EXHIBIT 86
Part 1

PART III

ENFORCEMENT OF FOREIGN JUDGMENTS

Edited by Robin Mayor

CHAPTER 9

THE SHARED LEGAL HERITAGE

Robin Mayor[*]

9.1 THE STATUS OF ENGLISH LAW

Much has been said in the preceding chapters on the overriding similarities of the various jurisdictions which form the subject of this book. It is not intended to repeat that here. As previously noted, the six 'offshore' jurisdictions share any number of similarities in their approach to foreign cooperation, which is in large part derived from the statutory provisions and common law developed in the United Kingdom. However, English law as such is not always directly applicable as part of the local law of the subject jurisdictions. The enforcement of foreign judgments is no exception; indeed, there are considerably more similarities than differences in the principles applied, even in the face of some different approaches by way of procedure. This is because the legislation dealing with this topic is based on English (or British) statutory precedents, which in turn results in the body of English precedent dealing with substantially similar statutory rules having particularly significant persuasive force.

Nevertheless, there are occasional differences of approach in terms of both the applicable substantive law and local procedural variations. The extent of local

* Robin Mayor is a partner in the Litigation & Restructuring Department of Conyers Dill & Pearman's Bermuda office.

case law dealing with this topic also varies considerably (for instance, there is very little local case law in the British Virgin Islands but a significant body of local jurisprudence in Bermuda).

The overriding principles to be derived from the following six chapters are as follows: (1) there is no direct enforcement of foreign judgments; and (2) there is a growing tendency to cooperation between sovereign nations such that it is becoming increasingly clear that jurisdictional boundaries are becoming less clearly defined and more open to reflect the global removal of commercial and political boundaries. In this regard the subject jurisdictions, despite their shared legal heritage, may be seen as not simply slavishly following British judicial precedents, but also creating new law of their own.

9.2 STATUTORY METHODS OF ENFORCEMENT OF FOREIGN JUDGMENTS

In all six jurisdictions, there is provision for registration of foreign judgments from certain named territories and countries. The legislation giving rise to the registration of judgments in all six jurisdictions is derived from or modelled on the UK Administration of Justice Act 1920 and the UK Foreign Judgments (Reciprocal Enforcement) Act 1933 and it is not therefore surprising that the provisions across the six are so similar.

It is clear that the identity of those recognised for the purposes of registration are those that have close historical, geographical or political ties. Needless to say, as a result of the diverse history of each of the six, this list, while having some names in common, is equally diverse. Bermuda includes recognition of judgments from the United Kingdom and the Federal courts and many of the state courts in Australia along with most, if not all of the Commonwealth or former Commonwealth dependent island nations. Not surprisingly, the British Virgin Islands similarly recognise many of the island territories and the courts of New South Wales and part of Nigeria. It is interesting to note that none of the six include in the list of those places from which judgments will be capable of registration, the United States.

Similarities in the requirements for registration include that the judgment must be: (1) a final judgment (although it can be subject to appeal); (2) from a superior court; and (3) for a sum of money due. Once registered, it will be treated in all material respects as if it was a judgment of the domestic court and the plaintiffs will be able to avail themselves of all of the remedies that they would have had the judgment been obtained in the local jurisdiction in the first place.

Prohibitions against registration include those judgments which represent taxes or penalties imposed by the foreign jurisdiction; this is as a result of the general attitude of these common law based countries towards punitive damages, amongst other things. The foreign court must also have had jurisdiction over the defendant. And the general thread running through these various analyses is that the foreign court's competence must be similar to the competency which would be enjoyed by a corresponding court in one of our six jurisdictions.

9.3 ENFORCEMENT OF FOREIGN JUDGMENTS AT COMMON LAW

If the foreign judgment is one which does not fall within the relevant registration legislation of the offshore jurisdiction, all six provide for the application of common law principles derived from England and Wales for enforcement.

Essentially, the English common law position, which is well established and has been adopted across the six jurisdictions, is that a fresh action may be brought in the domestic courts against the defendant based on the foreign judgment. Provided that there is no defence of fraud, failure of jurisdiction and it is not contrary to natural justice or to domestic public policy, the domestic courts will lean heavily toward giving summary judgment and will not seek to reopen the issues and have a fresh trial on matters that have already been determined by a competent foreign court.

These general principles have always applied to the enforcement of money judgments. However, there has historically been some doubt as to whether the same principles would apply to a non-monetary judgment. The law in the Cayman Islands appears to have developed such that non-money judgments can now be enforced.

As discussed in detail in Chapter 15, the Jersey Royal Court held in *Brunei Investment Agency and Bandone Sdn BHd and Others v Fidelis Nominees Ltd and Others*,[1] that the court should have a discretion to give effect to a foreign non-monetary judgment. The court spent considerable time reviewing the development of the common law rules relating to enforcement of foreign judgments and cited with favour several recent cases in which the issue of the enforcement of foreign non-money judgments has been considered, including a recent Cayman Islands case and several cases from Canada. The following

[1] [2008] JRC 152.

passage from a Canadian case perhaps best reflects the way in which the courts of the subject British-based systems will likely follow:

> The world has changed since the ... rules [concerning the recognition of foreign judgments] were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralised political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.[2]

The Royal Court of Jersey determined that they did have the discretion, but that such discretion must be exercised with caution.

It would be surprising indeed, if the decisions of the Privy Council (Isle of Man), the Cayman Islands decision[3] and the *Brunei* (Jersey) case were not viewed in all six territories as highly persuasive authority for the general proposition that in the modern commercial world that we currently occupy, it is unrealistic not to extend the common law principles of recognising and enforcing foreign judgments to include non-money judgments in certain circumstances.

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2 *Morguard Investments Limited v De Savoye* (1993) SCR 10777, cited with approval by the majority of the Supreme Court of Canada in *Pro Swing Inc v Elta Gold Inc* (2006) SCC 52.

3 *Miller v Gianne and Redwood Hotel Investment Corporation* [2007] CILR 18.

CHAPTER 10

BERMUDA

Alex Potts[*]

10.1 INTRODUCTION

A judgment or order of a foreign court ('a foreign judgment') has no direct legal effect in Bermuda,[1] and a foreign judgment is not enforceable in Bermuda in and of itself.

Steps have to be taken to have a foreign judgment legally enforced in Bermuda. Depending on the nature of the foreign judgment, a foreign judgment may be recognised or enforceable in Bermuda pursuant to various statutory rules or common law rules.

In particular:

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* Alex Potts is an Associate in the litigation department at Conyers Dill & Pearman's Bermuda office.

1 *Holborn Oil Company Ltd v Tesora Petroleum Corporation*, Civil Jurisdiction 1990, No 273, 20 August 1990; *Young et al v GNI Fund Management (Bermuda) Limited* [2001] Bda LR 70.

(1) there are statutory rules which apply to the registration and enforcement of final money judgments of superior Courts in the United Kingdom and certain Commonwealth countries and territories, under the Judgments (Reciprocal Enforcement) Act 1958 (1958 Act), as amended,[2] and regulations made thereunder;[3]

(2) there are statutory rules which apply to the registration and enforcement of maintenance orders made by foreign courts of reciprocating countries, under the Maintenance Orders (Reciprocal Enforcement) Act 1974 (1974 Act), as amended, and regulations made thereunder;[4]

(3) there are common law rules[5] applicable to the enforcement of final money judgments of foreign courts in the rest of the world;

(4) there are statutory[6] and common law rules applicable to the recognition of foreign judgments (rather than their enforcement), either as a defence to a claim or as conclusive of an issue in the Bermuda proceedings;

(5) there are statutory rules which apply to the recognition of divorces and legal separations.[7]

There is no coherent body of statutory or common law rules relating to the enforcement or recognition of foreign judgments that fall outside the categories of judgments referred to above.

This chapter does not intend to deal with the effect given in Bermuda to foreign judgments relating to the administration of estates or foreign adjudications in bankruptcy or insolvency proceedings (save in passing), nor the effect given to foreign decrees of dissolution or nullity of marriage, or foreign maintenance orders.

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2 For example, by the Protection of Trading Interests Act 1981.

3 The Judgments Extension Order 1956 (SR&O 5/1956); the Judgments (Reciprocal Enforcement) Rules 1976 (SR&O 60/1976); and the Judgments (Reciprocal Enforcement) (Australia) Order 1988 (BR 37/1988).

4 The Maintenance Orders (Reciprocal Enforcement) (Designation) Order 1975 (SR&O 66/1975); and the Maintenance Orders (Reciprocal Enforcement) (Designation) Amendment Order 1998 (BR 6/1998).

5 Subject to the statutory restrictions set out in the Protection of Trading Interests Act 1981, s 7.

6 The 1958 Act, s 7.

7 The Recognition of Divorces and Legal Separations Act 1977.

10.2 STATUTORY PROVISIONS FOR ENFORCEMENT

The Judgments (Reciprocal Enforcement) Act 1958

The Judgments (Reciprocal Enforcement) Act 1958 is largely modelled on the provisions of the UK Foreign Judgments (Reciprocal Enforcement) Act 1933, although some provisions appear to have been modelled on the UK Administration of Justice Act 1920, Part II.[8]

Foreign judgments to which the 1958 Act applies can be enforced by registering them in the Supreme Court of Bermuda. Provided that the foreign judgment falls within the scope of the 1958 Act, registration is available as of right, instead of merely as a matter of the Supreme Court's discretion.[9]

The effect of registration is that the foreign judgment has the same force and effect as a judgment of the Supreme Court entered at the date of registration, and the same steps may be taken to enforce it as if it were a judgment of the Supreme Court.[10]

Under the 1958 Act, the procedures for enforcing foreign judgments are designed to be more efficient than the procedures that exist at common law.

There is no statutory equivalent in Bermuda of the UK Civil Jurisdiction and Judgments Act 1982.

Secondary legislation

Secondary legislation made under the 1958 Act includes:

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8 See *Masri v Consolidated Contractors International Company SRL*, Supreme Court of Bermuda, Civil Jurisdiction 2008, No 142, 11 February 2009, per Kawaley J.

9 As was the case in the United Kingdom under the Administration of Justice Act 1920, and in Bermuda under the Judgments Extension Act 1923 (repealed).

10 Section 3(3). See also *Berliner Bank AG v Karageorgis*, Civil Jurisdiction 1997, No 86, 23 May 1997; [1997] Bda LR 37.

(1) the Judgments Extension Order 1956;[11]
(2) the Judgments (Reciprocal Enforcement) Rules 1976;[12] and
(3) the Judgments (Reciprocal Enforcement) (Australia) Order 1988.[13]

To which countries' judgments does the 1958 Act apply?

The Commonwealth jurisdictions to which the 1958 Act applies, by the 1958 Act itself and by Orders in Council made thereunder,[14] are set out in Appendix 10.1 (below).

To what kind of judgments does the 1958 Act apply?

The 1958 Act applies to all judgments of a 'superior court' of a relevant foreign jurisdiction which are final and conclusive as between the parties,[15] and under which a definite sum of money is payable to the plaintiff, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty.[16]

What is a sum of money?

For a foreign judgment to be enforceable under the 1958 Act, it must be for a definite sum of money. This expression includes a debt; damages; and a final order for costs. It does not include an interim order for costs, or an order for an interim payment on account. In *Young et al v GNI Fund Management (Bermuda) Limited*,[17] Meerabux J held that an order for payment of a sum of money '*on account of costs*' is not a final judgment, so that 'an account of money payable "on account" is not capable of registration under the 1958 Act'.

The foreign judgment must order the debtor to pay the creditor a definite and actually ascertained sum of money. If, however, all that is required is a simple

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11 SR&O 5/1956. In fact, the Judgments Extension Order 1956 was made under the Judgments Extension Act 1923 (repealed), s 5. The 1958 Act, s 11 extended its effect as if it had been made under the 1958 Act.

12 SR&O 60/1976.

13 BR 37/1988.

14 The Orders in Council include the Judgments Extension Order 1956, and the Judgments (Reciprocal Enforcement) Australia Order 1988.

15 Section 2(1)(a).

16 Section 2(1)(b).

17 [2001] Bda LR 70.

arithmetical calculation for the ascertainment of the sum it will be treated as being ascertained.[18]

To the extent that the foreign judgment orders the defendant to do anything else, for example, specific performance of a contract, that part of the foreign judgment will probably not be enforceable on the basis of the English and Australian authorities,[19] although it may be capable of recognition, for example on grounds of issue estoppel or *res judicata*. There may be scope for argument in Bermuda, however, as to whether recent, innovative Canadian,[20] Isle of Man,[21] Cayman Islands,[22] and Jersey[23] case law as to the enforcement of non-monetary foreign judgments should be followed and applied.

What are taxes, fines, or penalties?

The Supreme Court will not entertain an action for the enforcement, either directly or indirectly, of a penal[24] or revenue[25] law of a foreign country. It follows that the Supreme Court cannot entertain an action for the enforcement of a foreign judgment ordering the payment of taxes, fines, or penalties.

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18 *Beatty v Beatty* [1924] 1 KB 807, CA.

19 *Church of Scientology of California v Miller, The Times*, 15 October 1987; 23 October 1987, CA; *Re Resort Condominiums International Inc* [1995] 1 Qd 406 (interlocutory injunction not enforceable).

20 Note the Canadian case of *Pro-Swing Inc v ELTA Golf Club Inc* (2004) 71 OR (3d) 566, Ontario CA. See also *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077; and *Re Cavell Insurance Company Limited*, 23 May 2006, Docket C43657, Ontario CA.

21 *Pattni v Ali* [2007] 2 WLR 102.

22 *Miller v Gianne and Redwood Hotel Investment Corporation* [2007] CILR 18.

23 *Brunei Investment Agency and Bandone Sdn BHd and Others v Fidelis Nominees Ltd and Others* [2008] JRC 152.

24 *Huntington v Attrill* [1893] AC 150, PC; *US v Inkley* [1989] QB 255, CA; *McLaughlan v Carr and Lemieux (No 4)*, Civil Appeal No: 4 of 1978.

25 *Government of India v Taylor* [1955] AC 491. Note, however, the provisions of the USA-Bermuda Tax Convention Act 1986, the USA-Bermuda Tax Convention Act 1999, and the USA-Bermuda Tax Convention (section 10) Regulations 1995 (BR 2/1996), as well as the cases considering the meaning and effect of that legislation: *Bermuda Trust Company Ltd v Minister of Finance* [1996] Bda LR 45; *Minister of Finance v Braswell* [2003] Bda LR 24, and *Lewis & Ness v Minister of Finance* [2004] Bda LR 66.

Penalty in this sense normally means a sum of money payable to the State, and not to a private plaintiff, so that an award of punitive or exemplary damages is not necessarily 'penal' for these purposes.[26]

The Supreme Court, like the High Court of England and Wales, has generally demonstrated a degree of antipathy towards awards of punitive damages of the type sometimes awarded by juries in the USA, since the Supreme Court generally awards damages on a compensatory basis only.[27] It is arguable, therefore, that a foreign judgment containing an award of punitive damages would be unenforceable in Bermuda on public policy or natural justice grounds, although the point has not been specifically considered or decided by the Supreme Court. Although passages from *SA Consortium General Textiles v Sun & Sand Agencies Ltd*[28] were followed and applied by Meerabux J in *Young et al v GNI Fund Management (Bermuda) Limited*,[29] he did not consider in that case the question of the enforceability of a foreign judgment for punitive damages, nor Lord Denning MR's *obiter dicta.*

There is Australian authority to support the proposition that if the purpose of a damages award made by a foreign court is to punish the defendant, it may be unenforceable on public policy grounds.[30]

What is a judgment?

Judgments are defined, by section 1(1), as including:

(1) A judgment or order given or made by a court in any civil proceedings;
(2) A judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party;
(3) An award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.

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26 See *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] QB 279 at 309 per Lord Denning MR, by way of *obiter dicta*, although this was a case that pre-dated the UK Protection of Trading Interests Act 1980 and Bermuda's Protection of Trading Interests Act 1981, as well as the growth in punitive damages awards in the US courts.

27 Note also that an award of multiple damages might also have been regarded as penal at common law, even in the absence of the Protection of Trading Interests Act 1981. See *Jones v Jones* (1889) 22 QBD 425.

28 [1978] QB 279.

29 [2001] Bda LR 70.

30 See *Schnabel v Lui* [2002] NSWSC 15 at para 177.

What is a final and conclusive judgment?

For the purposes of section 2, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the foreign jurisdiction.[31]

The test of finality is the treatment of the judgment by the foreign court as *res judicata*.[32] A foreign judgment which is liable to be varied by the court that pronounced it is not a final judgment.

However, a default judgment may be final and conclusive, even if it might be liable to be set aside by the court which rendered it.[33] The test has been stated as whether the default judgment was 'entirely floating as a determination, enforceable only as expressly provided and in the course of that enforcement subject to revision', in which case it will not be final, or 'given the effect of finality unless subsequently altered', in which case it will be final.[34]

In *International Risk Management Group Ltd v Elwood Insurance Ltd*,[35] Ground J noted that 'even a default judgment may have some value ... and it would be wrong of me to make assumptions at this stage about its enforceability', although he did not decide the issue in that case on the enforceability of a foreign default judgment.

Judgment given in the superior courts

It is important to note the specific reference to 'superior court' in the 1958 Act, section 2(1).

Judgments of a foreign 'inferior court' (such as county courts or magistrates' courts in England and Wales) cannot be registered or enforced under the 1958 Act, even if they have been transferred, registered, or certified in the relevant foreign 'superior court' for the purposes of enforcement.

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31 Section 2(3). However, under s 5, the Supreme Court of Bermuda has the power to set aside or stay registration until after the determination of any appeal.

32 *Nouvion v Freeman* (1889) 15 App Cas 1 at 9.

33 See Dicey, Morris & Collins, *The Conflict of Laws*, 14th edn (London: Sweet & Maxwell, 2006), para 14-021.

34 *Schnabel v Lui* [2002] NSWSC 15 at para 97.

35 [1993] Bda LR 48.

In *Crossborder Capital Ltd v Overseas Partners Re Ltd*,[36] Kawaley J held that an English county court judgment (which had been transferred to the High Court for enforcement purposes) was not capable of being registered or enforced in Bermuda under the 1958 Act, since it was not a judgment given in the superior courts of the United Kingdom as required.

In view of the fact that county courts of England and Wales now have a much broader jurisdiction than they had in 1958 (so that their jurisdiction is in many respects now concurrent with the jurisdiction of the High Court), it is perhaps time that the 1958 Act is amended to enable enforcement of judgments of county courts of England and Wales that could equally have been obtained in the High Court.

Time limits for registering a foreign judgment

Under the 1958 Act, a judgment creditor (ordinarily the plaintiff) can apply to the Supreme Court to have the foreign judgment registered up to six years after the date of the judgment. If there have been proceedings by way of appeal against the foreign judgment, the six-year time limit does not start to run until the date of the last judgment given in those proceedings.[37]

A foreign judgment cannot be registered, however, if at the date of the application for registration: (1) it has been wholly satisfied;[38] or (2) it could not be enforced by execution in the United Kingdom or the jurisdiction in which the judgment was given or made.[39]

Currency conversion

Where the sum payable under a foreign judgment is expressed in a currency other than US or Bermuda dollars, such a judgment must be registered as if it were a judgment for such sum in US or Bermuda dollars, on the basis of the rate of exchange prevailing at the date of such judgment, as would be equivalent to the sum payable.[40]

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36 [2004] Bda LR 17.

37 Section 3(1).

38 If it has been partly satisfied, the foreign judgment can only be registered in respect of the balance remaining payable: see s 3(5).

39 Section 3(1).

40 Section 3(4).

How can the registration of a foreign judgment be set aside?

A foreign judgment registered under the 1958 Act can be set aside on an application of any party against whom a registered judgment may be enforced.

The registration of a foreign judgment must be set aside if the Supreme Court is satisfied that:

(1) it is not covered by the 1958 Act or was registered in contravention of the 1958 Act;[41]
(2) the foreign court had no jurisdiction in the circumstances of the case;[42]
(3) the defendant did not receive notice of the proceedings[43] in the foreign jurisdiction in sufficient time to enable him to defend the proceedings and did not appear;[44]
(4) it was obtained by fraud;[45]
(5) the rights under it are not vested in the person by whom the application for registration was made.[46]

The registration of a foreign judgment may be set aside if the Supreme Court is satisfied that the matter in dispute in the proceedings giving rise to the registered judgment had, previously to the date of such judgment, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.[47]

No party can seek to execute or enforce a judgment registered under the 1958 Act so long as it is competent for any party to make an application to have registration set aside, or, where such application has been made, until after it has been finally determined.[48]

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41 Section 4(1)(a)(i).

42 Section 4(1)(a)(ii). See also *Masri v Consolidated Contractors International Company SRL*, Supreme Court of Bermuda, Civil Jurisdiction 2008, No 142, 11 February 2009, per Kawaley J.

43 Notwithstanding that process may have been duly served on him in accordance with the law of the foreign jurisdiction.

44 Section 4(1)(a)(iii).

45 Section 4(1)(a)(iv). See also *Masri v Consolidated Contractors International Company SRL*, Supreme Court of Bermuda, Civil Jurisdiction 2008, No 142, 11 February 2009, in which Kawaley J decided not to follow or apply the reasoning of the House of Lords in *Owens Bank Ltd v Bracco* [1992] 2 AC 443. An appeal on this issue is due to be heard by the Court of Appeal for Bermuda in November 2009.

46 Section 4(1)(a)(v).

47 Section 4(1)(b).

48 Section 3(3).

The Supreme Court has recently held that, despite the wording of the Judgments (Reciprocal Enforcement) Rules 1976, rule 12, the Supreme Court is not entitled to set aside the registration of a foreign judgment, simply on the grounds that it is not 'just or convenient' to enforce the foreign judgment in Bermuda, or on 'public policy' grounds.[49]

The foreign court's jurisdiction

The statutory rules relating to the jurisdiction of the foreign court are modelled very closely on the rules at common law. The superior courts of the foreign jurisdiction shall be deemed to have had jurisdiction:[50]

(1) in the case of a judgment given in an action *in personam*:

(a) if the judgment debtor submitted to the jurisdiction of that court by voluntarily appearing in such proceedings other than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure in such proceedings or of contesting the jurisdiction of the court; or

(b) if the judgment debtor was a plaintiff in, or counterclaimed in, the proceedings giving rise to such judgment; or

(c) if the judgment debtor had, before the commencement of such proceedings, agreed, in respect of the subject matter thereof, to submit to the jurisdiction of the court giving such judgment; or

(d) if the judgment debtor was, at the time when such proceedings were instituted, resident in, or had its principal place of business in, the foreign jurisdiction; or

(e) if the judgment debtor had an office or place of business in the foreign jurisdiction and such proceedings were in respect of a transaction effected through or at such office or place;

(2) in the case of a judgment given in an action of which the subject matter was immovable property or in an action *in rem* of which the subject matter was movable property, if the property in question was, at the time of the proceedings giving rise to such judgment, situated in the foreign jurisdiction;

(3) in the case of a judgment given in any other action, if the jurisdiction of the court giving such judgment is recognised by the law of Bermuda.

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[49] See *Masri v Consolidated Contractors International Company SRL*, Supreme Court of Bermuda, Civil Jurisdiction 2008, No 142, 11 February 2009, per Kawaley J.

[50] Section 4(2).

The courts of the foreign jurisdiction shall not be deemed to have had jurisdiction[51] if the subject of the proceedings was immovable property situated outside the foreign jurisdiction; or if the bringing of the proceedings giving rise to a registered judgment was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the foreign jurisdiction; or if the judgment debtor was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the foreign jurisdiction and did not submit to the jurisdiction thereof.

The 1958 Act excludes enforcement at common law

In the event that a foreign judgment is covered by the 1958 Act, section 6 of the Act prohibits proceedings for the recovery of a sum payable under a judgment, other than proceedings provided for by the 1958 Act itself.

The 1958 Act therefore excludes the bringing of an action at common law upon a judgment capable of registration. In *Young et al v GNI Fund Management (Bermuda) Limited*,[52] Meerabux J struck out a claim to enforce a final money judgment of the High Court of England and Wales which had been brought at common law, rather than under the provisions of the 1958 Act.

Procedure

The procedure for registration and enforcement under the 1958 Act of a judgment rendered in the superior courts of a relevant foreign jurisdiction follows a similar procedure to that required under the UK Foreign Judgments (Reciprocal Enforcement) Act 1933. Specific procedural rules are set out in the Judgments (Reciprocal Enforcement) Rules 1976.[53]

In order to register a foreign judgment under the 1958 Act, an application must be made to a Judge in Chambers of the Supreme Court by Originating Summons in accordance with the Rules of the Supreme Court 1985.

The application must be supported by an affidavit exhibiting a verified or certified or authenticated copy of the foreign judgment which must state that the judgment creditor is entitled to enforce the judgment and no grounds for defence exist as stipulated in the 1958 Act, section 4.[54]

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51 Section 4(3).

52 [2001] Bda LR 70.

53 SR&O 60/1976.

54 The 1976 Rules, s 2.

If the court makes an order to permit registration of the judgment, the judgment then stands as a judgment of the Supreme Court.

The judgment debtor must be served with a notice of registration within a reasonable time after such registration and prior to the enforcement of the judgment.[55] This notice may be served either personally on the judgment debtor or by sending it to his usual place of abode or proper address.

The judgment debtor is given by the order a reasonable period within which he can apply to the court to have the registration set aside on certain grounds which are set out in the 1958 Act, section 4.[56] Once the judgment is registered, it is treated in all respects as a judgment of the Supreme Court.

The Protection of Trading Interests Act 1981

Under the Protection of Trading Interests Act 1981 (which is modelled on the UK Protection of Trading Interests Act 1980), a foreign judgment shall not be registered under the 1958 Act, and no court in Bermuda shall entertain proceedings at common law, for the recovery of any sum payable under such a foreign judgment, if it is a judgment for multiple damages.[57]

A judgment for multiple damages means a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment was given.[58]

Furthermore, the Protection of Trading Interests Act 1981 provides that a foreign judgment made under a law certified by the Minister to be anti-competitive[59] cannot be enforced in Bermuda.

There has been limited Bermuda case law on the meaning and effect of the Protection of Trading Interests Act 1981.[60] The English Court of Appeal has held,

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55 The 1976 Rules, s 6.

56 Ibid, s 12.

57 1981 Act, s 7(2).

58 Ibid, s 7(3).

59 Title 17:51. The 1981 Act, s 6 also enables to the courts to decline to assist foreign courts to collect evidence where a request contravenes the jurisdiction of Bermuda or Her Majesty's sovereignty.

60 In *International Risk Management v Elwood Insurance Limited* [1993] Bda LR 48, Ground J made reference to the Protection of Trading Interests Act 1981, but noted that it did not assist in the case in question, and did not consider it in any detail.

in *Lewis v Eliades*,[61] that similar UK legislation prevents enforcement of the multiplied elements of the foreign damages award, but not the judgment altogether.

10.3 ENFORCEMENT AT COMMON LAW

Judgments given in foreign jurisdictions not covered by the 1958 Act may be enforced or recognised in accordance with common law principles.

At common law, a foreign judgment cannot be enforced in Bermuda directly. It is necessary for a judgment creditor to commence fresh proceedings in Bermuda but, after the defendant has entered an appearance in the proceedings, the judgment creditor can apply for summary judgment.[62]

The application for summary judgment is based upon the premise that there is no dispute between the parties on the underlying liability since a foreign court of competent jurisdiction has already determined that issue. As a matter of practice the ability to obtain a summary judgment in respect of a foreign judgment provides a speedy procedure for the enforcement of foreign judgments.

In particular, foreign judgments *in personam* given by a foreign court with jurisdiction to give that judgment may be enforced by a claim or counterclaim for the amount due under it if the judgment is final and conclusive, and for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or penalty).

To the extent that the foreign judgment orders the defendant to do anything else, for example, specific performance of a contract, that part of the foreign judgment will probably not be enforceable on the basis of the English and Australian authorities,[63] although it may be capable of recognition, for example on grounds of issue estoppel or *res judicata*. There may be scope for argument in Bermuda, however, as to whether recent, innovative Canadian,[64] Isle of

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61 [2004] 1 WLR 692.

62 In addition to the Bermudian cases, see also *Grant v Easton* (1883) 13 QBD 302, CA, and *Colt Industries Inc v Sarlie (No 2)* [1966] 1 WLR 1287, CA.

63 *Church of Scientology of California v Miller, The Times*, 15 October 1987; 23 October 1987, CA; *Re Resort Condominiums International Inc* [1995] 1 Qd 406 (interlocutory injunction not enforceable).

64 Note the Canadian case of *Pro-Swing Inc v ELTA Golf Club Inc* (2004) 71 OR (3d) 566, Ontario CA. See also *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077; and *Re Cavell Insurance Company Limited*, 23 May 2006, Docket C43657, Ontario CA.

Man,[65] Cayman Islands,[66] and Jersey[67] case law as to the enforcement of non-monetary foreign judgments should be followed and applied.

Case law

The principles of English private international law governing the recognition and enforcement of foreign judgments at common law have been followed and applied by the Bermuda courts.

In applications for summary judgment based upon a foreign judgment, a Bermuda court will only refuse enforcement of the foreign judgment in limited circumstances,[68] including:

(1) where the foreign court did not have competent jurisdiction over the judgment debtor;
(2) where the foreign judgment was not final and conclusive on the merits;
(3) where the foreign judgment was obtained by fraud;
(4) where the foreign judgment was obtained in contravention of the rules of natural justice;
(5) where the foreign judgment purports to enforce penal or tax laws; or
(6) where the enforcement of the judgment would be contrary to the public policy of Bermuda.

This is demonstrated by the leading Bermuda case of *Ellefsen v Ellefsen*,[69] in which Ground J (as he then was) enforced, by summary judgment, a judgment from the Superior Court of New Hampshire.

Ground J set out the applicable principles in Bermuda, by applying the principles set out in Dicey's summary applicable in England and Wales:

> The legal position as to the enforcement of foreign judgments is set out in *Dicey & Morris on the Conflicts of Law*, 11th ed. p 421 –
>
> > 'A judgment creditor seeking to enforce a foreign judgment in England at common law cannot do so by direct execution to the judgment. He must bring an action on the foreign judgment. But he can apply for summary judgment

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65 *Pattni v Ali* [2007] 2 WLR 102.

66 *Miller v Gianne and Redwood Hotel Investment Corporation* [2007] CILR 18.

67 *Brunei Investment Agency and Bandone Sdn BHd and Others v Fidelis Nominees Ltd and Others* [2008] JRC 152.

68 *Muhl v Ardra* [1997] Bda LR 36.

69 Civil Jurisdiction 1993, No 202, 22 October 1993.

> under Order 14 of the Rules of the Supreme Court on the ground that the defendant has no defence to the claim; and if his application is successful, the defendant will not be allowed to defend at all.'

There is no statutory mechanism here for enforcing American judgments by means of registration and execution by the local Court, and so this statement of the common law represents the normal method for enforcing such judgments in Bermuda, and there is no dispute about that.

A final judgment *in personam* given by a court of a foreign country with jurisdiction to give it may be enforced by an action for the amount due under it if it is for a debt or a definite sum of money (not being a sum payable in respect of taxes or in respect of a fine or other penalty). The only grounds for resisting the enforcement of such a judgment at common law are: (1) want of jurisdiction in the foreign court, according to the view of the English Law; (2) that the judgment was obtained by fraud; (3) that its enforcement would be contrary to public policy; and (4) that the proceedings in which the judgment was obtain were contrary to Natural Justice (or the English idea of 'substantial justice,' as it was put in the leading case). Unless the judgment can be impeached on one of those four grounds, the court asked to enforce it will not conduct a hearing of the foreign judgment or look behind it in any way: see Dicey & Morris, Ibid., p.420 –

> 'Rule 42 – A foreign judgment which is final and conclusive on the merits and not impeachable under any of rules 43 to 46 (which are the four grounds I have set out above) is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either
>
> (1) of fact; or
> (2) of law.'

The commentary states that this has not been questioned since 1870.[70]

Ground J further stated the applicable Bermuda law in *Muhl v Ardra*:[71]

> There was no real dispute as to the law concerning the enforcement at Common Law of a foreign judgment, although there was a great deal of dispute as to its application to the facts of this case. I summarised the relevant law in my judgment in *Ellefsen v Ellefsen*, Civil Jurisdiction 1993, No 202 (22nd October 1993), and I consider that that statement of it still represents the law of Bermuda …
>
> In fact, in Ellefsen I enforced a judgment of the Superior Court of New Hampshire by summary judgment here. I therefore cite that case not just for the statement of

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70 Civil Jurisdiction 1993, No 202, 22 October 1993.

71 [1997] Bda LR 36.

principle, but to make it quite clear that the Courts of Bermuda stand ready to enforce a foreign judgment if it does not fall within the excluded categories.

In *Muhl v Ardra Insurance Company Ltd*,[72] the defendant successfully argued that a judgment of the New York state court should not be enforced for two principal reasons. Firstly, since the plaintiff had been in contempt of court of the Supreme Court, it would be contrary to Bermuda public policy to enforce the New York judgment. Secondly, the New York proceedings were contrary to natural justice, as understood in Bermuda and in England.

In *Christensen v Holderness School*,[73] the plaintiff sought to enforce a default judgment of the Superior Court of the State of New Hampshire, and applied for summary judgment against the defendant. The defendant successfully resisted the summary judgment application (on appeal) on the basis that he had not submitted to the jurisdiction of the foreign court, which the Bermuda Court of Appeal accepted was a triable issue.

In *Langner v Transport & Earthmoving*,[74] the plaintiff sought to enforce a final default judgment of the Circuit Court of the 17th Judicial Circuit of the State of Illinois, and applied for summary judgment against the defendant. The defendant successfully resisted the summary judgment application (both at first instance and on appeal) on the basis that there were triable issues as to whether the defendants had submitted to the jurisdiction of the foreign court, and as to whether there had been a breach of the defendants' rights of natural justice.

Did the foreign court have competent jurisdiction?

The Supreme Court will follow the English conflict of laws rule in determining whether the foreign court had proper jurisdiction in the original proceedings.

At common law, a foreign judgment will only be recognised if the foreign court had jurisdiction according to Bermuda rules of international law. According to these rules, foreign courts (for example a US court) have jurisdiction if any of the following requirements is satisfied:

(1) The defendant was present in the foreign country when the foreign proceedings were instituted; or
(2) The judgment debtor was the plaintiff or counterclaimed in the foreign (US) proceedings; or

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72 [1997] Bda LR 36.

73 Bermuda Civil Appeal 1981, No 20, 15 April 1982.

74 Bermuda Civil Appeal 1982, No 26, 11 April 1983.

(3) The judgment debtor was the defendant and submitted to the foreign (US) court's jurisdiction by voluntarily appearing; or
(4) The defendant had previously agreed to submit to the foreign (US) court's jurisdiction.

The presence test remains that set out in *Adams v Cape Industries plc.*[75] This test was followed and applied in Bermuda in the case of *Bacardi Limited v Rente Investments Ltd,*[76] decided by Ground CJ.

Where the foreign court has established its jurisdiction solely by reason of the nationality of the defendant, the Supreme Court will not recognise the foreign court's jurisdiction. Also, the fact that the cause of action occurred in the foreign jurisdiction may not be sufficient to establish the jurisdiction of the foreign court.[77]

Is a contest as to jurisdiction in a foreign court treated by the Bermuda court as a voluntary submission to that jurisdiction?

As to the question whether an appearance before the US court to contest jurisdiction would be viewed by the Supreme Court as amounting to voluntary submission to that court's jurisdiction, there is no statutory equivalent in Bermuda to the UK Civil Jurisdiction and Judgments Act 1982, section 33.

The common law position is reviewed in Dicey, Morris & Collins, *The Conflict of Laws*[78] at paragraphs 14-063 ff. Two cases are principally cited: *Harris v Taylor,*[79] and *Henry v Geoprosco International.*[80] These cases indicate that there is a substantial risk that a defendant who enters an appearance in the foreign court simply to contest jurisdiction would be treated as having entered a voluntary appearance.

Indeed, such a risk has been expressly recognised (although not decided upon) by Ground J in the Supreme Court of Bermuda in *International Risk Management Group Ltd v Elwood Insurance Ltd.*[81] In that case, the plaintiffs

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75 [1990] Ch 433.

76 [2005] Bda LR 60.

77 *Sirda Singh v Rajah of Faridkote* [1894] AC 670.

78 14th edn (London: Sweet & Maxwell, 2006).

79 [1914] 3 KB 145.

80 [1976] QB 726.

81 [1993] Bda LR 48.

had applied for an anti-suit injunction against the defendants, restraining them from pursuing litigation in Dallas County, Texas. Ground J noted that:

> A voluntary submission to the Texas jurisdiction could carry certain consequences for the plaintiffs in the event that the action eventually went against them. They are not resident in Texas and have no assets there. Their residence, and no doubt some at least of their assets, are in Bermuda. Bermuda may be unwilling (and at this stage I am only considering possibilities, not expressing a view) to enforce a judgment obtained in Texas under an extended jurisdiction to which the judgment debtor had not submitted. On the other hand, a submission, even for the purposes simply of contesting jurisdiction, followed by a withdrawal if the decision was adverse, may well render any judgment obtained thereafter enforceable in Bermuda.

However, it remains an open question, at common law, whether an appearance, the sole purpose and effect of which is to protest against the jurisdiction of the foreign court, amounts to a voluntary appearance. In *Arabian American Insurance Co v Al Amana Insurance & Reinsurance Co Ltd*,[82] Ground J said that:

> The common law, as established by the English Court of Appeal's decision in *Henry v Geoprosco International Ltd* [1976] QB 726, was that an appearance to contest jurisdiction on the basis that a discretion should be exercised against claiming jurisdiction constituted submission. That decision left open the question whether an appearance to contest jurisdiction constituted submission. That decision has been much criticized, and I frankly have doubts as to whether it would, or should, now be followed. Certainly I consider that, if it is to be followed, it should be limited to its strict *ratio decidendi*.

These comments of Ground J were, strictly speaking, *obiter dicta*, and did not definitively determine the position in Bermuda. However, if it was asked to consider the question today, the Supreme Court is likely to deal with the issue in the manner set out by Ground J. Notwithstanding Ground J's dicta in *International Risk Management Group Ltd v Elwood Insurance Ltd*, *Henry v Geoprosco International Ltd* would probably not be followed, since judgments of the English Court of Appeal are not binding on the Supreme Court of Bermuda, or, at the very least, it would be strictly limited to its ratio.

Although there is no certainty to this analysis, therefore, and significant risk obviously remains for a party electing to take this course, it is more likely than not that the Supreme Court would conclude that an appearance, the *sole purpose and effect* of which was to protest against the jurisdiction of the foreign court, did not amount to a voluntary appearance.

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82 [1994] Bda LR 27.

Final and conclusive on the merits

The foreign judgment must be final and conclusive in the sense that it is not a provisional judgment and the judgment is final in that particular court. If an appeal is pending, the foreign judgment will still be recognised but execution may be stayed until the appeal is resolved.

Natural justice?

In *Muhl v Ardra*, the Supreme Court refused the enforcement of a judgment of the Supreme Court of New York and dismissed a judgment creditor's action on the grounds that enforcement of the New York judgment would be contrary to public policy and was a judgment obtained in breach of the English idea of substantial justice, the judgment debtor not being permitted to defend unless it posted a sum of security which the foreign court had reason to think that it could pay, but which the Supreme Court found the defendant could not pay.

In that decision, Ground J said:

> The question is whether, looked at in the round, the judgment was obtained in a way which accords with the English idea of substantial justice. It is not a question of whether the legislation is unfair or objectionable, but whether the conduct of the particular case was, on its peculiar facts, contrary to Natural Justice. If it was, I do not think that it matters whether the procedure is derived from statute, case law or the whim of the presiding judge – if it is unfair, English and Bermudian courts will not enforce any judgment obtained as a result of it.

Recognition

A foreign judgment given by a court of a foreign country with jurisdiction to give that judgment, which is final and conclusive on the merits, and not impeachable on any of the grounds referred to above, is also entitled to recognition at common law and may be relied on in proceedings in Bermuda.

No proceedings may be brought by a person on a cause of action in respect of a judgment which has been given in his favour in proceedings between the same parties or their privies in a foreign court unless that judgment is not enforceable, or not entitled to recognition.

Estoppel

A party may be estopped from arguing that a foreign judgment should not be recognised in proceedings in Bermuda.

In *House of Spring Garden and ors v Waite and ors*[83] an application was made to enforce an Irish judgment in England at common law. A defendant who had not been party to the Irish action, but could have been if he chose, sought to argue that he was not bound, in the English proceedings, by the Irish judgment. The English Court of Appeal held that he was bound by estoppel, because of the privity of interest between himself and the other defendants.

There can be privity by blood, title or interest: see *Carl Zeiss Stiftung v Rayner and Keeler (No 2)*.[84]

The principle of estoppel is said to be founded on 'justice and common sense'. The English Court of Appeal also relied on the doctrine of abuse of process, since they considered that it would be an abuse, on the facts of that case, to require the plaintiffs to re-litigate the dispute.

In *Desert Sun Loan Corp v Hill*,[85] the English Court of Appeal accepted that issue estoppel could arise from an interlocutory judgment of a foreign court on a procedural, non-substantive issue, where there was express submission of the issue in question to the foreign court, and the specific issue of fact was raised and decided, finally and not just provisionally, by the court.

A judgment in default or by consent may be a judgment on the merits, but caution needs to be exercised.[86]

Procedure

An action to enforce a foreign judgment is usually brought by issuing a writ endorsed with a statement of claim which recites the amount of the judgment debt and the costs which will be claimed under the Writ. Upon receipt of notice of the Writ, the judgment debtor has 14 days to acknowledge service and a further 14 days in which to submit a defence.

If the debtor does not acknowledge service, the judgment creditor can obtain a judgment in default. Otherwise the judgment creditor will invariably apply for a summary judgment. The Supreme Court will issue an order for execution of the Bermuda judgment which is rendered to enforce the foreign judgment.

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83 [1990] 2 All ER 990. Referred to in passing in *Thyssen-Bornemisza v Thyssen-Bornemisza and others* [1999] Bda LR 14, CA.

84 [1967] 1 AC 853. See also *The Sennar (No 2)* [1985] 1 WLR 490, HL.

85 [1996] 2 All ER 847, CA.

86 See *Carl Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853 at 916–917, 926 and 946.

The expected length of time to obtain a judgment where the foreign judgment is not contested is approximately two weeks for a judgment in default and four weeks for a summary judgment.

Statutory demand based on a foreign judgment debt?

In *Holborn Oil Company Ltd v Tesora Petroleum Corporation*,[87] the plaintiff applied for an interim injunction restraining the defendant from issuing a petition to wind up the plaintiff company in the Supreme Court. Instead of issuing proceedings in Bermuda on the basis of the US judgment, the defendant had served a statutory demand on the plaintiff, demanding payment of a sum of money awarded to the defendant against the plaintiff in a court in the State of New York, in the United States.

Astwood CJ granted the injunction restraining the issuing of a winding up petition. He held that the New York judgment had:

> ... no legal effect in Bermuda. There is no judgment debt enforceable in Bermuda up to now and the Defendant is threatening the Plaintiff in Bermuda with an extra-territorial judgment debt ... It is basic law that a foreign judgment is not enforceable in Bermuda per se and I have no evidence that the Defendant has taken any steps in Bermuda to have the foreign judgment legally enforced here. In my opinion there is no debt in Bermuda which would give the Defendant a right *ex debito justitiae* to an order to wind up the company. If this were so it would make a mockery of our law and our institutions in that our sovereignty would be violated ...

It is an open question whether *Holborn Oil Company Ltd v Tesora Petroleum Corporation* will be followed or applied by the Supreme Court of Bermuda in the future.

Interim Mareva relief in support of proceedings to enforce a foreign judgment

Where there are proceedings in Bermuda to enforce a foreign judgment, the Supreme Court may grant a freezing injunction (known as a *Mareva* injunction) restraining the defendant from dissipating assets which are within the jurisdiction with a view to leaving the judgment unsatisfied.[88] The Supreme Court may also grant a worldwide freezing injunction if it has jurisdiction over the defendant whose assets are being frozen.

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87 Civil Jurisdiction 1990, No 273, 20 August 1990.

88 See *Aaliya Mubarak v Igbal Mubarak and Twenty First Century Holdings Ltd*, Civil Jurisdiction 2001, No 143, [2002] Bda LR 63 per Simmons AJ.

As to the question of whether a self-standing *Mareva* injunction can be granted in Bermuda in aid of foreign proceedings where a final and conclusive foreign judgment has not yet been obtained, *The Siskina*[89] remains good law in Bermuda, to the effect that the power of the Supreme Court to grant a *Mareva* injunction under the Bermuda Supreme Court Act 1905, section 19 presupposes the existence of an action, actual or potential, claiming substantive relief which the Supreme Court of Bermuda has jurisdiction to grant.[90] See also *Mercedes-Benz v Leiduck*,[91] but note the dissenting opinion of Lord Nicholls in that case.

There is no statutory equivalent in Bermuda to the UK Civil Jurisdiction and Judgments Act 1982,[92] section 25, which allows the English High Court to grant a *Mareva* injunction in aid of foreign proceedings, as in *Motorola Credit Corp v Uzan*.[93]

In the absence of such a statutory provision, the general view is that the Supreme Court does not have the jurisdiction to grant a self-standing *Mareva* injunction in aid of foreign proceedings, where there is no action for substantive relief which the Supreme Court has jurisdiction to grant.

However, there is some authority that might support an argument to the effect that the Supreme Court should recognise that it has such a jurisdiction at common law, even in the absence of specific legislation, for the purpose of the administration of justice generally.

In *Davis v Turning Properties Pty Ltd and Another*[94] an application was made for reciprocal recognition and enforcement in New South Wales following a decision of the Supreme Court of the Bahamas to grant a *Mareva* injunction against the defendants. Campbell J ignored the traditional test of 'final and conclusiveness between the parties' and, on the basis of the changing attitude

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89 [1979] 1 AC 210.

90 See *Locabail International Finance Ltd v Manios*, Civil Appeal 1988, No 4; and *Bank of Bermuda Ltd v Todd*, Civil Appeal 1992, No 13. The relevant question is whether the Bermuda court has power to grant the substantive relief, not whether it will in fact do so. Indeed, in many cases it will be impossible, at the time interlocutory relief is sought, to say whether or not the substantive proceedings and the grant of the final relief will or will not take place before the English court. See *Channel Tunnel Group Pty Ltd v Balfour Beatty Construction Limited* [1993] AC 334. Note that, in that case, Lord Browne-Wilkinson reserved his opinion as to whether Lord Diplock had correctly stated the law in *The Siskina* [1979] AC 210.

91 [1996] 1 AC 284, PC.

92 As amended by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302).

93 [2004] 1 WLR 113.

94 [2005] NSWSC 742.

towards *Mareva* injunctions in Australia since the High Court decision of *Cardile v LED Builders Pty Ltd*,[95] concluded that the test for recognition and enforcement of a foreign *Mareva* injunction was the administration of justice. Campbell J found for the plaintiff and held that:

> ... 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 of rights established elsewhere.

Campbell J further held that there is an inherent jurisdiction to make an Order in aid of the enforcement of a foreign judgment in Australia, whether that judgment has yet been obtained or not. Campbell J said:

> Biscoe, *Mareva and Anton Piller Orders* (Butterworths 2005) at paragraph [5.36] to [5.49] discusses the case law relating to freezing orders in aid of foreign proceedings. He suggests ... that, while Australia does not have any statutory provision equivalent to section 25 of the Civil Jurisdiction and Judgments Act 1982 (UK) in England, there is an inherent jurisdiction to make an order in aid of the enforcement of a foreign judgment in Australia, whether that judgment has yet been obtained or not. In my view that suggestion is right.

Other common law authorities that might support an argument to the effect that the Supreme Court of Bermuda should have such a jurisdiction at common law include the decision of the Jersey Court of Appeal in *Solvalub Limited v Match Investments Ltd*,[96] and the decision of the Supreme Court of the Bahamas in *Grupo Torras SA v Meespierson (Bahamas) Ltd et al*,[97] although it is important to note that this latter decision was overturned by the Court of Appeal of the Bahamas on 16 April 1999, apparently reluctantly.

10.4 FUTURE DEVELOPMENTS

Potential legislative developments

There is currently no legislation proposed by the Bermuda Government or before the Bermuda legislature relating to the enforcement of foreign judgments.

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95 (1999) 198 CLR 380.

96 [1996] JLR 361, (1997) 1 OFLR 152.

97 (1998) 2 OFLR 163.

Potential judicial developments

The likelihood of any judicial developments in this area obviously depends on the nature of the disputes that are litigated in the Supreme Court of Bermuda. It is worth noting that, in November 2009, the Court of Appeal for Bermuda is due to hear an appeal against the judgment of Mr Justice Kennedy in the case of *Masri v Consolidated Contractors International Company SRL*.[98]

It appears, however, as if the commercial judges currently sitting in the Supreme Court are flexible, commercial, and internationalist in their approach. It is thought likely that they would be willing to develop the common law of Bermuda in order to meet the justice of any particular case, as appropriate.

[98] Supreme Court of Bermuda, Civil Jurisdiction 2008 No 142, 11 February 2009.

APPENDIX 10.1

The Commonwealth jurisdictions to which the 1958 Act applies, by the 1958 Act itself and by Orders in Council made thereunder,[99] are:

(1) the United Kingdom, including:

  (a) England and Wales;[100]

  (b) Scotland;

  (c) Northern Ireland;

(2) the Bahamas;

(3) Barbados;

(4) Gibraltar;

(5) Grenada;

(6) Guyana (formerly British Guiana[101]);

(7) Hong Kong;

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[99] The Orders in Council include the Judgments Extension Order 1956, and the Judgments (Reciprocal Enforcement) Australia Order 1988.

[100] The 1958 Act, s 1(1) defines 'the superior courts of the United Kingdom' as being 'the High Court in England, the Court of Sessions in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster, or the Court of Chancery of the County Palatine of Durham, and includes judgments given in any courts on appeals against any judgments so given'. It is curious that this piece of legislation has not been updated since the enactment in the UK Courts Act 1971, s 41 (and subsequent legislation), which merged the Courts of Chancery of the County Palatine of Lancaster and the County Palatine of Durham with the High Court. It also makes no specific reference to Wales – which might provoke an interesting argument if there was ever an attempt made to register and enforce a judgment of the Cardiff District Registry.

[101] The Judgments Extension Order 1956 refers to British Guiana, and it has not been updated to accommodate the change in Guyana's name and status.

(8) the Leeward Islands. Although the Leeward Islands are not defined in the Judgments Extension Order 1956, and were actually dissolved as an administrative unit in 1956, it is thought[102] that they include the following jurisdictions:

(a) the British Virgin Islands;

(b) Anguilla;

(c) Saint Kitts;

(d) Nevis;

(e) Barbuda;

(f) Antigua;

(g) Redonda;

(9) Montserrat;

(10) St Vincent;

(11) Jamaica;[103]

(12) Nigeria;

(13) Dominica;

(14) St Lucia;

(15) the Federal Courts of the Commonwealth of Australia, as well as the State or Territory Courts of:

(a) New South Wales;

(b) the Northern Territory;

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[102] Although the point has not been tested before the Courts. Some of the jurisdictions that previously made up the Leeward Islands have now signed up to the jurisdiction of the Eastern Caribbean Supreme Court, which is a Superior Court of record for six independent states (Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines) and three British Overseas Territories (Anguilla, British Virgin Islands, and Montserrat); and has unlimited jurisdiction in each Member State. It was established in 1967 by the West Indies Associated States Supreme Court Order No 223 of 1967.

[103] Although the point has not been tested before the courts, it is arguable that the reference to Jamaica also includes the Cayman Islands, which was, at the relevant time, still a dependency of Jamaica.

(c) Queensland;

(d) Tasmania;

(e) Victoria;

(f) the Australian Capital Territory;

(g) Western Australia;

(h) South Australia;

(i) the Australian Antarctic Territory;

(j) the Heard and MacDonald Territory;

(k) the Coral Sea Islands Territory; and

(l) the Territory of Ashmore and Cartier Islands.

It should be noted that the 1958 Act does not apply to various Commonwealth jurisdictions which it might otherwise have been expected to cover, such as the Cayman Islands,[104] the Turks and Caicos Islands, the Isle of Man, Guernsey, Jersey, Singapore, Canada, India, South Africa, or New Zealand.

Furthermore, the 1958 Act does not apply to the United States, nor to any of the member states of the European Union, nor to China (other than Hong Kong).

An important statutory bar to Bermuda extending the application of the 1958 Act to other jurisdictions is contained in the 1958 Act, section 9(1). This provides that the Act may only be extended to other jurisdictions where:

> the Governor is satisfied that reciprocal provisions have been made by the Legislature of any part of Her Majesty's dominions outside the United Kingdom for the enforcement within that part of Her Majesty's dominions of judgments obtained in the Supreme Court.

[104] Although the point has not been tested before the courts, it is arguable that the reference to Jamaica also includes the Cayman Islands, which were, at the relevant time, still a dependency of Jamaica.

CHAPTER 11

THE BRITISH VIRGIN ISLANDS

Mark Forté and Richard Evans[*]

11.1 INTRODUCTION

As a leading offshore jurisdiction, the British Virgin Islands are well versed in the issues of international conflicts of law and the enforcement of overseas orders and judgments in commercial matters.

Indeed, in large commercial matters, there will always be one or often many more international elements. The courts of the British Virgin Islands routinely hear heavy substantive matters in all areas of commercial litigation (including insolvency). In addition, given that a principal use of BVI companies is to play a key role in an asset holding structure, it is not uncommon to be faced with the situation where parties have litigated, or arbitrated, their dispute in a different jurisdiction (or jurisdictions), and the successful party seeks to enforce the terms of such judgment, or order, against a BVI company so as to have recourse to its assets (wherever they may be). Accordingly, and not surprisingly, the British Virgin Islands have adopted and developed a sophisticated regime for the

* Mark Forté is a partner and head of the Litigation and Restructuring department of Conyers Dill & Pearman's BVI office. Richard Evans is an Associate in Conyers Dill & Pearman's BVI office.

enforcement of foreign judgments and awards. These developments have been incremental, and are to be found both in multiple statutory and judicial sources.

11.2 ENFORCEMENT BY REGISTRATION OF FOREIGN JUDGMENTS

It is convenient to consider the methods of enforcing foreign judgments and orders in two distinct parts, since different regimes apply to each:

- Monetary judgments – statutory enforcement.
- Other judgments – the common law position.

Monetary judgments

In practice, the question that most readily arises is how to enforce a judgment of a foreign court for the payment of a sum of money, and moreover, how to do so most effectively and efficiently. The direct enforcement of foreign judgments in the British Virgin Islands is principally rooted in a statutory source, namely the Reciprocal Enforcement of Judgments Act (Cap 65). This legislation allows registration of foreign judgments in the BVI High Court, but only if the judgment is from a prescribed country and relates to a sum of money payable. Non-money judgments, and judgments from non-prescribed countries, are not capable of registration under the Act, and as noted above, these are dealt with in a separate section of this chapter.

The concept of a 'judgment' is given an extended meaning in the Act, section 2(1) to include an arbitration award made in a prescribed jurisdiction, provided that the award is enforceable in the same manner as a judgment given in a court in that prescribed jurisdiction. In other words, providing that the arbitration award is first registered in its 'home' jurisdiction, in such a manner that it takes effect as if it were a judgment, then it is capable of being regarded as judgment under the Act.

The Act, section 3 requires that four criteria must be satisfied in order for a judgment to be eligible for registration in the British Virgin Islands:

(1) The judgment must have been obtained in one of the following jurisdictions:

- the High Court of England or Northern Ireland;
- the Court of Session in Scotland; or
- a superior court in any one of the following countries:

- Bahamas
- Barbados
- Bermuda
- Belize
- Trinidad & Tobago
- British Guiana
- St Lucia
- St Vincent
- Granada
- Jamaica
- New South Wales
- Nigeria (certain regions only);

(2) The judgment must be for a sum of money;
(3) An application for registration must be made within 12 months from the date of the judgment; and
(4) It must be 'just and convenient' that the judgment be enforced in the British Virgin Islands.

These, in essence, are threshold tests. Accordingly, once a judgment is eligible for registration, that is not the end of the matter. Section 3(2) provides that a judgment must be refused registration if:

(1) the foreign court acted without jurisdiction;
(2) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the foreign jurisdiction, did not voluntarily submit or agree to submit to the jurisdiction of that court;
(3) the judgment debtor was not duly served with the foreign proceedings and did not appear (regardless of whether he carried on business or ordinarily resided in the foreign jurisdiction, or voluntarily submitted to the jurisdiction of that court);
(4) the judgment was obtained by fraud;
(5) an appeal against the judgment is pending, or the debtor is entitled to and intends to lodge an appeal; or
(6) the judgment was in respect of a cause of action which, for reasons of public policy, would not have been entertained in this jurisdiction.

These exclusionary matters largely reflect the common law position, or accepted principles of common law, as regards enforcement of foreign judgments. Accordingly, to large measure, the statutory mechanism codifies the common law position, which is outlined below.

Upon registration under this mechanism, a judgment will be enforceable without the necessity of any retrial of the issues which were the subject of such judgment, or any re-examination of the underlying claims. In other words, the foreign judgment is fully recognised and treated as if it were obtained in the British Virgin Islands. Accordingly, all local forms of enforceability are available in respect of the judgment once recognised (for example: charging orders, writs of execution, appointment of a receiver, etc).

For completeness, it must be noted that the Foreign Judgments (Reciprocal Enforcement) Act 1964 also purports to designate certain Commonwealth jurisdictions from which judgments may be registered in the British Virgin Islands. Where an Order has been made pursuant to the 1964 Act, section 3, substantial reciprocity of treatment may be extended to a final and conclusive money judgment given in the superior court of any foreign country. Where an Order has been made pursuant to the 1964 Act, section 9, substantial reciprocity of treatment may be extended to final and conclusive money judgments obtained in the superior courts of any part of the Commonwealth outside the British Virgin Islands. Notably, there is some debate amongst local practitioners about whether sections 3 and 9 are cumulative or independent provisions, but there has been no judicial determination on the issue. In the final analysis, the debate may remain academic since, as a matter of practice, if a foreign judgment is not registrable under either statute, enforcement may be pursued.

11.3 ENFORCEMENT OF FOREIGN JUDGMENTS AT COMMON LAW

Where a judgment does not fall under the Reciprocal Enforcement of Judgments Act, then it can, in certain circumstances, be enforced at common law. Enforcement of a foreign judgment at common law is limited to judgments for a debt or specific sum of money (excluding amounts payable in respect of revenue claims, fines or penalties). This, as we have noted earlier in this chapter, is consistent with the Reciprocal Enforcement of Judgments Act.

Accordingly, a foreign judgment other than for a debt or specific sum of money is not enforceable in the British Virgin Islands.[1] In this event, the only course open to a party is to seek to litigate the issue afresh in the British Virgin Islands. It will be permissible, assuming that the established common law principles are met, to plead specifically issue estoppel, with a view to proceeding with the claim by way of summary judgment.

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[1] The rules governing the recognition at common law of foreign insolvency and equivalent orders are dealt with in Part IV (below).

It is not every foreign money judgment which will be recognised by the BVI court. Certain criteria must be met before the judgment can be used to base a claim which can be the subject of an application for summary judgment. Unfortunately, there are few British Virgin Islands judicial decisions directly on that point. Our view is that, the High Court of the British Virgin Islands will look for guidance to decisions in other Commonwealth countries, and beyond if useful. The most important decisions in this respect are generally those from the Courts of England and Wales (especially those from the Court of Appeal and the House of Lords), which the BVI court will regard as highly persuasive.

Generally

We consider that Rule 34 in Dicey, Morris & Collins, *The Conflict of Laws*[2] accurately summarises the general position under BVI law:

> A judgment of a court of a foreign country has no direct operation in England (read BVI) but may:
>
> (1) be enforceable by claim or counterclaim at common law or under statute; or
> (2) be recognised as a defence to a claim or as conclusive of an issue in a claim.

In the 2004 decision of *PB Neumatico Partnership v Hobarthe & National Commercial Bank*,[3] the court considered the status and enforceability of an unregistered Austrian judgment for an amount of $86,100.00.

Blenman J stated:

> The court is satisfied that in the absence of any statutory provisions existing in the State of Saint Vincent and the Grenadines for the reciprocal registration and enforcement of the Austrian judgment obtained, the common law principles apply. I do not hold the view that the Austrian judgment merged with the claim. P.B Neumatico could properly assert its common law rights. Accordingly, it was not obliged to re-register the judgment but could have properly sued on the judgment as it did. The Austrian judgment can be enforced in St Vincent by instituting a claim based on the judgment.[4]

The usual method of 'indirectly' enforcing a foreign judgment, as was done in the *PB Neumatico Case*, is to: (1) bring an action on the judgment; and (2) apply for summary judgment under the Eastern Caribbean Supreme Court Rules 2000, Part 15.

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2 14th edn (London: Sweet & Maxwell, 2006), para 14R-001, p 567.

3 Claim No 2003/299, St Vincent & the Grenadines.

4 Ibid, at para 19.

An example of this procedure is well illustrated in the 2003 decision of *Credit Suisse SA v Hentsch Henchoz & Cie*.[5] In that case, Capital Suisse commenced proceedings in the British Virgin Islands in respect of the validity of certain subscription agreements. A similar action had already been litigated between the parties in Utah and a judgment given which was adverse to Capital Suisse. The defendants applied for (reverse) summary judgment under Part 15 and for an order striking out the claim.

After referring with approval to the celebrated English decision of *DSV Silo-und Verwaltungsgesellschaft mbH v Owners of the Sennar and thirteen other ships, The Sennar*,[6] Rawlins J held:

> The result is that, on the basis of comity, this Court recognizes the Order of the Utah Court that was given on the 16th day of July 2002. The effect of this is that, on the doctrine of issue estoppel, Capital Suisse is estopped from litigating any issue concerning the validity of the subscription agreements. These agreements are the bases of its claim in this Court. The Utah Order operates to bar Capital Suisse from further pursuing its Claim in this action.[7]

The underlying basis of this decision is the well entrenched principle that there should be finality in litigation and that a party should not be twice vexed in the same matter.

Requirements for common law enforcement

In order for a judgment to be enforced under common law principles, the necessary criteria are as set out the judgment of Lord Brandon of Oakbrook in *The Sennar*. They are:

(a) the judgment must be of a court of competent jurisdiction, final and conclusive, and made on the merits of the case;
(b) the parties to the original judgment (or their privies) must be the same as those in the BVI action; and
(c) the issue in the BVI action must be the same as the issue decided by the court in the earlier action.[8]

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5 Claim No BVIHCV2001/0077.

6 [1985] 1 WLR 490.

7 *Credit Suisse SA v Hentsch Henchoz & Cie*, Claim No BVIHCV2001/0077, at para 26, p 11.

8 [1985] 1 WLR 490 at 499B.

Court of competent jurisdiction

In order for the High Court to recognise and enforce a foreign judgment under common law principles, the foreign court must have had jurisdiction to make the order. Having regard to Rule 36 in Dicey, Morris & Collins, *The Conflict of Laws*,[9] such jurisdiction will exist where:

(1) the judgment debtor was, at the time the proceedings were instituted, present in the foreign country; or
(2) the judgment debtor was the claimant, or counter-claimant, in the foreign proceedings; or
(3) the judgment debtor submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings; or
(4) the judgment debtor, prior to the commencement of proceedings, submitted to the jurisdiction of the foreign court in respect of the subject matter of the dispute (eg: pursuant to a contractual clause nominating a particular court or jurisdiction).

Jurisdiction based on points (2), (3) and (4) is quite straightforward. However, 'presence in the foreign country' is somewhat less stringent than the position under the Reciprocal Enforcement of Judgments Act which requires the debtor to be ordinarily resident or carrying on business in the foreign country. The rationale for this relaxation is the proposition that:

> so long as (the debtor) remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts ... The voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, is sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law.[10]

The Court of Appeal added that the debtor's presence must be voluntary and not induced by compulsion, fraud or duress.

Conclusiveness of the foreign judgment

Once it is established that the foreign court had jurisdiction to make the judgment, and the judgment was for a sum of money, then it must be shown that it was final and conclusive on the merits. That being the case, then unless the

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9 14th edn (London: Sweet & Maxwell, 2006), para 14R-048, pp 588–589.

10 *Adams v Cape Industries Plc* [1990] Ch 433 at 519.

judgment may be impeached on other grounds, it cannot be impeached for any error of fact or law.[11]

The concept of a 'final' judgment is to be construed in a broad sense such that a judgment may be 'final' even though an appeal has in fact been lodged and is pending:

> When the word 'final' is used with reference to a judgment, it does not mean a judgment that is not open to appeal but merely a judgment which is 'final' as opposed to 'interim'. A judgment which purports finally to determine rights is none the less effective for the purposes of creating an estoppel because it is liable to be reversed on appeal, or because an appeal is pending ...[12]

In *Marchioness of Huntly v Gaskell*,[13] Cozens-Hardy LJ stated:

> It is urged that the judgment of the Scotch Court of Session is not a final judgment; but when the word 'final' is used, as I think it is in some authorities with reference to judgments, that does not mean, I apprehend, a judgment which is not open to appeal, but merely 'final' as opposed to 'interlocutory.' A judgment is, in my opinion, not the less an estoppel between the parties to the action because it may be reversed on appeal to the House of Lords.[14]

Similarly, in *Harris v Willis*,[15] the plaintiff alleged that the defendant had caused damage to his boat. The defendant pleaded that the claim ought not be allowed because the Admiralty Court had already made a determination in his favour. The plaintiff argued that because he had lodged an appeal against the judgment of the Admiralty Court, that judgment should not preclude him from issuing the present proceedings. The Court dismissed the plaintiff's claim and accepted the defendants' submission:

> that the judgment subsists, and may be pleaded as a good judgment until reversed; and that the validity of a judgment is in no way affected by the mere appeal of the defeated party.[16]

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11 See Dicey, Morris & Collins, *The Conflict of Laws*, 14th edn (London: Sweet & Maxwell, 2006), Rule 41.

12 *Halsbury's Laws of England*, 4th edn, 2003 reissue, vol 16(2) (London: LexisNexis Butterworths), para 966.

13 [1905] 2 Ch 656.

14 Ibid, at p 667.

15 [1855] 15 CB 710.

16 Ibid, at p 712.

Judgment on the merits

It is not sufficient for a party to come to the High Court with a foreign judgment. The doctrine of issue estoppel will only apply to preclude the High Court from hearing afresh issues which were raised and decided in the original court. It is not the judgment *per se* which is of critical importance. For example, if the sole basis of a foreign judgment is that the original court lacked jurisdiction and the claim should have been brought in the British Virgin Islands, then this will not stop the BVI court from hearing and determining the substantive issues between the parties.

This criteria has been held to have been satisfied if the issue merely could have been raised and dealt with in the original action.[17]. This is consistent with the rule in *Henderson v Henderson*[18] which provides that in the absence of special circumstances, parties must bring their whole case before the High Court so that all aspects of it may be decided (subject to appeal) once and for all, rather than oppressing a defendant with successive suits which may drag continue for a prolonged period.

Similarity of parties

The identity of the parties in the BVI proceedings must be the same as the parties to the original judgment, or privies to those parties. In *C (a minor) v Hackney LBC*,[19] Simon-Brown LJ in the Court of appeal stated:

> The plea of *res judicata* applies only where the cause of action or issue was and remains between the same parties or their predecessors in title. The single exception to this rule is to be found in the Privy Council decision in *Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd.* [1975] AC 581, where the party held estopped in the subsequent proceedings had not itself been a party to the earlier action. It was, however, a closely related company with common directors and shareholders[20]

Similarity of issues

This requirement fairly states the obvious that the issues brought before the BVI court for determination must be the same as the issues decided (or which should have been decided) in the original action. However, it is not all issues which

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17 See *Barrow v Bankside Agency Limited* [1996] 1 WLR 257.

18 (1843) 3 Hare 100.

19 [1996] 1 WLR 789.

20 Ibid, at p 793.

will give rise to issue estoppel – only those substantive issues which were necessary to the making of the decision.[21] Findings made on collateral issues are not sufficient to found an estoppel.

Grounds of impeachment

Even if the criteria prescribed by Lord Brandon of Oakbrook are satisfied, a foreign judgment may be impeached and rendered unenforceable on the grounds of: (2) fraud; (2) being contrary to public policy; and (3) where there has been a denial of natural justice. Each of these grounds is analysed in detail in Rules 43 to 45 of Dicey, Morris & Collins, *The Conflict of Laws*.[22]

It is important to note that these categories of impeachment are quite specific. For example, a foreign judgment will not be impeachable merely if:

(1) The judgment is manifestly wrong on the merits or misapplies foreign law;
(2) The court admitted evidence which would have been inadmissible in the British Virgin Islands, or did not admit evidence which was admissible in the British Virgin Islands; or
(3) The processes and procedures adopted by the court were different to the British Virgin Islands.

The context in which a debtor will raise a ground of impeachment is as a defence to an application for summary judgment.

(1) *Fraud*: the validity of a judgment will be open to attack if there has been an element of fraud – either on the part of the judgment creditor, or by the foreign court.

The High Court has a wide discretion to investigate allegations of fraud and may undertake that task even if the fraud has already been alleged and dealt with in the foreign proceedings.[23] It should be noted, however, that even if the High Court makes a positive finding of fraud, this will only result in the judgment being unenforceable in the British Virgin Islands.[24]

(2) *Public policy*: the High Court may refuse to recognise a foreign judgment if it is contrary to public policy.

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21 See *Penn Texas-Corporation v Murat Anstalt (No 2)* [1964] 2 QB 647.

22 14th edn (London: Sweet & Maxwell, 2006), para 14R-127, p 622.

23 *Abouloff v Oppenheimer* (1882) 10 QBD 295.

24 *Soleimany v Soleimany* (1999) QB 785.

There are few reported cases in the United Kingdom and none in the British Virgin Islands specifically on that point. However, it is submitted that the High Court will take a narrow view of the scope of public policy as a defence.[25]

(3) *Natural justice*: a denial of natural justice will result in the foreign judgment being impeached.

In *Jacobson v Frachon*,[26] Lord Atkins considered the principles of natural justice and concluded:

> Those principles it seems to me involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.

11.4 FUTURE DEVELOPMENTS

We are not aware of any statutory reform relevant to the enforcement of judgments being planned in the foreseeable future, and accordingly, the separate statutory sources are likely to remain the starting point for questions of enforcement. However, the jurisdiction, by its very nature, lends itself to multi-jurisdictional disputes, and therefore it can readily be anticipated that this is an area that will continue to receive much continued judicial attention in the future. Given the BVI courts' general acceptance of Commonwealth decisions, and in particular those originating in England, it is likely that the BVI courts will follow the path adopted by the judges of those countries. Given that the British Virgin Islands shortly expect to be the venue of the newly created Commercial Court, there is likely to be an increased influx of commercial cases to the jurisdiction, most of which are bound to involve an international element, and many to raise issues of enforcement of foreign judgments.

In the insolvency context, there is presently no indication that the relevant provisions of the Insolvency Act dealing with recognition will be brought into force in the near future.

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25 *IPOC International Growth Fund Limited v LV Finance Group Limited*, Civil Appeal No 30 of 2006, BVI.

26 (1927) 138 LT 386.

CHAPTER 12

THE CAYMAN ISLANDS

*Nigel Meeson QC**

12.1 INTRODUCTION

A foreign judgment can be enforced in the Cayman Islands by an action on the judgment at common law or under Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (the Law). The Law is of very limited application as it has only been extended to Australia. In addition, a judgment of a superior court in the United Kingdom may, in theory, be enforced by registration under the Judgments and Awards (Reciprocal Enforcement) Act 1923 of Jamaica[1] within 12 months after the date of the judgment. However, this procedure is not in fact used in practice and, instead, UK judgments are enforced at common law. There are no Grand Court Rules which permit registration of a UK judgment under that Act, the Grand Court Rule[2] allowing registration of judgments applying only to judgments being enforced under the law.

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* Nigel Meeson QC is head of Litigation & Restructuring in Conyers Dill & Pearman's Cayman Islands office.

1 Which will continue to apply to the Cayman Islands, which prior to 1962 were a dependency of Jamaica.

2 Grand Court Rules Ord 71.

12.2 THE STATUTORY REGIME FOR ENFORCEMENT OF FOREIGN JUDGMENTS

The Law is, as its name suggests, based upon the application of the principle of reciprocity. It permits the Cayman Islands Governor in Council to extend the benefit of the law to judgments given by the superior courts of countries provided that he is satisfied that by so doing 'substantial reciprocity of treatment will be assured as respects the enforcement in such country of judgments given in the Grand Court' (of the Cayman Islands)[3] To date the only order made under the Law is to extend its application to the Superior Courts of Australia and its External Territories.[4]

It also has a corresponding negative feature that if the Governor in Council is satisfied:

> that the treatment in respect of recognition and enforcement accorded by the courts of any foreign country to judgments given in the Grand Court is substantially less favourable than that accorded by the Grand Court to judgments of the superior courts of that country[5]

then an order may be made which has the effect that 'no proceedings shall be entertained in the Grand Court for the recovery of any sum alleged to be payable under a judgment given in a court of [that] country'.[6] No order has been made under this provision of the Law.

The Law provides an exclusive regime for the enforcement of foreign judgments to which it applies and provides expressly that no other proceedings for the recovery of a sum payable under such a foreign judgment shall be entertained by the Grand Court.[7]

In order to qualify for reciprocal enforcement the following conditions have to be met by the judgment sought to be enforced:

(a) it is final and conclusive as between the parties thereto;

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3 The Law, s 3(1).

4 The Foreign Judgments Reciprocal Enforcement (Australia and its External Territories) Order 1993 designated the following courts to be Superior Courts for the purposes of the Law: The High Court of Australia, The Federal Court of Australia, the Family court of Australia, the Family Court of Western Australia, and the Supreme Courts of New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, Northern Territory, Australia Capital Territory and Norfolk Island.

5 The Law, s 10(1).

6 Ibid, s 10(2).

7 Ibid, s 8.

(b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and

(c) it is given after the coming into operation of the order directing that this Part shall extend to that foreign country.'[8]

A judgment will be final and conclusive notwithstanding that it is under appeal or still subject to the possibility of appeal.[9] However, if an appeal is pending, or the judgment debtor is entitled and intends to appeal against the judgment, he may apply to the court to set aside registration and the Court may either set aside the registration or adjourn the application to set aside until after the expiration of such period as appears to the court to be reasonably sufficient to enable the judgment debtor to take the necessary steps to have the appeal disposed of by the competent appellate tribunal.[10]

The foreign judgment creditor has six years from the date of the foreign judgment in which to apply for the judgment to be registered in the Grand Court.[11] Where there has been an appeal the six years runs from the date of the last judgment given in the appeal process.[12] A judgment which has been wholly satisfied or which cannot be enforced by means of execution in the country of the original judgment may not be registered.[13]

Once registered, the foreign judgment has the same effect as a judgment of the Grand Court entered on the date of registration as respects execution and the accrual of interest on the judgment.[14]

Where the foreign judgment has been partially satisfied, it may be registered as respects the amount unsatisfied.[15] Similarly, a foreign judgment containing provisions which cannot be registered under the Law may nevertheless be registered as regards those provisions of the judgment which may be so registered.[16] A foreign judgment given in a currency other than Cayman Islands dollars will be entered in Cayman Islands dollars converted from the currency of

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8 The Law, s 3(2).

9 Ibid, s 3(3).

10 Ibid, s 7(1).

11 Ibid, s 4(1).

12 Ibid.

13 Ibid.

14 Ibid, s 4(2).

15 Ibid, s 4(4).

16 Ibid, s 4(5).

judgment at the rate prevailing at the date of the original judgment.[17] The judgment registered will include interest payable under the foreign judgment up to the date of registration together with the costs of registration including the cost of obtaining a certified copy of the judgment from the original court.[18]

A foreign judgment registered under the Law shall be set aside on one or more of the following grounds:[19]

(1) the judgment is not a judgment to which this Part applies or was registered in contravention of the foregoing provisions of this Law;
(2) the courts of the country of the original court had no jurisdiction in the circumstances of the case;
(3) the judgment debtor, being a defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;
(4) the judgment was obtained by fraud;
(5) the enforcement of the judgment would be contrary to public policy in the country of the registering court; or
(6) the rights under the judgments are not vested in the person by whom the application for registration was made.

The question whether or not the courts of the country of the original court had jurisdiction for the purposes of an application to set aside the registration of the judgment is answered according to the principles set out in the Law.

The foreign court is deemed to have had jurisdiction in the following circumstances:[20]

(a) in the case of a judgment given in an action *in personam* if the judgment debtor:

(i) being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court;
(ii) was plaintiff in, or counter-claimed in, the proceedings in the original court;
(iii) being a defendant in the original court, had before the commencement of

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17 The Law, s 4(3).

18 Ibid, s 4(6).

19 Ibid, s 6(1)(a).

20 Ibid, s 6(2).

the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court;

(iv) being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

(v) being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;

(b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action *in rem* of which the subject matter was movable property, if the property in question was at the time of proceedings in the original court situate in the country of that court; and

(c) in the case of a judgment given in an action other than any such action as is mentioned in paragraph (a) or paragraph (b), if the jurisdiction of the original court is recognised by the law of the registering court.

Notwithstanding these rules the foreign court is deemed not to have had jurisdiction in the following circumstances:[21]

(a) if the subject of the proceedings was immovable property outside the country of the original court;

(b) except in the cases mentioned in sub-paragraph (i), (ii) and (iii) of paragraph (a) and in paragraph (c) of subsection (2), if the bringing of the proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of the country of that court; or

(c) if the judgment debtor, being a defendant in the original proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court.

In addition the Grand Court has a discretion to set aside the registration if it is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.[22]

Although it is only money judgments which may be registered and enforced in the same way as a money judgment issued by the Grand Court,[23] if the other conditions for registration are satisfied a non-money judgment may be recognised in the Grand Court as conclusive between the parties thereto in all

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21 The Law, s 6(3).

22 Ibid, s 6(1)(b).

23 Ibid, s 3(2)(b).

proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings[24] unless:

(a) where the judgment has been registered and the registration thereof has been set aside on some ground other than that:

(i) a sum of money was not payable under the judgment;
(ii) the judgment had been wholly or partly satisfied; or
(iii) at the date of the application the judgment could not be enforced by execution in the country of the original court; or

(b) where the judgment has not been registered, it is shown (whether it could have been registered or not) that, if it had been registered, the registration thereof would have been set aside on an application for that purpose on some ground other than one of the grounds specified in paragraph (a).[25]

The Law does not, however, prevent reliance upon the common law rules of cause of action and issue estoppel because the Law, section 9(3) provides:

> Nothing in this section shall be taken to prevent the Grand Court recognising any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognised before the passing of this Law.

The procedural requirements for registering a judgment under the law are straightforward. The application for registration is made by an *ex parte* originating summons unless the court directs service on the judgment debtor.[26] The application is supported by an affidavit:[27]

(a) exhibiting the judgment or a verified or certified or otherwise duly authenticated copy thereof, and where the judgment is not in the English language, a translation thereof in that language certified by a notary public or authenticated by affidavit;
(b) stating the name, trade or business and the usual or last known place of abode or business of the judgment creditor and the judgment debtor respectively, so far as known to the deponent;
(c) stating to the best of the information or belief of the deponent:

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24 The Law, s 9(1).

25 Ibid, s 9(2).

26 Grand Court Rules Ord 71, r 2.

27 Ibid, Ord 71, r 3.