EXHIBIT 66

Nygh's Conflict of Laws in Australia

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Part X

Recognition and Enforcement of Foreign Judgments and Awards

Chapters

Chapter 40

Recognition and Enforcement of Foreign Judgments at Common Law

Introduction

[40.1] The common law rules for enforcement of judgments given by other courts are in principle applicable both to interstate and overseas judgments. However, as Chapter 42 shows, there are specific rules applicable to Australian judgments, which render the common law rules irrelevant to intra-Australian enforcement. As well, there is a statutory scheme in the *Foreign Judgments Act 1991* (Cth) for the recognition and enforcement of judgments made in foreign countries with which reciprocal arrangements have been made. That scheme is discussed in Chapter 41. The list of foreign jurisdictions to which the statutory scheme applies is relatively short, however. For foreign judgments rendered in most parts of the world, the only basis for recognition and enforcement is the common law principles considered in this chapter.

[40.2] To entitle a foreign judgment to recognition at common law, four conditions must be satisfied: (a) the foreign court must have exercised a jurisdiction that Australian courts recognise; (b) the foreign judgment must be final and conclusive; (c) there must be an identity of parties; and (d) if based on a judgment *in personam*, the judgment must be for a fixed debt.[1]

The onus of establishing the existence of those conditions rests upon the party seeking to rely upon the foreign judgment. That party must not only establish that the foreign court had jurisdiction in the international sense,[2] but also that the foreign judgment was final and conclusive according to the law under which it was pronounced.[3] Once that onus is satisfied, the judgment is *prima facie* entitled to

1. *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 552, at [18] per Bleby J.
2. *R v McLeod* (1890) 11 LR (NSW) 218 at 221 per Windeyer J.
3. *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853. But query whether the court in the absence of evidence may rely on the presumption that the foreign judgment has the same effect as a similar judgment has under the law of the forum (at 927 per Lord Hodson).

enforcement as a valid obligation, unless the defendant can establish one or more of the recognised defences to the enforcement of a foreign judgment.

[40.3] Most foreign judgments are judgments *in personam*; that is, judgments that impose a personal obligation on the defendant, such as judgments for damages for breach of contract or in tort or decrees for specific performance or an injunction. This must be contrasted with a judgment *in rem*, which can be either a judgment that affects the status of a person or corporation or a judgment that affects or creates an interest in property. Judgments affecting the status of a person or corporation are best discussed under the headings of family law, bankruptcy and corporations.[4] Those affecting or creating an interest in property form part of the law concerning title to property.[5] Hence, virtually all of the discussion in this chapter will be concerned with jurisdiction *in personam*.

The Jurisdiction of Foreign Courts

[40.4] The first and foremost prerequisite for recognition or enforcement of a foreign *in personam* judgment is that the foreign court has exercised a jurisdiction that the forum will recognise. The term 'jurisdiction' here used does not refer to the jurisdiction of the foreign court under its own rules, but 'jurisdiction in the international sense', by which is meant a competence that is recognised under Australian conflictual rules.

[40.5] The basic principle is that the foreign court must have had jurisdiction over the person of the defendant at the time when the jurisdiction of the foreign court was invoked. Traditionally, that jurisdiction can arise in one of two ways: by the presence or residence of the defendant in the foreign jurisdiction, or by the voluntary submission by the defendant to that jurisdiction. Additional and alternative bases of jurisdiction have been put forward from time to time but have not received much acceptance.

Presence or residence of the defendant

[40.6] There is little doubt that an Australian court will recognise a foreign judgment if the defendant was personally served with originating process while he or she was physically present within the jurisdiction of the adjudicating court, even though that presence was only temporary.[6] There may be an exception if the defendant was induced by fraud to come within the jurisdiction of the foreign court for the concealed purpose of serving him or her with originating process.[7] This mirrors the basis upon which Australian courts exercise jurisdiction over foreigners at common

4. See Chs 26 (divorce and annulments), 29 (status of children), 30 (adoption), 31 (mental incapacity), 36 (bankruptcy) and 35 (corporations).
5. See **[33.11]–[33.13]**.
6. *Herman v Meallin* (1891) 8 WN (NSW) 38; *Close v Arnot* (SC(NSW), Graham AJ, 21 November 1997, BC9706194, unreported).
7. *Close v Arnot* (SC (NSW), Graham AJ, 21 November 1997, BC9706194 at 14–15, unreported).

law. The presence must be that of the defendant personally. For these purposes, a natural person cannot be present in a foreign jurisdiction through an agent or partner carrying on business there on his or her behalf.[8]

[40.7] Does it suffice that the defendant was ordinarily resident within the foreign jurisdiction even though served whilst temporarily outside that jurisdiction? In principle the answer should be 'Yes'. In *Marshall v Houghton*,[9] the Manitoba Court of Appeal recognised an English judgment given against a defendant who was domiciled and ordinarily resident in England, but who had been served with the writ during a visit to Minnesota.

[40.8] There is old English authority for the proposition that the defendant's residence in the jurisdiction must exist at the time the jurisdiction of the foreign court is invoked.[10] According to that view, the fact that the defendant was resident in the foreign jurisdiction when the obligation or cause of action arose does not suffice if the defendant has left the jurisdiction by the time proceedings are commenced.[11] In *Beals v Saldanha*,[12] the Supreme Court of Canada threw off the shackles of the old view, holding that a foreign judgment should be recognised or enforced if the defendant had a 'real and substantial connection' with the foreign jurisdiction, regardless of whether he or she was resident or present in that jurisdiction when proceedings were instituted there. The *Beals* plaintiffs sued in Florida seeking damages for fraudulent misrepresentation and rescission of a contract for the sale of a vacant lot owned by the defendants in Florida. Initiating process was served on the defendants in Ontario, where they lived. The court in Florida gave judgment for the plaintiffs and the Supreme Court of Canada affirmed the decision of the Ontario Court of Appeal that the judgment should be enforced in Ontario. Major J said:[13]

> The principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law ... [T]he reality of international commerce and the movement of people continue to be directly relevant to determining the appropriate response of private international law to particular issues, such as the enforcement of monetary judgments ... International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law ... Subject to the legislatures adopting a different approach by statute, the 'real and substantial connection' test should apply to the law with respect to the enforcement and recognition of foreign judgments.

The court held that by entering into a property transaction in Florida, the Canadian defendants had established a 'real and substantial connection' with Florida such that they could reasonably have expected to be subject to the jurisdiction of the courts of Florida, which was sufficient to justify recognition and enforcement of the Florida judgment in the courts of Ontario.

8. *Seegner v Marks* (1895) 21 VLR 491.
9. [1923] 2 WWR 553.
10. *Sirdar Gurdyal Singh v Rajah of Faridkote* [1894] AC 670.
11. *Ibid.* See also *Bushfield Aircraft Co v Great Western Aviation Pty Ltd* (1996) 16 SR(WA) 97 (presence of corporation at the time cause of action arose insufficient where no presence when initiating process was issued).
12. [2003] 3 SCR 416; 234 DLR (4th) 1.
13. *Ibid* at [27]–[29].

[40.9] The modern Canadian view has much to commend it, although it is heavily dependent on the fact that Canadian courts use a 'real and substantial connection' test as the basis of jurisdiction over absent defendants. Major J explained the relationship between the tests as follows:[14]

> [I]t is reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a 'real and substantial connection' test.

It is unlikely that Australian courts will be bold enough to adopt a 'real and substantial connection' test for recognition and enforcement of foreign judgments when that is not the basis for an assertion of jurisdiction over absent defendants by Australian courts. Nevertheless, at the very least, the fact that the defendant is no longer ordinarily resident in the jurisdiction when the cause of action arose should no longer be regarded as an insuperable impediment to enforcement of a judgment of a court in that jurisdiction, if the defendant has been properly served with process.[15]

[40.10] Whatever the rule about the presence or residence of persons, it requires some modification in the case of corporations. It is, of course, artificial to speak of the 'residence' or 'presence' of corporations. Those terms when used in this context merely serve to denote the degree of connection required to render a corporation liable to the involuntary jurisdiction of the foreign court. The test is the same as that applied at common law to determine whether a foreign corporation is liable to the jurisdiction of the forum. The older English cases hold that in order to be amenable to the jurisdiction of a foreign court, the corporation must carry on business in that country 'at a definite, and to some reasonable extent, permanent place'.[16] This can be done either by maintaining a branch office in premises owned or leased by the company, or by carrying on the business of the company in that country through an agent for more than a minimal period of time.[17] If the company is represented by an agent, that agent must have authority to bind the company. A mere commercial agency does not constitute a 'presence'.[18] A company is not 'present' through a wholly owned subsidiary, unless that subsidiary is shown to be a mere façade concealing the true facts.[19]

Here, too, the Canadian approach adopted in *Beals* is considerably more generous than the older English cases. Canadian courts have recognised and enforced judgments rendered in foreign courts where jurisdiction was based not on the 'residence' or 'presence' of a corporate defendant in the foreign jurisdiction, but merely on the fact that the defendant corporation's business had a 'real and substantial connection' with the foreign jurisdiction.[20]

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14. *Ibid* at [29].
15. See, for example, *Clarke v Lo Bianco* (1991) 59 BCLR (2d) 334; 84 DLR (4th) 244; *Federal Deposit Insurance Corp v Vanstone* [1992] 2 WWR 407; 88 DLR (4th) 448.
16. *Littauer Glove Corp v F W Millington (1920) Ltd* (1928) 44 TLR 746 at 747 per Salter J. See also *Bushfield Aircraft Co v Great Western Aviation Pty Ltd* (1996) 16 SR(WA) 97.
17. *Adams v Cape Industries plc* [1990] Ch 433 at 530 per Slade LJ for the Court of Appeal.
18. *Vogel v Kohnstamm Ltd* [1973] 1 QB 133.
19. *Adams v Cape Industries plc* [1990] Ch 433.
20. See, for example, *Stoddard v Accurpress Manufacturing Ltd* (1993) 84 BCLR (2d) 194; [1994] 1 WWR 677; *Moses v Shore Boat Builders Ltd* [1994] 1 WWR 112; 106 DLR (4th) 654 (BCCA); *Disney Enterprises Inc v Click Enterprises Inc* (2006) 267 DLR (4th) 291.

[40.11] It has been assumed in this discussion that the jurisdiction of the foreign court coincides with the territory of a 'country' or 'law area' as that term is normally understood. Thus, if initiating process is issued out of an American state court, the presence or residence of the defendant must be in that state and not in the United States as a whole. However, if initiating process is issued out of a United States federal court which can exercise jurisdiction, whether by reference to federal or state law, over a defendant present elsewhere in the United States outside the state where that court is sitting, the relevant jurisdictional area may be the United States as a whole.[21]

Voluntary submission by the defendant

[40.12] A party can submit to the jurisdiction of a foreign court either by appearing as a party in the proceedings, whether as plaintiff or defendant, or by agreeing in advance to accept the jurisdiction of that court.

Submission by appearance

[40.13] It is clear that a non-resident defendant who was served outside the jurisdiction of the foreign court, but has nonetheless appeared to argue the merits of the case, has thereby submitted to the jurisdiction of that court. The mere filing of an unqualified appearance amounts to a submission,[22] unless the appearance was entered by a solicitor without authority from the client,[23] or the appearance was withdrawn with the leave of the foreign court or in accordance with its rules.[24] Filing an appearance to protest the jurisdiction is not a submission, unless the defendant proceeds to argue the merits.[25]

A litigant who commences proceedings in a foreign court as plaintiff is obviously bound by the outcome whether it favours the plaintiff or not.[26] Similarly, the plaintiff cannot complain if the defendant recovers damages by way of set-off, cross-action or counter-claim.[27]

[40.14] It has often been said that the appearance must be 'voluntary'. Obviously an appearance entered under physical coercion or the threat thereof, or even an appearance procured by error, fraud or undue influence[28] would not be regarded

21. The Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433 at 457 expressed some support for this view without deciding the issue.
22. *Victorian Phillip Stephan Photo Litho Co v Davies* (1890) 11 LR (NSW) 257. Compare *Von Wyl v Engeler* [1998] 3 NZLR 416 (CA) (held where there was no appearance by defendant in Swiss proceedings, there was no submission to jurisdiction, thus no enforcement of judgment).
23. *Redhead v Redhead* [1926] NZLR 131; *Hendrikman v Magenta Druck & Verlag GmbH* [1997] QB 426 (ECJ: Brussels Convention on Jurisdiction and Enforcement of Judgments 1968, Art 27(2)). Compare *Norsemeter Holding AS v Boele (No 1)* [2002] NSWCA 363, where the defendant's lawyers continued to represent the defendant during an appeal although the defendant had withdrawn the lawyers' authority to represent him after the trial at first instance. It was held that the defendant had submitted to the jurisdiction of the court and (probably) the appeal court.
24. *Malaysia Singapore Airlines v Parker* (1972) 3 SASR 300.
25. *Re Williams* (1904) 2N & S 183; *Bushfield Aircraft Co v Great Western Aviation Pty Ltd* (1996) 16 SR(WA) 97.
26. *Schibsby v Westenholz* (1870) LR 6 QB 155 at 166.
27. *Burpee v Burpee* [1929] 3 DLR 18.
28. *Israel Discount Bank of New York v Hadjipateras* [1983] 3 All ER 139.

as voluntary. But compulsion may take subtler forms; for example a defendant may feel compelled to appear in a foreign action because of assets there which could be seized in execution if the plaintiff obtained judgment by default. In *Voinet v Barrett*[29] the English Court of Appeal accepted the proposition that an appearance entered to prevent the possible seizure of property was voluntary. In contrast, three different provincial courts of appeal in Canada have held that an appearance to set aside a default judgment in order to save property within the jurisdiction, which might otherwise be seized in execution, does not amount to a voluntary submission for these purposes.[30] In Australia, the position has been settled by s 11 of the Foreign Judgments Act 1991 (Cth), which applies to enforcement actions brought at common law. Section 11 provides that the entry of an appearance in foreign proceedings shall not be regarded as establishing the jurisdiction of the foreign court if the appearance was for the purpose only of one or more of the following:

(a) protecting, or obtaining the release of —
  (i) property seized, or threatened with seizure, in the proceedings; or
  (ii) property seized subject to an order restraining its disposition or disposal;
(b) contesting the jurisdiction of the court; or
(c) inviting the court in its discretion not to exercise its jurisdiction in the proceedings.[31]

[40.15] In *Guiard v De Claremont*,[32] a majority of the English Court of Appeal held that a defendant who succeeded in setting aside a French default judgment but then proceeded to defend the case on its merits had submitted to the jurisdiction of the French courts even though at the time of his appearance his French assets had already been seized in execution of the judgment. The same result should apply in Australia, notwithstanding the operation of the Foreign Judgments Act 1991 (Cth) s 11, because of the effect of the defendant's defence of the case on the merits.[33]

A majority of the English Court of Appeal held in *SA General Textiles v Sun and Sand Ltd*[34] that a party appealing against a judgment given in default of appearance submits thereby to the jurisdiction of the original court. Needless to say, such a party certainly submits to the jurisdiction of the appellate court, including its affirmation of the judgment given below.[35] A defendant who successfully defends an action on the merits in a foreign court cannot then withdraw his or her submission before a regular appeal from that decision is heard but must be taken to have submitted to the jurisdiction of the appeal court.[36]

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29. (1885) 55 LJ QB 39 at 41.
30. *McLean v Shields* (1885) 9 OR 699 (Ont CA); *Esdale v Bank of Ottawa* [1920] 1 WWR; 51 DLR 485 (Alta CA); *Carrick Estates Ltd v Young* [1988] 1 WWR 261; 43 DLR (4th) 161 (Sask CA).
31. This partly follows the Civil Jurisdiction and Judgments Act 1982 (UK) s 31. See also *Bannerton Holdings Pty Ltd v Sydbank Soenderjylland A/S* (Fed C of A, Nicholson J, 9 February 1996, 133/1993, BC9600172, unreported) (describing reasons for passage of s 11).
32. [1914] 3 KB 145.
33. See also *Martyn v Graham* [2003] QDC 447 at [23] per Shanahan DCJ (defendant's involvement in proceedings in Philippines went beyond merely noting an objection to the court exercising its jurisdiction).
34. [1978] QB 279 (Lord Denning MR and Shaw LJ; Goff LJ not deciding).
35. *Ferdinand Wagner v Laubscher Bros & Co* [1970] 2 QB 313.
36. *Norsemeter Holding AS v Boele (No 1)* [2002] NSWSC 370, reversed on other grounds as *Boele v Norsemeter Holding AS* [2002] NSWCA 363, but with *obiter* indication of some approval for this proposition at [23] per Giles JA (with whom Handley and Beazley JJA agreed).

[40.16] For a long time it was a vexed question whether an appearance entered to protest the jurisdiction of the foreign court could amount to a submission if the motion to set aside service of the writ or to obtain a stay of proceedings was refused by the foreign court.[37] In *Henry v Geopresco International Ltd*,[38] the English Court of Appeal held that there is voluntary submission for these purposes where the defendant does not dispute the jurisdiction of the foreign court under its own rules but merely requests that the court exercise its discretion to decline jurisdiction (which is the posture in *forum non conveniens* cases). The effect of *Henry's* case was reversed by statute in the United Kingdom[39] and the issue is now settled in Australia by the Foreign Judgments Act 1991 (Cth) s 11 (see **[40.14]**). Under s 11, neither contesting the foreign court's jurisdiction nor asking the foreign court to decline jurisdiction amounts to a voluntary submission in itself.

In *Starlight International Inc v Bruce*,[40] Lawrence Collins J held that there is no submission for the purposes of the United Kingdom Act if the procedure of the foreign court requires the defendant to contest the jurisdiction and plead to the merits at the same time. There should be no submission unless the defendant has taken some step that is only necessary or useful if the objection to jurisdiction has been waived.[41] This distinction seems to apply with equal force to s 11 of the Australian Act, which provides that there is no submission if the defendant has appeared 'merely because' he or she wishes to contest the jurisdiction of the foreign court, or to invite the court not to exercise its discretion. If the defendant is forced by the foreign court's procedure to contest the merits in order to make his or her point about jurisdiction, then the submission should be regarded as being merely for the purpose of making the defendant's jurisdictional argument.

[40.17] The law of the foreign court and the law of the forum may differ on what amounts to submission for the purposes of jurisdiction. That situation arose in English proceedings in *Akai v People's Insurance Co*.[42] The defendant had entered a conditional appearance in an action brought in the Supreme Court of New South Wales, seeking a stay of the proceedings. Under the law of New South Wales, the steps taken by the defendant amounted to submission to the court's jurisdiction. Nevertheless, in subsequent proceedings in England, it was held that the defendant had not submitted to the jurisdiction for the purposes of s 33 of the Civil Jurisdiction and Judgments Act 1982 (UK), the United Kingdom's equivalent of s 11 of the Foreign Judgments Act 1991 (Cth). Thomas J said that in considering what amounts to submission for these purposes, the court must have regard to the general framework of its own procedural rules, but also to the domestic law of the court where the steps were taken.[43] If a step would not be regarded as a submission by the domestic law of the foreign court, it

37. See *Harris v Taylor* [1915] 2KB 580; *Re Dulles' Settlement (No 2)* [1951] Ch 842 at 850 per Denning LJ; *NV Daarnhouwer & Co Handel Mij v Boulos* [1968] Lloyd's Rep 259.
38. [1976] QB 726.
39. Civil Jurisdiction and Judgments Act 1982 (UK) s 33(1).
40. [2002] I L Pr 35; [2002] EWHC 374 (Ch D).
41. *Ibid* at 622, at [14].
42. [1998] 1 Lloyd's Rep 90. The High Court of Australia had previously considered the same dispute between the same parties: *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.
43. [1998] 1 Lloyd's Rep 90 at 97 per Thomas J.

should not be regarded as a submission, even if it would amount to such under the law of the forum.[44] Thomas J said that the converse would not necessarily be the case.[45] If a step would be regarded as a submission by the domestic law of the foreign court, but not by the law of the forum, the forum court is free to disregard the foreign court's characterisation and to hold that there had been no submission. That is what Thomas J held in *Akai* itself, saying that to hold otherwise would be to revive the principle in *Henry v Geopresco*.[46]

Thomas J's decision in *Akai* depended, at least in part, on s 32(3) of the Civil Jurisdiction and Judgments Act 1982 (UK), which provides that a court in the United Kingdom shall not be bound by any decision of an overseas court about whether there has been a submission to the jurisdiction. Subsection 32(3) has no counterpart in s 11 of the Foreign Judgments Act 1991 (Cth), which also does not use the language of 'submission', unlike s 33 of the United Kingdom Act. For the purposes of s 11, the question is simply whether the defendant appeared before the foreign court for the purposes of contesting its jurisdiction or asking it not to exercise its jurisdiction. Those should be simple questions of fact, not calling for interpretation of whether such steps amounted to submission, either by the law of the forum or by that of the foreign court's country.

Submission by agreement

[40.18] A person who agrees in advance to submit to the jurisdiction of a foreign court cannot afterwards complain that the foreign court did not have jurisdiction. The most obvious example of submission is a contractual clause that stipulates that a specified tribunal shall have jurisdiction in respect of any disputes arising between the parties. A submission also occurs when the defendant has given a person who resides within the foreign country authority to accept service on the defendant's behalf or where it has been agreed that service may be effected by leaving documents at a given address within that jurisdiction.[47] It is no objection that the defendant was not actually aware of the existence of the submission clause in the contract, or even that the clause permitted a method of service which made it most unlikely that the defendant would ever have personal notice of the existence of the action.[48]

[40.19] Can a submission agreement be implied? In *Blohn v Desser*[49] Diplock J held that:

> ... where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to

44. *Ibid*; *Adams v Cape Industries plc* [1990] Ch 433 at 461 per Scott J; *The Eastern Trader* [1996] 2 Lloyd's Rep 585 at 599–601 per Rix J; *Thyssen Inc v Calypso Shipping Corp SA* [2000] 2 Lloyd's Rep 243 at [20] per David Steel J; *Starlight International Inc v Bruce* [2002] I L Pr 35; [2002] EWHC 374 (Ch D).
45. [1998] 1 Lloyd's Rep 90 at 97 per Thomas J.
46. [1976] QB 726.
47. Compare *Von Wyl v Engeler* [1998] 3 NZLR 416 (CA), where the defendant's agreement to have service accepted by the foreign court itself as his agent was held not to amount to submission, because the foreign court refused to act in that capacity.
48. *Copin v Adamson* (1875) LR 1 Ex D 17.
49. [1962] 2 QB 116 at 123.

> conduct business on behalf of the partnership at that place of business, and causes or permits ... these matters to be notified to persons dealing with the firm by registration in a public register, he does impliedly agree with all persons to whom such a notification is made — that is to say, the public to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at that place of business by that agent.

Unfortunately, this sensible suggestion is in conflict with statements made by the Privy Council in *Sirdar Gurdyal Singh v Rajah of Faridkote*[50] and by Kennedy LJ in *Emanuel v Symon*[51] to the effect that an agreement to submit must be express. For that reason Ashworth J in *Vogel v Kohnstamm Ltd*[52] refused to follow *Blohn v Desser*. *Sirdar Gurdyal Singh* has also been followed in New Zealand.[53]

[40.20] A choice of law clause whereby the parties agree that their contract shall be governed by, or construed under, the law of a particular country does not amount to a submission to the courts of that country.[54] Similarly an agreement 'to proceed only in accordance with Indonesian law' was held not to mean that Indonesian courts should have exclusive jurisdiction over the contract.[55] It would seem therefore that an agreement to submit must not only be express but must also be explicit.

Suggested additional and alternative bases for jurisdiction

Reciprocity or comity

[40.21] In *Re Dulles' Settlement (No 2)*[56] Denning LJ put forward the concept of reciprocity as a basis for jurisdiction; namely that an English court should recognise the exercise of a foreign jurisdiction in circumstances similar to those in which an English court was entitled to assume jurisdiction. Thus, he suggested that since English courts could assume jurisdiction over a foreign defendant on the basis of a tort having been committed in England, they should recognise a foreign judgment given against an English defendant on the basis that he or she had committed a tort in the foreign jurisdiction. This principle was adopted in relation to recognition of foreign divorces by the Court of Appeal in *Travers v Holley*[57] where Hodson LJ said:

> ... it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves.

[40.22] In *Re Trepca Mines Ltd*,[58] Hodson LJ himself expressed the view that the *Travers v Holley* principle was only relevant in matrimonial causes. Attempts to persuade courts to accept the principle of reciprocity in relation to judgments

50. [1894] AC 670 at 686.
51. [1908] 1 KB 302 at 313–14.
52. [1973] 1 QB 133. Followed by Scott J in *Adams v Cape Industries plc* [1990] Ch 433 at 465–6.
53. *Gordon Pacific Developments Pty Ltd v Conlon* [1993] 3 NZLR 760 at 767 per Henry J.
54. *Dunbee v Gilman & Co (Australia) Pty Ltd* (1968) 70 SR (NSW) 219.
55. *Keenco v South Australia & Territory Air Service Ltd* (1974) 8 SASR 216.
56. [1951] Ch 842 at 851.
57. [1953] P 246 at 257.
58. [1960] 3 All ER 304n.

in personam have failed in England,[59] New Zealand[60] and Western Australia.[61] However, reciprocity of treatment played an important part in the adoption of the 'real and substantial connection' test (see **[40.7]**) by the Supreme Court of Canada in *Beals v Saldanha*.[62] Major J observed: '[I]t is reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a "real and substantial connection" test'.[63]

The nationality or domicile of the defendant

[40.23] Buckley LJ listed in *Emanuel v Symon*[64] as one of the bases of recognition of the judgment of a foreign court the situation where the defendant is a subject of the foreign country in which the judgment has been obtained. That proposition has not received much support and was rejected by Davitt P in the Irish case of *Rainford v Newell-Roberts*.[65] However, the issue arose in 1989 before the Supreme Court of New South Wales in *Federal Finance & Mortgage Ltd v Winternitz*.[66] In that case the plaintiff, a corporation formed under the law of Hawaii, had obtained judgment in that state against the defendant, who was a citizen of the United States and who was registered as a voter in Hawaii. However, at the time of the judgment he had established permanent residence in Australia, where he had been served with the Hawaiian writ. Sully J held that in these circumstances the defendant could properly be regarded as a 'subject' of the state of Hawaii and that consequently the court in Hawaii had jurisdiction over him in the international sense.

[40.24] There are obvious difficulties with nationality as a basis for recognition. There is first of all the problem of linking nationality of a federal country with its constituent parts. If Winternitz had not maintained registration as a voter in Hawaii his United States citizenship would have been of little relevance. It is clear that common nationality, as in the former British Empire, does not give jurisdiction to each of the constituent jurisdictions.[67] Equally, birth in Hawaii would not by itself have been a sufficient connection.[68]

[40.25] Second, for many migrants to Australia, nationality may be dormant. The judgment of Sully J implies that the connection must be an active one, as evidenced by the holding of a passport, an application for a pension and voter registration. This would exclude the long-term resident of Australia who still holds the nationality of the country of birth without active participation in its political life and, *a fortiori*, the dual national.

59. *Felixstowe Dock & Ry Co v United States Lines Inc* [1989] QB 360 at 373–6.
60. *Sharps Commercials Ltd v Gas Turbines Ltd* [1956] NZLR 819; *Gordon Pacific Developments Pty Ltd v Conlon* [1993] 3 NZLR 760.
61. *Crick v Hennessy* [1973] WAR 74; see also *Malaysia-Singapore Airlines Ltd v Parker* [1972] 3 SASR 300 at 304.
62. [2003] 3 SCR 416; 234 DLR (4th) 1.
63. *Ibid* at [29].
64. [1908] 1 KB 302 at 309.
65. [1962] IR 95.
66. SC (NSW), Sully J, 9 November 1989, BC8901479, unreported.
67. *Warner v Fischer* (1875) 13 SCR (NSW) 46.
68. *Gavin Gibson & Co Ltd v Gibson* [1913] 3 KB 379.

It may be that domicile could also serve as a basis for international competence.[69] Authority is slight. It was invoked as an alternative basis for recognition in the Manitoba case of *Marshall v Houghton*.[70] In its traditional sense domicile is a difficult and technical notion, the use of which should not be extended. As reformed by the Domicile Acts it is not much different from ordinary residence.

Subject matter present or cause of action arising in foreign jurisdiction

[40.26] The fact that the litigation concerned property of the defendant situated within the jurisdiction of the foreign court was rejected as a basis for jurisdiction in the international sense by the Court of Appeal in *Emanuel v Symon*[71] unless the foreign court rendered judgment against that property *in rem*. Nor does it suffice that the obligation which the plaintiff sought to enforce against the defendant was entered into or arose within the jurisdiction of the foreign court.[72]

Judgments *in rem*

[40.27] A judgment *in rem* may take the form of a judgment against the *res* itself, such as a judgment given against a ship in Admiralty. Such a judgment will be recognised by Australian courts if the ship in question was present within the jurisdiction of the foreign court at the commencement of the proceedings there.[73]

[40.28] In a more general sense the term 'judgment *in rem*' is also used to denote any judgment whereby a party has movable or immovable property adjudged to that party in title or possession,[74] or whereby a party obtains a judicial sale of the property. Such a judgment, if made by the courts of the country where the property is situated, will be recognised in Australia as passing the title or right of possession. It is probably better to regard the foreign judgment as a disposition or assignment of the property in accordance with the *lex situs*. As Blackburn J said in *Castrique v Imrie*:[75]

> In the case of *Cammell v Sewell* (1860) 5 H & N 728, a more general principle was laid down, viz, that 'if personal property is disposed of in a manner binding according to the law of the country where it is, the disposition is binding everywhere'. This, we think, as a general rule, is correct, though no doubt it may be open to exceptions and qualifications; and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* is binding everywhere, is in truth but a branch of that more general principle.

If this is true, there is little need to worry whether a foreign judgment is a judgment *in rem* or not. All that matters is whether under the *lex situs* the judgment of the court of the *situs* or any dealing done in pursuance thereof was sufficient to pass the title or other interest in the property.[76]

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69. *Jaffer v Williams* (1908) 25 TLR 12 at 13 per Bucknill J.
70. [1923] 2 WWR 553.
71. [1908] 1 KB 302.
72. *Bank of New Zealand v Lloyd* (1898) 14 WN (NSW) 160.
73. *Castrique v Imrie* (1870) LR 4 HL 414. See also *Readhead v Admiralty Marshal, Western Australia District Registry* (1998) 87 FCR 229 at 242–3; 157 ALR 660 at 672 per Ryan J.
74. *SS Pacific Star v Bank of America National Trust & Savings Assn* [1965] WAR 159.
75. (1870) LR 4 HL 414 at 429.
76. *Cammell v Sewell* (1860) 5 H & N 728; 157 ER 1371.

[40.29] Whatever view one takes, the foreign judgment in order to be recognised in Australia as affecting the title to the property in question must under the *lex situs* purport to affect the title or other interest in the property involved. Thus, if the effect of the judgment under the *lex situs* is merely to create a right *in personam* against the defendant which may be enforced against the defendant's property, should it come within the jurisdiction of the foreign court, the judgment can only be recognised in the forum if the foreign court had personal jurisdiction over the defendant.[77]

The Judgment Must Be Final and Conclusive

[40.30] The foreign judgment must be final and conclusive. By this is meant not only that the judgment must have put an end to the particular proceedings pending between the parties, but also that it must also settle once and for all the controversy between the parties that led to the proceedings. As Lord Herschell said in *Nouvion v Freeman*:[78]

> ... it must be shewn that in the Court by which it [ie the judgment] was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt ...

In *Nouvion v Freeman* the House of Lords was asked to give effect to a Spanish *remate* judgment. Such a judgment was made in summary proceedings in which the defendant's right to raise defences to the action was restricted. The party aggrieved by such a *remate* judgment was entitled under Spanish law to have the matter re-litigated in plenary proceedings before the same court in which case the defendant could raise all the defences available to him or her. It was obvious that a *remate* judgment was not final and conclusive.

[40.31] The key test of finality is whether the foreign tribunal treats the judgment as *res judicata* of the issues between the parties to the litigation.[79] For example, in *Blohn v Desser*[80] an Austrian court had given judgment against a partnership of which the defendant was a member. The plaintiff sought to enforce the judgment against the defendant personally in England. Under Austrian law a judgment given against a partnership did not bind each partner individually unless further proceedings were taken against that partner in which certain defences could be raised which were not

77. *Re Macartney* [1921] 1 Ch 522.
78. (1889) 15 App Cas 1 at 9.
79. *Schnabel v Yung Lui* [2002] NSWSC 15 at [77], [133] per Bergin J.
80. [1962] 2 QB 116.

available in the action against the partnership. Diplock J held that the judgment obtained against the partnership as a whole was not final and conclusive in relation to the defendant personally.

The fact that an appeal lies from the decision of the foreign court or even that appellate proceedings are pending does not affect the finality of the judgment[81] though the courts have a discretionary power to stay proceedings. Similarly, the possibility that the final order of the foreign court may subsequently be varied in the event of default of a party carrying out its terms does not affect the finality of the order.[82]

[40.32] Default judgments give rise to some difficulty because in most countries a default judgment can be set aside by the court that made it upon the application of the defendant. Until steps are taken to set the judgment aside, the judgment is enforceable as a final and conclusive judgment.[83] That is so even if the defendant is entitled to have the judgment set aside,[84] although there are dicta in older cases to the effect that where the defendant can demand that the judgment be set aside as of right within a set period, the judgment cannot be regarded as final and conclusive until that period has expired.[85] Where the judgment may set aside only upon cause being shown by the defendant, the judgment should be treated as final and conclusive until actually set aside.[86]

[40.33] A corollary of this principle is that where an Australian court gives judgment entirely on the basis of a foreign judgment, and the foreign judgment is later overturned and set aside, good reason exists to set aside the judgment that relied on it.[87]

[40.34] In many countries an order for spousal or child maintenance can be varied or set aside with retrospective effect by the court that made it. Such orders are, therefore, not final and conclusive and cannot be enforced in Australia,[88] except as provided by statute.[89] If, as is the case in some American jurisdictions, the maintenance order can only be varied with prospective effect, Australian courts will enforce a claim at common law for the arrears accumulated under such an order.[90]

[40.35] The plaintiff bears the burden of establishing that the judgment to be enforced is final and conclusive.[91]

81. *Colt Industries Inc v Sarlie (No 2)* [1966] 3 All ER 85.
82. *In the Marriage of Kemeny* (1998) 145 FLR 6.
83. *Schnabel v Yung Lui* [2002] NSWSC 15 at [77] per Bergin J; *Benefit Strategies Group Inc v Prider* (2007) 211 FLR 113 at 115 per Gray J.
84. *Schnabel v Yung Lui* [2002] NSWSC 15 at [77]–[80], [133] per Bergin J; *Vanquelin v Bouard* (1863) 15 CB (NS) 341; 143 ER 817.
85. *Jeannot v Furst* (1909) 25 TLR 424 at 425 per Bray J.
86. *Ainslie v Ainslie* (1927) 39 CLR 381; *Barclays Bank Ltd v Piacun* [1984] 2 Qd R 476; *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508; *Re Dooney* [1993] 2 Qd R 362.
87. *Benefit Strategies Group Inc v Prider* (2007) 211 FLR 113.
88. *Davis v Davis* (1922) 22 SR (NSW) 185.
89. See Ch 27.
90. *Beatty v Beatty* [1924] 1 KB 807.
91. *Schnabel v Yung Lui* [2002] NSWSC 15 at [76] per Bergin J; *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853 at 927, 970.

The Identity of the Parties

[40.36] The parties to the foreign judgment and to the enforcement proceedings must be identical and in the same interest. One of the grounds on which the Austrian judgment in *Blohn v Desser*[92] (see **[40.31]**) was refused recognition was that under Austrian law the judgment was effective only against the partnership as such, whilst the plaintiff in the English proceedings was seeking to enforce the judgment against the defendant personally. In *Newcom Holdings Pty Ltd v Funge Systems Inc*,[93] a Full Court of the Supreme Court of South Australia declined to enforce an order made in bankruptcy proceedings in the United States because (among other reasons) that order only affected parties to the bankruptcy proceedings, which did not include the person against whom enforcement was sought in South Australia.

What Judgments Can Be Enforced?

[40.37] The rule that only foreign judgments for a fixed sum may be enforced is the outcome of the archaic rule that the proper action on a foreign judgment is an action in *indebitatus assumpsit*. The result is that Australian courts at common law can only enforce foreign judgments that are for a fixed, or readily calculable, sum of money. This means that an order for the payment of a sum of money that is subject to the deduction of an as yet unascertained amount for costs cannot be enforced in the forum.[94]

[40.38] However, this common law restraint never applied to judgments in equity.[95] In *White v Verkouille*[96] McPherson J of the Supreme Court of Queensland allowed a receiver appointed by the District Court of Nevada to administer the assets of the defendant and to take possession of the Queensland bank accounts of the defendant without requiring as a prerequisite that the Nevada judgment be made a judgment of the Queensland court. Provided there was a sufficient connection between the defendant and the foreign court which granted the equitable relief, the forum would directly recognise the authority of the person appointed under the foreign order and make consequential orders to support that authority.

[40.39] In *Davis v Turning Properties Pty Ltd*,[97] Campbell J of the Supreme Court of New South Wales made a Mareva order to give effect in New South Wales to a Mareva order previously made by the Supreme Court of the Bahamas. To some extent, this amounts to an extension of the rule that judgments in equity are enforceable, because the High Court has held that Mareva orders are not injunctions but rather orders

92. [1962] 2 QB 116.
93. [2006] SASC 284.
94. *Taylor v Begg* [1932] NZLR 286.
95. *Houlditch v Marquess of Donegal* (1834) 2 Cl & F 470. See further, White, 'Enforcement of Foreign Judgments in Equity' (1982) 9 *Syd LR* 630.
96. [1990] 2 Qd R 191.
97. (2005) 222 ALR 676.

made in exercise of the court's inherent power to prevent frustration of its process.[98] The principle stated by Campbell J was rather broader in scope than the simple enforcement of judgments in equity:[99]

> The administration of justice in New South Wales is not confined to the orderly disposition of litigation which is begun here, tried here and ends here. In circumstances where international commerce and international monetary transactions are a daily reality, and where money can be transferred overseas with sometimes as little as a click on a computer mouse, the administration of justice in this state includes the enforcement in this state of rights established elsewhere. As well, the ordinary course of administration of justice has long included a court making certain of its remedies available in aid of proceedings in another court ...

[40.40] In *Celtic Resources Holdings plc v Arduina Holding BV*,[100] Hasluck J of the Supreme Court of Western Australia was prepared to accept, following *Davis*, that in certain circumstances Australian superior courts have an inherent jurisdiction to grant Mareva relief in relation to assets in Australia where a foreign judgment has been or is to be obtained. However, in exercising that jurisdiction, the court must endeavour to act consistently with the procedural and substantive requirements of the country of the original court. In *Celtic Resources*, the applicant applied *ex parte* for a Mareva order in Western Australia to freeze assets until enforcement could be made of a judgment given in the United Kingdom. At the time of the application, the United Kingdom judgment was not yet enforceable under the Civil Procedure Rules (UK) and so could not be enforced directly in Western Australia.[101] Accordingly, Hasluck J held that no Mareva order should yet be made in Western Australia, because to do so would circumvent and be inconsistent with the prescribed procedure in the country of origin by having the indirect effect of enforcing the judgment in question before it had become enforceable in the country of origin.

The Effect of a Foreign Judgment

[40.41] Due to the fiction that foreign courts were not courts of record, the earliest authorities regarded foreign judgments merely as *prima facie* evidence of the existence of a debt and not as creating an estoppel between the parties. As a result, the issue ostensibly settled by the foreign judgment could be reopened in the forum.[102]

[40.42] However, during the nineteenth century the courts came to accept that, provided the foreign court had jurisdiction in the international sense, the intrinsic

98. *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1 at 32–3; 153 ALR 643 at 658–9, at [35] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 400–1; 162 ALR 294 at 307–8, at [41] per Gaudron, McHugh, Gummow and Callinan JJ.
99. Ibid at 686–7.
100. (2006) 32 WAR 276.
101. Enforcement of the judgment, once finalised, would have been under the Foreign Judgments Act 1991 (Cth) (see Ch 41) rather than at common law.
102. *Walker v Witter* (1778) 1 Doug 1 at 5, 6.

merits of the judgment could not be called into question. The position was summed up authoritatively by Blackburn J in *Godard v Gray*:[103]

> The decisions ... seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the grounds that it was erroneous on the merits; or to be set up as a defence to an action on it, that the tribunal mistook either the facts or the law.

In that case, a French court had rendered a judgment in which it purported to construe an English contract containing a penalty clause. Under English law the clause was void, but the French court, though purporting to apply English law, awarded damages according to the amount fixed by the penalty clause. In accordance with the principle stated above, the English court refused to reopen the French decision. The French judgment being the final and conclusive decision given by a court of competent jurisdiction was enforced as such in England even though it was obviously wrongly decided.

Australian courts have accepted and applied the principle in *Godard v Gray* on several occasions.[104]

[40.43] Despite the old fiction that a foreign judgment is not a judgment of record, a foreign judgment today has most, though not all, of the attributes of *res judicata*, which attach to a domestic judgment under the common law.[105] But the foreign court cannot bind an Australian court on the issue of whether the foreign court had jurisdiction in the international sense.[106]

Enforcement

[40.44] A plaintiff who wishes to enforce a foreign judgment against the defendant in the forum can rely on the estoppel created by the judgment in two distinct ways.[107]

In the first place the plaintiff can rely on the foreign judgment as imposing an obligation on the defendant to pay the sum adjudged. Since this is a sum certain the plaintiff can sue for the amount as a liquidated amount like any other simple contract debt.[108]

[40.45] In the alternative, or in addition, the plaintiff may bring action once more on the original cause of action for which judgment was obtained abroad. One of the results of the fiction that a foreign court is not a court of record is that a foreign judgment does not bring about a merger of the original cause of action.[109]

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103. (1870) LR 6 QB 139 at 150.
104. See, for example, *Ainslie v Ainslie* (1927) 39 CLR 381 at 402 per Higgins J; *Norsemeter Holding AS v Boele (No 1)* [2002] NSWSC 370 at [14] per Einstein J (reversed on other grounds as *Boele v Norsemeter Holding AS* [2002] NSWCA 363); *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 567 per Bleby J; *RDCW Diamonds v Da Gloria* [2006] NSWSC 450 at [31] per Rothman J.
105. *Carl Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853 at 917 per Lord Reid, at 925 per Lord Hodson; *RDCW Diamonds v Da Gloria* [2006] NSWSC 450 at [28] per Rothman J.
106. *Harris v Harris* [1947] VLR 44. See also *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.
107. *RDCW Diamonds v Da Gloria* [2006] NSWSC 450 at [28]–[29] per Rothman J.
108. *Hong Kong and Macao Glass Co v Gritton* (1886) 12 VLR 128; *RDCW Diamonds v Da Gloria* [2006] NSWSC 450.
109. *RDCW Diamonds v Da Gloria* [2006] NSWSC 450 at [28] per Rothman J.

Thus, the plaintiff is free to bring an action for the same cause. But since the case of *Godard v Gray*[110] (see **[40.42]**) a plaintiff can rely on the judgment as creating an estoppel precluding the defendant from raising any defence which was, or could have been, raised in the foreign proceedings.[111] The rule is anomalous in that it simultaneously denies and affirms that a foreign judgment can operate as *res judicata*, but the continued existence of this method of enforcement was affirmed by a Full Court of the Supreme Court of New South Wales in *Delfino v Trevis (No 2)*[112] and, more recently, by the Supreme Court of New South Wales in *RDCW Diamonds v Da Gloria*.[113]

[40.46] The right to bring a fresh action on the same cause of action may enable a plaintiff who has received unsatisfactory damages abroad to try to increase recovery in the forum.[114] It is a defence to such an action that the plaintiff has elected to sue abroad and that the judgment obtained has been wholly satisfied.[115] If there are two persons liable, one of whom has been successfully sued abroad and the other not, judgment can be obtained in the forum against the second defendant, provided the amount recovered from the first defendant is deducted.[116]

[40.47] For the defence to succeed, the defendant must show: (i) identity of the parties; (ii) identity of the causes of action; (iii) a valid and final foreign judgment; and (iv) payment made in pursuance of the judgment of the foreign court.[117] The foreign proceedings must have been instituted at the election of the plaintiff, though they need not have been instituted by the plaintiff.

In *Black v Yates*[118] the husband of the plaintiff was killed in an accident in Spain due to the negligence of the defendant. According to the law of Spain the widow's claim for damages analogous to the Fatal Accidents Act was brought by the prosecution as part of the criminal proceedings. However, the widow's Spanish lawyers joined in the proceedings and failed to request the court not to take the civil claim into consideration as permitted by Spanish law. Judgment was obtained for the loss suffered by herself and the children as dependants of the deceased breadwinner and the sum was paid into the Spanish court. Potter J held that the widow had made her election to sue for civil damages in Spain through her lawyers there and payment having been made in court, the judgment was satisfied. However, the claim made by her on behalf of the children in England was held to be sustainable as they were entitled to repudiate an election made on their behalf that was not in their interest, it being accepted by Potter J that the sum awarded by the Spanish court was insufficient by English standards.[119]

110. (1870) LR 6 QB 139.
111. *Carl Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853; *RDCW Diamonds v Da Gloria* [2006] NSWSC 450 at [28] per Rothman J.
112. [1963] NSWR 194. The rule that a cause of action does not merge in a foreign judgment has been abolished in England by the Civil Jurisdiction and Judgments Act 1982 (UK) s 34.
113. [2006] NSWSC 450.
114. *Republic of India v India SS Co Ltd: The Indian Grace (No 1)* [1993] AC 410.
115. *Kohnke v Karger* [1951] 2 KB 670 at 675 per Lynskey LJ.
116. *Ibid* at 675–6.
117. *Black v Yates* [1992] 1 QB 526 at 530, 540 per Potter J.
118. [1992] QB 526.
119. *Ibid* at 553 per Potter J.

By way of defence, cause of action estoppel or issue estoppel

[40.48] A foreign judgment is not only a sword but also a shield. A foreign judgment which has been satisfied may be pleaded by way of cause of action estoppel as a bar to any subsequent action brought between the same parties or their privies in the forum on the same cause of action. Though the parties should be identical[120] and the causes of action and heads of damage recoverable the same,[121] it is not essential that the law applicable and consequently the possible result in each jurisdiction be the same.

Thus, in *In the Marriage of Miller and Caddy*[122] a woman brought in proceedings in California for division of the matrimonial property consequent upon divorce. She obtained a declaration confirming the equal ownership of property held by the parties jointly in New South Wales. That order was in accordance with Californian law, which provided for the equal division of community property. Deviation from that rule was exceptional. Several years later, the woman applied in Australia for an adjustment of the title to the New South Wales property in her favour under s 79 of the *Family Law Act 1975* (Cth). In view of the gross disparity in resources of the parties it was likely that an Australian court, if not constrained by the Californian judgment, would have awarded her more than one half of the local assets. A Full Court of the Family Court of Australia held that the cause of action in California was one for the adjustment of property rights as was the cause of action under s 79. The fact that the law to be applied was different in each jurisdiction did not detract from that identity. Accordingly the wife was estopped from proceeding with her Australian action. Nor, in the view of the Full Court, was it material that the Californian order in that respect had been merely declaratory and had not sought to alter the existing rights of the parties. An application for leave to appeal to the High Court was refused.

[40.49] Cause of action estoppel normally assumes that the matter has been fully litigated on the merits in the foreign court.[123] However, if a party to the foreign proceedings has deliberately withdrawn from those proceedings, that party cannot afterwards complain that there was no trial 'on the merits' of his or her claim. The dismissal of that claim will prevent a second action being brought on the same claim between the same parties in the forum.[124] The defence of cause of action estoppel may be waived expressly, or by failing to plead it, or circumstances may arise in which a party may be estopped from relying on it.[125]

[40.50] A foreign judgment can also be relied upon by way of issue estoppel to prevent the reopening of any issue in subsequent proceedings that has previously been litigated between the same parties or their privies. In *Carl Zeiss Stiftung v Rayner*

120. *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 36 FCR 406, *affirmed on other grounds* (1993) 43 FCR 510.
121. *Black v Yates* [1992] 1 QB 526.
122. (1986) 84 FLR 169; 10 Fam LR 858. See also *In the Marriage of Kemeny* (1998) 145 FLR 6; 23 Fam LR 105, a very similar dispute with an identical outcome.
123. *Black-Clawson International Ltd v Papierwerke AG* [1975] AC 591.
124. *Linprint Pty Ltd v Hexham Textiles Pty Ltd* (1991) 23 NSWLR 508 at 520 per Kirby P, at 526 per Clarke JA.
125. *Republic of India v India SS Co Ltd: The Indian Grace (No 1)* [1993] AC 410.

and Keeler (No 2),[126] Lord Guest said that for the doctrine of issue estoppel to apply in the second set of proceedings, the requirements were:

> (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Lord Guest's formulation of the test was unanimously adopted by the High Court of Australia in *Kuligowski v Metrobus*,[127] albeit in a case not concerned with foreign judgments. In *The Sennar (No 2)*,[128] Lord Brandon said that the second requirement, that of finality, can be broken down into two conditions; namely that the foreign decision is 'final and conclusive' and that it was 'on the merits'.[129] In relation to the latter requirement, Lord Brandon said:[130]

> [A] decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.

[40.51] These tests indicate that it is possible for a foreign judgment to found a subsequent issue estoppel in Australian proceedings even if the foreign judgment is an interlocutory one,[131] although the need for caution has been urged in such cases.[132] Indeed, the majority in *Carl Zeiss* agreed on the need for caution in applying the doctrine of issue estoppel to foreign judgments generally, because of the possible injustice and inconvenience that might be caused to defendants unfamiliar with procedures in a foreign court. In particular, the majority stated the requirements that the issue in question should be fully litigated before, and considered by, the foreign court and that the foreign court's decision on that issue would operate by way of issue estoppel in the courts of the country where it was rendered.[133]

[40.52] In *The Sennar (No 2)*,[134] the plaintiff brought an action in tort in the Netherlands against the defendant shipowner alleging that they had suffered loss as a result of the the master of the defendant's ship inserting a false date in a bill of lading. The bill of lading contained conferring exclusive jurisdiction on the courts of Sudan. The Dutch court declined jurisdiction on the ground that the plaintiff's action could only lie on the contract contained in the bill of lading and that its jurisdiction was thereby excluded. The plaintiff's successor in title then brought action in England in tort in respect of the same cause of action.

126. [1967] 1 AC 853 at 935.
127. (2004) 220 CLR 363 at 373; 208 ALR 1 at 7, at [21].
128. [1985] 1 WLR 490.
129. *Armacel Pty Ltd v Smurfit Stone Container Corp* (2008) 248 ALR 573 at 580–1, at [60] per Jacobson J.
130. [1985] 1 WLR 490 at 499.
131. *Makhoul v Barnes* (1995) 60 FCR 572; *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 at [399] per Lander J; *Inasmuch Community Inc v Bright* [2006] NSWCA 99 at [60] per Beazley JA; *Castillon v P & O Ports Ltd* [2007] QCA 364 at [54]–[58] per Holmes JA.
132. *Castillon v P & O Ports Ltd* [2007] QCA 364 at [55] per Holmes JA; *Armacel Pty Ltd v Smurfit Stone Container Corp* (2008) 248 ALR 573 at 581, at [63], [66] per Jacobson J. See also *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 at 43 (NZCA).
133. *Carl Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853 at 918–19 per Lord Reid.
134. [1985] 1 WLR 490.

Since the Dutch court had not decided on the merits of the substantive claim for damages, no cause of action estoppel arose. However, the defendant sought to rely on the Dutch decision to estop the plaintiff from arguing that the exclusive jurisdiction clause did not apply. For the plaintiff it was argued that there was no estoppel because (a) the Dutch decision was not on the merits of the claim, and (b) the cause of action in the Dutch court was not the same as that in the English court.

Dealing with the first matter, the House of Lords made it clear that in order to qualify as a decision on the merits, the determination need not be one which disposes of the substantive claim. It means simply that a court has held that it has jurisdiction to adjudicate upon an issue raised in the cause of action and that its judgment on that issue is final and conclusive.[135] The Dutch court had determined two matters: first, that the action should lie in contract and not in tort; and second, that under the bill of lading such claim could only be brought in the Sudan.

In relation to the second matter, the House of Lords looked at substance rather than the manner in which the action was framed. In substance the issue in both jurisdictions was the same: the application of the exclusive jurisdiction clause, whether the action was framed in contract or in tort.[136]

[40.53] Similarly, in *Armacel Pty Ltd v Smurfit Stone Container Corp*,[137] Jacobson J of the Federal Court of Australia held that an issue estoppel arose as a result of the decision of a United States District Court to the effect that a choice of forum clause in a contract was not an exclusive jurisdiction clause. The Federal Court held that the plaintiff was estopped from arguing that the clause conferred jurisdiction exclusively on the courts of New South Wales. The United States District Court's decision refusing to grant a stay of proceedings because the clause was not exclusive satisfied all three limbs of the *Carl Zeiss* test. Jacobson J also held that it was not material that the United States court had applied United States law when interpreting the relevant clause rather than New South Wales law, which was the governing law of the contract. When the issues and the parties are the same, 'issue estoppel operates regardless of whether the local court would regard the reasoning of the foreign judgment as open to criticism'.[138]

Can a judgment that is defective under its own law have international validity?

[40.54] It may happen that a court of competent jurisdiction in the international sense lacked jurisdiction under its own law with the result that the judgment is a complete nullity under that law. Could the defendant in enforcement proceedings challenge the validity of the judgment under its own law?

One may be forgiven for thinking that the answer is obvious. How could one say of a judgment which is a nullity in the place where it was given that it was final and conclusive under that law? In the early Australian cases dealing with the recognition

135. *Ibid* at 494 per Lord Diplock.
136. *Ibid* at 500 per Lord Brandon.
137. (2008) 248 ALR 573.
138. *Ibid* at 583, at [82].

of foreign judgments it was always assumed that the plaintiff who relied on a foreign judgment had to plead that the judgment was given by a court duly competent under its own law.[139] As Higinbotham J said in *Hogan v Moore*,[140] a foreign judgment is conclusive 'to the same extent as in the country where the judgment was obtained'.

[40.55] This simple solution conflicts with the reasoning of the English Court of Appeal in *Pemberton v Hughes*.[141] In that case it was alleged that a divorce decree given by a Florida court which was competent in the international sense was void under the law of Florida because the decree had been pronounced before the time for appearance by the respondent under its Rules of Court had expired. The Court of Appeal was not satisfied on the evidence that under Florida law this omission rendered the decree null and void. But even if it did, the court held the decree to be effective in England. As Lindley MR explained:[142]

> [T]he jurisdiction which is important in these matters is the competence of the Court in an international sense ie, its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country.

In coming to this conclusion his Lordship relied on the earlier case of *Vanquelin v Bouard*.[143] In that case the plaintiff brought action in England on a judgment pronounced in France by a commercial tribunal. The jurisdiction of that court was limited by French law to certain transactions (including the drawing and acceptance of bills of exchange) entered into by traders who were resident within the jurisdiction of the tribunal. The defendant in the English proceedings pleaded that he was not a trader and had not been resident within the jurisdiction of the French court. The plea was held to be bad, Erle CJ saying:[144]

> [I]t seems to me upon this plea that the court of the *Tribunal de Commerce* had jurisdiction over the subject matter of the suit in which the judgment was obtained, viz the liability of the acceptor of a bill of exchange, and that, if it were a matter of defence that the defendant was not a trader or not resident within the jurisdiction of the court, it was a matter which ought to have been set up by way of defence in that court, and cannot avail the defendant in an action upon the judgment here.

Far from saying that the question of internal jurisdiction was irrelevant, Erle CJ expressly found that the French court had jurisdiction over the kind of action in question. What was at issu e was whether the French court had jurisdiction in respect of the particular transaction and over the particular defendant. When seen in the light of a closer reading of *Vanquelin v Bouard*, the rather sweeping statement of Lindley MR quoted above should be confined to situations where, in his own words, the

139. *Larnach v Alleyne* (1862) 1W & W 342 at 358 per Chapman J; *Beer v Patrick* (1880) 1 LR (NSW) 157; *Re Annand* (1888) 14 VLR 1009.
140. (1885) 6 ALT 156 at 157.
141. [1899] 1 Ch 781.
142. *Ibid* at 791. This passage was quoted with approval in *Norsemeter Holding AS v Boele (No 1)* [2002] NSWSC 370 at [14] per Einstein J (reversed on other grounds as *Boele v Norsemeter Holding AS* [2002] NSWCA 363).
143. (1863) 15 CBNS 341; 143 ER 817.
144. *Ibid* at 368.

foreign judgment is assailed 'for a mere error in procedure'.[145] One must therefore distinguish between a complete lack of jurisdiction on the one hand, and a mistake as to the procedure or law in the exercise of jurisdiction on the other.

[40.56] Thus, if the foreign court lacked jurisdiction under its own law over the type of proceedings in question (that is, if it lacked what Australian procedure would call subject matter jurisdiction), the judgment should be treated as a nullity even though the foreign court may have had jurisdiction in the international sense. For example, in *Papadopoulos v Papadopoulos*,[146] a civil court in Cyprus annulled a marriage when only the religious authorities were competent to do so under Cypriot law. A Divisional Court of the Probate, Divorce and Admiralty Division of the High Court in England refused to recognise the Cypriot judgment on the ground that the court in Cyprus had no jurisdiction under its own law. The court's lack of subject matter jurisdiction could not be remedied by the parties' consent.[147]

[40.57] In contrast, if the foreign court did have jurisdiction under its own law to deal with the particular type of action before it, its judgment must be given effect within the forum even though it may be open to challenge under the law where it was made, on account of some error of fact or law, so long as the judgment has not been set aside by the court that made it.[148] In *Ainslie v Ainslie*[149] it was argued that a Western Australian separation order should not be recognised in New South Wales because it had been made on a ground not authorised by Western Australian law. Isaacs J refused to accede to this argument, saying:[150] 'By the law of the domicile [that is, Western Australia] that order stands unimpeached in Western Australia, and no court in New South Wales can challenge it for the reason put forward'.

[40.58] This principle applies even if the judgment is void under the law of the place where it was made. In *Merker v Merker*[151] a German court with general jurisdiction to annul marriages had purported to annul a marriage as being void *ab initio*. According to English standards the German court had jurisdiction to make such a decree. However, under German law the marriage was actually voidable, not void, and because of this mistake other German courts would have disregarded the decree. Sir Jocelyn Simon P, however, held that he was bound to give effect to it. At first sight such a decision seems ludicrous. It is, however, based on sound principle. Generally speaking the forum is not competent to decide whether a foreign court has properly applied its own law. Unless the lack of jurisdiction is obvious on the face of the judgment, the party who alleges that the judgment of a foreign court is a nullity under the law of that court must first have the judgment set aside in the country where it was made.[152]

145. *Pemberton v Hughes* [1899] 1 Ch 781 at 793. See also H E Read, *Recognition and Enforcement of Foreign Judgments*, Harvard University Press, Cambridge, Massachusetts, 1938, pp 93–100; Nussbaum, 'Jurisdiction and Foreign Judgments' (1941) 41 *Col LR* 221 at 231, 232; Cheshire and North, pp 431–2.
146. *Papadopoulos v Papadopoulos* [1930] P 55.
147. *Ibid* at 66 per Lord Merrivale.
148. *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 567, at [79] per Bleby J.
149. (1927) 39 CLR 381.
150. *Ibid* at 393.
151. [1963] P 283.
152. *SA General Textiles v Sun and Sand Ltd* [1978] QB at 297 per Lord Denning MR.

Defences to Enforcement

[40.59] A final and conclusive judgment given by a court of competent jurisdiction in the international sense is *prima facie* entitled to enforcement in Australia. It is, with one important and anomalous exception, not open to a defendant to challenge the intrinsic merits of the foreign decision by alleging that the foreign court made a mistake as to the facts or the law.[153] Equally, the defendant cannot raise in the enforcement proceedings any defence that was or could have been raised in the foreign proceedings even though it would have been a complete answer to the claim.[154] Thus, for example, in *Israel Discount Bank of New York v Hadjipateras*,[155] a defendant failed to appear in proceedings against him in New York and judgment was entered against him. In the enforcement proceedings he sought to rely on the defence of undue influence which would have been available to him in New York, but which he had not raised on legal advice that his chances of defending the proceedings successfully were far greater in England. The Court of Appeal held that he could not raise the defence in the English proceedings.

[40.60] It may be otherwise if the defence was not available under the law of the foreign court, or material evidence on which the defence could be based was not available at the time of the proceedings before that court.[156] The reasoning of Stephenson LJ in *Israel Discount Bank v Hadjipateras*[157] suggests that only defences based on the distinctive public policy of the forum, such as duress and undue influence, can be raised in the forum if not available under the law of the place where the judgment was obtained.

[40.61] Consequently, the number of defences that a defendant can raise to the enforcement of a foreign judgment in Australia is limited. The defences are as follows.

That the foreign judgment was obtained by fraud

[40.62] Any judgment whether it be domestic or foreign can at any time be challenged on the ground that it was obtained by a fraud upon the court. A domestic judgment can only be challenged on this ground, however, if the facts on which the allegation of fraud are based were not before the court in the original action and did not become known to the party seeking to have the judgment set aside until after the hearing of the original proceedings.[158]

153. *Godard v Gray* (1870) LR 6 QB 139. See also *Ainslie v Ainslie* (1927) 39 CLR 381 at 402 per Higgins J; *Norsemeter Holding AS v Boele (No 1)* [2002] NSWSC 370 at [14] per Einstein J (reversed on other grounds as *Boele v Norsemeter Holding AS* [2002] NSWCA 363); *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 567 per Bleby J; *RDCW Diamonds v Da Gloria* [2006] NSWSC 450 at [31] per Rothman J.
154. *Ellis v M'Henry* (1871) LR 6 CP 228.
155. [1983] 3 All ER 129.
156. Such an argument was made in *Bank Polska v Opara* [2007] QSC 1 but the Supreme Court of Queensland did not find it necessary to decide the question.
157. [1983] 3 All ER 129 at 134.
158. *Duchess of Kingston's Case* (1776) 2 Sm LC (13th ed) 644; 168 ER 175.

There is no doubt that a foreign judgment can also be impeached in these circumstances. 'Fraud' in the sense here used includes not only actual fraud, but also the equitable notion of constructive fraud such as conduct on the part of a person under a fiduciary duty which raises the inference that he or she has made a private profit out of the trust even if it cannot be proved that such a profit was actually made.[159]

[40.63] The fraud is normally the fraud of the plaintiff. But it need not be so: the fraud could be on the part of the court,[160] or even on the part of the defendant in the foreign proceedings as in the case where a defendant under a fiduciary duty consents to a judgment to pay a certain sum to the beneficiary without fully disclosing the extent of the funds it holds in trust.[161] Proof of perjury by a witness is insufficient unless the plaintiff perpetrated the fraud by procuring the witness's perjury.[162] Even perjury on the part of an agent of the plaintiff is insufficient, because perjury would lie beyond the scope of the agent's authority unless the plaintiff procured the perjury.[163] In *Benefit Strategies Group Inc v Prider*,[164] the defendants in South Australian enforcement proceedings argued that a foreign judgment from a state court in California was fraudulently obtained because of perjury on the part of the Californian process servers, who had declared that they had properly served the defendants in purported compliance with Californian law. The defendants denied that there had been proper service. They had entered no appearance in the foreign proceedings and the Californian court gave judgment against them by default. In the enforcement proceedings, a Full Court of the Supreme Court of South Australia held that mere proof of perjury on the part of the process servers would be insufficient to resist enforcement of the Californian judgment.[165] The mere fact that the process servers in California were agents of the plaintiffs was not enough in itself to establish that their (alleged) perjury was procured by or at the instance of the plaintiffs.[166]

[40.64] Difficulties have been caused by a series of English decisions in which it has been held that the defence of fraud may be raised in enforcement proceedings, even though it was already raised before, and adjudicated upon by, the foreign court. In *Vadala v Lawes*[167] the defendant pleaded to an action brought against him on an Italian judgment that the judgment had been procured by false evidence. The plaintiff replied that these allegations had been raised in the Italian proceedings and had been rejected by the Italian court. Nevertheless, the Court of Appeal held that the defendant could raise the issue again in England. As Lindley LJ put it:[168]

> [I]f the fraud upon the foreign Court consists of the fact that the plaintiff has induced that Court by fraud to come to the wrong conclusion, you can reopen the whole case

159. *Larnach v Alleyne* (1862) 1W & W (E) 342.
160. *Price v Dewhirst* (1837) 8 Sim 279; 59 ER 111.
161. *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 at 596–7 per Peter Gibson J.
162. *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 557, at [37] per Bleby J.
163. *Ibid* at 558, at [39] per Bleby J.
164. *Ibid.*
165. *Ibid* at 559, at [42] per Bleby J (with whom Vanstone and Anderson JJ agreed).
166. *Ibid.*
167. (1890) 25 QBD 310.
168. *Ibid* at 316–17.

even though you will have in this Court to go into the very facts which were investigated and which were in issue in the foreign court.

In *Syal v Heyward*,[169] the English Court of Appeal took the principle to its logical conclusion. In that case the defendants were aware of the fact that the claim made against them in the foreign proceedings was false, but they chose not to defend the action abroad, preferring to raise the question of fraud in the enforcement proceedings in England. The Court of Appeal held that they could do so, and it later affirmed the principle again in *Jet Holdings Inc v Patel*.[170] In that case the plaintiff had brought an action in California. The defendant alleged in the Californian proceedings that he feared for his life and safety if he went to California. He was ordered to attend for the taking of depositions. When he failed to do so, judgment was given against him in his absence. Following *Vadala v Lawes*, the Court of Appeal held that the defendant could raise the issue of the alleged intimidation again in the enforcement proceedings. It amounted to fraud because the allegations of violence, threats and fear had been denied by the plaintiff's lawyers in the Californian proceedings.[171]

[40.65] It is difficult to reconcile the decision in *Jet Holdings* with the Court of Appeal's earlier decision in *Israel Discount Bank of New York v Hadjipateras*[172] (see **[40.59]**). It seems illogical to allow a defendant to raise the issue of intimidation when that same issue was raised and contested in the foreign court, but not to allow the defendant to raise the question of undue influence when that issue was not raised abroad and, consequently, could not there be placed in issue. Instead of discouraging multiplicity of litigation, such an approach would encourage it.

[40.66] In England, there is only one exception to the principle that an issue of fraud can be reopened in enforcement proceedings, even if it has been raised or could have been raised in the foreign court. If the defendant in the foreign proceedings has first moved the foreign court to set aside its judgment on the ground of fraud and failed, the defendant will be estopped from alleging the same fraud in the English proceedings.[173]

Apart from this exception, the House of Lords in *Owens Bank Ltd v Bracco*[174] refused to bow to textwriter opinion and reiterated the broad defence of fraud available in English courts. It did so, as appears from the speech of Lord Bridge of Harwich,[175] on the ground that the inclusion of fraud as a specific defence to the enforcement of judgments in the then Imperial scheme embodied in the Administration of Justice Act 1920 (UK) s 9(2)(d) and later repeated in the wider Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) s 4(1)(a)(iv), indicated a specific legislative intention that the word 'fraud' should have a wider meaning in the statutory context than it had

169. [1948] 2 KB 443.
170. [1990] QB 335.
171. *Ibid* at 346–7 per Staughton LJ.
172. [1983] 3 All ER 129.
173. *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241. A co-defendant who did not join in the challenge in the foreign court may still be estopped: *ibid.* The correctness of this decision was accepted by the Court of Appeal in *Owens Bank Ltd v Bracco* [1992] 2 AC 443 at 472, where it was suggested that the raising of the issue of fraud in enforcement proceedings in a third country could create an estoppel. The speeches in the House of Lords did not refer to the issue.
174. [1992] 2 AC 443.
175. *Ibid* at 488–9.

in domestic English law. In view of that wider statutory meaning, his Lordship felt unable to amend the common law for fear that this would create a disparity between common law and statute.[176]

[40.67] The reasoning, with great respect, appears to be a case of lifting oneself up by one's bootstraps. The statutory provision to which his Lordship referred does not define the word 'fraud'. It can be given any meaning the court chooses. It is clear that it should have the same meaning as at common law, and if the House of Lords had reversed the previous decisions of the Court of Appeal, the very basis for giving the statutory provision the wider meaning would have gone.[177] As it is, the House has enshrined in English law a rule which, as Kirby P aptly put it in *Wentworth v Rogers (No 5)*,[178] may be 'no more than a reflection of the attitudes of the English judiciary at the apogee of the British Empire' towards foreign courts.

[40.68] The issue came up for decision for the first time in Australia in *Keele v Findley*.[179] In that case, Rogers CJ CommD, sitting at first instance, refused to follow the English decisions. His Honour did so for the following reasons:[180]

1. There was no case in Australia in which the matter had come up squarely for decision. Until recently, *obiter dicta* in Australian courts favoured English authority but without serious consideration of the issue.[181]
2. There was a respectable line of authority in Canada, both before and after *Vadala v Lawes*, supporting the view that a foreign judgment can only be refused enforcement on the ground of fraud in the same circumstances as would entitle the forum to set aside a domestic judgment; namely, where the fraud was unknown to the party alleging the same at the time of the original trial.[182] On the other hand, in New Zealand the Court of Appeal has followed *Vadala v Lawes*[183] but not *Syal v Heyward*.[184]
3. If the English line of authority was in error, it should not be transplanted to this country.
4. The English decisions have been unanimously condemned by textwriters.[185]
5. The English line of authority started at a time before it was clarified that an English judgment could only be set aside for extrinsic fraud.[186]

176. *Ibid* at 489.
177. See *Keele v Findley* (1990) 21 NSWLR 445 at 457 per Rogers CJ CommD.
178. (1986) 6 NSWLR 534 at 541.
179. (1990) 21 NSWLR 444.
180. *Ibid* at 457–8.
181. *Norman v Norman (No 2)* (1968) 12 FLR 39 at 47 per Fox J; *Res Nova Inc v Edelsten* (SC (NSW), Foster J, 17049/1980, 7 May 1985, BC8601318, unreported).
182. *Jacobs v Beaver* (1908) 17 Ont LR 496 at 506 per Garrow JA; *McDougall v Occidental Syndicate Ltd* (1912) 4 DLR 727; *Manolopoulos v Pnaiffe* [1930] 2 DLR 169.
183. (1890) 25 QBD 310.
184. *Svirkis v Gibson* [1977] 2 NZLR 4 at 10.
185. *Dicey, Morris & Collins on the Conflict of Laws*, Thomson Sweet & Maxwell, London, 14th ed, 2006, pp 622–8; Sykes and Pryles, *Australian Private International Law*, 3rd ed, LBC, Sydney, 1991, p 120.
186. The first decision in the line is the decision of the Court of Appeal in *Abouloff v Oppenheimer* (1882) 10 QBD 295. The requirement of extrinsic fraud in relation to domestic judgments was not settled by the House of Lords until *Boswell v Coaks (No 2)* (1894) 6 R 167.

6. The same rule should apply for the enforcement of local and foreign judgments in the face of allegations of fraud.

[40.69] Despite Rogers CJ CommD's strongly-argued opposition, two later Australian cases have held that the English rule still forms part of Australian law. In *Close v Arnott*,[187] Graham AJ observed that the Canadian decisions and textbook writers' criticisms relied on by Rogers CJ CommD had been considered and rejected by the House of Lords in *Owens Bank Ltd v Bracco*,[188] but the House of Lords had made no mention of *Keele v Findley*.[189] As a result, Graham AJ said that if necessary, he would distinguish *Keele v Findley* and find that the English rule continued to apply in New South Wales in respect of actions to enforce judgments obtained in undefended proceedings in a foreign court where the defendant has, for good reason, been unable to meet the plaintiff's case in that court.

In *Ki Won Yoon v Young Dung Song*,[190] Dunford J went a step further and said that *Keele v Findley* was incorrectly decided, and that the English rule should continue to be applied in New South Wales unless and until changed by parliament.[191] In *Ki Won Yoon*, the plaintiff, a South Korean resident, obtained judgment against the defendant, an Australian resident, in a South Korean court. The defendant submitted to the jurisdiction of the Korean court and his representatives argued the case on the merits, without success. In the enforcement proceedings in Australia, the defendant argued that the Korean judgment had been obtained by fraud by way of misrepresentations to the Korean court. After considering the evidence afresh, Dunford J concluded that the plaintiff's evidence was unsatisfactory, that the Korean judgment had been obtained by fraud, and that enforcement in Australia should be refused.

[40.70] The issue was not considered by an Australian appellate court until *Benefit Strategies Group Inc v Prider*.[192] In that case, Bleby J, sitting in a Full Court of the Supreme Court of South Australia, did no more than observe the difference of opinion between judges at first instance in Australia and acknowledge the widespread criticism of the English approach.[193] The court was not required to choose between the competing points of view. There is a slight hint of support for *Keele v Findley* in Bleby J's comment about the Australian cases that have followed the English decisions: '[E]ven if those decisions correctly represent the law of Australia ...'.[194] Although 'even if' does not suggest a ringing endorsement of *Close* and *Yoon*, neither does it constitute a resounding condemnation. The issue still remains open to be decided on principle by an Australian appellate court.

[40.71] The reasons given by Rogers CJ CommD in *Keele v Findley* can only be described as compelling. Australian courts need no longer regard the English cases as binding. Principle favours rejection of the English rule, as the textwriters have long and unanimously argued.

187. SC (NSW), Graham AJ, 10107/1996, 21 November 1997, BC9706194, unreported.
188. [1992] 2 AC 443.
189. (1990) 21 NSWLR 444.
190. (2000) 158 FLR 295.
191. *Ibid* at [22].
192. (2005) 91 SASR 544.
193. *Ibid* at 558–9, at [41].
194. *Ibid.*

That the foreign judgment is contrary to public policy

[40.72] A foreign judgment may be denied enforcement because it is founded on a law that is not acceptable to the public policy of the forum, such as a judgment for the wages of a prostitute, or an order for the maintenance of a child not confined to minority or other specified period.[195] In *Vervaeke v Smith*,[196] a Belgian annulment of a marriage celebrated in England between persons who had no intention of living together as husband and wife was refused recognition because the Belgian law which treated such marriages as void conflicted with the distinctive rule of English public policy, which regarded such a marriage as valid.

[40.73] A foreign judgment may also be contrary to public policy because it was obtained in a manner obnoxious to the law of the forum, such as by duress[197] or undue influence.[198] However, except in the anomalous case of fraud (on which, see **[40.67]–[40.71]**), the defence that public policy is offended by the method in which the judgment was obtained cannot be raised in the forum if a similar defence was available under the law of the foreign court.[199] Foreign judgments affecting personal status, for example, divorces, annulments and adoptions, have also been denied recognition under the discretionary power to refuse recognition if such orders have been obtained in circumstances abroad, or have an effect on a party in the forum, which is 'contrary to substantial justice'.[200]

[40.74] In *Stern v National Australia Bank*,[201] Tamberlin J of the Federal Court of Australia held that recognition of a Californian judgment should not be denied on the ground that the Australian plaintiff had been guilty of conduct in breach of s 52 of the *Trade Practices Act 1974* (Cth) outside Australia. The defendant had argued that it would be offensive to Australian public policy to allow the plaintiff to enforce the Californian judgment without allowing the defendant to raise a defence or counter-claim based on the plaintiff's breach of s 52, unless an equivalent defence or claim were available in California. Tamberlin J rejected that argument, observing that denial of enforcement is only available when the offence to public policy is of a high order, as in cases involving fundamental questions of moral and ethical policy, fairness of procedure and illegality.[202] Tamberlin J's decision was affirmed by the Full Court of the Federal Court of Australia, which did not find it necessary to come to any decision on the public policy issue because of its conclusion on the evidence that the plaintiff had not breached s 52 in any event.[203]

[40.75] Tamberlin J's views in *Stern* were adopted by Atkinson J of the Supreme Court of Queensland in *De Santis v Russo*[204] in the context of the equivalent defence

195. *Re Macartney* [1921] 1 Ch 522.
196. [1983] 1 AC 145.
197. *Re Meyer* [1971] P 298.
198. *Israel Discount Bank of New York v Hadjipateras* [1983] 3 All ER 139.
199. *Ibid.*
200. For a general discussion of public policy, see Ch 18.
201. [1999] FCA 1421 at [133]–[147], BC9907269.
202. *Ibid* at [143].
203. (2000) 171 ALR 192 at 208 per Hill, O'Connor and Moore JJ.
204. (2001) 27 Fam LR 414 at 419, at [19].

to enforcement on grounds of public policy contained in the Foreign Judgments Act 1991 (Cth) s 7(2)(a)(xi). Atkinson J held that the Italian law of child maintenance, while different from its Australian counterpart, did not 'so offend the essential principles of justice and morality' that enforcement of an Italian judgment should be refused.[205] However, Atkinson J's decision to enforce the Italian judgment was overruled on other grounds by the Queensland Court of Appeal.[206]

[40.76] The result is that neither case is authoritative: *Stern* because Tamberlin J's views were probably *obiter*, because the Full Court held that there was no reason to consider the possible effect of s 52, and *De Santis* because Atkinson J's decision was reversed by the Court of Appeal, albeit on other grounds.[207] Nevertheless, the principle espoused by Tamberlin and Atkinson JJ should be followed and applied. The public policy ground for refusal of enforcement should be narrowly confined. The fact that Australian law would have produced a different result is in some sense evidence that Australian law has a different 'policy' from the relevant foreign law, but that should not be sufficient. The offence against Australian public policy should be profound before refusal to enforce is warranted. Anything less comes close to a review of the merits of the foreign decision.

[40.77] If an Australian court confirms a scheme of arrangement between a corporation and its creditors under the *Corporations Act 2001* (Cth), the same court should refuse to enforce any foreign judgment affecting the rights of the parties to the scheme of arrangement. The scheme of arrangement adjusts the rights of the corporation in a manner that accommodates the rights and interests of the corporation itself, its members and creditors and also the interests of the Australian community in which it has been conducting business and incurring obligations. That compulsory adjustment of the contractual rights of the parties expresses a policy of a forum that must be taken to override any inconsistent allocation of rights embodied in a foreign judgment.[208]

[40.78] In *Schnabel v Lui*,[209] Bergin J of the Supreme Court of New South Wales ordered enforcement of a judgment for compensatory damages made by a federal court in California, but refused to enforce that part of the judgment attributable to an award of punitive damages. Bergin J held that because the purpose of the award of punitive damages was to punish the defendant for failing to comply with the court's orders, that part of the judgment was penal in nature and so was unenforceable because of the exclusionary principle that Australian courts will not enforce a penal law either directly at the suit of a foreign government or indirectly in a suit between private citizens.[210] It was possible and practicable to sever the unenforceable award of punitive damages from the award of compensatory damages, which was enforceable.[211]

205. *Ibid* at 420–1, at [22].
206. [2002] 2 Qd R 230.
207. *Bank Polska v Opara* [2007] QSC 1 at [16] per Chesterman J.
208. *Re Bulong Nickel Pty Ltd* (2002) 26 WAR 466 at [18] per Heenan J; *Re Glencore Nickel Pty Ltd* (2003) 44 ACSR 210 at 217–18, at [39], [44] per McLure J.
209. [2002] NSWSC 15.
210. See generally Ch 18.
211. *Schnabel v Yung Lui* [2002] NSWSC 15 at [180] per Bergin J. See also *Lewis v Eliades* [2004] 1 WLR 692, severing the unenforceable punitive component of an award of damages from an enforceable award of compensatory damages.

However, in *Benefit Strategies Group Inc v Prider*,[212] a Full Court of the Supreme Court of South Australia said, *obiter*, that not all foreign judgments for punitive damages are unenforceable on public policy grounds. The punitive damages in *Schnabel* were awarded as a sanction for failure to comply with the court's orders, giving them what Bleby J in *Prider* called 'an obvious "public" connotation'.[213] Speaking for a unanimous court, Bleby J said that where the foreign court's award of punitive damages is made to punish the defendant's deliberate and callous disregard of the plaintiff's rights, the award has 'no public element' and enforcement of it would not be contrary to the public policy of Australia, even if the amount awarded far exceeds what would have been awarded in an Australian court.[214] The plaintiff in *Prider* had not sought to enforce the punitive damages component of the foreign judgment in that case, which was awarded to punish the defendant's 'brazen and fraudulent conduct'. That made the Full Court's comments about the enforceability of foreign punitive awards *obiter*, but it would seem unwise for any plaintiff to make a similar concession in the future.

The Full Court in *Prider* agreed with Bergin J in *Schnabel* that if part of a foreign award *is* unenforceable on public policy grounds, it should be severed from the enforceable component of the award for compensatory damages and costs, if it is practicable to do so.[215]

That the foreign court acted contrary to natural justice

[40.79] The requirement of natural justice relates to the procedure of the foreign court. Traditionally it is seen as imposing two requirements: (1) each party must have had the opportunity of presenting his or her case before an impartial tribunal; and (2) each party must have been given due notice of the proceedings.

[40.80] A fair hearing is obviously denied if the court is composed of persons with an interest in the outcome of proceedings.[216] However, the bias must be in the tribunal itself. It is no denial of natural justice that the court has unwittingly appointed as its official investigator a relative of one of the parties, provided the report made by the investigator was only evidence before the court and the party complaining of its bias had the opportunity of assailing it before the foreign court.[217] It would also be a denial of natural justice if a party were not allowed to give evidence before, or address, a foreign court, but there is no denial of natural justice if the foreign rules do not permit either party to a suit to give evidence on their own behalf in the proceedings since both are put to the same procedural disadvantage.[218] It is also a denial of natural justice if one party is prevented by the intimidation of the other party from conducting the proceedings in the foreign court.[219]

212. (2005) 91 SASR 544 at 552.
213. *Ibid* at 565–6, at [72].
214. *Ibid* at 565–6, at [68], [73].
215. *Ibid* at 566, at [75], citing *Raulin v Fischer* [1911] 2 KB 93.
216. *Price v Dewhirst* (1837) 8 Sim 279; 59 ER 111.
217. *Jacobson v Frachon* (1927) 44 TLR 103.
218. *Scarpetta v Lowenfeld* (1911) 27 TLR 509.
219. *Jet Holdings Inc v Patel* [1990] QB 335.

[40.81] In dealing with allegations that the defendant was not given due notice of the foreign proceedings, Australian courts have been careful not to impose the standards of the forum on foreign courts.[220] It would seem that if notice of proceedings has been dispensed with *bona fide* and in accordance with the rules of the foreign court, Australian courts will, generally speaking, allow the foreign judgment to stand.[221] It matters not that the forum would not have dispensed with notice in the same situation,[222] though a line would have to be drawn somewhere as in the case where the rules of a foreign court dispensed with the need of giving a foreign defendant any form of personal notification even in peace time.[223]

There is, however, a denial of natural justice when the foreign court is prevailed upon to dispense with notice of the proceedings to the defendant by the fraud of the plaintiff. Thus, if a petitioner in foreign divorce proceedings falsely swears that he has no knowledge of the current address of his wife and obtains on the basis of such evidence an order dispensing with personal service, the resulting decree will not be recognised in Australia.[224]

[40.82] In *Boele v Norsemeter Holding AS*,[225] the plaintiff sought enforcement in New South Wales of a judgment given against the defendant, an Australian, by the Borgarting Court of Appeals in Norway. The defendant had successfully defended the case at first instance in Norway and had terminated his Norwegian lawyers' retainer after being told that his case was a success. The plaintiff appealed and the defendant's Norwegian lawyers filed a cross-appeal on his behalf and represented him in the appeal proceedings without informing him either of the appeal or the cross-appeal. The Borgarting Court of Appeal allowed the appeal and dismissed the cross-appeal. The plaintiff brought enforcement proceedings in New South Wales and sought summary judgment, relying on the Norwegian judgment. The New South Wales Court of Appeal held that summary judgment was inappropriate because the defendant had an arguable case that he was not afforded natural justice in relation to the appeal because he had not been given adequate notice. Although the question of due notice was to be considered with regard to the notice provisions of the foreign court,[226] the New South Wales Court of Appeal held that there was not enough evidence to establish, to the level necessary for summary judgment, that notice to a lawyer constitutes due notice under Norwegian law even after that lawyer's authority to represent his or her client has been terminated without that termination being reported to the court or the other side.

[40.83] It was suggested by the English Court of Appeal in *Jet Holdings Inc v Patel*[227] that it is for the forum to determine whether the foreign court has denied natural justice. This would mean that, as in relation to fraud, a defendant who has raised, or

220. *Igra v Igra* [1951] P 404 at 412 per Pearce J; *Boele v Norsemeter Holding AS* [2002] NSWCA 363 at [28] per Giles JA.
221. *Jeannot v Fuerst* (1909) 25 TLR 429.
222. *Ibid.*
223. *Buchanan v Rocker* (1808) 9 East 192.
224. *Terrell v Terrell* [1971] VR 155.
225. [2002] NSWCA 363.
226. See n 220 above.
227. [1990] QB 335 at 345 per Staughton J.

could have raised, the issue abroad might, if unsuccessful there, raise the matter again in the forum.[228]

In *Adams v Cape Industries plc*[229] the English Court of Appeal suggested that where the denial of natural justice took the traditional form of lack of notice or opportunity to be heard, the defendant should, as in relation to fraud, not be obliged to use any available remedy in the foreign court to challenge the judgment. Outside that core area there should generally be such an obligation unless, as in *Adams*, the defendant had no knowledge or means of knowledge of the procedural injustice in time to make use of the remedy in the foreign court. If the fraud analogy applies, a defendant who raises the issue of denial of natural justice unsuccessfully in the original proceedings can raise it again in the forum, but a defendant who has applied to the foreign court to set the judgment aside and has failed may be estopped in the forum.[230]

[40.84] The English Court of Appeal indicated in *Adams v Cape Industries plc*[231] that the concept of denial of procedural natural justice is not confined to the two traditional grounds identified in **[40.76]** above, namely a failure to give notice or an opportunity to attend, but it also extends to other situations where the forum's concept of substantial justice is infringed. In that case it was held to be contrary to natural justice that the foreign court entered judgment in default of appearance by the defendant, but without a hearing or a judicial assessment of the evidence in each individual case of several brought against the defendant, although required to do so by its own law. The defendant had been given notice of the proceedings and been given the opportunity to attend, but had not been notified that damages would be determined summarily without judicial assessment.

[40.85] This aspect of the Court of Appeal's decision in *Adams* constitutes a considerable expansion of the forum court's power to refuse enforcement, one that seems inconsistent with the general principle considered above in **[40.32]**; namely that a foreign default judgment is enforceable as a final and conclusive judgment until the defendant actually takes steps in the foreign court to have it set aside.

That the foreign judgment is penal or a judgment for a revenue debt

[40.86] The rule that penal or revenue judgments will not be enforced in the forum is an aspect of the general rule that Australian courts do not enforce foreign laws that are penal or revenue laws. The matter is discussed in Chapter 18.

In some jurisdictions, a judge or magistrate trying a criminal action may add to the penalty imposed an award of compensation to the victim. In such a case the penalty can be severed from the remainder of the judgment.[232] Similarly, if an award of punitive damages is unenforceable (as to which, see **[40.78]**), it can be severed from an award of compensatory damages, if it is practicable to do so.[233]

228. [1990] Ch 433 at 569.
229. *Ibid* at 568–71.
230. *House of Spring Gardens Ltd v Waite* [1991] 1 QB 241.
231. [1990] Ch 433 at 564–7.
232. *Raulin v Fischer* [1911] 2 KB 93.
233. *Schnabel v Lui* [2002] NSWSC 15 at [180] per Bergin J; *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 566, at [75] per Bleby J. See also *Lewis v Eliades* [2004] 1 WLR 692, severing the unenforceable punitive component of an award of damages from an enforceable award of compensatory damages.

That the foreign court acted perversely in refusing to apply the appropriate law

[40.87] This defence is doubtful since it is impossible to say when the foreign court has acted 'perversely'. The only authority supporting it is the old case of *Simpson v Fogo*,[234] where Page Wood VC refused to give effect to a Louisiana judgment on the ground that the Louisiana court had perversely refused to apply English law, which the Vice-Chancellor considered properly applicable.

The decision, which dates from 1862, was based on the assumption in accordance with the then prevailing vested rights theory that the choice of law rules applied by English courts had universal validity. An English court might therefore say, without arrogance, that a foreign court that did not apply the same conflicts rule was perverse.

[40.88] Today, such a proposition is obviously untenable. The matter was discussed by the House of Lords in *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)*.[235] Though none of their Lordships was prepared to state categorically that the defence of perversity did not exist, almost all of them agreed that English courts could not sit in judgment on the conflicts principles applied by foreign courts.

However, that sensible view was not shared by Lord Simon in *Vervaeke v Smith*,[236] who said:

> If, as I think, our choice of law rule ... indicates English law as determinant of the validity of this marriage, it provides a potent reason for preferring the legally recognised English public policy and thus for refusing recognition to the Belgian judgment based on a contrary public policy.

It is submitted with respect, that if Lord Simon intended to indicate by his remarks that a foreign judgment based on foreign law could be denied recognition because an English court would have applied English law, it would be a regression from the standards of international comity. Fortunately, the decision in *Vervaeke v Smith* can be explained on other grounds.

[40.89] In *Air Foyle Ltd v Center Capital Ltd*,[237] Gross J of the High Court of England and Wales quoted *Simpson v Fogo* as authority for a rather different, and more readily defensible proposition, namely that a foreign judgment has no effect if it is 'perverse, in the sense that it is at variance with generally accepted doctrines of private international law'. It is difficult to be sure what Gross J meant by 'generally accepted doctrines', but if the foreign court applies a choice of law rule that is not only different from that of the forum court but also different from any of the rules normally applied in conflicts cases, then it might qualify as being sufficiently 'perverse' to warrant a refusal to enforce. For example, if the foreign court were to decide a transnational contract case by applying the law of the more populous nation, rather than the parties' chosen law, the forum court could deny enforcement on the ground that the choice of law was perverse. Admittedly, it is difficult to think of examples that would fall within Gross

234. (1863) 1 Hem & M 199; 71 ER 85.
235. [1967] 1 AC 853.
236. [1983] 1 AC 149 at 166.
237. [2003] 2 Lloyd's Rep 753 at 761.

J's formulation of the rule, but that formulation has the considerable advantage of not sharing the parochialism of Lord Simon's view.

That the party seeking enforcement or recognition is estopped from relying on the foreign judgment by reason of estoppel arising out of a prior judgment within the forum between the same parties and concerning the same issue or issues

[40.90] If there is a conflict between a foreign judgment and an earlier judgment in the forum on the same matter between the same parties, the forum will prefer its own.

This is the explanation of the decision in *Vervaeke v Smith*.[238] That case concerned a marriage celebrated in London between Vervaeke, a Belgian prostitute, and Smith, a citizen of the United Kingdom, in 1954 solely for the purpose of preventing Vervake's deportation from the United Kingdom as an undesirable alien. The parties did not intend to cohabit and never did. In 1970 Vervaeke married her former employer, Messina, who died during the wedding feast. Vervaeke sought as his widow to assert her claim to his considerable investments in England. However, Smith was still alive and the prior marriage had not been dissolved.

Vervaeke sought an annulment of her marriage to Smith on the ground that she lacked consent because she was not aware of the true nature of the ceremony at the time. Her petition was dismissed by Ormrod J in *Messina v Smith*[239] on a finding on the facts that she had been fully aware of the nature of the ceremony and had consented to it. Subsequently, she returned to Belgium and obtained an annulment from a Belgian court on the ground that under Belgian law the parties did not intend to enter into a marriage but a sham relationship. She then applied to the English courts for recognition of the Belgian annulment and a consequential declaration that her marriage to Messina was valid.

The House of Lords held unanimously that she was not entitled to either order on the ground that the English decree, which was earlier in time to the Belgian decree, made it *res judicata* that the English marriage was not rendered invalid on the ground of absence of consent. The Belgian proceedings were also based on an absence of consent although directed to the intention to cohabit and not to the nature of the ceremony. The appellant was estopped in England by cause of action estoppel from raising again a cause of action based on the alleged invalidity of the first marriage. She was also estopped by issue estoppel from raising again the issue of her consent to the first marriage in the proceedings for a declaration that the marriage to Messina was valid.[240]

[40.91] It is obvious that a party cannot go shopping around to overturn an earlier decision. For example, in *E D & F Man (Sugar) Ltd v Yani Haryanto (No 2)*,[241] Haryanto sought a declaration that he was not bound by a contract for the sale of sugar to him by Man. The action was dismissed, as was Haryanto's appeal. Haryanto

238. [1983] 1 AC 145. See also *E D & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429.
239. [1971] P 322.
240. [1983] 1 AC 145 at 153–5 per Lord Diplock.
241. [1991] 1 Lloyd's Rep 129.

and Man then entered into a settlement agreement, by which Haryanto agreed to pay Man US$9 million. Haryanto then sought and obtained judgment from a court in Indonesia annulling the settlement agreement and the underlying sale contract on which Man's original claim had been based. The English Court of Appeal refused to recognise the Indonesian judgment because it was inconsistent with the earlier English decision.

Similarly, if there is a conflict between two foreign decisions the earlier should prevail.[242] It would seem also to follow that an earlier foreign determination should prevail over one in the forum.

The Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth)

[40.92] The *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) was enacted to protect Australian business from what is considered to be excessive jurisdiction exercised by foreign courts, particularly in the United States, in antitrust proceedings. Complaints have been made that the courts of that country have violated the territorial sovereignty of other states, including Australia, by purporting to exercise jurisdiction in respect of persons, matters or conduct outside the United States by reason of some alleged impact on business within the United States.[243] Furthermore, the award of treble damages authorised by the United States antitrust legislation (the Sherman Act) is considered excessive, although not penal in the conflictual sense.[244]

Section 9 of the Act allows the Federal Attorney-General to make a declaration in respect of a foreign antitrust judgment if he or she considers such to be desirable in the national interest, or considers the exercise of power by the foreign court to be contrary to international law or inconsistent with international comity or practice. The effect of the declaration is to prevent the enforcement of the judgment as a whole in Australia, or if the declaration specifies an amount of money, to limit enforcement to that sum of money.

[40.93] If the plaintiff in the antitrust proceedings has recovered damages overseas on a judgment so barred, or in excess of the amount permitted by the declaration, s 10 permits the defendant to recover such damages or excess in proceedings in the Federal Court from the plaintiff and, in the case of a corporate plaintiff, any related corporation. Under s 11 the defendant may also recover reasonable costs and expenses incurred in the foreign antitrust proceedings. However, the recovery and costs provisions are only available to persons who are Australian citizens not ordinarily resident in the foreign country at the commencement of the antitrust proceedings, or a corporation incorporated in Australia, not having its principal place of business in the foreign country at the commencement of the antitrust proceedings, or an

242. *Showlag v Mansour* [1995] 1 AC 431; *People's Insurance Co of China, Hebei Branch v Vysanthi Shipping Co Ltd (The Joanna V)* [2003] 2 Lloyd's Rep 617.

243. The 'effects test' for extra-territorial application of the Sherman Act was first stated in *United States v Aluminum Co of America*, 148 F 2d 416 (2d Cir, 1945). The Supreme Court of the United States has since considerably modified the extra-territorial reach of the Sherman Act. In its most recent decision on the question, *F Hoffman-La Roche Ltd v Empagran SA*, 542 US 155 (2004), a majority of the court referred to the need to 'avoid unreasonable interference with the sovereign authority of other nations' (*ibid* at 164).

244. *Huntington v Attrill* [1893] AC 150. See generally Ch 18.

Australian government or public authority.[245] The Act also makes provision in s 12 for the enforcement in Australia of similar orders made under equivalent legislation in other countries with which Australia has entered into a reciprocal arrangement.[246]

[40.94] Finally, under s 14 the Attorney-General may prohibit compliance with any foreign order or injunction requiring something to be done in Australia, or prohibiting the doing of something in Australia, or requiring a person to refrain from conduct in Australia. Such orders, not being of a monetary nature, would not at common law have been enforceable in Australia, but the existence of such a direction may be a defence to proceedings for non-compliance in the United States.

245. Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Cth) ss 10(3), 11(2).
246. For example, The Protection of Trading Interests Act 1980 (UK).

EXHIBIT 67

New South Wales
Supreme Court

CITATION :	**Independent Trustee Services Ltd v Morris [2010] NSWSC 1218**
HEARING DATE(S) :	20 October 2010
JUDGMENT DATE :	20 October 2010
JUDGMENT OF :	Bryson AJ at 1
EX TEMPORE JUDGMENT DATE :	20 October 2010
DECISION :	1. Judgment in favour of the Planitiff against the Defendant in the sum of £29,397,240.96. 2. An order that an account be taken before an Associate Justice, on the basis of wilful default, of the dealings by the Defendant, his servants and agents with the £52 million paid out of the Impacted Schemes as referred to in order 1 of the orders of the High Court of Justice Chancery Division of 1 July 2010, and the traceable proceeds thereof.
CATCHWORDS :	COURTS and JUDGES - PRIVATE INTERNATIONAL LAW recognition and enforcement of foreign judgments - plaintiff obtained in litigation in High Court London judgment for money amount and declarations establishing liability for knowing ssistance of breaches of trust, and order for accounts - plaintiff sought judgment and orders in NSW enforcing orders of High Court - exercise of jurisdiction in UK based on service outside UK (and in NSW) and not on service within UK - defendant, a UK citizen resident in Australia, did not appear and plaintiff applied for summary disposal consideration of - recognition and enforcement of foreign judgments for a) money sum, b) equitable remedies - citizenship of foreign jurisdiction as a ground for recognition, sufficient

	connexion as ground for enforcement of equitable remedies - after review of case law, judgment and orders of High Court were enforced
LEGISLATION CITED :	Uniform Civil Procedure Rules 2005
CASES CITED :	Davis v Turning Properties Pty Ltd [2005] NSWSC 642 Emanuel v Symon [1908] 1 KB 302 Federal Finance and Mortgage Ltd v Winternitz (unreported SC (NSW), 9 November 1989) General Steam Navigation Co v Guillou (1843) 11 M & W 877 Houlditch v Marquis of Donegal (1834) 2 Cl & F 470; 6 ER 1232 Rainford v Newell-Roberts [1962] IR 95 Roussillon v Roussillon (1880) 14 Ch D 351 Schibsby v Westenholz (1870) LR 6 QB 155 White v Verkouille [1990] 2 Qd R 191
TEXTS CITED :	Not applicable
PARTIES :	Independent Trustee Services Ltd Anthony James Morris
FILE NUMBER(S) :	**SC** 2010/236266
COUNSEL :	Pl: Mr Parker SC / Mr Zahra Def: No appearance
SOLICITORS :	Pl: Clayton Utz, Sydney Def: No appearance.

IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION

BRYSON AJ

Wednesday 20 **October 2010**

SC 2010/236266 **INDEPENDENT TRUSTEE SERVICES LTD v**

ANTHONY JAMES MORRIS
JUDGMENT

1 HIS HONOUR: The plaintiff by summons of 15 July 2010 claimed relief with the effect of enforcing in New South Wales Judgments and Orders made in the High Court of Justice of England and Wales on 1 and 2 July 2010 by Justice Peter Smith.

2 The evidence shows that the defendant was duly served with the summons in the present proceedings. He has not appeared. Further, he has been served with the Notice of Motion filed by the plaintiff on 6 October 2010 which is before me today. His name was called outside the court earlier today and he did not appear. Those who appeared for the plaintiff have told me that he has not given any indication in any communication to them that he would do so.

3 At an earlier stage in these proceedings he applied for an order dismissing the proceedings, it would seem on the basis that New South Wales was an inconvenient forum and on other bases, but he was not successful.

4 The Uniform Civil Procedure Rules authorise him to make that application without filing an appearance. In the course of his application which was heard by Justice Ball on 29 July 2010 some statements were made by counsel on his behalf which are material to my later consideration and I will return to them later.

5 At later interlocutory stages in these proceedings he was directed by a Registrar to file an appearance, but the time available under that direction has passed and he has not done so. In effect the Notice of Motion now before me seeks summary disposal of the proceedings on the footing that they are undefended.

6 The plaintiff filed an earlier Notice of Motion to a similar effect dated 10 September 2010 but does not proceed on that Notice of Motion and it is dismissed.

7 The documents I have seen are the Summons, the Notice of Motion, the following affidavits; Robert Lancaster of 19 July 2010 (which shows service of the summons); affidavit of Norman Trevor King of 19 October 2010 (which shows service of the Notice of Motion); affidavit of David Kilmaine Percy De Ferrars of 15 July 2010, which gives the history and many particulars of the proceedings in the United Kingdom; the affidavit of Scott Anthony Grahame, which sets out the history of the proceedings in New South Wales; Mr Grahame's further affidavit of 13 October 2010 to like effect. With this affidavit Mr Grahame produces a copy of submissions made on behalf of the defendant before Justice Ball. The affidavits of Mr King and Mr Grahame of 6 October 2010 are now filed in court by leave. I have also seen the affidavit of Hetal Kotecha of 23 September 2010. The deponent is an officer of the plaintiff and his evidence includes material showing the basis of a calculation of the amount now claimed; that affidavit too is filed in court.

8 The plaintiff tenders and I take notice of the Court's record of transcript of proceedings before Justice Ball of 29 July 2010 and that will be marked Interlocutory Exhibit A.

9 The particular Orders of the High Court of Justice which are the basis of the present application for summary disposal are these:

10 On 24 May 2010 Justice Peter Smith made Orders at the conclusion of the hearing when Judgment was reserved. These Orders include in Order 3 that a number of defendants including the now defendant

> "... file and serve on the Claimant no later than 18 June 2010 an account of the use and application of, and any profits, investment income, growth and interest earned on, the assets of the Impacted Schemes, from their recovery or receipt by each of those Defendants to the taking of the account".

11 His Lordship obviously contemplated that when that account was filed some measure, such as inquiry, would be undertaken to establish what, if anything, was due upon the account, but those measures have not begun because the now defendant did not comply. In effect the plaintiff now asks that this Court take up the inquiry thus begun.
12 In his Lordship's Orders of 1 July 2010 it was further ordered, among many orders dealing with the liability of most of the many defendants in the proceedings in England, as follows:

> In order 2 it was declared to the effect that a number of defendants including the now defendant dishonestly assisted in breaches of trust referred to in paragraph 1 of those orders in transferring £52m out of the pension schemes listed in appendix 1 to the Particulars of Claim.

13 Then in order 3 it was declared to the effect that a number of defendants including the now defendant were "... liable for knowing receipt to the extent that they received assets of the Impacted Schemes or the traceable proceeds thereof".
14 I see these Orders as intended to establish, and finally establishing, entitlement of the plaintiff to remedies against the now defendant, leaving for further consideration the ascertainment of the quantum of recovery.
15 Order 8 of 1 July 2010 is specifically directed to the liability of the now defendant and it is in these words:

> The sixth defendant to pay the Claimant forthwith the sum of £52,000,000
> (a) (as to the entire sum) by way of equitable compensation for dishonest assistance, and
>
> (b) (as to £4,938,068) as liability for knowing receipt.
>
> Plus interest at 2% p.a. above base rate compounded with monthly rests from the dates that the elements of this sum were transferred out of the Impacted Schemes, such interest assessed in the sum of £6,270,570.48 and continuing at a daily rate of £11,397.26.

16 The plaintiff does not seek judgment in this Court for the full amount as there have been credits of various kinds.
17 Notwithstanding the terms of the order 8, which appear to be open to a reading of which the daily rate of interest is not affected by part payment or other credits, I regard reference to the daily rate as no more than an illustration and not precluding calculation of interest at the rate referred to and compounded, but with credits brought into account at appropriate dates and corresponding reductions in the interest.
18 In effect, the plaintiff seeks a money judgment based on order 8 as a judgment given in England, the judgment itself being the cause of action. The plaintiff also seeks orders which would give remedies carrying out the determinations about liability for dishonest assistance and knowing receipt, the first step towards the determination of which was taken by Order 3 of 24 May 2010.
19 The plaintiff's counsel also told me that the plaintiff was ready to base its case on the underlying causes of action and grounds of suit which were upheld by Justice Peter Smith, that is to say, to satisfy this Court that the same conclusion should be reached here

as was reached by Justice Peter Smith. I do not regard this as an exercise which it is necessary to undertake because for reasons which I will state I am of the view that the decisions reached by Justice Peter Smith should be given effect according to the principles on which the Court ordinarily acts in actions based on judgments in other jurisdictions.

20 With respect to Order 8, which I regard as a judgment for payment of money, the first basis on which it is contended that I should recognise and give effect to the judgment in England is that it falls within a ground of recognition that the now defendant is a United Kingdom citizen. Evidence shows plainly that he is a United Kingdom citizen; he holds a United Kingdom passport issued in 2003 and current until 2013, which it should be inferred was relied on by him in his travels to and entry into Australia.

21 Further it should be understood that his citizenship is not some relic of an early stage of his life, but is an active part of his present situation on which he relies for international travel and for other purposes. It appears clearly that the High Court of Justice in England proceeded on a different basis of jurisdiction than simple reliance on his United Kingdom citizenship. A number of measures were taken to serve English process on him here. A Judge of that Court at an early stage made an order in effect ratifying some relatively informal steps which had been taken. Soon afterwards the now defendant communicated with the plaintiff's solicitors in England in terms which clearly showed that he well knew of the English process, and at a later stage, after some months, actual delivery to him of the English process was effected.

22 I take it that the Court in England acted on some extension of classic principles in which the exercise of jurisdiction is based on service within the jurisdiction, extensions familiar here as similar principles are acted on in Australia in the exercise of jurisdiction based on service outside Australia. However the ground of recognition put forward is the now defendant's United Kingdom citizenship, accompanied by proofs and observations which show that it is an active citizenship.

23 Instances of the now defendant's reliance on that status include assertions made on his behalf by his senior counsel before Justice Ball, in written submissions which relied heavily and recurringly on his status as a United Kingdom citizen and on influences which that was said to have on his position under the law of the United Kingdom and, in particular, in relation to the English proceedings and other possible proceedings there arising out of the same events. Observations of a similar kind were developed at some length and relied on by his senior counsel during the hearing of the proceedings before Justice Ball. If and insofar as it is necessary that his citizenship should be active, that requirement is fully met in the present case.

24 Counsel have referred me to observations in several decisions in England in the Court of Queens Bench, in the Court of Appeal and elsewhere to the effect that citizenship of a foreign country is a recognised ground of jurisdiction on which the effectiveness of foreign judgments is accepted under the common law. In *Schibsby v Westenholz* (1870) LR 6 QB 155 the judgment of the Court of Queens Bench given by Justice Blackburn contains observations on the grounds of jurisdiction of foreign judgments in the exercise of which are recognised in the common law of England. Justice Blackburn's observations referred to the earlier decision of *General Steam Navigation Co v Guillou* (1843) 11 M & W 877 at 894 (Baron Parke) which appeared to show that allegiance to the foreign country in which jurisdiction was exercised was a basis upon which recognition would be accorded. This was expressed a little obliquely and was not essential for the decision in *Schibsby v Westenholz*, but the observations were made by a Judge of high reputation speaking on behalf of the whole Court of Queens Bench and are entitled to considerable respect. In *Roussillon v Roussillon* (1880) 14 Ch D 351 Fry J considered the implications

of this passage and stated the result, it should be said in rather clearer terms than appeared from the judgment of Blackburn J. After referring to that and other authorities Fry J said at 371;

> "What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court?"

After referring to case law, his Lordship went on:

> "The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained..." (and his Lordship went on to consider another possible case.)

25 In *Emanuel v Symon* [1908] 1 KB 302 the Court of Appeal considered the subject. At page 309 Lord Justice Buckley stated:

> "... these are five cases in which the Courts of this country will enforce a foreign judgment:
> (1) where the defendant is a subject of the foreign country in which the judgment has been obtained;..."

and went on to state other cases.

26 In this case, as in *Roussillon v Roussillon* and as I understand it in *Schibsby v Westenholz*, recognition was not founded on the ground of allegiance or citizenship and the observation should be understood to be *obiter dictum*. However this view appears repeatedly in judgments on appeal given by judges of considerable reputation; such observations are not made lightly. It has been pointed out by text writers and elsewhere that direct authority for that proposition is not cited in any of these cases. I would add that allegiance or citizenship has not, in any event for some centuries, been a ground upon which English courts themselves have assumed jurisdiction.

27 Many text writers, so it would seem, have felt dissatisfied with this view. Their views were collected in the High Court of the Irish Republic in *Rainford v Newell-Roberts* [1962] IR 95 by President Davitt, who after careful consideration of the text writers as well as case law to which I referred and other case law, declined to act on that basis and to recognise a judgment which had been given in the United Kingdom against a citizen of the United Kingdom, but not based on service within the United Kingdom. In New South Wales in *Federal Finance and Mortgage Ltd v Winternitz* (unreported, 9 November 1989) Sully J acted on the basis which the English decisions support in recognising and enforcing a judgment given against a United States citizen in the State of Hawaii. His Honour did not refer to *Rainford v Newell Roberts* and based his decision principally on what he referred to as "the celebrated statement of principle" made by Lord Justice Buckley in *Emanuel v Symon.*

28 Notwithstanding the absence of citation in the English authorities of any case in which this ground of jurisdiction has been contested and upheld after argument, I am of the view that I should follow them. Ordinarily a decision of the Court of Appeal of England and

Wales on a common law question not affected by statutory interpretation or constitutional or other considerations special to Australia ought be followed unless there is some sound basis for concluding that it was erroneous. Justice Sully has followed *Emanuel v Symon.* I must respectfully say that I have not found the judgment of Davitt P in *Rainford v Newell-Roberts* persuasive to any extent which would justify my not following the opinion repeatedly expressed in England. Notwithstanding the absence of authority specifically deciding the point, it seems to me very unlikely that these repeated statements were made without reliance on knowledge of practice decisions which may not have attracted a great deal of attention or found their way into law reports but were known to those distinguished judges.

29 In my view I should recognise and give effect to the money judgment in para 8 of Justice Peter Smith's orders of 1 July 2010.

30 Adoption of the declaratory orders and orders to account does not raise quite the same point when I am asked to recognise and make orders based on them. The order which I am now asked to make is "an order that an account be taken before an Associate Justice, on the basis of wilful default, of the dealings by the defendant his servants and agents with the £52,000,000 paid out of the Impacted Schemes referred to in Order 1 of the High Court of Justice, Chancery Division of 1 July 2010 and the traceable proceeds thereof".

31 If the declarations and order to account had been made by this Court and there had not been compliance, such an order would be made as a matter of course to give effect to the earlier decision. The English declaratory orders establish finally that there have been dishonest assistance and knowing receipt, and the interlocutory character of the order for the now defendant to give an account does not diminish the final character of those determinations.

32 Still, the orders do not have the concrete form of money judgments addressed in the authorities I have so far referred to. Rather this Court is asked to take up the controversy determined as far as it has been in England and take the next steps, as it were, in the same litigation.

33 Counsel have referred me to authorities which show that a Court of Equity will lend assistance to the enforcement of a foreign judgment also in a Court of Equity, without requiring as a prerequisite of enforcement here that the foreign order be made a judgment of the court here, but requiring that the court here be satisfied that there is a sufficient connection between the defendant and the jurisdiction in which the foreign order was made to justify recognition of the foreign court's order. The law was, in my view, satisfactorily restated in *White v Verkouille* [1990] 2 Qd R 191 by Justice McPherson. His Honour made a characteristically careful review of instances in case law where equity courts had acted in this way. The case law is derived, not altogether clearly, from the decision of the House of Lords in *Houlditch v Marquis of Donegal* (1834) 2 Cl & F 470; 6 ER 1232.

34 In effect Justice McPherson decided to recognise the appointment by a court in Nevada in the United States of a receiver and to allow that receiver to pursue enforcement in Queensland of rights determined by the court in Nevada.

35 The concept of a sufficient connection to justify recognition is not at all a well defined concept but I have no doubt that it is satisfied in the present case where the now defendant is usually to be found in New South Wales and has been able to conduct legal business here for a limited purpose while the substantial merits of the litigation have been determined fully and carefully in the United Kingdom, a country whose citizenship he claims, actually has and at times relied on. I regard it as appropriate to take up enforcement of the decision already reached.

36 In this view I am fortified by observations of Justice Campbell in *Davis v Turning*

Properties Pty Ltd [2005] NSWSC 642 at para 35.

37 For these reasons I propose to make the order and to take up in this Court the exercise of taking an account on the basis of wilful default which the decision already reached in the High Court of Justice in England and Wales fully justifies.

38 I turn to address the calculation of the amount of the money judgment which should now be entered. I would like counsel's assistance on this.

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EXHIBIT 68

[1957 B. No. 3168.]; [1961] 3 W.L.R. 719

***116 Blohn v Desser and Others.**

Queen's Bench Division

J. Diplock

1961 May 1, 2, 3.

Conflict of Laws—Foreign judgment—Implied submission to foreign jurisdiction—Judgment against partnership firm in Austria—Sleeping partner resident in England—Partner's name entered in Austrian commercial register—Whether implied submission to jurisdiction of Austrian court—Whether judgment recognised by English court—Austrian judgment not enforceable against partners personally—Personal defences available in Austria—Whether judgment final and conclusive—Whether enforceable.

The plaintiff, an Austrian resident in Vienna, suing on a bill of exchange, obtained in the Commercial Court of Vienna a judgment against a partnership firm there. The defendant was a partner in the firm and her name was registered as such in the commercial register in Vienna, but she was only a sleeping partner receiving no income from the firm, and at all material times was resident in England. The plaintiff brought an action against the defendant personally in England on, inter alia, the Austrian judgment. By Austrian law, although the firm had no separate legal personality, the judgment was not a judgment against the partners personally, and in order to render her personally liable a further action would have had to be brought against the defendant, when various personal defences not concluded by the judgment would have been available. ***117** The defendant did not seek to raise those defences in the present action.

On the defendant's contention that the judgment of the Austrian court was not binding or enforceable against her:-

(1)that the defendant, as a partner in the firm, must be regarded as having carried on business in Vienna through an agent resident there and that, having permitted those matters to be notified to persons dealing with the firm by registration in a public register, she had impliedly agreed with those persons to submit to the jurisdiction of the court of Vienna, and that, therefore, the English courts would recognise the judgment of the court of Vienna.Dictum of Buckley L.J. in Emanuel v. Symon.[1908] 1 K.B. 302, 309, C.A. applied.(2)But that the judgment against the partnership firm was not enforceable against the defendant as either it was not a judgment against her personally or, if it was, by reason of the defences which would be available to her in Vienna it was not a final and conclusive judgment.

ACTION.

The following statement of facts is taken from the judgment of Diplock J. The plaintiff, Mrs. Edith **Blohn**, an Austrian national resident in Vienna, sued Margarete **Desser**, Friderike Gottfried and Franz Diamant, three members of a partnership firm established under Austrian law, carrying on business under the name Salvator Malskafee Gesselschaft Deir and Company. The business was a family business and the defendants were brother and sisters. The first defendant was resident in England. She took no part in, and received no income from the business, but her name remained on the commercial register in Vienna as a partner, and in Austrian law she remained a partner. She alone was served with the writ and entered an appearance to the English action. The action therefore continued against her alone. The plaintiff and her only witness as to fact, one, Koerpner, were unable to come to England and their evidence was taken in Austria under letters of request.

At various dates between December, 1954, and October, 1956, the plaintiff made a number of loans to Franz Diamant, the brother of the defendant, which amounted to a sum of the order of 70,000 Austrian schillings. Part of that sum was borrowed by him for the business of the partnership firm and part for his own private purposes. By November, 1956, the partnership firm was in serious financial difficulties and on November 21 judicial proceedings were started in the Commercial Court of Vienna for the purpose of arriving at a composition of creditors. No composition agreement was reached with the creditors, and on March 18, 1957, bankruptcy***118** proceedings were instituted in the Commercial Court and a trustee in bankruptcy was appointed in Vienna. The effect of such proceedings and appointment in Austrian law was to divest Diamant of all authority to act on behalf of the partnership firm for so long as the bankruptcy proceedings continued. On June 15 the bankruptcy proceedings were discontinued and were set aside because the available assets were insufficient to meet the costs of the trustee in bankruptcy. Diamant's authority to act on behalf of the firm accordingly revived upon that date. On July 2, 1957, the plaintiff brought an action for 70,000 Austrian schillings in the Commercial Court of Vienna on a bill of exchange dated November 3, 1956, payable on February 2, 1957, and accepted by Franz Diamant in the name and on behalf of the partnership firm, and on July 15, 1957, that court gave judgment for the plaintiff.

The plaintiff claimed (1) £1,003 9s. on the judgment obtained against the partnership firm in the Commercial Court in Vienna with costs and interest; (2) alternatively £961 2s. on the bill of exchange; and (3) in the further alternative, £962 4s. on an account stated bearing the date November 3, 1956, and signed by Franz Diamant on behalf and in the name of the partnership firm.

The defendant denied that the bill of exchange and account stated were in fact executed on November 3, 1956, but alleged that they were executed upon a date about March 23 or 24, 1957, while the bankruptcy proceedings were current, and that Franz Diamant had no authority then to execute them on behalf of the partnership firm. The defendant also alleged that the judgment did not create a cause of action against her in the English courts, on the grounds, inter alia, that the Commercial Court of Vienna had no jurisdiction to give judgment; and that it was not a final and conclusive judgment.

Paul Sieghart for the plaintiff. In the view of English private international law the Austrian court had jurisdiction: Dicey's Conflict of Laws, 7th ed. (1958), rule 186, p. 1007. The defendant was a defendant in the Austrian action: had it been an English action against an English partnership she would have been deemed to have been a defendant: Western National Bank v. Perez Triana.1 The evidence was that the position is the same in Austrian law. Being a defendant, she impliedly agreed to submit to the jurisdiction of the Austrian court: Dicey's Conflict of Laws, rule 189, 3rd Case; Emanuel v. Symon2 ; Bank of***119** Australasia v. Harding3 ; Bank of Australasia v. Nias.4 Further, the defendant had an office or place of business in Austria and the Austrian proceedings were in respect of a transaction effected through or at that office or place: Dicey's Conflict of Laws, rule 189, 5th Case - Littauer Glove Corporation v. (F. W.) Millington(1920) Ltd.5 is cited as authority for this, but does not seem to support it entirely. But the rule accords with the Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (2) (a) (iv) . Lastly, the Austrian judgment was final and conclusive within the meaning of Nouvion v. Freeman.6 The effect of the expert evidence is that, although this defendant could have raised personal defences (such as that she was not a partner, or that the debt had been paid since the judgment) if it was sought to enforce the judgment against her in Austria, the judgment itself was res judicata as to the existence and amount of the debt itself and she would have been unable to challenge this except on the ground that the judgment had been obtained by fraud, which is a ground on which any judgment, however final, can be set aside. For the judgment to be other than "final and

conclusive" it is not enough that an order has to be obtained from the court which pronounced it for its enforcement *or* that on an application for such an order the judgment is liable to be abrogated or varied: both those conditions must apply, and the use of the word "or" instead of "and" in the headnote in Harrop v. Harrop7 is wrong: see the judgment of Sankey J. in that case.8 [Reference was also made to In re Macartney9 and Beatty v. Beatty.10]

Leonard Caplan Q.C. and *Harry Lester* for the defendant. If the bill of exchange was given in pursuance of a fraudulent scheme between the plaintiff and Diamant, then the plaintiff cannot recover on a foreign judgment founded on that bill of exchange. But if the foreign judgment is not vitiated by fraud the plaintiff still cannot recover on it, because it is not a final judgment; under the Austrian procedure the defendant remains entitled to contest various matters before there can be a judgment finally binding on her there. Accordingly, on the authority of Nouvion v. Freeman,11 the present judgment is not enforceable***120** in the English courts. Moreover, the facts of the matter do not fall within any of the five cases, enumerated by Buckley L.J. in Emanuel V. Symon,12 in which the courts of this country will enforce a foreign judgment. So far as any claim is based upon an account stated or a bill of exchange, Diamant had no authority to bind the defendant according to English law (In re Cunningham & Co. Ltd.13 , and according to the expert evidence the law of Austria is the same as our law on this point. In any event, if the account was stated and the bill of exchange accepted, between March 18 and June 15, 1957, then, by reason of the then existing Austrian bankruptcy proceedings, diamant would have had no authority to act for the defendant at that time under Austrian law, and the account stated and bill of exchange would, therefore, not bind her.

DIPLOCK J.

stated the facts, found that the acceptance was inserted on the bill of exchange by Diamant and the bill of exchange handed over in blank to the plaintiff on the same day as the account stated, namely, on March 23 or 24, 1957; and continued: It follows, therefore, that in so far as the plaintiff's case is based on the account stated or the bill of exchange it fails, because at the time that the account stated was drawn up and the bill of exchange accepted, Diamant had no authority to act on behalf of the firm so as to make the first defendant liable as a partner.

There remains to be dealt with the plaintiff's claim upon the Austrian judgment. In Austrian law the individual partners of a partnership firm are potentially liable for the debts of the partnership, and the partnership does not possess a separate personality. A creditor seeking to recover judgment in the Austrian courts in respect of a partnership debt can either sue the partnership firm in the firm's name, as the plaintiff did in the present case, or can sue the individual partners in their own names, or may take both these steps simultaneously. If, as in the present case, the partners are not sued individually, but an action is brought against a partnership firm in the partnership name, execution can be obtained only against the partnership assets, and not against the assets of the individual partners.

In order to render the individual partners personally liable so as to obtain execution against their personal assets, it is necessary to bring a further action against the individual partner sought to***121** be rendered liable. In Austrian law there is no doctrine of merger of the original debt in the judgment; the action against individual partners is accordingly brought upon the original debt. But the doctrine of estoppel by res judicata applies, and the individual partner cannot raise any defence which could have been raised on behalf of the partnership in the original action against the partnership firm. He can, however, raise other defences, either personal to himself such as that he was not a partner at the material time, or defences arising out of matters subsequent to the judgment such as that the debt has been satisfied in whole or in part since the judgment.

The expert witnesses in Austrian law were not agreed as to whether an individual person could raise as a defence the fact that the judgment against the partnership firm had been obtained by fraud, or whether, if he desired to allege this, he had to bring separate proceedings to have the judgment against the partnership firm set aside.

Faced with the invidious task of choosing between rival experts, I prefer the view of Dr. Bresch that separate proceedings to set the judgment aside are required, if it is desired to resist the claim on the ground that the judgment was obtained by fraud.

That is the background of Austrian law against which I have to consider whether the plaintiff can establish a cause of action based, not on the bill of exchange itself or the account stated, but based on the Austrian judgment against the partnership firm. The first defendant says that this judgment does not create a cause of action against her in the English courts for three reasons: (1) that it was obtained by fraud; (2) that the Commercial Court of Vienna by which judgment was pronounced had no jurisdiction to give judgment, and (3) that the judgment was not a final and conclusive judgment against her, in the sense in which that expression is used in the English courts.

With considerable hesitation I have reached the conclusion that I ought not to find that the judgment is unenforceable on the grounds that it was obtained by fraud. It is true that it was given in default of appearance and was founded on a bill of exchange which I have found to be ante-dated and in fact accepted by a person who, at the real date of acceptance, had no authority to bind the firm. It is also true that Diamant has suggested a number of reasons, all of them discreditable and none of them credible, why it was brought into existence at that date. But by the time the action was brought, that is, after the bankruptcy was determined, Diamant's authority to bind the firm was revived.***122**

I am not prepared to find as a fact, apart from mere suspicion, that there was no antecedent indebtedness of the firm to the plaintiff in respect of which Franz Diamant could not have properly accepted a bill of exchange for 70,000 schillings on behalf of the firm at any time either before or after the bankruptcy terminated. If this were so, the fact that the bill of exchange was accepted on March 23 or 24, and not either before March 18 or after June 15, 1957, although in law fatal to the claim on the bill of exchange, would be little more than a technicality and would not, in my view, constitute such extrinsic fraud as would entitle me, in the words of Lindley L.J. in Vadala v. Lawes,14 to "fritter away" the principle that a foreign judgment is final and conclusive on the merits.

Although, therefore, there are many grounds of deep suspicion, I am not prepared, without having had the opportunity of myself seeing and hearing the plaintiff and Koerpner, to hold that the judgment of the Commercial Court of Vienna is voidable for having been obtained by fraud.

The second ground on which the first defendant relies, namely. that the Commercial Court of Vienna had no jurisdiction to pronounce judgment against her, raises a point of law upon which there is no direct authority. Mrs. **Desser** was at no relevant time resident or present in Austria. She was, however, a sleeping partner in the Austrian firm which carried on business in Vienna at a place of business there, and whose managing partner, Diamant, was resident in Vienna. The Austrian firm, as I have said, had no separate legal personality in Austrian law.

The position is, therefore, that Mrs. **Desser** at all material times carried on business in Vienna, not in person, but through an agent resident in Vienna. Does this render her amenable to the jurisdiction of the Austrian courts in respect of a business transaction effected on her behalf in Vienna by that agent, if the action is brought at a time when the business is still being carried on? This is a question which is devoid of authority, no doubt because in the modern world business is generally conducted by corporations, that is to say, fictitious persons who can

only be resident through an agent. In the case of a corporation, therefore, the relevant problem tends to be whether the corporation. through its agent, is resident in the foreign country: see, for example, Littauer Glove Corporation v. (F. W.) Millington (1920) Ltd.15 A natural person, however, can only be resident in person. ***123**

I cannot therefore escape reaching a decision on the question of principle: Has a court of a foreign country jurisdiction in an action in personam against a debtor who does not reside physically in the country but who, at the time of the action, carries on business at a place in that country through an agent resident in that country, where the action is brought in respect of a transaction effected by that agent at his place of business?

In Emanuel v. Symon16 Buckley L.J. enumerated the five cases in which an English court would enforce a foreign judgment. His enumeration was as follows17 : "(1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained."

There may be some doubt as to whether today it would be held that the jurisdiction exists in the first category of cases, but the other four cases have never been questioned. It is also, I think, clear law that the contract referred to in the fifth case, to submit to the forum in which the judgment was obtained, may be express or implied.

It seems to me that, where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to conduct business on behalf of the partnership at that place of business, and causes or permits, as in the present case, these matters to be notified to persons dealing with that firm by registration in a public register, he does impliedly agree with all persons to whom such a notification is made - that is to say, the public - to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at that place of business by that agent.

While I do not accept that comity is the basis on which English courts recognise and enforce foreign judgments, for there are many instances in which English courts exercise jurisdiction in personam over non-resident foreigners where they do not recognise a similar jurisdiction in a foreign court, it is to be observed that the English courts under R.S.C., Ord. 48A, r. 1, do purport to exercise jurisdiction over non-resident foreign partners***124** of partnership firms carrying on business at a place of business in England. I hold, therefore, in the absence of any binding authority upon me, that the Commercial Court of Vienna had jurisdiction to entertain an action against the first defendant upon the bill of exchange.

This, however, does not conclude the matter. The plaintiff did not obtain a judgment against the first defendant personally, but only a judgment against the firm. The judgment is no doubt final and conclusive against the firm and can be executed against the partnership assets. But in Austrian law of itself it creates no personal liability against the first defendant and gives no right of execution against her personal effects. In order to render her personally liable in Austrian law a further action must be brought against her in Austria and a further judgment against her personally must be obtained. This is not merely a procedure for obtaining execution of an existing judgment, for, in the action against her, although she would be estopped by res judicata from raising any defence which could have been raised in the action against the partnership, she could raise other defences personal to herself, such as that she was not a partner at the relevant time, or defences arising after the original judgment, such as payment of the debt in whole or in part.

In my opinion, the judgment against the partnership firm is not enforceable against the first defendant in England on the alternative grounds either (a) that it is not a judgment against her personally, or (b) that if it is, it is not a final and conclusive judgment.

What is a final and conclusive judgment in English law so as to entitle a judgment creditor to sue upon it in the English courts? Lord Herschell said in Nouvion v. Freeman 18 : "My Lords, I think that in order to establish that such a judgment has been pronounced" - that is to say, a final and conclusive judgment of a foreign court - "it must be shown that in the court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in the same court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the***125** same parties be afterwards contested in that court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our courts for the payment of that debt."

Lord Bramwell put the matter more succinctly in his speech, where he said19 : "There is an essential difference, therefore. between the case where a court of competent jurisdiction has entertained all the controversies between the parties which they could and chose to raise, and come to a conclusion, which is presumed to be accurate, and this case where there is no ground for saying that all possible controversies between the parties have been decided."

The judgment of the Austrian court against the partnership firm does not, in my view, enable the plaintiff to say as against the first defendant that all possible controversies between the parties have been decided by the judgment against the partnership firm, because on the evidence of Austrian law there are defences which would be available to her which are not concluded by the judgment that the partnership firm is liable. It is irrelevant that the first defendant has not sought, in the present action on the judgment, to raise the only kinds of defences which would have been available to her had she been sued personally in Austria after the judgment against the partnership firm had been given. The question is not whether she could have successfully defended an action in Austria, but whether the judgment against the partnership firm on which she is sued in England falls within the category of a final and conclusive judgment against her - a category of judgment which alone the English courts will enforce.

Interesting questions might have arisen had the plaintiff, instead of suing on the judgment, sought to rely upon it as an estoppel by res judicata by way of reply to the defence to the cause of action on the bill of exchange that it was accepted without authority, but this has not been pleaded and fortunately I need not consider it.***126**

I hold, therefore, that the plaintiff cannot recover against the first defendant on the judgment, and the action accordingly fails.Judgment for the defendant, with costs. ([Reported by LUCILLE FUNG, Barrister-at-Law.])

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1. [1891] 1 Q.B. 304, 307; 7 T.L.R. 177, C.A.

2. [1908] 1 K.B. 302; 24 T.L.R. 85, C.A.

3. (1850) 9 C.B. 661; 19 L.J.C.P. 345.

4. (1851) 16 Q.B. 717; 20 L.J.Q.B. 284.

5. (1928) 44 T.L.R. 746.

6. (1889) 15 App.Cas. 1; 38 W.R. 581, H.L.

7. [1920] 3 K.B. 386; 36 T.L.R. 635.

8. [1920] 3 K.B. 386, 399.

9. [1921] 1 Ch. 522; 90 L.J.Ch. 314.

10. [1924] 1 K.B. 807.

11. 15 App.Cas. 1.

12. [1908] 1 K.B. 302, 309.

13. (1887) 36 Ch.D. 532.

14. (1890) 25 Q.B.D. 310, 316, C.A.

15. (1928) 44 T.L.R. 746.

16. [1908] 1 K.B. 302, C.A.

17. Ibid. 309.

18. (1889) 15 App.Cas. 1, 9, H.L.

19. 15 App.Cas. 1, 15.

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EXHIBIT 69

[1963] 2 Q.B. 352 [1962] 3 W.L.R. 157 [1962] 2 All E.R. 214 [1962] 1 Lloyd's Rep. 187 (1962) 106 S.J. 452 [1963] 2 Q.B. 352 [1962] 3 W.L.R. 157 [1962] 2 All E.R. 214 [1962] 1 Lloyd's Rep. 187 (1962) 106 S.J. 452
(Cite as: [1963] 2 Q.B. 352)

[1962] 3 W.L.R. 157

*352 Rossano v Manufacturers' Life Insurance Co.

Queen's Bench Division

J. McNair

1962 Feb. 14, 15, 16, 19, 20, 21; March 7.

Conflict of Laws—Contract—Proper law— **Insurance** policies entered into in Egypt— **Insurance** company's head office in Canada—Where moneys payable—Proper law of contract—Situs of debt—Contractual place of performance—Whether Egypt or Ontario—Whether Egyptian garnishee orders enforceable in England.

Conflict of Laws—Chose in action or debt—Situs—Whether foreign law of situs relevant—Insurance policies entered into in Egypt with Ontario company.

Conflict of Laws—Confiscatory or political legislation—Exchange control legislation—Effect on moneys payable under insurance policies—Place of performance.

Conflict of laws—Revenue laws—Whether enforceable in other State—Garnishee orders in Egypt in favour of Egyptian revenue authorities.

The plaintiff who, in 1940, was an Egyptian national residing and carrying on business as a cotton merchant in Egypt, applied for three 20-year endowment policies of insurance for £3,000, £4,000 and United States $10,000 with the defendant insurance company, who had branches in many parts of the world with their head office in Toronto, Canada. On October 31, 1940, the defendants' Cairo office issued to the plaintiff a single interim policy covering the two applications for sterling policies; and on November 25, 1940, the final policies were executed at Toronto in the plaintiff's favour, each policy being the form used by the defendants for foreign business. The total 20 years' premiums under the dollar policy were paid in advance to the head office in Toronto by means of a draft on a bank in Boston; and the plaintiff likewise paid the full 20 years' premiums in respect of the sterling policies by sterling cheque to the defendants' Cairo office. Under the first two policies, the parties agreed that money was to be made payable in banker's demand drafts on London for pounds sterling. As to the third policy, it was agreed that the money was to be paid in banker's demand draft on New York for U.S. dollars.

The policies all matured on March 15, 1960, and the plaintiff brought an action claiming the money due under them. The defendants relied on two defences: (a) that the proper law of the contracts being Egyptian or the situs of the debt or the contractual place of performance being in Egypt, payment by the defendants would be illegal under the Egyptian exchange control law if effected without the permission of the Egyptian control authorities; (b) that as there were two garnishee orders, served upon the defendants' branch in Egypt by the Egyptian revenue authorities in respect of tax alleged to be due by the plaintiff, payment to the plaintiff would expose them to penalties or to the risk of having to pay the money twice and they were, therefore, not liable to pay the sums claimed:-***353**

(1)that applying the test as laid down by Lord Simonds in Bonython v. Commonwealth of Australia[1951] A.C. 201, 219; 66 T.L.R. (Pt. 2) 969, P.C., and accepted by the House of Lords in In re United Railways of Havana and Regla Warehouses Ltd.[1961] A.C. 1007; [1960] 2 W.L.R. 969; [1960] 2 All E.R. 332, H.L., as being "the system of law by reference to which the contract was made and that with which the transaction has its closest and most real connection," the proper law of the contracts was the law of Ontario, and, accordingly the

Egyptian control legislation did not apply to the policies as part of the proper law of the contracts (post, p. 371).Pick v. Manufacturers' Life Insurance Co.[1958] 2 Lloyd's Rep. 93 applied.(2)That Egyptian exchange control legislation did not apply to the policies merely by reason of the situs of the debt being in Egypt (post, p. 371).Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank[1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38, C.A. applied.(3)That in considering what was the place of performance of the contracts, the relevant act of performance was the payment of the policy moneys; and that although Egypt was a permissible place of performance, the defendants had not the right to insist on payment only in Egypt, and accordingly Egypt was not the relevant place of performance and the Egyptian control legislation did not apply (post, p. 372).Pick v. Manufacturers' Life Insurance Co.[1958] 2 Lloyd's Rep. 93, considered.(4)That the recognition of the garnishee orders served on the defendants would offend against the well-settled principle that English courts will not recognise or enforce directly or indirectly a foreign revenue law or claim (post, p. 376); and that, accordingly, the defendants could not escape liability on the policies by reason of the garnishee orders and the plaintiff's claim succeeded.Peter Buchanan Ltd. & Macharg v. McVey[1955] A.C. 516n. and Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd.[1920] 1 K.B. 539; 36 T.L.R. 125 applied.*Per curiam.* I should not be deterred from holding that the situs of the debt was not in Egypt on evidence that by Egyptian law the situs of the debt was Egypt (post, p. 380).

ACTION.

The following statement of facts is taken from the judgment of McNair J. In 1940 Charles Rossano, the plaintiff, was an Egyptian national by birth residing in Egypt where, with others, he carried on business in Alexandria as a partner in a limited partnership firm by the name of Levi Rossano & Co. At that time the Italian forces were threatening Egypt, and it was clear that Egypt might become the seat of war. In those circumstances discussion took place between the plaintiff and Mr. Harrari, the***354** district manager of the defendants' Alexandria office, which ultimately resulted in the issue of the policies sued upon. The policies were three 20-year endowment policies and were issued as follows: (1) On November 25, 1940, for £3,000 sterling, payable on March 15, 1960, such amount being expressly made payable in banker's demand drafts on London for pounds sterling. (2) On November 25, 1940, for £4,000 sterling payable on March 15, 1960, such amount being expressly made payable in banker's demand drafts on London for pounds sterling. (3) On January 21, 1941, for U.S. 10,000 dollars payable on March 15, 1960, such amount being expressly made payable in banker's demand draft on New York for United States dollars.

The defendants were a company incorporated according to the law of Canada, and having branches in many countries outside Canada, including a branch in Egypt, through which the policies in question were negotiated. The policies matured on March 15, 1960, and the amount alleged to be due was a sum of £9,906 9s. 10d.

The plaintiff brought an action to recover this sum and the amount being due was not disputed.

The defendants relied upon two main defences. First, that the proper law of the contracts being Egyptian law, or alternatively the situs of the debt being in Egypt, or in the further alternative the contractual place of performance, that was, payment of the policy moneys, being Egypt, payment by the defendants would be illegal under the Egyptian Exchange Control laws if effected without the permission of the Egyptian Control authorities as it would involve a payment of foreign currency between two persons occupying the status of residents under that law. It was admitted that no permission had been granted by the Exchange Control.

Secondly, the defendants said that by virtue of two

garnishee orders, the one dated November 16, 1960, and the second dated January 23, 1962, served upon the defendants' branch in Egypt by the Egyptian revenue authorities in respect of tax alleged to be due by the plaintiff, payment by them of the policy moneys to the plaintiff would expose them to penalties under the law of Egypt, or expose them to the risk of having to pay the money twice, and that they were not liable to pay the sums claimed. The plaintiff denied that he was under any tax liability, but in any event submitted that for a variety of reasons each of the orders was a nullity, and further, seeing that to give effect to***355** them or either of them would be at least indirectly to enforce a foreign revenue law, the court would not recognise them.

In view of the fact that the defendants carried on business in many countries outside Canada, it was urged by the defendants that the case was of the greatest importance to them far exceeding the money involved since they might, if the plaintiff's case was well founded, be involved in great difficulties in connection with other policies issued in Egypt or in many of the other countries in which they carried on business.

John F. Donaldson Q.C. and *Adrian Hamilton* for the plaintiff. (1) The defence is based first on provisions of Egyptian exchange control legislation alleged to prohibit the payment of the policy moneys outside Egypt. These provisions will not be recognised in the English courts unless Egyptian law is either the proper law of the contract, or the law of the place where the contract has to be performed: Kleinwort, Sons & Co. Ltd. v. Ungarische Baumwolle Industrie Aktiengesellschaft1 and Dicey's Conflict of Laws, 7th ed., p. 919 et seq. Neither of these conditions is fulfilled.

(2) The proper law of the contracts is not Egyptian law, but the law of Ontario, or alternatively in the case of the sterling policies, English law, and in the case of the U.S. dollar policy, the law of the State of New York. The test laid down by the House of Lords in In re United Railways of Havana Ltd.,2 adopting the test of Lord Simonds delivering the judgment of the Privy Council in Bonython v. Commonwealth of Australia,3 is the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection. In The Assunzione4 the test applied by the Court of Appeal was the test of Lord Wright in Mount Albert Borough Council v. Australasian Temperance and Mutual Life Assurance Society Ltd.,5 namely, that the duty of the court is to determine for the parties what is the proper law which, as just and reasonable persons, they ought to have intended if they had thought about the question when they made the contract. In Pick v. Manufacturers' Life Insurance Co.6 Diplock J. held***356** that a policy issued by the same defendants, and, the plaintiff contends, in distinguishable form was governed by the law of Ontario.

The following factors in particular point to the proper law being the law of Ontario, and not Egyptian law: (a) The policies are on a standard form and there is a presumption that all policies in that form will be subject to the same law. The defendants cannot have intended their policy to have different meanings in different countries. (b) At the time the contracts were entered into there was a world war in progress and the assured (who was and is of the Jewish faith) wanted to be able to draw money anywhere in the world. The defendants assured him that he could do so in any country in which the defendants operated subject to local regulations. (c) The defendants' Cairo office had no authority to issue policies. Such authority had to be given by the defendants' head office in Toronto. No alteration in the terms of a policy could be agreed unless agreed to in writing by the head office. Notice of any assignment had to be given to the head office. (d) Payment of amounts due under the policy by or to the company were to be made in the case of the sterling policies by bankers' demand drafts on London for pounds sterling, and in the dollar policy by bankers' demand drafts on New York, U.S.A. for United States dollars. (e) The plaintiff asked for the policy to be written in Eng-

lish, rather than French - the commercial language of Egypt. (f) In the case of the dollar policy the premiums were prepaid in Toronto by drafts on Boston, and it was originally agreed that this policy should be delivered in Boston, although ultimately it was in fact delivered in Cairo. (g) In the case of all the policies a claim could be made to the defendants' head office or their nearest authorised representative. (h) The defendants were incorporated and had their head office in Toronto, Ontario, and were subject to Ontario law, including the Insurance Act of ontario, on which the form of policy was substantially based. The statutory restrictions referred to in the application form incorporated in the policy relate to the Ontario statute. (i) In the case of a 20-year endowment policy there is the possibility of a policy-holder becoming interested in the liquidation of the insurer, which in the present case would have taken place under the law of Ontario.

(3) In any event, if Egyptian law is applicable, the exchange laws, on their true construction, do not prohibit payment by the defendants' London branch.***357**

(4) The law of the place of performance is not Egyptian law. There is no term in the policy that the policy moneys are only payable in Egypt. The notice on the policies invites the policy-holder who wishes to make a claim to write to the head office or nearest authorised representative of the defendants. The primary place of payment and performance is London, in the case of the sterling policies, and New York in the case of the dollar policy, and Diplock J. was right in so holding in Pick's case.7

(5)The second limb of the defence is based on two alleged Egyptian garnishee orders. English law will not recognise these orders since the lex situs of the debts is not Egyptian law. The lex situs of a debt governs its validity and effect: Dicey's Conflict of Laws, 7th ed., p. 556; Swiss Bank Corporation v. Boehmische Bank.8 The lex situs of these debts was Canadian, or alternatively English or New York law, and not Egyptian law: New York Life Insurance Co. v. Public Trustee9 ; Pick's case.10

(6) English courts will not recognise either of the garnishee orders because they relate to alleged tax liabilities of the plaintiff in Egypt, and their recognition would involve indirect enforcement of foreign revenue law: Government of India v. Taylor11 ;Peter Buchanan Ltd. v. McVey12 and Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd.13

(7) These garnishee orders are administrative orders, and not the orders of any court. There is no authority for English courts to give judicial recognition to an administrative garnishee order issued in a foreign country, and no such recognition should be given.

(8) Both garnishee orders are later in date than the maturity dates of the policies. The defendants should have paid the policies on maturity before the garnishee orders were made, and cannot now take advantage of their default in payment by relying on these garnishee orders.

(9) On the facts both garnishee orders were invalid as they were not proved to have been signed by the Minister of Finance or his duly authorised deputy, and were not served within the time required by Egyptian law. [Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros.14 was referred to.]***358**

Eustace Roskill Q.C. and *Anthony Lloyd* for the defendants. This case raises important questions of principle for the defendants, namely, (1) what is the proper law of the contracts of insurance contained in the policies, and (2) are the defendants obliged to pay the policy moneys to the plaintiff in England if to do so would be illegal by Egyptian law or would put the defendants in peril of having to pay twice.

First, the proper law of the contracts is Egyptian law. The correct test is that laid down in Bonython v. Commonwealth of Australia15 and applied in In re United Railways of Havana and Regla Warehouses Ltd.,16 namely, the law of the country with

which the contract has the closest connection. The following factors point to Egyptian law as the proper law of the contracts. (1) The plaintiff was an Egyptian national resident in Egypt at the time the contracts were made. It was the plaintiff's intention to remain in Egypt indefinitely. (2) The defendants had an office in Cairo which was responsible for all business transacted by the defendants in the Middle East. This office was empowered to issue interim policies and to adjust and settle claims. (3) The preliminary negotiations for the contracts were carried on in Egypt. The contracts were made in Egypt, since by their express terms they did not become binding until delivery of the policies, which in the present case took place in Egypt. The policies were kept in Egypt, and were on the defendants Egyptian register. (4) The policies provided for payment of premiums in Egypt.

Pick v. Manufacturers' Life Insurance Co.17 is distinguishable on all the above grounds. Alternatively, it was wrongly decided.

Assuming Egyptian law to be the proper law of the contracts then Egyptian exchange control legislation will be given full effect by English courts: In re Helbert Wagg & Co. Ltd.18 ; Kahler v. Midland Bank19 ; Zivnostenska Banka National Corporation v. Frankman.20 Payment of the policy moneys has at all material times been prohibited by the Egyptian exchange control legislation without the consent of the proper authorities. Accordingly, the defendants have a good defence to this claim.

Alternatively, if Egyptian law is not the proper law of the contracts, Egyptian exchange control legislation applies since***359** Egypt is the place of performance. The policies do not expressly provide where the policy moneys are to be paid, but there is an implied term that they are to be paid in Egypt. That is what the parties must have intended when the contracts were made. The argument that the parties must have intended the policy moneys to be payable at the defendants' head office failed in New York Life Insurance Co. v. Public Trustee.21 The reference in the policies to payment by banker's demand drafts on London and New York relates to the mode of payment, not to the place of payment.

Secondly, the debts on the policies are situated in Egypt. That is the place where they are primarily payable by virtue of an implied term in the contracts, or where they would have been paid according to the ordinary course of business: F. & K. Jabbour v. Custodian for Israeli Absentee Property.22

The debts have been validly attached according to Egyptian law by two garnishee orders. English courts will recognise and give effect to that attachment, since it is valid according to the law of the place where the debts are situated: Swiss Bank Corporation v. Boehmische Bank.23 Alternatively, English courts will as a matter of comity give effect to the garnishee orders since by Egyptian law, the law of the place of attachment, the debts are situated in Egypt, or alternatively, since both debtor and garnishee are subject to the jurisdiction of the Egyptian courts: Martin v. Nadel24 ; Cheshire, Private International Law, 4th ed., p. 460; 6th ed., p. 499. By giving effect to the Egyptian garnishee orders the English court would not be enforcing a foreign revenue law. There is a distinction between a foreign government suing to recover tax in these courts, which has never been permitted, and the recognition of a valid attachment by a foreign government. Such recognition would not even be indirect enforcement of the foreign revenue law. The rule against enforcing foreign revenue laws has never been carried so far.

Cur. adv. vult.

1962. March 7. MCNAIR J.

read the following judgment, which after stating the facts substantially as set out above, continued:

(1) The first and most important matter which falls for my***360** decision is as to the proper law of the policies. None of the policies contain any express provision as to what law is to govern the contract. On behalf of the defendants it is submitted that the

proper law is Egyptian law; on behalf of the plaintiff it is submitted that the proper law of all three policies is the law of Ontario, or alternatively as to two of the policies for £3,000 and £4,000 sterling respectively payable in banker's demand drafts on London for pounds sterling, the proper law is the law of England, and in respect of the third policy for 10,000 United States dollars payable in banker's demand draft on New York for United States dollars, the proper law is the law of the state of New York.

The test to be applied in determining the proper law of the contract in the absence of any express provision in the policy or any provision in the policy as to jurisdiction has in my judgment been authoritatively determined in a manner binding upon me by the decision of the House of Lords in In re United Railways of Havana and Regla Warehouses Ltd., sub nom. Tomlinson and First Pennsylvanian Banking & Trust Co.,25 where their Lordships by a majority expressly accepted the test laid down in the judgment of the Privy Council delivered by Lord Simonds in John Lavington Bonython v. Commonwealth of Australia26 as being "the system of law by reference to which the contract was made or that with which the transaction has its closest and mode real connection." Later Lord Simonds said27 : "The question then, is what is the proper law of the contract, or, to relate the general question to the particular problem, within the framework of what monetary or financial system should the instrument be construed. On the assumption that express reference is made to none, the question becomes a matter of implication to be derived from all the circumstances of the transaction." In the United Railways case28 (a case of immense complexity) one of the issues was as to the proper law of a lease executed in New York of certain rolling stock used on a railway undertaking in Cuba, the lease forming the security for repayment of a loan raised in the United States of America for the purchase of the rolling stock. Lord Denning said29 : "the test is simply with what country has the transaction***361** the closest and most real connection: see Bonython v. Commonwealth of Australia.30 Applying this test, I think the proper law of the transaction, including the lease, is the law of one of the United States." It may be observed that Lord Denning probably per incuriam has substituted the word "country" for "system of law" in Lord Simonds' test, but it is clear that no change was intended. Lord Morris said31 : "If, then, the question is posed as to what is the law 'by reference to which the contract was made or that with which the transaction has its closest and most real connection' ... I would answer - the law of Pennsylvania." Lord Simonds32 stated that he was wholly in agreement with Lord Morris's conclusion of law upon the question of the law to be applied. Lord Reid33 expressed his agreement with the reasons given by Lord Denning and Lord Morris for adopting the law of Pennsylvania. Lord Radcliffe took a rather different view when he said34 : "I do not think that the tests for determining the proper law of a contract can ever be comprehended under a single phrase, so various are the situations and considerations that have to be taken account of; but this is a case in which, in my opinion, the law of the place of performance ought to be regarded as of preponderating importance, and of those two possible places Pennsylvania, which is both the home of the trustee and the place where the capital is to be repaid, seems to me clearly the natural choice."

In the course of the argument I was referred to the test formulated in rather different terms in the Court of Appeal in The Assunzione,35 adopting a passage from the judgment of Lord Wright in Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society,36 that the duty of the court is "to determine for the parties what is the proper law which, as just and reasonable persons, they ought ... [to] have intended if they had thought about the question when they made the contract" (*per* Singleton L.J.37 and *per* Birkett L.J. 38 . It does not appear from the reports that the Bonython case39 was cited in the argument in the Court of Appeal in the Assunzione case40 or that the latter was cited in the argument in the United-Railways of Havana case.41 In these circumstances

I propose to apply the test as laid down by Lord Simonds in the Bonython case42 and accepted by the House of Lords in the United Railways of Havana case.43

One further preliminary point. The proper law must be determined as at the making of the contract, though the court will, of course, give effect to changes in that proper law which arise after the making of the contract. See Kahler v. Midland Bank44 and Zivnostenska Banka National Corpn. v. Frankman,45 both cases in which the proper law of the contract being a foreign law including its exchange control law, the English courts gave effect to subsequent changes in that law.

(2) I now turn to the facts. At all material times the defendants had an office in Cairo which was responsible for all business transacted by the defendants over a wide area in the Middle East including Egypt, the Sudan, Palestine, Cyprus, Lebanon, Syria and Iraq. This office was under the control of Baird, who held a direct power of attorney from the defendants. By this power Baird was empowered (inter alia): "(1) To establish and manage agencies of the company; (2) to canvass for and solicit applications for insurance with the company on the lives of individuals; (3) to countersign and issue interim policies of insurance and official receipts under the conditions sanctioned by the company and on forms having the signatures of the proper officers of the company; ... (7) to receive and collect all vouchers proofs and documents of what kind so ever which shall concern any loss; and to institute all necessary inquiries and examinations touching every such loss and to adjust and settle the same with the respective claimants."

From the evidence of McNab, now the vice-president and chief agency officer of the defendants, and at the material time the agency superintendent for the defendants covering the Middle East Area, it appears that in practice the authority of the Cairo office in the person of Baird to issue interim policies was probably restricted as to amount and some degree of control from head office; that in the case of final policies, the decision whether to issue them or not was taken in Toronto where the policy was sealed, and that it was merely transmitted to the branch for handing over; that claims, whether under an interim policy or a***363** final policy presented by the insured in Egypt, would be dealt with by the Cairo office subject to corroboration or authorisation from Toronto, though Cairo may have had authority to pay claims of a certain amount by themselves. Furthermore, apart from exchange control regulations, an assured, to obtain payment, could in practice go to the head office or any branch for payment wherever the policy was issued. Indeed for the plaintiff one of the attractions in dealing with the defendant company was that they were a foreign insurance company abroad, and that if Egypt was invaded, and he was not in occupied territory, he would be able to draw his policy moneys anywhere in the world. Confirmation that Harrari so understood the position is to be found in two letters which he wrote to the plaintiff under date June 11, 1960, in which he stated that payments due in connection with the policies would be made by drafts on London for sterling policies or draft on New York for United States dollar policies, and such payments would be made through any of the company's branch offices in any country in which the company operated provided that the company was not prevented from doing so by legal restrictions or exchange regulations of the Governments concerned. This evidence of the attitude of the plaintiff and Harrari I regard as significant and admissible not for the purpose of importing into the contract any contractual terms to the effect stated, but as part of the surrounding circumstances in which the policies were negotiated.

(3) As the result of these negotiations the plaintiff on June 11, 1940, signed three application forms addressed to the defendants by which he applied for three 20-year endowment policies for £3,000, £4,000 and United States dollars 10,000 respectively. These application forms, which were ultimately incorporated into the final policies, contained the following provisions: (a) The necessity

for mise en demeure by huissier is expressly waived; (b) policy to be written in English; (c) a declaration by the plaintiff that in the event of his death the insurance was to be paid to his wife; and (d) a declaration that he reserved the right to change the beneficiary subject to statutory restrictions. The significance, if any, of these provisions I shall refer to later.

(4) Payment of premiums. The total 20 years' premiums under the dollar policy were paid in advance by the plaintiff with the application direct to the defendants' head office in Toronto by means of a draft on the First National Bank of Boston where the plaintiff had dollar funds since before the war. These dollars had been duly declared by the plaintiff to the Egyptian exchange***364** control authorities. As regards the sterling policies, the plaintiff likewise in the first instance paid the full 20-year premium with the application amounting to just under £5,000 by sterling cheque to the defendants' Cairo office, but subsequently £2,700 of this sum was repaid to the plaintiff.

(5) Issue of Interim Policies. On October 26 Baird of the defendants' Cairo office cabled to the defendants in Toronto for permission to issue interim policies covering the plaintiff's application for the sterling policies. On October 28 the defendants in Toronto instructed their Cairo office to discuss with the exchange control authorities the question of the prepaid premiums, and to secure their written permission to the issue of each of the policies, including the dollar policy, showing the amount of the policy and the amount of the prepaid premium, and for permission for the delivery of the policies in the United States as had been requested by the plaintiff on June 19. No evidence was tendered as to what was done on these instructions except that on December 10, 1940, the plaintiff made a formal declaration that the dollars paid for the premiums of the dollar policy formed part of a pre-war balance to his credit at New York; but I infer that no objection was taken by the exchange control authorities as to the issue of any of these policies provided they were delivered in Egypt. On October 31, 1940, the defendants' Cairo office issued to the plaintiff a single interim policy for a period of five months for £7,000 covering the two applications for the sterling policies under the counter-signature of Baird. These policies provided (so far as is material) as follows: "This interim policy shall cease to be effective when a policy is issued to supersede the insurance hereunder. This interim policy may be cancelled at any time during the said period of five months." No interim policy for the dollar insurance appears to have been issued.

(6) Issue of final policies sued upon. On November 25, 1940, three policies for £3,000, £4,000 and United States $10,000 were executed at Toronto in favour of the plaintiff bearing the signatures of the general manager and of the president, and under the seal of the defendant company. The dollar policy was apparently lost in transit, and a new policy so signed and sealed was executed on January 21, 1941. Subject to variations necessary in the dollar policy to take account of the dollar obligations as to the payment of the premiums and of the amount **insured**, each of the policies was in identical form, this being the form used by the company for foreign business.***365**

The policy for £3,000 recited that "the Manufacturers' **Life Insurance** Company Limited head office Toronto Canada hereby **insure** the **life** of Charles **Rossano** ... under this policy of **insurance**, the particulars of which are as follows: (1) Plan of **insurance** - twenty year endowment. (2) Sum **insured** - three thousand pounds sterling. (3) When payable: (a) on March 15, 1960, if the **life insured** is living and this policy is in force; (b) on receipt and approval of the prior death of the **life insured** while this policy is in force. (4) Beneficiary. If the policy becomes payable as provided in (a) above, the **insured**. If the policy becomes payable as provided in (b) above, Mary **Rossano**, subject to the provisions on the succeeding pages hereof. ... (8) Surplus. Apportioned annually in accordance with the annual dividend options on the succeeding pages of this

policy. The provisions and options printed and written by the company on the succeeding pages hereof form part of this contract form as fully as if stated over the seal and signatures hereto affixed." Overleaf there are set out a number of printed conditions and two added rubber stamp clauses to which reference will be made.

It is only necessary to set out in this judgment certain of these clauses as follows: "Condition (1) The Contract. This policy and the application therefor a copy of which is attached constitute the entire contract. This policy shall not take effect until it has been delivered and the first premium paid to the company in exchange for the official receipt, no change having taken place in the insurability of the life insured subsequent to the completion of the application. No provision or condition of this policy may be waived or modified except by endorsement hereon signed by the president, vice-president or general manager. (2) Incontestability. ... (3) Payment of Premiums. ... A grace of one month (of not less than 30 days) from the actual due date of the premium stated herein will be allowed for payment of renewal premiums" (the first sentence of this clause dealing with payment of the first premium had been struck out in view of the payments of the premiums in advance above referred to). "(4) Currency. All amounts payable under the terms of this policy either to or by the company ale payable in bankers demand drafts on London, England, for pounds sterling." (In the case of the dollar policy the final words read "bankers demand draft on New York U.S.A. for United States Dollars.") "(5) Automatic premium loan. ... (6) Loan values. ... (7) Cash and paid up insurance values. ... (8) Extended insurance. ... (9) Reinstatement. ... (10)***366** Payment of claims. When this policy becomes a claim it must be delivered to the company with a valid discharge thereto. The amount of any lien or indebtedness on the policy will be deducted from the amount payable. (11) Suicide. ... (12) Proof of age." There then follow provisions dealing with annual dividend options which are not material.

Next follows a printed clause dealing with appointment of beneficiary, and finally (so far as is material) a printed clause dealing with assignment in the following terms: "Any assignment of this policy shall be in duplicate and both copies sent to the head office, Toronto, Canada."

Of the added clauses appearing by rubber stamp two are or may be relevant: "(1) War Risks. Notwithstanding anything herein contained to the contrary, this policy is issued on the condition that the total sum payable hereunder shall not be greater than the net amount of premium paid ... with interest, (a) if the life insured serves in any military, naval or air force and the death of the life insured results directly from war ... (b) if the life insured travels beyond the geographical boundaries of Egypt and Palestine and the death of the life insured results directly or indirectly from war. ... (2) Payment of any sum to keep this policy in force must be made at the company's offices at Cairo or Alexandria - or to persons empowered to receive them - in exchange for the company's official receipt signed by the general manager and countersigned by an agent or cashier of the company."

On the back of the policy the following notice is printed: "Important. When it is desired to obtain payment of any benefit under this contract write direct to the Manufacturers' Life Insurance Company, Toronto, Canada, or communicate with the nearest authorised representative of the company. By so doing time and expense may be saved as the company will furnish free of charge the required forms for completion together with any necessary advice and instructions." The policies having been executed in Canada were sent to the company's branch in Egypt and there delivered to the plaintiff. They remained in Egypt until January or February, 1961, when they reached this country.

(7) Canadian Insurance Law. (a) The Manufacturers' Life Insurance Company as an insurance company is subject to the Canadian and British Insurance Companies Act, a Dominion Statute broadly similar to the English Assurance Companies Acts

containing provisions designed to secure their financial stability,***367** their deposits and the rights of different classes of policy holders in winding up.

(b) In Part V of the Insurance Act of Ontario (chapter 183 in the Revised Statutes of Ontario, 1950) there are some 60 sections (sections 131-191) containing detailed provisions relating to the rights and obligations arising under contracts of life insurance. Section 132 provides as follows: "(1) Notwithstanding any agreement, condition or stipulation to the contrary, this Part shall apply to every contract of life insurance made in the Province after January 1, 1925, and any term in any such contract inconsistent with this Part shall be null and void. ... (3) This Part shall apply to every other contract of life insurance made after January 1, 1925, where the contract provides that this Part shall apply or that the contract shall be construed or governed by the law of the Province."

Mr. McVitty, a member of the Ontario Bar, and a partner in the firm of J. K. Henry and Associates of Toronto, who act for the defendants in this case, was called on behalf of the defendants to speak as to the effect of this Act, and I am indebted to him for his careful and informed evidence as to the effect of this law, and as to forms of contract in practice used by the defendants. It appears that the defendants use five types of policy forms: The Canadian form, the United States form, the United Kingdom form, the Foreign General form and the Foreign British Commonwealth form. The policies issued to the plaintiff were on the Foreign General form. Accordingly, unless the policies were on the facts stated above made in Ontario, and unless on their true construction they provided that Part V shall apply, or that the contract shall be construed or governed by the law of the Province, Part V would not as a matter of law apply to them. Mr. McVitty, however, agreed that the agreement of the parties that Part V should apply, or that it should be governed and construed by the law of the Province, might be express or implied. A comparison between the terms of the Home or Canadian Policy and the terms of the Foreign General Policy showed that they were almost identical, and admittedly the terms of the Home or Canadian policy are founded upon the compulsory requirements of Part V. The only points of difference at all between the plaintiff's policy and the Home or Canadian policy which were relied upon were (1) the war risk clause; (2) the second of the rubber stamp clauses dealing with payments of sums required to keep the policy alive, and (3) the clause entitled "Appointment of Beneficiary."

Very considerable discussion arose on the terms of this last***368** clause which, according to Mr. McVitty, would be void under the Ontario Statute in so far as it would or might permit the plaintiff to substitute another beneficiary for his wife. Under the Ontario Statute the wife is within the class of preferred beneficiaries whose rights are safeguarded by this statute. Inasmuch, however, as in the application form which formed part of the policy the plaintiff "reserved the right to change the beneficiary subject to statutory restrictions," the effect of reading these two provisions together is, in my judgment, that the proviso to the printed beneficiary clause to which objection was taken would not operate if the change of beneficiary was not permitted by the statutory restrictions, which I think can refer only to the statutory restrictions contained in the Ontario Act. I did not understand Mr. McVitty to say anything to the contrary, though he did say that the proviso offended against the law of Ontario, and that the reservation of the right to change the application form would not be of any particular value to the plaintiff. I think it is quite plain that the Foreign Form is in all essentials based upon the terms of the Ontario Statute even though that statute may not as a matter of law apply to all insurances effected on the Foreign Form. Before leaving this branch of the case I should just note that, according to Mr. McVitty, a policy issued in Toronto providing for payment in sterling or dollars would normally or not unusually provide in the currency clause for payment by bankers' draft on London or New York as the case may be.

(8) Egyptian Insurance Law. By law No. 156 of 1950, which re-enacted with amendments law No. 92 of 1939 which applies to Egyptian undertakings and foreign undertakings which transact in Egypt life insurance, it is provided by article 16 that every undertaking shall maintain a register of policies transacted by the undertaking, and by article 20that they shall maintain in Egypt assets of value at least equal to the mathematical liability in respect of operations transacted or fulfilled in Egypt. These assets by article 24 are (subject to certain conditions) made available to holders of such policies. The plaintiff's policies were in accordance with this law registered on the company's register in Egypt, and the necessary deposits maintained in Egypt, but there was no evidence that the plaintiff had any knowledge of any of the matters referred to in this paragraph.

(9) I have now set out at some length the material evidence in this case bearing upon the issue of the proper law of the contract. If the test had been with what country had the transaction the***369** closest and most real connection, following the language used by Lord Denning, as I think per incuriam, in the United Railways of Havana case,46 it may well be that there was much to be said for the view that the transaction had its closest and most real connection with Egypt, seeing that the policies were negotiated between two parties in Egypt and were delivered in Egypt. But if the real question is what intention as to the proper law is to be imputed to the parties, and if the answer to this question is to be tested by consideration of what is the system of law by reference to which the contract was made or that with which the transaction has its closest connection, I think the answer must quite clearly be not the law of Egypt but rather the law of Ontario. The policy form is clearly based on the law of Ontario. The defendant corporation had its head office in Ontario. The negotiations for the insurance conducted in Egypt could never have led to a policy unless the terms of the application had been accepted by the superior officers of the company in Toronto. No alteration or modification of the printed conditions of the policy could be effected unless expressly agreed to in writing by the officers of the company in Toronto. No assignment could be effective unless notice was given to the company in Toronto. There is no provision in the policy requiring the policies to be presented to the company for payment in Egypt. Both the policy moneys and the premiums are expressed in a currency other than Egyptian. The notice on the back of the policy advises the policy-holder who wishes to obtain payment to write direct to the head office in Canada or communicate with the nearest authorised representative of the company. Further, it seems to me that where a resident in a territory seeks life insurance from a foreign insurance company through its local agent in that territory, it is manifest that normally he chooses the foreign company because he has faith not only in that company, but in the system of law under which it operates. One further observation may be added. It seems clear that under the Bonython47 test the question is still what intention is to be imputed to the parties: see the speech of Lord Simonds.48

(10) Earlier in my judgment I reserved for later consideration the relevance (if any) of two special provisions in the application form as follows: (a) "The necessity for mise en demeure by huissier is expressly waived," and (b) "Policy to be written in English." As to (a) the evidence was that mise en demeure***370** relates and relates only to a procedural provision of the mixed courts in Egypt (abolished in 1947) which required that before proceedings could be instituted a formal claim (similar to a solicitor's letter before action) should be served upon the alleged debtor by an official process server. It was submitted that this indicated that the parties had in mind that, in the event of dispute, resort would be made to the mixed court. Even if this be so, I had evidence that the mixed court applied a wide variety of laws by no means confined to the law of Egypt. I am unable to infer anything relevant from this provision. (b) "Policy to be written in English." There was evidence that in 1940 the normal commercial language in Egypt was French.

From this it was argued that but for the plaintiff's election to have the policies in English, the policies would have been in French, the commercial language of Egypt. It could be equally argued that the plaintiff's choice of English indicated that he wanted to secure that the language used should not be the commercial language of Egypt but should be the language of Ontario.

(11) I am fortified in the conclusion which I have reached by the decision of Diplock J. in Pick v. Manufacturers' Life Insurance Co.,49 and by the reasoning expressed by that judge for his conclusion that the policy in question in that case was not governed by the law of Palestine (now Israel) but by the law of Ontario.

It was submitted by Mr. Roskill that that case was distinguishable from this case, as I understand it, on three grounds. First, that in Pick's case50 the assured, a German refugee in Palestine. "had in the back of his mind that he might return to Germany if circumstances made that country again a congenial place of residence," whereas the plaintiff was an Egyptian born and bred, permanently residing there, with no intention in 1940 of leaving Egypt; but it is clear from the plaintiff's evidence (which I accept) that at the time when the policies were negotiated there was war on the Egyptian border, and being of Jewish faith he feared that he might have to leave the country, and wished accordingly to have policies payable anywhere in the world. Secondly, that in Pick's case51 there was no evidence that anyone had power to issue interim policies in Palestine. This appears to be true, but in my view is irrelevant. Thirdly, that in Pick's case52 the first sentence of the clause relating to payment of premiums had not been struck out. As I have already stated,***371** in the present case the plaintiff paid the whole 20 years' premiums on the dollar policy direct to the defendants in Toronto, and the premiums on the sterling policies by a sterling cheque to the defendants' Cairo office. Such payments made the first sentence of the clause unnecessary and inappropriate in the present case. I cannot appreciate that this factor provided any valid ground of distinction. In my judgment, accordingly, the Egyptian control legislation does not apply to these policies as part of the proper law of the contracts.

(12) I next have to consider whether it applies (a) by reason of the situs of the debt being in Egypt or (b) by reason of the fact that Egypt is the contractual place of performance. Though it is pleaded in paragraph 6 of the re-amended defence that the Egyptian control legislation would apply as part of the law of the situs of the debt under the policy, that situs being Egypt, I did not understand from the argument addressed to me that the lex situs was advanced as a ground for applying the Egyptian control legislation independent of the law of the place of performance. So far as I recall no authority was cited to me on this branch of the case supporting such distinction, and I knew of none. It may be observed that the lex situs is not stated to be such a ground in rule 178 of the 7th edition of Dicey which provides as follows: "(1) A contractual obligation may be invalidated or discharged by exchange control legislation if - (a) such legislation is part of the law of the contract; or (b) it is part of the law of the place of performance; or (c) it is part of English law and the relevant statute or statutory instrument is applicable to the contract." In a note on page 921 the editors observe: "The mere fact that exchange control legislation is in force at the place at which a party to the contract resides or carries on business or in the State of which he is a national and that the performance of the contract is excused or made illegal by such legislation, is no defence to an action on the contract, unless either the law to which this legislation belongs is the proper law of the contract, or the contract was to be performed at the place where the legislation is in force." The passage is in my judgment abundantly supported by the decision in the Court of Appeal in Kleinwort, Sons & Co. v. Ungarische, etc.53

Accordingly I have next to consider what was the place of performance of these contracts, and for this

purpose the relevant act of performance is the payment of the policy moneys; for a***372** contract may contain obligations which have to be performed in different countries so that the law of the place of performance of one obligation may be different from the law of the place of performance of another. The policies do not expressly provide for the place of performance; the mode of performance of the material obligation is stated in condition 4 of the policy to be, in the case of the sterling policies, "in bankers demand drafts on London England for pounds sterling," or in the case of the dollar policy in bankers demand drafts on New York U.S.A. for United States dollars." Both these modes of payment are normal or not unusual modes of payment in Ontario of sterling or dollar obligations. They may be (though there was no direct evidence on this point) also normal modes of payment in Egypt.

Reliance was placed upon the fact that the policies were physically in Egypt at maturity date. I attach no significance to this. Perhaps rather more weight should be given to the fact that the policies were on the defendants' Egyptian register and backed by deposits in Egypt, albeit they were also backed by deposits in Canada. But I can find no express or implied term in the policies which justifies the defendants in saying that the policy moneys are payable only in Egypt. Indeed there is no express term in the policy or any term necessarily to be implied to require the defendants to maintain a branch in Egypt authorised to pay. Furthermore, the notice on the back of the policies clearly invites the policyholder who desires to obtain payment to write direct to the head office or the nearest authorised representative of the company. Though Egypt was a permissible place of performance, the defendants had no right to insist upon payment only in Egypt, and accordingly Egypt was not the relevant place of performance.

In Pick's case54 Diplock J. said55 : "I apprehend that the principal obligation of the defendants is to pay sterling, the currency in which the policy is expressed, and that banker's drafts when delivered amount to conditional payment only, and, if dishonoured on payment" (query "presentation") "in London do not discharge the contract. The contract is finally discharged only when the draft is honoured in London, which is, in my view, the primary place of payment in the strict sense of that word." This may well be so.

(13) Though as stated above I have reached the conclusion that the Egyptian control legislation does not apply either as***373** part of the proper law or as part of the law of the place of performance, it is probably desirable that I should state shortly my understanding as to the Egyptian control legislation on the assumption that it does apply to the facts of this case in view of the evidence which was called by the defendants on this point.

For this purpose it is necessary to state certain further facts. As stated above, in 1940 **Rossano** was an Egyptian national residing and carrying on business as a cotton merchant with others as a partner in a limited partnership firm by the name of Levi **Rossano** & Co. He is a member of the Jewish community. In the course of his business he had occasion to make many visits abroad. In 1948, whilst **Rossano** was out of Egypt for health reasons, his property in Egypt was sequestrated for a short time until July 3, 1949. He returned to Egypt in March, 1950, and remained there (apart from short business trips abroad) until August 4, 1956, when he left Egypt again on a business trip, having obtained a tax clearance from the Egyptian revenue authorities before leaving. In November, 1956, the Suez crisis arose. Fearing that he would be subject to further discrimination on the grounds of his faith Rossano abandoned any intentions of returning to Egypt. His Egyptian passport was withdrawn, and he assumed Italian nationality by tracing descent from his grandfather (a registered Italian national) and thereafter severed his connections wholly from Egypt so far as to do so was within his power.

No evidence as to Egyptian law was called on behalf of the plaintiff, but on behalf of the defendants there was called Mr. Theodore Page, a member of

the Inner Temple, who practised before the mixed courts and British consular courts in Egypt until they ceased to function as such in 1949. Since that date Mr. Page had no right of audience before any Egyptian courts, but has continued to advise clients both in London and Egypt on matters of Egyptian law and has done his best to keep his knowledge of Egyptian law up to date. No objection was taken as to the qualification of Mr. Page to give evidence on Egyptian law as it exists today.

On the basis of Mr. Page's evidence it is I think clear that (a) the plaintiff, notwithstanding his attempt to sever his connections with Egypt, would be regarded as a "resident" for the purpose of the Egyptian control law; and (b) that a payment by the defendants' branch in Egypt to the plaintiff of sterling or dollar currency would be illegal without the permission of***374** the exchange control authorities. (See the statutory provisions relied upon by the defendants by way of amendment in paragraph 6 of the re-amended defence which were in force at the material date of the policies, namely, March 15, 1960, when they were replaced by decree No. 893 of 1960 which came into force on October 22, 1960.) Mr. Page further stated that a payment of sterling or dollars by the defendants in Toronto would also be illegal by the same laws, and would expose the defendants' Cairo branch and its personnel to penalties under Egyptian law.

It seems clear that under article 24 of chapter I, section 3 of the Exchange Control Regulations of 1960, the defendant company itself would rank as a "non-resident"; but their Egyptian branch being "a branch or office of a foreign institution carrying out any activity in the Egyptian Province" would rank as a resident. The basis of Mr. Page's theory that payment by the defendant company abroad would involve the branch in Egypt in illegality was that, from the Egyptian point of view, the liability of the company is the liability of the branch and the branch is a resident, and that the only place in the Egyptian view where the policies could be paid being Egypt, a payment by the head office outside Egypt would be a payment by the head office as agent for the Cairo office. I confess that I find the greatest possible difficulty in following this theory, and had it been necessary for my decision I should have held that I was left in doubt whether as a strict matter of Egyptian law, as distinct from the practice of the exchange control authorities, a payment by the defendants' head office outside Egypt would be illegal. In so stating my view I am not unmindful of the limitation on the power of the court to draw conclusions as to foreign law where the evidence of an expert on foreign law has been given. (See Dicey, 7th edition, page 1112, "Use of foreign sources" and the cases there cited.)

(14) I now turn to the defence based upon the alleged garnishee orders. The facts as to the garnishee orders are pleaded in paragraph 10 of the re-amended defence as follows: "On November 16, 1960, the defendants were served with a garnishee order," (the first garnishee order), "in respect of an amount of £E5,677 alleged to be due from the plaintiff to the Egyptian tax department for the years 1950/51 to 1955/56 plus interest at 6 per cent. from November 27, 1960. Further or alternatively on or about January 23, 1962, the defendants were served with a second garnishee order in respect of an amount of £E12,291 alleged to be due from the plaintiff to the Egyptian***375** tax department for the years 1951 and 1952 exclusive of interest. The said orders purported to attach all securities belonging to the plaintiff in the hands of the defendants and all sums of money falling due hereunder and to require the defendants to remit the same to the said department or so much thereof as might be necessary to cover the said amounts."

In support of this plea the defendants put in (without objection as to their formal proof) two documents in Arabic purporting to be the garnishee orders relied upon, together with English translations. I accept that orders in this form were served on the defendants in Cairo. The English translation of the first garnishee order so far as is material provides as follows: "In accordance with the au-

thority empowered legally to us: We hereby have levied an executory attachment against the taxpayer Charles **Rossano** in the hands of the Manufacturers' **Life Insurance** Company, of 20, Sharia Adj Pacha, Cairo, on all what it would have in its custody such as money, securities. deeds or otherwise. We have notified the company not to effect payment of what it would have in its hands or to hand over same to the taxpayer. We have asked the said company to file a declaration within fifteen days from the date hereof regarding what it would have in its custody and to show therein an accurate and detailed description thereof as well as its number and measure or its weight or amount; and remit same within forty days from the date hereof or remit what would cover the said taxes plus interest re late payment or deposit same with the Treasury of the inspectorate in case the date of settlement has fallen due, otherwise it should be withheld in its hands until such date falls due when the company should remit same or deposit it with the Treasury of the inspectorate." The document bears the signatures of a tax inspector and of a controller. Pursuant to this notice the defendants' Cairo office on November 29, 1960, wrote to the controller setting out particulars of the three policies sued upon showing the maturity date to be March 15, 1960, and stating with regard to remitting the amounts as requested by the inspectorate: "We wish to draw your attention firstly that the above mentioned policies are expressed in foreign currencies and payable to a non-resident person and that the matter necessitates the obtainment of approval from the Exchange Control before we effect any payment in accordance with the prevailing laws and regulations." In spite of further requests for payment by the tax authorities no payments have been made. For completeness I should add that the tax in***376** question is alleged to be a liability of Charles Rossano in his capacity as partner of Levi Rossano & Company.

On behalf of the defendants it wag submitted (1) that whatever be the proper law of the contract, the debt is and was situated in Cairo and that debt has been validly attached in the country where it was situated; (2) that an English court will as a matter of private international law recognise and give effect to the validity of that attachment and not put the garnishee in peril of having to pay twice, and that it does not matter whether the attachment proceedings are in respect of a revenue claim; (3) that if the debt is not situated in Egypt, the English court will as a matter of comity give effect to the proceedings and will not put the garnishee in peril of having to pay twice if the court is satisfied (a) that by the law of the place of attachment the situs of the debt is in that place, that is, Egypt; or (b) that by the law of the place of attachment there is jurisdiction over the debtor, the garnishee and the garnishor.

The plaintiff, on the other hand, by his counsel submitted (1) that the situs of the debt was not Egypt; (2) that the garnishee orders were invalid (a) because not signed by the Minister of Finance or his duly authorised deputy, and (b) because not served on the debtor within six days as required by article 28 of the relevant law; (3) that the garnishee orders provide no defence since (a) no payment has been made under either or (b) neither of them was made until after the maturity date on which the defendants should have paid; (4) that this court should not recognise the garnishee as to do so would be indirectly at least to enforce a foreign revenue law; and (5) that the orders being in the nature of administrative orders and not orders of any court, an English court will not enforce them.

Many of the points raised in these submissions raise difficult questions of private international law upon which English authority is scanty. But as I have reached the conclusion that the fundamental objection to the recognition of these orders is that their recognition would offend against the well-settled principle that the English court will not recognise or enforce directly or indirectly a foreign revenue law or claim, it is not necessary for me as a matter of decision to deal with many of the other points raised. The basic principle underlying the proposition stated above is to be found stated with charac-

teristic trenchancy by Lord Mansfield C.J. in Planche v. Fletcher,56 Holman v.Johnson57 and Lever v. Fletcher58 that "no country ever takes notice of the revenue laws of another." (See the speech of Lord Simonds in Government of India v. Taylor,59 which is a direct authority, if authority be needed, that the English courts will not entertain a suit by a foreign State to recover a tax.) But in the speech of Lord Keith60 reference is made with approval to the judgment of Kingsmill Moore J. in the High Court of Eire in Peter Buchanan Ltd. & Macharg v. McVey61 as illustrating the position which is relevant to the present case "that in no circumstances will the courts directly or indirectly enforce the revenue laws of another country."

In the course of the judgment above referred to, Kingsmill Moore J.62 says this: "If I am right in attributing such importance to the principle, then it is clear that its enforcement must not depend merely on the form in which the claim is made. It is not a question whether the plaintiff is a foreign State or the representative of a foreign State or its revenue authority. In every case the substance of the claim must be scrutinised, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected." In my judgment for this court to allow the defendants to set up in diminution or extinction of the plaintiff's claim a foreign garnishee order or attachment served upon them by the Egyptian tax authorities would clearly be contrary to the principles above stated.

Another application of the same principle is to be found in Indian and General Investment Trust Ltd. v. Borax Consolidated Ltd.,63 where the defendant guarantors of certain gold bonds issued by a railway company in the United States, who undertook to pay the principal money and interest in London, sought to deduct from the annual payment under the bonds an income tax of 2 per cent. imposed under the United States Government tax legislation which required the railway company to deduct this tax on payment of interest. Sankey J., in rejecting the defence, said64 : "There is no Act of Parliament which allows payment of income tax to another country to be reckoned as a discharge." If in the present case the defendants had***378** actually remitted the amount of the tax to the Egyptian authorities, this would not, on the basis of Sankey J.'s judgment, have been reckoned a discharge. Still less, if no payment has been made, can a mere attachment of a debt by a foreign revenue authority amount to a defence.

It is perhaps not without significance to observe that if this court by its judgment decreed that the defendants were not liable on the policies by reason of these orders, theoretically at least there would be nothing to prevent the Egyptian revenue authorities from recovering their alleged debt from some other property of the plaintiff's in Egypt and not persisting in their claim against the defendants under these orders. I am, of course, not suggesting for a moment that the defendants, if released from the claim under the garnishee, would not pay the plaintiff in spite of the discharge of their policy debt by the judgment.

Though I have preferred to rest my rejection of the defendants' defence based upon the garnishee orders upon the ground stated above, it is probably convenient that I should deal with at least some of the other points debated before me on this branch of the case.

(15) Situs of debt. In New York Life Insurance Co. v. Public Trustee65 the question arose whether moneys due under life policies of a New York insurance company signed by the president and secretary of the company and countersigned by the general manager for Europe, which had been issued in London to German nationals before the First World War, were caught by the charge imposed pursuant to the Treaty of Versailles. The policy money was expressed to be paid in London. The Court of Appeal, basing themselves primarily upon the provision in the policies as to payment in London, held that the debt was situated here and so subject to the charge. There is no such express pro-

vision in the policies here in suit. There being no express provision in these policies as to the place of payment, the defendants accordingly relied upon the statement of principle by Pearson J. in F. & K. Jabbour v. Custodian of Israeli Absentee Property 66 in the following terms: "Where a corporation has residence in two or more countries, the debt or chose in action is properly recoverable, and therefore situated in that one of those countries where the sum payable is primarily payable, and that is where it is required to be paid***379** by an express or implied provision of the contract or, if there is no such provision, where it would be paid according to the ordinary course of business."

In the policies here sued upon there is no express provision as to the place of payment. The mode of payment is prescribed as "in banker's demand draft on London," or in the case of the dollar policy "on New York." In Pick's case67 above referred to Diplock J. expressed the view that the primary place for the delivery of the banker's draft on London was the head office in Toronto, but that until the draft was honoured in London the delivery of the draft was conditional payment only, and the primary place of payment was London. The plaintiff, if all had gone well, would have collected his money by presenting his banker's draft in London and New York though he might of course have discounted the draft elsewhere. But in the ordinary course of business he would not, I think, have collected sterling or dollars from the defendants in Egypt. I should accordingly hold that the situs of the debt was not in Egypt.

It was argued, however, that even if this is so by English law, the debt for the policy moneys was by Egyptian law situated in Egypt. According to the uncontradicted evidence of Mr. Page, this is so. But I am by no means certain that by English law or by English principles of private international law this is in any way relevant. In New York Life Insurance Co. v. Public Trustee(supra)68 Warrington L.J. says: "according to the law of one country it may be that these debts which we are prepared to hold are localised in England might be held to be localised elsewhere, but what we have to do is to give our decision upon the municipal law of this country and upon the facts and circumstances of this particular case."

It is true that the court there were considering the application of an English statute, but I am not sure that this is the critical point. Furthermore, there is some authority that an English court would not be debarred from determining on its own principles that the proper law of a contract is the law of A. by the fact that the courts of B. have held or would hold that the proper law of the contract was the law of B. or some law other than the law of A. (See In re United Railways(supra),69 *per* Jenkins L.J.70 and *per* Willmer L.J.71 By parity of reasoning***380** it would seem to me that I should not be deterred from holding that the situs of the debt was not in Egypt on the evidence of Mr. Page that by Egyptian law the situs of the debt was Egypt.

(16) Validity of the garnishee order. This question was debated at great length in the evidence of Mr. Page. In summary the effect of his evidence was as follows: In the case of an ordinary non-governmental debt it is open to the creditor A. to go to the judge in chambers, and on production to him of prima facie evidence of a debt due from B. to apply for an order against C. attaching by way of "precautionary execution" or cautionary sequestration any debt due by C. to B. By the practice of the Egyptian courts such attachment will be valid unless and until the debtor B. satisfies the judge in chambers that no debt is due by him to A. In the case of governmental debts the department concerned may proceed by "the administrative way"; that is to say, without any application to the judge in chambers they may by an order signed by the minister or his duly authorised deputy, or, in the case of a tax liability, on the basis of a tax assessment signed by the minister or his duly authorised deputy, issue a similar attachment signed by the minister or his duly authorised deputy, issue a similar attachment order on a third party who holds

funds belonging to the debtor (for example, in the case of a banker and customer) or who owes money either in praesenti, or subject to a condition requiring the person upon whom the order is served to declare to the department what funds of the debtor he holds or what moneys he owes the debtor either in praesenti or subject to a condition, and further requiring him to pay the money over to the department within 40 days of the service of the notice in the case of a present debt, or on the fulfilment of the condition in the case of a conditional debt.

Two major points were taken on this topic by the plaintiff (i) that neither the tax assessment referred to in the attachments relied upon nor the attachment orders were proved to have been signed by the minister or his duly authorised deputy; and (ii) that it was not proved that article 29 of the law 308 of 1955 requiring notice to the debtor within eight days had been complied with. As to (i) Mr. Page's evidence was to the effect that, by a general directive issued by the Minister of Finance soon after the law was made, tax inspectors and controllers of the relevant tax departments were authorised to sign the relevant tax assessments and to issue and sign such orders; but no such general directive was produced or otherwise proved before me.***381**

As to (ii) the material part of article 29 in the certified true translation put before the court provided as follows: "A copy of the attachment notice must be notified to the debtor within eight days following the date of the notice served on the third party whereby it should be mentioned the date on which the notice was served on the third party otherwise the attachment will be void." Though Mr. Page at first accepted this translation as accurate, subsequently he said that the true translation or meaning of the concluding words was that "it was voidable at the instance of the alleged debtor" or "under sanction of the garnishee or seizure being voidable at the instance of the debtor," this being Mr. Page's translation of the French words "sous peine de nullite de la saisie-arret."

I find some difficulty in accepting either of these expressions as being true translations of the French text. Mr. Page was, however, quite definite in his view that the garnishee himself has no right to challenge the validity of the order and that it was binding upon him unless the alleged debtor applies to the court to set it aside. No provision of the statute or any decision of the court was produced in support of this view, but it was said to be based upon the practice of the court. According to Mr. Page. this result would follow even if the debtor being abroad had in fact received no notice of the alleged tax assessment or of the garnishee order. There being no evidence to the contrary I feel constrained to accept this as the true view, however unreasonable it may be, though I confess I have reached this conclusion with considerable reluctance and hesitation, especially as I formed the view that Mr. Page (under the pressure of cross-examination) perhaps unconsciously was at times inclined to depart from the position of a dispassionate expounder of the law and assumed the role of an advocate.

But on the assumption that the garnishee orders or either of them are valid by Egyptian law, and by that law binding upon the defendants, two further points remain for consideration. First, being garnishee or sequestration orders imposed by the act of the executive, and not the result of any judicial proceedings, must or should an English court afford them recognition? I have been referred to no authority of our courts in which the effect of administrative garnishee has been discussed. The editors of Dicey when stating in rule 92 that the validity and effect of an attachment or garnishment of a debt is governed by the lex situs of the debt are clearly referring to garnishee orders made by a***382** competent court. I should not be disposed on general principles to extend the recognition further.

Secondly, it is submitted on behalf of the plaintiff that on the facts of this case the defendants should not be held entitled to rely upon them since both of them are later in date than the maturity dates of the policies upon which date, upon my previous findings, the policy moneys should have been paid. If

allowed now to rely upon them, they would, it is said, in effect be taking advantage of their own wrong or default. In my judgment this plea is well-founded, and should be accepted.

(17) I now turn to the third submission advanced on behalf of the defendants. This may be stated as follows: That the English courts will as a matter of comity give effect to foreign garnishee proceedings if the court is satisfied (a) that by the law of the place of attachment the situs of the debt is in the country of attachment, namely, Egypt, or (b) that by the law of the place of attachment there is jurisdiction over the garnishee, the debtor and his garnishor.

As to the first limb of this proposition I have already stated my views as to the situs of the debt and need not develop this point further since so far as I know no separate authority was relied upon under this branch of the argument.

As to the second limb of this submission based upon the jurisdiction of the foreign court over the debtor the garnishee and the garnishor, as at present advised I should not be prepared to accept that on the facts proved the Egyptian court had jurisdiction over **Rossano**. At the time in question **Rossano**, though according to Egyptian law still an Egyptian national (albeit also an Italian national by Italian law) and "resident" for the purpose of Egyptian exchange control regulations, was not physically in Egypt, had no intention of returning to Egypt, and so far as lay in his power had severed his connections with Egypt. He personally had no knowledge of the orders. The limited partnership firm of Levi Rossano & Co. had ceased to be registered on the Egyptian Commercial Register and had ceased to be a legal entity, and it was not proved to my satisfaction that anyone in Egypt had any authority from him to accept service of any proceedings or documents in relation to any personal liability of his. Even if the attachment order had been an order of the Egyptian court upon Rossano personally so as to have the status of a judgment of a foreign court, as at present advised I should not have concluded that the Egyptian courts had such***383** jurisdiction over Rossano as to justify enforcement of that judgment at common law in the English courts.

Though the Foreign Judgments (Reciprocal Enforcement) Act, 1933, has no application even to a judgment of an Egyptian court seeing that the Act has not been applied to Egypt, the provisions of section 2 of that Act, which set out the grounds upon which a foreign court is to be deemed to have jurisdiction, were designed to reproduce the common law rules appropriate to the enforcement of a foreign judgment at common law, and according to the editors of Dicey, at p. 109, may be relied upon as stating the rules of the common law. If this is so, it is to be observed that in this section neither nationality nor allegiance is stated as founding jurisdiction, nor would submission merely for the purpose of protecting or otherwise obtaining the release of property seized, or threatened with seizure, have founded jurisdiction. I should not be disposed to accept the third submission as well founded.

I am much indebted to counsel for the help they have given to me in this case by their wide-ranging arguments. In case this case should go further, it is right that I should state that there were a number of points taken in the arguments before me with which I have not thought it necessary to deal specifically.

There will be judgment for the plaintiff for the sum of £9,906 9s. 10d. together with interest thereon at the rate of 5 per cent. per annum from March 15, 1960.Judgment for the plaintiff with costs. ([Reported by LUCILLE FUNG, Barrister-at-Law.])

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1. [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38, C.A.

2. [1961] A.C. 1007; [1960] 2 W.L.R. 969; [1960] 2 All E.R. 332, H.L.

3. [1951] A.C. 201, 219; 66 T.L.R. (Pt. 2) 969, P.C.

4. [1954] P. 150; [1954] 2 W.L.R. 234; [1954] 1 All

E.R. 278, C.A.

5. [1938] A.C. 224, P.C.

6. [1958] 2 Lloyd's Rep. 93.

7. [1958] 2 Lloyd's Rep. 93.

8. [1923] 1 K.B. 673.

9. [1924] 2 Ch. 101; 40 T.L.R. 430, C.A.

10. [1958] 2 Lloyd's Rep. 93.

11. [1955] A.C. 491, 510, H.L.

12. [1955] A.C. 516n.

13. [1920] 1 K.B. 539; 36 T.L.R. 125.

14. [1937] 1 K.B. 534: 53 T.L.R. 126; [1936] 3 All E.R. 696, C.A.

15. [1951] A.C. 201.

16. [1961] A.C. 1007; [1960] 2 W.L.R. 969; [1960] 2 All E.R. 332, H.L.

17. [1958] 2 Lloyd's Rep. 93.

18. [1956] 1 Ch. 323.

19. [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621, H.L.

20. [1950] A.C. 57; [1949] 2 All E.R. 671, H.L.

21. [1924] 2 Ch. 101; 40 T.L.R. 430, C.A.

22. [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145, 146.

23. [1923] 1 K.B. 673.

24. [1906] 2 K.B. 26.

25. [1961] A.C. 1007; [1960] 2 W.L.R. 969; [1960] 2 All E.R. 332, H.L.

26. [1951] A.C. 201, 219; 66 T.L.R. (Pt. 2) 969.

27. Ibid. 221.

28. [1961] A.C. 1007.

29. Ibid. 1068.

30. [1951] A.C. 201; 66 T.L.R. (Pt. 2) 969.

31. [1961] A.C. 1007, 1081.

32. [1961] A.C. 1007, 1035.

33. Ibid. 1050.

34. Ibid. 1058.

35. [1954] P. 150; [1954] 2 W.L.R. 234; [1954] 1 All E.R. 278, C.A.

36. [1938] A.C. 224.

37. [1954] P. 150, 175.

38. Ibid. 186.

39. [1951] A.C. 201; 66 T.L.R. (Pt. 2) 969.

40. [1954] P. 150; [1954] 2 W.L.R. 234; [1954] 1 All E.R. 278, C.A.

41. [1961] A.C. 1007.

42. [1951] A.C. 201; 66 T.L.R. (Pt. 2) 969.

43. [1961] A.C. 1007.

44. [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621, H.L.

45. [1950] A.C. 57; [1949] 2 All E.R. 671, H.L.

46. [1961] A.C. 1007.

47. [1951] A.C. 201.

48. Ibid. 219-222.

49. [1958] 2 Lloyd's Rep. 93.

50. [1958] 2 Lloyd's Rep. 93.

51. [1958] 2 Lloyd's Rep. 93.

52. [1958] 2 Lloyd's Rep. 93.

53. [1939] 2 K.B. 678: 55 T.L.R. 814: [1939] 3 All E.R. 38, C.A.

54. [1958] 2 Lloyd's Rep. 93.

55. Ibid. 99.

56. (1779) 1 Dong.K.B. 251.

57. (1775) 1 Cowp. 341.

58. (1780) Unreported.

59. [1955] A.C. 491; [1955] 2 W.L.R. 303; [1955] 1 All E.R. 292, H.L.

60. [1955] A.C. 491, 510.

61. [1955] A.C. 516n.

62. Ibid. 529.

63. [1920] 1 K.B. 539; 36 T.L.R. 125.

64. [1920] 1 K.B. 539, 549.

65. [1924] 2 Ch. 101; 40 T.L.R. 430, C.A.

66. [1954] 1 W.L.R. 139; [1954] 1 All E.R. 145, 146.

67. [1958] 2 Lloyd's Rep. 93.

68. [1924] 2 Ch. 101, 117.

69. [1961] A.C. 1007.

70. [1960] Ch. 52, 97.

71. Ibid. 114.

END OF DOCUMENT

EXHIBIT 70

[1973] Q.B. 133 [1971] 3 W.L.R. 537 [1971] 2 All E.R. 1428 (1971) 115 S.J. 773 [1973] Q.B. 133 [1971] 3 W.L.R. 537 [1971] 2 All E.R. 1428 (1971) 115 S.J. 773
(Cite as: [1973] Q.B. 133)

[1971] 3 W.L.R. 537

***133 Vogel v R. and A. Kohnstamm Ltd.**

Queen's Bench Division

J. Ashworth

1971 April 22, 23

Conflict of Laws—Foreign judgment—Jurisdiction to enforce—Plaintiff's claim to enforce judgment of Israeli court in action for breach of contract—Defendant company registered in England—Contract negotiated through defendants' representative in Israel—Whether defendants resident in Israel for purposes of jurisdiction of Israeli court—Whether submission to jurisdiction to be express or implied.

The defendants, a company registered in England, sold through K, leather skins to the plaintiff, a leather merchant in Israel. The defendants had no office of their own in Israel. All the material correspondence was conducted with them in England and their connection with the state of Israel was limited to their dealings through K, who was their representative and sought customers for them and was the means of communication between them and any buyer, but who had no authority to conclude any contracts on their behalf. The plaintiff started proceedings for breach of contract against the defendants in Israel. When process was served on the defendants by leave of the Israeli court, the defendants wrote to the court in Israel that they did not admit the court's jurisdiction to entertain the dispute and that their letter was not to be taken as any appearence in the proceedings. The court in Israel gave judgment for the plaintiff who sought to enforce it in England. On the question whether the defendants at the time of action in Israel were resident in Israel and if not whether they had submitted to the jurisdiction of the court:-

dismissing the plaintiff's claim, (1) that as K's activities did not amount to a carrying on of business for the defendants in Israel, the defendants were not resident in Israel and therefore the court of Israel had no jurisdiction over them.Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag [1914] 1 K. B. 715, C.A. applied.(2)That to be effective a submission to the jurisdiction of a foreign court, in matters of contract must be express and not implied; there had been no such submission by the defendants to the court of Israel, whose judgment was accordingly arrived at without jurisdiction and was not enforceable by the plaintiff at common law in England.Sirdar Gurdyal Singh v. Rajah of Faridkote [1894] A.C. 670, P.C. and Emanuel v. Symon [1908] 1 K.B. 302, C.A. followed.Blohn v. Desser [1962] 2 Q.B. 116 not followed.

The following cases are referred to in the judgment:

- Blohn v. Desser [1962] 2 Q.B. 116; [1961] 3 W.L.R. 719; [1961] 3 All E.R. 1.
- Emanuel v. Symon [1908] 1 K.B. 302, C.A..
- Littauer Glove Corporation v. F. W. Millington (1920) Ltd. (1928) 44 T.L.R. 746.

***134**

- Okura & Co. Ltd. v. Forsbacka Jernverks Aktiebolag [1914] 1 K.B. 715, C.A..
- Sfeir & Co. v. National Insurance Co. of New Zealand Ltd. [1964] 1 Lloyd's Rep. 330.
- Sirdar Gurdyal Singh v. Rajah of Faridkote [1894] A.C. 670, P.C..

The following additional cases were cited in argu-

ment:

- Moorcock, The (1889) 14 P.D. 64, C.A..
- Saccharin Corporation Ltd. v. Chemische Fabrik Von Heyden Aktiengesellschaft [1911] 2 K.B. 516, C.A..

ACTION

On October 3, 1967, the District Court of Tel Aviv-Yaffo in the Republic of Israel gave judgment for the plaintiff, Arie **Vogel**, a leather merchant carrying on business in Tel Aviv, against the defendants, R. and A. **Kohnstamm** Ltd., an English company with their registered office in Beckenham, Kent, having a Tannery at Leeds. The judgment was in respect of financial loss and damage arising from an alleged breach of contract by the defendants, the sum awarded including costs and interests being IL35,621-554, the sterling equivalent of which was £4,240 13s. 3d. The plaintiff seeking to enforce that judgment in England issued a writ claiming the sterling equivalent. The defendants in their defence denied liability on the grounds that the statement of claim disclosed no cause of action; that the court of Tel Aviv-Yaffo had no jurisdiction over the defendants as the latter were not incorporated in nor carried on business in the State of Israel; further, that they had never submitted to the jurisdiction of that court.

The facts are fully set out in the judgment.

S. J. Waldman for the plaintiff.

L. K. E. Boreham Q.C. and *Roger Titheridge* for the defendants.

The main submissions of counsel are referred to in the judgment.

ASHWORTH J.

This is an interesting and unusual case and I start my judgment by expressing my indebtedness to counsel on both sides for their assistance in it.

The nature of the claim is as follows: the plaintiff seeks to recover in England the sterling equivalent of a judgment in his favour given by a court in Tel Aviv in Israel in 1967 whereby the defendants were held liable to pay to the plaintiff IL28,000, together with some sums by way of costs. This claim is brought at common law and I am not concerned with the Foreign Judgments Reciprocal Enforcement Act 1933, nor with the Administration of Justice Act 1920.

The claim in Tel Aviv brought by the plaintiff against the defendants and one Kornbluth as appears from the statement of claim which is exhibited to Mr. Maklev's affidavit was described as being a claim for financial damages and loss of profit. In that court, as I was informed, the plaintiff's claim against Mr. Kornbluth was not pursued.

The claim arose out of two contracts admittedly made between the plaintiff and the defendants in 1965 under which the defendants sold to the***135** plaintiff quantities of leather skins. The plaintiff is a leather merchant carrying on business in Tel Aviv. Mr. Kornbluth is described on his own notepaper as being a manufacturer's representative. He also carries on business in Tel Aviv, The defendants are an English company with their registered office in Beckenham in Kent, having a tannery in Leeds.

In 1963 the defendants entered into an agreement with Mr. Kornbluth, and the terms of that agreement were set out in a letter dated August 23, 1963, addressed by the defendants to him. I need not read it all but it is quite plain from that letter that there was set Up as a result a relationship between the defendants and Mr. Kornbluth, the precise nature of which I shall have to examine later. In the second paragraph the defendants said:

"I think at the start it would be best if we gave it a trial period of, say, six months, with of course a view to our working together for an indeterminate

period. I do not myself believe in a binding agency agreement, but I am sure we could work together on the understanding that we will not let you down.

"As discussed, all offers which we shall make to you, or to your customers, will include a commission of 5 per cent., and we allow a discount of 3 per cent. for payment by letter of credit. The quoted prices are f.o.b., U.K. port, packing charges are extra at cost. We understand you do not wish us to include packing charges on our invoices, but that you will settle these separately by a separate invoice by your annual visit to this counterweigh."

There was inevitably considerable discussion in argument as to the correct description of Mr. Kornbluth, vis-à-vis the defendants. In some senses he could certainly be called their agent, though it is common ground that he was not at any time authorised to enter into any binding agreement on their behalf.

The evidence as to the way in which business was transacted is to be found in oral evidence given by Mr. Demuth and in the agreed bundle there is a copy, not only of the relevant letters, but of Mr. Kornbluth's commission account. I say at once that I accept without hesitation the evidence given by Mr. Demuth. He described in some detail how the business proceeded, and his summary of Mr. Kornbluth's job was as follows. He said:

"His job was to show our products, to solicit orders or enquiries which he would submit to us. Finally we would agree and ask him to accept the order on our behalf. He was never allowed to accept orders and the question of price or payment was not left to him. If we had a new line we would send it to him to publicise. The documents were raised as between the customer and the defendants. They were not raised against Mr. Kornbluth. Payment was expected from the purchaser. Packaging was for the purchaser's account and Mr. Kornbluth's commission account would be credited after payment had been received. There was no guaranteed minimum commission per year. Mr. Kornbluth had an address in Tel Aviv but we took no part in procuring his accommodation, nor did we contribute to the costs of that accommodation or to its running expenses." ***136** He was cross-examined but there was no material alteration, or indeed enlargement, of what I have in substance recited already.

I take the view that Mr. Demuth's description was fair and accurate. Mr. Kornbluth's role was that of a person seeking customers who would buy the defendants' goods. For this purpose he was provided with samples for which he paid, and having found a potential customer he would act as a go-between between that person and the defendants. Correspondence would pass between the defendants and Mr. Kornbluth regarding a proposed order and Mr. Kornbluth would be in communication with the customer. lf as a result a contract was made it would be made between the defendants and the customer and at no time had Mr. Kornbluth any authority to make a contract on behalf of the defendants.

It is tempting perhaps to over-emphasise the fact that Mr. Kornbluth was paid by way of commission because commission as a method of payment is frequently associated with persons who are truly called agents. But I do not regard that factor in this case as colouring in the least the view which I have already indicated, that Mr. Kornbluth was not an agent in the strict legal sense of the term; he was a person who represented the defendants' interests in this sense, that he was eager to get business for them which would be to their advantage and to his own, and he was the means of communication between such persons as might be induced to buy the defendants' goods and the defendants.

Mr. Waldman helpfully classified persons to whom the label "agent" is sometimes ascribed, and he gave three broad classifications. I agree entirely with him that the first of his classes is in no legal sense of the word an agent at all; the example he gave was that of a motor dealer who is selling cars on his own account but puts up a notice to the effect that he is a Hillman agent, or the like: he is nothing of the sort, but it is convenient to use that

phrase so that people may know they can go to him if they want a Hillman car.

At the other end of the scale there is the true legal agent who is authorised to act on his principal's behalf and binds his principal by so acting. But Mr. Waldman said, and he may be right, that there is another class in between; a person who negotiates a contract which is ultimately made by the principal with a purchaser. Such a person does not make the contract but he does act as agent. That was Mr. Waldman's submission. Fortunately in this case I am not concerned with the question whether Mr. Kornbluth, so to speak, had authority in this particular case to do what he did. The relevance of the discussion about agency stems from the fact that in order to succeed the plaintiff here has to persuade me either that the defendants were resident in Israel through Mr. Kornbluth as their agent or that they were carrying on business through him in such a way as to give rise to an implied agreement on their part to submit to the jurisdiction of Israeli courts.

For my part I take the view that the use of the word "agent" in regard to Mr. Kornbluth is apt to be misleading. He was in a sense the representative as he so described himself of manufacturers in England. The defendants were not the only manufacturers whose interests he furthered in Israel, but he was a representative for the purpose of finding customers, carrying on communication between the interested parties when such***137** customers were found and so on. But I, for my part, would find it easier to refer to him as a representative rather than as an agent, because that latter term is apt to be misleading.

I must now turn to the contracts and examine them in a little detail. There were two of them, although it was hoped originally that there would only be one covering two different types of skins.

The matter started, so far as is relevant to this case, with a letter which unfortunately is no longer available dated August 25, 1965. That letter was written by the defendants to Mr. Kornbluth and I have very little doubt, from reading the rest of the correspondence, that in that letter the defendants made known to Mr. Kornbluth that they had a special line in suede special skins and that they had an offer for disposal in Israel of two lots, each of 200 dozen, one known as H.M., and the other L.M. That letter was enough to enable Mr. Kornbluth to interest the plaintiff, and there is a cablegram from Mr. Kornbluth to the defendants dated September 10 dealing with the matter. On the same day the defendants wrote to him. It is important, I think, to note that this letter could not possibly be regarded as a contract, though it was the first step in letters that did lead up to a contract, because by paragraph 2 they say:

"We note, with pleasure, that Messrs. **Vogels**" - the plaintiff - "are interested in purchasing 200 dozen each H.M. and L.M. Nyama Suede Specials as offered in our letter of August 25. We have immediately made arrangements for the dispatch of six sample skins of each of these grades to be sent to you by air and they will be shipped as per detail in our cable." The last paragraph of that letter is also important. It says:

"As mentioned the price of this leather is 28d." - meaning old pence - "per square foot F.O.B. London, packing extra at cost, and our terms are payment against irrevocable letter of credit." That was a plain indication of the terms on which the defendants were prepared to do business with such customer, in particular the plaintiff, whom Mr. Kornbluth might find.

In the correspondence there is a letter dated September 16 from Mr. Kornbluth to the defendants:

"Enclosed please find an order received from the (plaintiff) for your kind best and quickest execution. ... Regarding payment, we supply them on cash against documents," to which I shall hereafter refer to as C/D, "regularly, and see no reason why we should cause them unnecessary letter of credit expenses, which are at present rather very heavy in-

deed." It is quite plain, incidentally, from that letter that any possible contract in regard to L.M. skins was for the moment in abeyance. The other matter that emerges from that letter is that this order, so called, was in fact in law a counter offer, because it varied the terms which had been put forward by the defendants inasmuch as the terms of payment were to be C/D as opposed to letters of credit. and the order itself contains***138** at the foot of it, "C/D through The Israel Mercantile Bank Ltd., Tel Aviv."

The defendants replied to that letter of September 16 and the attached order. In paragraph 1 they say:

"We confirm having booked the 200 dozen Treforest Suede and now look forward to receiving your import licence number.

"We will make the necessary arrangements to invoice these goods as Treforest Nyama Suede Sheep, which has been your request in this type of leather up to now. On the question of terms of payment for this order, our accounts department are dealing with this matter, and we will revert in a post or two." It seems to me that at that stage the defendants were considering the counter offer and although the first paragraph does contain the expression that they had booked the order, in my view no contract was at that stage made.

It was not until October 15, some fortnight later, that the defendants did make up their minds, because there appears in the correspondence an invoice dealing with this 200 dozen H.M. skins. and it is to be noted that that invoice is addressed to the plaintiff in Tel Aviv and it contains in terms the words, "Cash against documents through the Israel Mercantile Bank Ltd., Tel Aviv." and from that moment at least the parties were ad idem and there was a firm contract. Moreover it is common ground that the goods were in fact shipped immediately f.o.b.

I feel no doubt in my own mind that directly the defendants carried out their obligation to put these goods on board that vessel their obligations were fully discharged, assuming always that the skins were of suitable quality. In my judgment that contract was made in the sense that the legal obligation was accepted by the defendants and by the plaintiff when that shipment was made and that invoice was issued. Up till then there had been no final agreement in regard to the terms of payment.

Having reached agreement on that matter the parties then returned to the charge in regard to L.M. skins. On October 21 Mr. Kornbluth wrote to the defendants, having previously cabled to them to the same effect, as follows:

"We beg to confirm our today's cable which was sent on the express request of the customer [the plaintiff] which reads: 'Yours 15th **Vogel** interested hundred dozen Treforest black suede L.M. 28 be invoiced sheep provided you dispatch per airfreight your account stop Customer prepared pay freight difference between sea and airfreight stop Payment as last fullstop If accepted must leave immediately." and in the last paragraph of the letter this proposal on the part of the plaintiff was expanded and expressed otherwise than in telegraphese.

The defendants' reaction was immediate. A cable dated October 22 reads: "Yours 22nd proposal unacceptable can forward **Vogel** Treforest suede L.M. specials 28 FOB day after receipt letter of credit cable confirmation." It is quite plain that at that moment the sequence was that the defendants had originally offered some L.M., the plaintiff had not ***139** been interested and he had then put forward a completely different offer to buy 100 dozen and the defendants had rejected that proposal.

On October 24, two days later, the plaintiff, as I hold, made a new offer which was transmitted through Mr. Kornbluth: "Vogel accepting please airfreight immediately rush documents airmail bank C/D fullstop." I need not read the letter posted on October 25, because it was dictated on October 22 and really does not affect the issue now before me.

But on October 25 again what is described as an or-

der emanated from Mr. Kornbluth, an order to the defendants from the plaintiff, for 100 dozen suede L.M. ex special offer. and that has at its foot the phrase, "C/D through any bank." The reaction of the defendants to that is to be found in a letter of October 29.

"We thank you for your letter of October 25" - which I have not read - "and your covering confirmation order - therein enclosed.

"We also thank you for your cable. ... As mentioned in our letter of October 27 we were pleased that the customer accepted our terms." That sentence is a little cryptic. What it must mean is "our terms relating to freight." The reason I say that is that the next sentence is indeed a concession by the defendants because the plaintiff had not accepted the terms in regard to letters of credit. The next sentence reads, "The goods will be going forward on a cash against documents basis as requested."

Then we find another invoice for these L.M. specials, cash against documents through the Israel Mercantile Bank Ltd., Tel Aviv. Once again it seems to me there is a sequence of offer and counter-offer, consideration and the like, and it was not until October 29, when the defendants made up their minds that they would deal with the matter by way of C/D instead of letters of credit, that the full terms of the contract were finally agreed. Sure enough the goods were transmitted by air as requested.

The importance of all this is because amongst other contentions put forward by Mr. Waldman in support of his broad proposition that the defendants were subject to the jurisdiction of the Israeli court was one that in fact the contract was made in Israel. In my view that submission is not well founded. This contract was not made in Israel, neither of the contracts was made in Israel. I will not repeat the detailed analysis that I have already expressed but it does seem to me quite impossible to say on these documents that the contract was made in Israel: still less that it was made by Mr. Kornbluth.

I ought now, to complete the history, to summarise what happened afterwards. The goods arrived and the plaintiff was dissatisfied. Fortunately it is quite unnecessary for me even to consider whether his complaints were justified or not; they are set out in a letter. That letter quite plainly shows, even if half of it is true, that he had some cause for disgruntlement. The defendants made understandable efforts to reach a compromise which came to nothing and the matter was passed over to the plaintiff's lawyer.

Eventually, at the very beginning of 1967, application was made to the***140** court in Tel Aviv for leave to serve the defendants in England with process in the action which by then the plaintiff had launched in Tel Aviv. Leave was granted and the documents were transmitted to the High Court here and in due course, there is no doubt about it, the defendants in England were served with the necessary documents in the Israeli action. It would not be right to say that the defendants ignored them. It would have been discourteous on their part to do so and possibly foolish. To their credit they went to their lawyers and there appears amongst the exhibits to Mr. Maklev's affidavit a letter written by the defendants' solicitors on June 8, 1967, which I think is worth reading because it is a very proper letter to have written. It is addressed to the President of the District Court at Tel Aviv and says:

"We have been instructed by [the defendants] in connection with a claim which we understand has been made by [the plaintiff] against our clients.

"We are writing to inform you, as a matter of courtesy, that our clients do not admit that your court has any jurisdiction in this matter, nor do they admit any of the allegations put forward on behalf of the plaintiff. This letter is not to be taken as an appearance in this case nor do our clients intend to take any steps or other action in the proceedings. Perhaps you would be good enough to inform the plaintiff's lawyer of the receipt of this letter and the contents.

"We must stress, once again, that this letter is not to

be taken as any appearance in these proceedings at all." Mr. Waldman chaffingly said that whatever else emerged from this case one thing was quite certain, namely, that the defendants' solicitors bolted and barred every possible door as against the contention that the defendants were in some way active parties in the Israeli court. and so judgment was entered for IL28,000 with certain extra costs, and in due course the plaintiff was minded to seek the fruits of that judgment in England.

The writ was issued on February 7, 1969, claiming the sterling equivalent of that judgment. The defence, after certain particulars had been given, was pure and simple. Paragraph 1:

"The statement of claim discloses no cause of action. (2) If, which is not admitted, the District Court of Tel Aviv-Yaffo gave the alleged judgment, the said court had no jurisdiction over the defendants. The defendants rely upon the following matters: (a) The defendants are not incorporated in nor do they carry on business in, the State of Israel. (b) The defendants have never submitted to the jurisdiction of the said court." That is the issue which has now come before me.

Fortunately in some ways one can start with a measure of agreement between the parties as to the applicable principle. The most convenient place to find them is in a judgment given by Buckley L.J. in Emanuel v. Symon [1908] 1 K.B. 302. He said, at p. 309:

"In actions in person am there are five cases in which the courts of this country will enforce a foreign judgment: (1) Where the defendant***141** is a subject of the foreign country in which the judgment has been obtained;" I break off to say that that first class now seems to have been sufficiently questioned to be a doubtful authority.

"(2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained."

For the plaintiff here Mr. Waldman contends that this case falls within class (2), shortly described as residence; or class (5), where he has contracted to submit himself to that jurisdiction. and I agree with him in some measure, those two classes are apt to overlap. At any rate in this case the relevant considerations are common in large measure to both principles. Accordingly it is submitted on behalf of the plaintiff that the defendants were within the Israeli court's jurisdiction either because they were resident there or because they had by implication agreed to submit to the jurisdiction. I stress the words "by implication," though I shall have to return to them because Mr. Waldman rightly concedes that in this particular case there can be no question of an express agreement to accept the Israeli court's jurisdiction.

I find it more convenient to consider the question whether the defendants can be said to have been at the material time resident in the State of Israel. As has been said in many cases, residence is a question of fact and when one is dealing with human beings one can normally approach the matter on the footing that residence involves physical residence by the person in question. I keep open the possibility that even in regard to such a person he may be constructively resident in another country although his physical presence is elsewhere. But in the case of a corporation there is broadly speaking no question of physical residence. A corporation or company, if resident in another country, is resident there by way of agents.

A number of cases have been cited, all of them having some bearing on the matter, and I must refer to a number of them. I am dealing only at the moment with the question of residence. In Littauer Glove Corporation v. F. W. Millington (1920) Ltd. (1928) 44 T.L.R. 746, the headnote reads:

"To constitute residence by a British company in a

foreign state so as to render the company subject to the jurisdiction of the courts of that state, the company must to some extent carry on business in that state at a definite and reasonably permanent place." The main feature of that case is very different from any matter which arises in the present case because the person through whom the defendant corporation was said to have residence in the United States was not a person with any fixed or reasonably permanent place; whereas it is common ground that at all material times Mr. Kornbluth had an office in Tel Aviv and could be described as having both a definite and reasonably permanent place. Accordingly in that case, the facts of which I need not recite, the so-called residence of the director of the defendant company was of much too fleeting a character and so lacking in permanence that the court had***142** no difficulty in holding that the English company was not resident in the United States for the purpose of conferring jurisdiction from those courts.

The matter was also considered by Mocatta J. in Sfeir & Co. v. National Insurance Co. of New Zealand Ltd. [1964] 1 Lloyd's Rep. 330. In that case there was a body in Ghana which in some sense could be called an agent or agents of the defendant insurance company, who, as their name implies, were domiciled or resident in New Zealand. The entity in Ghana had a limited authority to act for the defendants. They were allowed to deal with minor claims and indeed settle them on the defendant's behalf. In cases where the loss did not exceed £5, and the entity was reasonably satisfied that the claim was presented in all good faith, they were authorised to dispense with a survey. All claims exceeding £1,000 and all unusual claims had to be submitted to the defendants for approval. Having examined the facts in a lengthy judgment the judge came to the conclusion that this limited authority vested in the agent in Accra was not sufficient to render the defendants resident in Ghana and therefore subject to the jurisdiction of the Ghanian courts.

Of course each case must depend on its own facts and I am only citing those to show that every effort has been made to find a case which could fairly be regarded as parallel to the present.

Dealing still only with residence I now have to examine in what sense can it be said that the defendants were resident in Israel. They had no office of their own there. All the material correspondence was conducted with them in England and their connection with the State of Israel was limited, in my view, to their dealings through Mr. Kornbluth.

In examining how far the presence of a representative or agent will, so to speak, impinge on the absent company so as to render that absent company subject to the relevant jurisdiction, I find help to be obtained from cases in which the converse situation has been considered: namely, where the English courts have been invited to allow process to issue to foreign companies on the footing that such foreign companies are "here."

Much the most useful authority which has been cited to me is Okura and Co. Ltd. v. Forsbacka Jernverks Aktiebolag [1914] 1 K.B. 715. It is worth reading the headnote:

"The defendants were a foreign corporation carrying on business in Sweden as manufacturers. They employed as their sole agents in the United Kingdom a firm in London who also acted as agents for other firms and carried on business as merchants on their own account. The agents had no general authority to enter into contracts on behalf of the defendants, but they obtained orders and submitted them to the defendants for their approval. On being notified by the defendants that they accepted the orders the agents signed contracts with the purchasers as agents for the defendants. The goods were shipped direct from the defendants in Sweden to the purchasers. The agents in some cases received payment in London from the purchasers and remitted the amount to the defendants less their agreed commission:- *Held,* that the defendants were not carrying on their business at the agents' office in London so as to be resident at a place within the jurisdic-

tion, and that service of a writ on the agents at their office was, therefore, not a good service on the defendants."***143**

As Mr. Boreham said, having read to me the headnote, if that was the view of the court in that case how much stronger in his favour is the present, because on the face of it there are details in the facts of that case which might have led the court to think that the corporation in question was indeed "here," whereas such features are absent in the present case. There is force in that, but the matter for which I am citing the authority is the passage from Buckley L.J.'s judgment where he said, at pp. 718-719:

"In one sense, of course, the corporation cannot be 'here.' The question really is whether this corporation can be said to be 'here' by a person who represents it in a sense relevant to the question which we have to decide. The point to be considered is, do the facts show that this corporation is carrying on its business in this country? In determining that question, three matters have to be considered. First, the acts relied on as showing that the corporation is carrying on business in this country must have continued for a sufficiently substantial period of time. That is the case here. Next, it is essential that these acts should have been done at some fixed place of business. If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business. The third essential, and one which it is always more difficult to satisfy, is that the corporation must be 'here' by a person who carries on business for the corporation in this country. It is not enough to show that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country." Then he goes on to refer to authorities, all of them relevant and all of them in a sense interesting as showing the line of distinction which the courts have drawn in the past between the situations which were, on the face of it, somewhat similar.

At the end of the day there is a test which the courts have used as part of the material on which to reach a conclusion, namely, is the person in question doing his business or doing the absent corporation's business? Conversely, are they doing business through him or by him?

I confess I find these aphorisms, if that is what they are, apt to lead one astray; one can find the choice phrase and then fit the facts to it and so on. But they are useful and I have asked myself anxiously in this case whether in any real sense of the word the defendants can be said to have been there in Israel; and all that emerges from this case is that there was a man called Kornbluth who sought customers for them, transmitted correspondence to them and received it from them. had no authority whatever to bind the defendants in any shape or form. I have come to the conclusion really without any hesitation that the defendants were not resident in Israel at any material time.

It is fair to Mr. Waldman to say that he himself accepted that if he was limited to the question of residence as the basis of this action he might find himself in difficulty. But he has another approach, overlapping, but separate. What he says is that on these facts and on the decided cases***144** the fair conclusion to draw is that the defendants by implication agreed to submit themselves to the jurisdiction of the Tel Aviv court.

Before I examine the authorities on that issue I would start with this comment; in considering whether a term should be implied, courts have laid down over and over again that the test is not whether it would be reasonable to imply a term and I follow that guidance. But I do venture to suggest that one test which a court can at least look at is the test whether it would be unreasonable to imply such a term. and I can think of no reason in this world why the defendants should have wished to submit themselves to the jurisdiction of the Israeli courts in respect of these skins which they were selling to customers in Israel. True they might have agreed to do so but I would have thought that one can at least start with the premise that it would be surprising if

by implication they had committed themselves to that result.

The problem is lamentably bedevilled by the fact that not every decided case to which I have been referred sings the same tune. If this case had been decided in 1909, after the decision in Sirdar Gurdyal Singh v. Rajah of Faridkote [1894] A.C. 670 and of Emanuel v. Symon [1908] 1 K.B. 302, I venture to think it would have taken a shorter time than it has taken before me. But since that date there have been two decisions, each of which is relied on and rightly relied on by Mr. Waldman, which have set the matter in balance.

Let me start with the firm ground of ancient authority. In 1894 there came before the Privy Council Sirdar Gurdyal Singh v. Rajah of Faridkote [1894] A.C. 670, and in summary form the issue there was whether the defendant, as he originally was, could be sued in the Faridkote court for the money which was said to be due from him for misfeasance committed by him when he was treasurer in Faridkote. By the time the action had been brought he had made his way to the neighboring state of Jhind. Action was brought in the Faridkote court, successfully in the end, and it came before the Privy Council. In the course of giving the judgment of their Lordships Lord Selborne dealt with this matter. I believe all I need cite, despite the fact that much is relevant, is a passage at the end of the judgment. Lord Selborne, referring to a doubt expressed by Blackburn J. in a previous case, said, at p. 686:

"their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the forum loci contractus, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied." In that single sentence there is, as I see it, a firm declaration that this contractual submission to the jurisdiction of another country's courts must, if it is to be effective, be expressed and cannot be implied.

Fourteen years later Emanuel v. Symon [1908] 1 K.B. 302 came before the Court of Appeal. That was a case in which Channell J. - if I may say so, no mean judge - had given judgment for the plaintiff who had sought to enforce in this country a judgment given in Australia against the defendant. ***145** It is an interesting case and a very strong decision because the parties had been partners in business in Australia and when the subject matter of the partnership was wound up in Australia it was found that the partners collectively owed a certain amount of money to strangers, and of that sum of money plainly the defendant himself would owe part as being a partner. The defendant had not been domiciled in Western Australia at the time of suit, nor resident there at the date of the action. He did not appear in the process, he did not expressly agree to submit to the jurisdiction and accordingly it was held that he was not bound by its finding or decree and that the action in this country, which was based on that finding and decree, could not be maintained. The headnote observes that Sirdar's case [1894] A.C. 670, which I have already cited, was followed.

It is in my view interesting to note that the successful plaintiffs, who were the respondents in the Court of Appeal, were represented by Mr. Holman Gregory. In the course of his argument he raised the very contention Mr. Waldman has been raising before me in this form, [1908] 1 K.B. 302, 305:

"When persons agree to become partners in a business or transaction which can only be carried on or effected in a foreign country, there is necessarily implied an agreement to submit to the jurisdiction of the foreign courts." That provoked Kennedy L.J. to intervene. He said, as recorded, "Such an agreement, in order to be binding, must be express. It is not to be implied:" and he cites Sirdar. Mr. Boreham was good enough to read to me most of Lord Alverstone's judgment and Mr. Waldman read some of Buckley L.J.'s judgment: but the real gem of the collection I think is to be found in the judgment of

Kennedy L.J. It is quite true that it does not go so far as his intervention but it goes a long way. What he says is this [1908] 1 K.B. 302, 313-314:

"the decision of the Privy Council is clear that there is no implied obligation on a foreigner to the country of that forum to accept the forum loci contractus, as having, by reason of the contract, acquired a conventional jurisdiction over him in a suit founded upon that contract for all future time, wherever the foreigner may be domiciled or resident at the time of the institution of the suit. Such an obligation may exist by express agreement, as in the case of Copin v. Adamson, (1874) L.R. 9 Ex. 345 and as in many cases of foreign contracts where the parties by articles of agreement bind themselves to accept the jurisdiction of foreign tribunals; but such an obligation, as is pointed out in the decision of the Privy Council, [Sirdar] is not to be implied from the mere fact of entering into a contract in a foreign country."

Those two cases in my view establish the principle that an implied agreement to assent to the jurisdiction of a foreign tribunal is not something which courts of this country have entertained as a legal possibility. Recognising that such an agreement may be made expressly they have in terms decided that implication is not to be relied upon.

There the matter might have rested but for the fact that in 1961 there came before Diplock J. the case of Blohn v. Desser [1962] 2 Q.B. 116.***146** That was a case in which the plaintiff, an Austrian resident in Vienna, had obtained in the Commercial Court or Vienna a judgment against a partnership there. The defendant was a partner in the firm and her name was registered as such in the commercial register in Vienna. But she was only a sleeping partner receiving no income from the firm and at all material times was resident in England. The plaintiff brought an action against the defendant personally in England on, inter alia, the Austrian judgment. As counsel all agree it would have been quite possible for the judge to dispose of that claim on the short and simple ground on which he eventually did dismiss it, but in the course of giving judgment he entertained argument and gave his views upon a topic which was not necessary for his decision, and places those who come after in some difficulty when it is realised that what he there said runs completely counter to the passages which I have cited from Sirdar and from Emanuel v. Symon. The curious thing is if I might say so, that Diplock J. then had cited to him Emanuel v. Symon for the purpose of showing to him the five types of cases listed by Buckley L.J. which I have already referred to. But then having set out those five cases the judge said, at p. 123:

"There may be some doubt as to whether today it would be held that the jurisdiction exists in the first category of cases, but the other four cases have never been questioned. It is also, I think, clear law that the contract referred to in the fifth case, to submit to the forum in which the judgment was obtained, may be express or implied." I suppose that eminent as counsel were who were engaged in that case none of them directed his Lordship's attention to the intervention of Kennedy L.J. or the passage in his judgment which I have cited; if they had done so I can hardly believe that he would have said that the contrary was clear law. He went on to say:

"It seems to me that, where a person becomes a partner in a foreign firm with a place of business within the jurisdiction of a foreign court, and appoints an agent resident in that jurisdiction to conduct business on behalf of the partnership at that place of business, and causes or permits, as in the present case, these matters to be notified to persons dealing with that firm by registration in a public register, he does impliedly agree with all persons to whom such a notification is made - that is to say, the public - to submit to the jurisdiction of the court of the country in which the business is carried on in respect of transactions conducted at that place of business by that agent."

That passage has, as I am informed, and as I find in the current edition of *Dicey and Morris, Conflict of Laws*, 8th ed. (1967), p. 980, been the subject of

critical comment. It would be impudent on my part to add criticism of my own: it is enough for me to say that faced with the choice between that passage and the earlier authorities I feel no hesitation in prefering the older authorities.

It is only fair to Mr. Waldman to add that Mocatta J., in a case already mentioned, Sfeir & Co. v. National Insurance Co. of New Zealand Ltd. [1964] 1 Lloyd's Rep. 330 does seem in terms to have accepted that an agreement to submit to the jurisdiction of the foreign tribunal may be***147** implied. Once again there were other reasons why his decision in favour of the defendants was certainly maintainable and correct and I leave it there. Leaving it there I can only say that there are clearly dicta to the contrary of what I am deciding, but at least I am fortified by having authority of high weight in favour of the view which I now take.

Of course, as Mr. Waldman says, once I have reached that conclusion his claim goes. It must go because there is no express agreement here, none could be relied on, by which the defendants could be held to have agreed to submit themselves to the jurisdiction of the Israeli court.

Nonetheless because so much care has been taken in presenting this case I ought to add that if it were necessary for me to decide the point I should rule that there is no such implied agreement to be deduced in the present case. That is to say, assuming that such an agreement would give the plaintiff the relief he seeks, the facts are not enough to give rise to the implication. The facts relied on by Mr. Waldman were (a) that the contract was made within the jurisdiction of the foreign tribunal; (b) by or through an agent residing there; (c) such agent was a person carrying on business residentially within that jurisdiction; and (d) the contract was to be performed within the jurisdiction. In my judgment while proposition (c) is established, namely that Mr. Kornbluth was carrying on business residentially within that jurisdiction, none of the other material factors are established at all. I hold that Kornbluth was not an agent. I hold that the contract was not made within the foreign jurisdiction. and lastly I hold it was not to be performed there. On these grounds there must be judgment for the defendants. Judgment for the defendants with costs. Order to pay £250 in court by way of security for costs, with interest if any, to the defendants' solicitors in part satisfaction of costs. ([Reported by RENGAN KRISHNAN ESQ., Barrister-at-Law])
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