-slicing clause under a new section 176A, Insolvency Act 1986, to redistribute some of the proceeds from floating-charge assets to unsecured creditors.
[32] Ibid., at [5].
[33] Ibid., at [1].
[34] Ibid., at [17]. Article 13(2) states that "Paragraph 1 of the present article [on the parity treatment of foreign creditors] does not affect… the exclusion of foreign tax and social security claims from such a proceeding…".
[35] Idem.

Australia.[36] The parties had found common ground in their pleadings to the effect that the company could not be wound up in Australia because it did not carry out the type of business in Australia that would bring it within the section 583 of the Corporations Act 2001 (Cth) facility permitting the winding up of foreign companies. Moreover, the company did not fall within the winding up provision set out in section 601CL(14) of that Act because it was not registered in Australia to carry out business and hence could not have a liquidator appointed in Australia at the behest of either the Australian Securities and Investments Commission or a liquidator appointed in its place of origin. Finally, there was also no Letter of Request under section 581 of the same Act from the Caymans court seeking the appointment of a local liquidator.[37] As such, the only liquidation extant was that in the Cayman Islands. This put the Commissioner in the particularly difficult position of being unable to pursue his statutory remedy of attachment because of the recognition of the foreign proceedings and the consequence of the stay and suspension of enforcement, not to mention the limitations contained in the court's orders made in October 2010.[38]

There was some reference to other powers the Commissioner might have available to serve notice on the liquidators to discharge the *pari passu* value of the debt or to require persons holding funds, even as agents or trustees, to discharge the tax debts owed[39] The judge did not feel it necessary, however, to determine which of the possible remedies was open to the Commissioner, given that the Commissioner did not attempt to use any of the powers, while the 2010 orders the judge made had the effect of "changing the landscape" with respect to their use.[40] The judge was simply content to note that the Commissioner's option in the present case was to proceed to an application for the variation of the orders so as to achieve a similar result to that which would apply were an Australian liquidation to be carried out under section 555 of the Corporations Act 2001 (Cth).[41] In response to points put forward on the Commissioner's behalf, counsel for the liquidators made 5 submissions:

(i) The Commissioner was not entitled to a *pari passu* distribution of the Australian assets because there was no jurisdiction in Australia to wind up the company;

(ii) If, however, there was jurisdiction, then there was no requirement under the principle of "modified universalism" (as expressed in *Re HIH*[42]) to treat tax claims *pari passu* with other claims;

(iii) "Modified universalism" would be better served by permitting Saad's funds to be remitted to the Cayman Islands, where the liquidation at the company's COMI was taking place;

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[36] Ibid., at [18].

[37] Ibid., at [19].

[38] Ibid., at [20], citing *Bruton Holdings Pty Ltd (In Liq) v FCT* (2009) 239 CLR 346 and referencing section 260-5, Schedule 1, Taxation Administration Act 1953 (Cth).

[39] Ibid., at [21]-[23], referencing sections 254, 255 and 255(1)(a), Income Tax Assessment Act 1936 (Cth) and section 260-45, Schedule 1, Taxation Administration Act 1953 (Cth).

[40] Ibid., at [24].

[41] Idem.

[42] *Re HIH Insurance Ltd* [2008] 1 WLR 852 ("*Re HIH*"). The case is also reported *sub nom. McGrath and Ors v Riddell and Ors* [2008] UKHL 21. In both instances, the relevant citation is at [30] (per Lord Hoffmann).

(iv) Keeping the 2010 orders in operation (and not varied, as sought by the Commissioner) would not be manifestly contrary to Australian public policy as contemplated in Article 6 of the Model Law;

(v) In any event, the Commissioner had, by submitting a proof of debt on 3 December 2009, implicitly submitted the determination of his claim to the Cayman jurisdiction and was no longer entitled to invoke the protection of the Australian court.[43]

Modified Universalism

In dealing with point (iii) of the submissions,[44] the judge refers to *Re HIH*, where the United Kingdom House of Lords[45] agreed to the request of an Australian court for the remittance to Australia of funds arising out of reinsurance proceeds for policies into which the failed insurer subject to proceedings in Australia had entered. This would have the result that the distribution would take place under the scheme in section 562A of the Corporations Act 2001 (Cth) and which would additionally have the impact of preferring the insurance creditors as opposed to the unsecured creditors who had submitted proofs of debt in the United Kingdom.[46] As the Model Law did not apply, the request was received under section 426 of the Insolvency Act 1986 ("section 426"),[47] under which Australia is a recognised jurisdiction for assistance to be given by British courts. The judges below had held that, in their view, the co-operation mechanism could not be used to oblige a liquidator carrying out proceedings in the United Kingdom to transfer funds to Australia where the priority rules on distribution would be so different as to trigger a possible offence to a court's view of the *pari passu* principle.[48] However, this was not a perspective shared by the House of Lords, which held that the co-operation implicit in the section 426 framework mandated co-operation in some instances, even though the foreign law was very different to the equivalent domestic provisions. Lord Hoffmann stated that section 426 enabled the court to authorise a liquidator to remit assets and to leave the distribution of the same to the courts and liquidators of the country whence the request issued.[49] It would do so because there was a power under the statute to determine that a foreign jurisdiction was more appropriate to deal with all the outstanding issues and questions in a winding up. Lord Hoffmann also said that the same power would arise under the court's inherent jurisdiction by application of the principle of "modified universalism", a principle extant in English law since the 18th century and which required that the English courts cooperate with foreign courts, particularly those carrying out principal proceedings so as to ensure that the all the company's assets were parcelled out amongst the creditors under a single system of

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[43] *Re Saad*, at [25].
[44] Points (i)-(ii) appear to be rolled up in this argument.
[45] The House of Lords lost its appellate judicial capacity to the new United Kingdom Supreme Court via the Constitutional Reform Act 2005, but which only came into effect after this case was heard.
[46] *Re Saad*, at [26].
[47] Section 426 is one of the members of an extended family sharing common roots, including section 29, Bankruptcy Act 1966 (Cth), Article 49 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 and section 581, Corporations Act 2001 (Cth).
[48] In the High Court: [2005] EWHC 2125 and Court of Appeal: [2006] EWCA Civ 732.
[49] *Re HIH*, at [26]-[27], [43]-[44] and [62].

distribution.[50] Dealing with *Re HIH*, the judge recounts the view expressed by Lord Hoffmann to the effect that the application of Australian law was more likely to reflect the expectations of the creditors, rather than the distribution of the reinsurance proceeds under the rules of an English liquidation.[51] Particular passages of the judgment quoted by the judge include where Lord Hoffmann states that:

> "…[a]s for UK public policy, I cannot see how it would be prejudiced by the application of Australian law to the distribution of the English assets… There are no grounds of justice or policy which require this country to insist upon distributing an Australian company's assets according to its own system of priorities only because they happen to have been situated in this country at the time of the appointment of the provisional liquidators."[52]

In its application to the circumstances affecting Saad, the judge says he would think it likely that if the company's creditors addressed the matter, they would expect that the company meets its local tax obligations in any jurisdiction where it earns income or makes taxable gains before the net amounts were available for the payment of dividends in the Cayman Islands. The creditors would be unlikely to think that the tax authorities would not seek to recover sums due before remittance of funds to the Cayman, where incidentally the sums would under local law be irrecoverable. The fact that a foreign debtor is insolvent is not, according to the judge, a sufficient reason to exclude that debtor from the application of a tax liability in circumstances where a local debtor subject to local proceedings would be similarly obliged.[53] For the judge, the purpose of the "modified universalism" principle is to achieve a proper and fair distribution to creditors in an insolvency with cross-border elements.[54] Referring to *Rubin*,[55] the judge notes the observation there that:

> "…in order to achieve a proper and fair distribution of assets between creditors, it will often be necessary to adjust prior transactions and to recover previous dispositions of property so as to constitute the estate which is available for distribution."[56]

For the judge, the public policy in Australia, by removing crown priority from tax and placing tax debts in the same position as unsecured debts in both individual and corporate insolvencies, had the consequence of enlarging the estate available for distribution to creditors and treating the Commissioner as any other unsecured creditor whose debts were admitted to proof. The legislative scheme also included a statutory right to be paid the *pari passu* value of a tax debt on the same footing as an unsecured creditor in respect of a debt that was admitted to proof.[57] Now, returning to the Model Law, the

[50] *Re Saad*, at [27], citing *Re HIH*, at [28] and [30].
[51] *Re Saad*, at [28].
[52] *Re HIH*, at [34] and [36].
[53] *Re Saad*, at [29].
[54] Ibid., at [30].
[55] *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 ("*Rubin*"). For a comment on this case, see, by this author, "The Limits of Co-Operation at Common Law: *Rubin v Eurofinance* in the Supreme Court" (2013) 10 *International Corporate Rescue* 106.
[56] *Rubin*, at [94].
[57] *Re Saad*, at [31].

judge notes that Article 13(2) permits foreign tax and social security claims to be excluded from proof in the jurisdiction where the debtor's COMI is located. This is certainly the position in Australia. As the Model Law permits each state party the power to adapt Article 13 as it sees fit, it also implicitly recognises that such claims for tax and social security would be dealt with outside the confines of the Model Law framework, in some states by the retention of a priority over proceeds which would apply before any sum were available for remittance for the purpose of foreign proceedings. This in itself would not, for the judge, be contrary to the Model Law's purposes as the Model Law itself made no provision for the treatment of such claims except on an exclusionary basis.[58] In coming to this view,[59] the judge is fortified by the statement in *Rubin* that the Model Law should not be taken to affect the rules in private or public international law in respect of matters that do not fall within its purview, either because they are excluded or because no mention is made expressly of their inclusion, the example in that case being of the rules on recognition and enforcement of judgments in cross-border insolvency matters.[60]

On whether such an interpretation can be supported, the judge turns to the Vienna Convention on the Law of Treaties of 1969, whose canons on construction and interpretation the judge argues are authoritative statements on customary international law for the purposes of construing international instruments and are, moreover, imported by Article 8 of the Model Law.[61] The approach in *Rubin* is certainly consonant, he states, with the Article 31(1) of the Treaty requirement that any interpretation is to have regard in good faith to the ordinary meaning of the terms of the international instrument and to the context and in light of its purpose.[62] Because the Model Law is, apart from Article 13(2), silent about the treatment of tax and social security claims, there appears to be nothing in it that would diminish the ability of tax authorities to collect what is due them by way of assessment and/or penalties prior to the remittance of any surplus funds for the benefit of proceedings taking place in the jurisdiction where the debtor has its COMI.[63] Furthermore, objective (c) in the preamble to the Model Law does state that one of the aims of the Model Law is to achieve the:

> "…fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor."

For the judge, there is therefore nothing in the Model Law that discriminates against the operations of domestic tax laws in their application to the debtor's estate. In terms of fairness, it would not be fair on domestic tax authorities (and on the creditors of the debtor in question, not to mention

[58] Ibid., at [32].
[59] Ibid., at [33].
[60] *Rubin*, at [142]-[143].
[61] *Re Saad*, at [34]-[35], citing *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595; *Chiropedic Bedding Pty Ltd v Radburg Pty Ltd* (2008) 170 FCR 560.
[62] Ibid., at [36]. In fact, the judge makes the point that the Model Law expressly accepts that foreign tax claims may be excluded from participating in "local" distributions (the word local being highlighted in the text of the judgment). The view may be taken, *a contrario*, that it says nothing about "foreign" distributions.
[63] Ibid., at [37].

taxpayers and others carrying out business in that jurisdiction) for a debtor to be freed of its tax obligations, except presumably those in the jurisdiction where it has its COMI, simply by the fact that that jurisdiction happens not to permit the admission to proof of such debts incurred elsewhere under a rule of private international law. There is no reason to exempt the debtor from liability in every jurisdiction other than where its COMI is located.[64]

In this light, the judge does not think the Commissioner's position is adequately protected, particularly given the fact that the Commissioner cannot prove in the Caymans liquidation. Even if the Commissioner were to be entitled to be paid out of the amounts raised in Australia, he would still be at a disadvantage because the total funds in Australia represent less than half of what the Commissioner might be entitled to receive were he treated as an unsecured creditor in the Caymans.[65] Moreover, if the sums were remitted as they stood, other unsecured creditors would obtain a windfall to the extent that the Commissioner could not prove in the Cayman insolvency. For the judge, this would be contrary to the preamble statement on the "fair and efficient administration" of insolvency and would result in the company effectively acquiring immunity from the incidence of tax in Australia on its transactions.[66] A final remark on the point noting the fact that a local liquidation is not available emphasises the vulnerable position the Commissioner is in as he cannot access his remedies under the local statute, which have been pre-empted by the recognition of the foreign proceedings and relief being granted under Article 21 of the Model Law.[67] It is the judge's view that Article 22 of the same permits him to order that the Commissioner's claim be imputable to the proceeds held locally prior to the remittance of any surplus and that the 2010 orders may be modified to give effect to this.[68] The judge therefore does not have to make a finding on the alternative argument put by the Commissioner that the 2010 orders, unless modified, would infringe Australian public policy, thus dealing with point (iv) of the submissions, although he does observe that there is much force in the submission made.[69]

Submission to Jurisdiction

A more contentious (and difficult) issue arises in the case because of the Commissioner's alleged submission to jurisdiction (point (v) of the submissions) by the communication of what were labelled proofs of debt to the foreign liquidators on a number of occasions, presumably before finding out that tax claims were in any event not admissible under Cayman Islands law. Also referring to *Rubin*, where the issue fell to be decided in the New Cap limb of the combined appeal, counsel for the liquidators argue that, by submitting proofs and attending a creditors' meeting in 2010, the Commissioner has effectively submitted to jurisdiction and could not thus

[64] Ibid., at [38].
[65] Ibid., at [39].
[66] Ibid., at [40].
[67] Ibid., at [41].
[68] Ibid., at [42].
[69] Ibid., at [43]-[45].

apply for the modification of the 2010 orders, being estopped by his conduct.[70] The judge deals in short order with this submission. The principle in *Re Morton*,[71] on which *Rubin* also relied, involved a creditor who had not only submitted to proof, but had also received a distribution, in relation to which he had further given credit for prior sums received from the debtor. The court held that the court with jurisdiction to decide matters of fact and law in order to effect a complete distribution of the estate had the necessary competence to determine issues in relation to the administration of that estate. For the court concerned, as that creditor had thereby become an “active party”, the creditor was deemed to have submitted to jurisdiction.[72] However, in *Rubin*, although the creditor in New Cap had also participated by way of submitting a proof and receiving a dividend, the court also stated that, on the issue of whether there had been submission for the purpose of enforcing a foreign judgment (the issue in the Rubin limb itself), whether submission had in fact occurred was a matter for the court and “is to be inferred from all the facts”.[73]

For the judge, this holistic assessment prompts him to note that the so-called proofs were filed prior to the Commissioner realising that assets were present in Australia and that the Commissioner’s communications with the liquidators had mostly to do with ascertaining whether any assets were in fact in Australia and whether local agents were in charge of dealing with them. If any benefit had been received by the Commissioner by submitting those proofs, it was in receiving the liquidators’ reports and circulars as well as information about the creditors’ meeting,[74] information he would have been entitled to receive in Australia in any event as a known creditor of the company. Nothing otherwise indicated that the Commissioner had submitted to the jurisdiction of the Cayman court, whether by the making of any application or being a party to any such application before that court, nor had proofs been called for in relation to the making of a dividend, as featured in the other cases relied upon. Furthermore, the debts the Commissioner was owed were in any event inadmissible to proof by the law of the Caymans and he was therefore not a creditor with a claim recognised by that law.[75] For the judge, merely seeking information from the liquidators to be able to determine if the company had any assets in Australia against which the Commissioner could exercise a remedy, submitting proofs and attending the creditors’ meeting were not steps that were inconsistent with later bringing this application before the court. In fact, until such time as the Commissioner had the requisite information, he could not be said to have irretrievably elected to take one course of action or another, such as by submitting to the jurisdiction of a foreign court.[76] As such, the judge is satisfied that the 2010 orders may be modified to permit the Commissioner to recover as much of his *pari passu* entitlement as he is able

[70] Ibid., at [46].
[71] (1875) LR 20 Eq 733.
[72] *Re Saad*, at [47].
[73] Ibid., at [48], citing *Rubin*, at [161].
[74] Ibid., at [49].
[75] Ibid., at [50].
[76] Ibid., at [51]-[52].

on the same basis as if his claim were admitted to proof in the Cayman Islands.[77]

An Early View of the Case

This is a fascinating case for a number of reasons, not least because of the articulation here between an old common law principle and the more modern frameworks of the Model Law and the European Insolvency Regulation. In the case of the latter, the issue is resolved because of the mutual trust doctrine which underpins the automatic recognition and enforcement facility and under which there is no distinction made between debts to private or public bodies. In the case of the Model Law, because it is a lighter and less coercive framework, there are matters that will fall outside its purview and that it will not be able or attempt to regulate. Thus, the text acknowledges the possibility of a different treatment for tax claims. Because these claims can be excluded by states adopting the text, as its Article 13(2) contemplates, an interesting question arises as to what happens to the assistance principle when such claims are present in a cross-border insolvency case and such debts cannot be pursued in proceedings before the jurisdiction of the COMI. The Australian court answers this by stating that, though assistance is paramount, especially after the foreign proceedings have been recognised, that assistance can be circumscribed by the need to deal with issues that lie outside the scope of the Model Law. Support for this position, which might be termed a form of "modified" assistance, is sought in the Vienna Convention 1969 approach to the interpretation of international texts. In itself, this is also an innovation in the way the Model Law, which is designed to be a text adopted into domestic law,[78] is nonetheless treated as having an international origin. This requires the text to be interpreted uniformly so as to avoid divergences in practice between the states that adopt it.

In this case too, the appeal to "modified universalism" here is also interesting, because of the reference to fairness as the context against which the basic principle operates. Under this principle, the jurisdiction where COMI is located is preferred as the jurisdiction that collects and distributes, because that is what the creditors expect and fairness and efficiency support this. In the instant case, because the Commissioner could not claim in the foreign proceedings, fairness required that he at least be able to claim against assets present within the jurisdiction. Here, the practice, as it operates to allow a "parallel" proceeding involving the taxman, appears to bring in a mutuality element, in that the same process would conceivably apply were the position reversed and that the tax claim emanated from the foreign jurisdiction. Unlike a grab-rule, however, which often works to prefer local creditors and guarantees their satisfaction first, the Commissioner does not seek any more than what he would obtain *pari passu* if he were in fact an unsecured creditor whose claim was admissible in those Cayman proceedings. The *pari passu* principle is thus not breached, though on the facts the Commissioner does not obtain, even if the whole of the USD 7 million were imputed to his claim,

[77] Ibid., at [53].
[78] In fact, the Model Law comes with an accompanying Legislative Guide contemplating how states might choose to adopt its provisions into their legal systems.

anywhere near the sum he would be able to obtain if the local assets were remitted to the Caymans and he were able to access the combined pool as an unsecured creditor.

Summary

Overall, the decision appears logical, although a better option might be to deal with tax matters in international insolvency situations on the same basis as any other debts. However, this might be a step too far, given that both of the jurisdictions here apply the same exclusionary rule for tax debts. International consensus seems a long way from developing for these types of claims, as illustrated by the case of the European Insolvency Regulation, whose long gestation eventually enabled a consensus to develop over the treatment of tax claims on a par with other types of debts. The Model Law has not had the same critical exposure that would facilitate the re-assessment of the justification for the retention of the revenue rule. As such, the differential treatment of tax claims seems destined to be a feature of cross-border cases under the Model Law for the foreseeable future.

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