

## January 2012: London Litigation Update

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**Liquidator Ordered to Disclose Documents to Creditor for Use in Arbitration:** In *Sunwing Vacation Inc v. E-Clear (UK) plc* [2011] EWHC 1544 (Ch), 3 June 2011, the U.K. High Court of Justice Chancery Division considered whether Section 155(1) of the 1986 Insolvency Act, which requires the disclosure of an insolvent company's papers to its creditors, also required the disclosure of documents to a creditor for use in a separate arbitration against a third party. The applicants, Sunwing Vacations Inc. and Vacances Sunwing Inc. (collectively "Sunwing") applied for an order against E-Clear (UK) plc (E-Clear), a company in voluntary liquidation of which they were creditors, and E-Clear's liquidators for the disclosure of documents for use in arbitration proceedings in Germany. The German arbitration involved claims by Sunwing that relate to E-Clear's debt to Sunwing.

Under Section 112(1) of the Insolvency Act 1986 (IA 1986), a creditor of a company in liquidation (but not being wound-up by a court) may request that a court exercise its power as if the company were being wound-up by the court. One such power is set forth in Section 155(1) IA 1986, which provides that a court "may, at any time after making a winding-up order, make such order for inspection of the company's books and papers by its creditors and contributors as the court thinks just; and any books and papers in the company's possession may be inspected by creditors and contributories accordingly, but not further or otherwise." It has been held that the exercise of power under Section 155(1) must be for the purpose of the winding up a company (per Millett J in *Re DPR Futures Ltd* [1989] 1 WLR).

The main issue in *Sunwing* was whether the action sought by Sunwing under Section 155(1) was for the purpose of winding up E-Clear. The Court noted that, if Sunwing was successful in the German arbitration, it would reduce the recovery sought by Sunwing from the wind-up of E-Clear. The Court found that the exercise of power under section 155(1), *i.e.*, disclosure of the documents, could benefit E-Clear and its creditors generally. As a result, the Court held that, the requested order was for the purposes of winding up.

This decision confirms that a creditor can apply for disclosure of an insolvent company's papers for use in any proceedings where the creditor may obtain a benefit that reduces its claim in the insolvency.

**Sovereign Immunity:** Could an affiliate of a New York-based hedge fund seize Argentina's assets in Britain using a \$284 million U.S. court judgment it had against the South American nation? In *NML Capital v Argentina*, the U.K. Supreme Court held that the hedge fund was entitled to do so.

The claim arose out of New York law governing sovereign bonds issued by Argentina and bought, at a significant discount, by NML Capital in the early 2000s. When Argentina failed to pay the requisite interest on the bonds, NML Capital called an event of default and obtained a New York judgment against Argentina for over US\$284 million. NML then sought to have the judgment recognized and enforced in England under the common law (there was no reciprocal enforcement legislation between the UK and the US). Argentina argued that it was a sovereign state and had immunity under the U.K. State Immunity Act 1978 ("SIA"), which grants general immunity to states unless specific exceptions apply. The U.K. Court of Appeal found in Argentina's favor in February 2010.

Before the U.K. Supreme Court, NML Capital raised three points: *first*, that one of the exceptions in the SIA was that a state could not enjoy immunity for "a commercial transaction" it entered into; *second*, the Civil Judgments and Jurisdiction Act 1982 ("CJJA") stated that foreign judgments against a sovereign state could not be enforceable unless two conditions were met: (a) the state would not be immune if English law applied (*i.e.*, the SIA above); and (b) that the judgment satisfied enforceability criteria under English law; *third*, that under the terms of the bonds, Argentina had waived immunity and had submitted to the jurisdiction of the national courts for enforcement.

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On the first issue, the Justices were split 3-2. While there was no dispute that the bonds would constitute a commercial transaction, the issue was whether proceedings to enforce judgments could be considered a “commercial transaction.” The majority were of the view that such proceedings fell into the category of “commercial transactions” because of Parliament’s intention at the time the legislation was drafted and market practice at the time in international capital markets. However, on the second issue, because all the Justices felt that NML could prevail on the CJJA to strip Argentina of its immunity. Lord Phillips, summarizing the effect of the CJJA on this particular case, stated: “State immunity cannot be raised as a bar to the recognition and enforcement of a foreign judgment if, under the principles of international law recognized in this jurisdiction, the state against whom the judgment was given was not entitled to immunity in respect of the claim.” Thus, if the state would not have enjoyed immunity under the claim, there is no reason why the judgment should not be recognized or enforced. On the third issue, the U.K. Supreme Court found that, on the specific terms of the bonds, Argentina’s submission to New York jurisdiction meant it had waived its right to object to jurisdiction for the purposes of subsequent enforcement proceedings.

**Common Sense and Contract Interpretation:** In *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50, The U.K. Supreme Court recently gave important guidance on the English courts’ approach to contractual interpretation. The fundamental rule under English law is that the purpose of contractual interpretation is to determine what the parties meant by the language they used. This is an objective enquiry – it involves ascertaining how a reasonable person, with all of the background knowledge available to the parties at the time of the contract, would construe the document.

The question in *Rainy* concerned the role played by considerations of “business common sense” in determining what the parties meant. Delivering the Supreme Court’s judgment, Lord Clarke said that “where the parties have used unambiguous language, the court must apply it.” Even if the result compelled by that language strikes the court as commercially absurd or unfair, English law takes the view that loyalty to the text of a commercial contract is the paramount principle of interpretation.

However, Lord Clarke said that where a clause in a contract was ambiguous (meaning it is capable of two or more meanings), it is appropriate for the court to apply the construction that is most consistent with, in the court’s view, commercial common sense. Accordingly, if there is contractual ambiguity, litigants can employ more creative arguments exploring the underlying commercial purpose of the transaction. Otherwise, if there is no contractual ambiguity, litigants in the English courts are invariably stuck with the words.

***Lucasfilm v Ainsworth* [2011] UKSC 39 (the ‘Stormtrooper Helmet’ case):** England’s highest Court has held that Star Wars Stormtrooper helmets are not “sculptures,” much to the chagrin of Lucasfilm. In doing so, it also found that an action for copyright infringement based on activity outside the EU (in this case the United States) could be brought in England against someone residing in the United Kingdom over whom the English courts have personal jurisdiction.

There was no dispute that Mr. Ainsworth had infringed Lucasfilms’ U.S. copyrights in the United Kingdom by placing advertisements for his Star Wars Stormtrooper helmets in U.S. publications, operating a website in the United States, and sending his products to American customers from the United Kingdom. Default judgment for infringement of copyrights had been entered against Mr. Ainsworth in California, but he remained in the United Kingdom. The English Court therefore had to consider whether jurisdiction existed for an infringement action of an American copyright.

Previously, the Court of Appeal in England had held that European legislation requires English courts to hear copyright infringement actions against defendants over which they have jurisdiction, even if the infringement took place elsewhere in the European Union. However, until *Lucasfilm*, it was generally accepted that this principle did not extend beyond the European Union. Indeed this was the stance taken by the (lower) Court of Appeal in the case.

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The Supreme Court, however, swept aside this view, ruling that the claim for infringement of a U.S. copyright in breach of U.S. copyright law is a claim over which the English courts can accept jurisdiction if there is jurisdiction over the defendant (in this case, he was domiciled in the United Kingdom). This is arguably the Supreme Court's upholding of *forum necessitatis* considerations, allowing English courts to assert jurisdiction in instances where claimants would otherwise be bereft of a suitable forum in which to litigate. The Supreme Court emphasized that this applied to copyright infringement, not validity or registration issues, but the case nevertheless may have wide-ranging implications, and shows an increased willingness of the English Courts to consider U.S. copyright infringement claims.