

# EXHIBIT 86

## Part 2

- (i) that the judgment creditor is entitled to enforce the judgment;
- (ii) as the case may require, either that at the date of the application the judgment has not been satisfied, or the amount in respect of which it remains unsatisfied;
- (iii) that the judgment does not fall within any of the cases in which a judgment may not be registered under the Law, section 4.

The Grand Court has power to order the applicant to provide security for costs for the application for registration and of any proceedings which may be brought to set aside the registration.<sup>28</sup>

The order giving leave to register a judgment must be drawn up by, or on behalf of, the judgment creditor, but need not be served on the judgment debtor, unless the Court otherwise directs.<sup>29</sup> The order is required to state the period within which an application may be made to set aside the registration<sup>30</sup> and shall contain a notification that execution on the judgment will not issue until after the expiration of that period.<sup>31</sup> Once registered, the judgment is filed in the register of judgments as if it were a judgment of the Grand Court.<sup>32</sup>

Notice of registration of a judgment containing:

- (a) full particulars of the judgment registered and the order for registration;
- (b) the name and address of the judgment creditor or of his attorney or agent on whom, and at which, any summons issued by the judgment debtor may be served;
- (c) the right of the judgment debtor to apply to have the registration set aside; and
- (d) the period within which an application to set aside the registration may be made.<sup>33</sup>

The notice must be served on the judgment debtor by delivering it to him personally or by sending it to him at his usual or last known place of abode or business or in such other manner as the court may direct.<sup>34</sup> If this is outside the

<sup>28</sup> Grand Court Rules Ord 71, r 4.

<sup>29</sup> *Ibid*, Ord 71, r 5.

<sup>30</sup> Under *ibid*, Ord 71, r 5(4) the court may, on an application made at any time while it remains competent for any party to apply to have the registration set aside, extend the period (either as originally fixed or as subsequently extended) within which an application to have the registration set aside may be made.

<sup>31</sup> *Ibid*, Ord 71, r 5.

<sup>32</sup> *Ibid*, Ord 71, r 6.

<sup>33</sup> *Ibid*, Ord 71, r 7(3).

<sup>34</sup> *Ibid*, Ord 71, r 7(1).

Cayman Islands then it may be served abroad without leave provided the same rules are followed as if it were a writ to be served abroad.<sup>35</sup>

An application to set aside the registration of a judgment must be made by summons supported by affidavit. In addition, the Grand Court hearing the application may order any issue between the judgment creditor and the judgment debtor to be tried in any manner in which an issue in an action may be ordered to be tried.<sup>36</sup>

Execution shall not issue on a judgment registered under the Law until after the period within which an application may be made to set aside the registration, as specified in the order for registration and as extended by the court if it has been so extended.<sup>37</sup> If an application has been made to set aside the registration of a judgment then execution shall not issue until after such application is finally determined.<sup>38</sup> In order to issue execution on a judgment registered under the Law the applicant must produce to the Clerk of the Grand Court an affidavit of service of the notice of registration of the judgment and any order made by the Grand Court in relation to the judgment.<sup>39</sup>

### **12.3 ENFORCEMENT AT COMMON LAW**

By reason of the limited application of the statutory regime for enforcement of foreign judgments as explained above, the majority of foreign judgments enforced in the Cayman Islands will be enforced at common law by means of an action on the judgment. In practice this is a straightforward procedure. An action on the foreign judgment will be commenced by writ, but the foreign judgment creditor can apply under Grand Court Rules, Order 14 for summary judgment on the ground that the foreign judgment debtor has no defence to the claim. As will appear below, the potential defences against enforcement of a foreign judgment at common law in the Cayman Islands are limited and therefore summary judgment will normally be granted thereby providing a swift and economic means of enforcing the foreign judgment in the Cayman Islands. Once judgment has been given, the judgment is a judgment of the Grand Court and may be enforced in the Cayman Islands by the various means available for the enforcement of domestic judgments.

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<sup>35</sup> Grand Court Rules Ord 71, r 7(2).

<sup>36</sup> *Ibid*, Ord 71, r 9.

<sup>37</sup> *Ibid*, Ord 71, r 10(1).

<sup>38</sup> *Ibid*, Ord 71, r 10(2).

<sup>39</sup> *Ibid*, Ord 71, r 10(3).

An action may be brought on an *in personam* judgment at common law if it is for a money judgment, it is final and conclusive and was made by a court having competent jurisdiction, that is to say jurisdiction in accordance with Cayman Islands conflict of laws rules, which are to all intents and purposes identical to those of England and Wales.

### Money judgment

A money judgment is a judgment that orders the judgment debtor to pay a definite and ascertained amount of money to the judgment creditor. It may be a judgment for a debt or for damages or for costs, but the Grand Court, just as the courts of England and Wales will not enforce directly or indirectly the revenue laws of a foreign country<sup>40</sup> nor will they enforce any fine or other penalty.<sup>41</sup>

### Final and conclusive<sup>42</sup>

A judgment will be final and conclusive<sup>43</sup> if the foreign court would treat the matter as having been determined so that it was *res judicata* and could not be re-litigated by the parties in the foreign court otherwise than by appeal. In other words it must be a judgment that is final as opposed to interlocutory so that it could subsequently be abrogated or varied by the foreign court which granted it.<sup>44</sup>

The fact that the foreign judgment may be subject to appeal or is even actively under appeal does not prevent it from being considered final in the sense required for enforcement at common law. However, where the foreign judgment was under appeal the Grand Court would stay execution of any judgment given on an action brought on the foreign judgment.

<sup>40</sup> *Wahr-Hansen v Compass Trust Company Limited* [2007] CILR 55 per Henderson J, Grand Court.

<sup>41</sup> 'Penalty' in this context means a payment to the state rather than a private claimant. However, punitive damages which are not compensatory in character are likely to be held contrary to public policy and on that ground unenforceable.

<sup>42</sup> The leading English case is *Nouvion v Freeman* (1889) 15 App Cas 1.

<sup>43</sup> The phrase sounds more interesting than it is: If it is final it will be conclusive, and if it is conclusive it will be final.

<sup>44</sup> As opposed to being reversed or varied on appeal to a higher court.

### A court of competent jurisdiction

The foreign court will have jurisdiction over the judgment debtor and so be a court of competent jurisdiction if:

- (1) the judgment debtor was, at the time the proceedings were instituted, present in the foreign country;
- (2) the judgment debtor was the plaintiff or counter-claimant in the proceedings in the foreign court;
- (3) the judgment debtor was the defendant and submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings and contesting them on the merits; or
- (4) the judgment debtor was the defendant and, before the commencement of the proceedings, agreed in respect of the subject-matter of the proceedings to submit to the jurisdiction of the foreign court.<sup>45</sup>

These principles were expressly recognised as applicable in the Cayman Islands by Levers J in *Banco Mercantil Del Norte SA (Grupo Financiero Banorte) v Cabal Peniche*<sup>46</sup> where she said:

... at common law the Court will enforce a judgment of a foreign court in a claim *in personam* provided that the foreign court had jurisdiction over the judgment debtor in accordance with the rules of private international law, i.e. in one of the following four cases:

- (a) if the judgment debtor was, at the time the proceedings were instituted, present in the foreign country;
- (b) if the judgment debtor was the plaintiff or counter-claimant in the proceedings in the foreign court;
- (c) if the judgment debtor was the defendant and submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings and contesting them on the merits; or
- (d) if the judgment debtor was the defendant and, before the commencement of the proceedings, agreed in respect of the subject matter of the proceedings to submit to the jurisdiction of the foreign court.

The foreign judgment must also not be procured by fraud, given in breach of natural justice, or otherwise contrary to Cayman public policy.<sup>47</sup>

<sup>45</sup> Rule 36 in Dicey, Morris & Collins, *The Conflict of Laws*, 14th edn (London: Sweet & Maxwell, 2006), at p 588.

<sup>46</sup> [2003] CILR 355 per Levers J, Grand Court.

<sup>47</sup> *Ibid*, at (8).

The foreign court will have had jurisdiction under these rules over the judgment debtor even though he was not resident in the foreign country at the time the proceedings were commenced against him, provided that if an individual he was physically present there. In *Adams v Cape Industries PLC*<sup>48</sup> the English Court of Appeal said:

while the use of the particular phrase 'temporary allegiance' may be a misleading one in this context, we would, on the basis of the authorities referred to above, regard the source of the territorial jurisdiction of the court of a foreign country to summon a defendant to appear before it as being his obligation for the time being to abide by its laws and accept the jurisdiction of its courts while present in its territory. So long as he 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. In the absence of authority compelling a contrary conclusion, we would conclude that 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.<sup>49</sup>

Where the judgment debtor was resident in the foreign country, but not present at the time this is probably sufficient to give the foreign court jurisdiction.<sup>50</sup>

In the case of a corporation the test for 'presence' is whether the corporation is carrying on business at a fixed place within the foreign country. The Court of Appeal in *Adams v Cape Industries plc* gave the following guidance:

In relation to trading corporations, we derive the three following propositions from consideration of the many authorities cited to us relating to the 'presence' of an overseas corporation.

- (1) The English courts will be likely to treat a trading corporation incorporated under the law of one country ('an overseas corporation') as present within the jurisdiction of the courts of another country only if either (i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a 'branch office' case), or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.

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<sup>48</sup> [1990] Ch 433 (CA).

<sup>49</sup> *Ibid*, at 519.

<sup>50</sup> See *State Bank of India v Murjani Marketing Group Ltd*, 27 March 1991, unreported (CA).

- (2) In either of these two cases presence can only be established if it can fairly be said that the overseas corporation's business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.
- (3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant on such investigation: (a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation; (b) whether the overseas corporation has directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff; (c) what other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative; (d) whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way; (e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative; (f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation; (g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation; (h) what business, if any, the representative transacts as principal exclusively on his own behalf; (i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it; (j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.

This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive.<sup>51</sup>

These principles would be applied by the Grand Court.

## 12.4 NON-MONEY JUDGMENTS

Until recently, where a foreign judgment provides for relief other than the payment of money, it was not thought that the judgment could be enforced in the Cayman Islands, although it could nevertheless be recognised by the courts

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<sup>51</sup> [1990] Ch 433 at 530–531.

of the Cayman Islands and be relied upon by way of defence. Following the decision of Smellie CJ in *Miller v Gianne and Redwood Hotel Investment Corporation*<sup>52</sup> it seems most likely that a non-monetary foreign judgment will now be enforced in the Cayman Islands following the recent development of the common law in *Pattni v Ali*<sup>53</sup> and *Pro Swing v Elta Golf*.<sup>54</sup>

In order to be recognised at common law a foreign judgment must be a final and conclusive judgment on the merits and must be made by a court having competent jurisdiction, that is to say jurisdiction in accordance with Cayman Islands conflict of laws rules, which are to all intents and purposes identical to those of England and Wales.

The question whether the judgment is final and conclusive has been considered above.

For the judgment to have been 'on the merits' the foreign judgment must deal with the substantive issues in the case and not merely decide on the basis of a procedural rule in the foreign court.<sup>55</sup>

In *The Sennar (No 2)*<sup>56</sup> Lord Brandon said:

Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.<sup>57</sup>

The rules for jurisdiction for a foreign judgment *in personam* have been considered above.

Where the foreign judgment is *in rem*, ie the judgment deals with the right to possession or property in a thing or the sale of a thing in satisfaction of a claim against the thing itself then it will be recognised or enforced in the Cayman islands at common law if it relates to moveable or immoveable property situate in the foreign country at the time of the proceedings.

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<sup>52</sup> [2007] CILR 18.

<sup>53</sup> [2006] UKPC 51 (Isle of Man).

<sup>54</sup> [2006] SCR 612 (SCC).

<sup>55</sup> *Harris v Quine* (1869) LR 4 QB 653.

<sup>56</sup> [1985] 1 WLR 490 (HL).

<sup>57</sup> *Ibid*, at 499.



## 12.5 BARS TO RECOGNITION OR ENFORCEMENT

Where the foreign judgment is entitled to recognition or to be enforced at common law it cannot be challenged on the ground of an error of law or an error of fact. Where the judgment has been procured by fraud, whether by fraud on the foreign court or a fraud on the judgment debtor, then it will not be recognised or enforced in the Cayman Islands. Similarly, if recognition would be contrary to the public policy of the Cayman Islands or was obtained in breach of natural justice.

### The fraud exception

The fraud exception to recognition and enforcement is applicable even though the foreign court has itself considered the evidence which supports the allegation of fraud. In *Vadala v Lawes*<sup>58</sup> Lindley LJ said:

if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can re-open the whole case even although you will have this court to go into the very facts which were investigated and which were in issue in the foreign court.

This principle has more recently been re-affirmed by the Court of Appeal in *Jet Holdings v Patel*<sup>59</sup> and by the House of Lords in *Owens Bank v Bracco*.<sup>60</sup>

### Public policy

The scope of this exception is uncertain as there are few decisions on the refusal to recognise or enforce a foreign judgment on the grounds of public policy.

One area where it would apply would be where the foreign judgment was obtained in breach of an anti-suit injunction issued by the Grand Court, or was inconsistent with a previous decision of the Grand Court in proceedings between the same parties.<sup>61</sup>

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<sup>58</sup> (1890) 10 QBD 295 (CA) applying *Abouloff v Oppenheimer* (1882) 10 QBD (CA).

<sup>59</sup> [1990] 1 QB 335.

<sup>60</sup> [1992] 2 AC 443.

<sup>61</sup> *Vervaeke Smith* [1983] 1 AC 145; *ED&F Man v Haryanto (No 2)* [1991] 1 Lloyd's Rep 429 (CA).

Another public policy issue arises in the context of actions for the enforcement, either directly or indirectly, of a penal<sup>62</sup> or revenue<sup>63</sup> law of a foreign country, which the Grand Court will not entertain. It follows that the court cannot entertain an action for the enforcement of a foreign judgment ordering the payment of taxes, fines, or penalties.

Penalty in this sense normally means a sum of money payable to the state, and not to a private claimant, so that an award of punitive or exemplary damages is not necessarily 'penal' for these purposes.<sup>64</sup>

Cayman courts, like English courts, generally demonstrate a degree of antipathy towards awards of punitive damages of the type sometimes awarded by juries in the United States, since Cayman courts generally award damages on a compensatory basis only. 'Exemplary damages' or 'punitive damages' are not generally available in the domestic legal system of the Cayman Islands, except in very limited, exceptional circumstances.

It is arguable, therefore, that a foreign judgment containing an award of punitive damages would be unenforceable in the Cayman Islands on public policy or natural justice grounds, although the point has not been specifically considered or decided by a Cayman court.

There is Australian authority, however, 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.<sup>65</sup> An award of multiple damages might also be regarded as penal at common law, and therefore unenforceable as a matter of public policy.<sup>66</sup>

### Natural justice

This exception applies where there was some irregularity in the foreign proceedings which has prevented either notice to the judgment debtor or has

<sup>62</sup> *Huntington v Attrill* [1883] AC 150, PC; *US v Inkley* [1989] QB 255, CA; *Stutts v Premier Benefit Capital Trust* [1992–1993] CILR 605; *Marada Global Corp v Marada Corp* [1994–95] CILR 546; *Kalley v Manus* [1999] CILR 566; and *TMSF v Wisteria Bay Limited* [2007] CILR 310 per Smellie CJ, Grand Court.

<sup>63</sup> *Government of India v Taylor* [1955] AC 491. See also *Wahr-Hansen v Compass Trust Company Limited* [2007] CILR 55 per Henderson J, Grand Court.

<sup>64</sup> See *SA Consortium General Textiles v Sun & Sand Agencies Ltd* [1978] QB 279 at 309 per Lord Denning MR, by way of *obiter dicta*.

<sup>65</sup> See *Schnabel v Lui* [2002] NSWSC 15 at para 177.

<sup>66</sup> See *Jones v Jones* (1889) 22 QBD 425.

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prevented the judgment debtor from having an opportunity to present his case before the foreign court or has otherwise amounted to a breach of natural justice. The classic exposition of relevant principle is contained in the judgment of Lord Lindley in *Pemberton v Hughes*<sup>67</sup> where he said:

If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice.<sup>68</sup>

In *Adams v Cape Industries plc*<sup>69</sup> the Court of Appeal reaffirmed that the appropriate test was whether the foreign proceedings offended against the domestic court's notion of 'substantial justice' and in that case included a requirement that damages should not be fixed subjectively by or on behalf of the plaintiff.<sup>70</sup>

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<sup>67</sup> [1899] 1 Ch 781 (CA).

<sup>68</sup> Ibid, at 790.

<sup>69</sup> [1990] Ch 433 (CA).

<sup>70</sup> Ibid, at 567.

## CHAPTER 13

# THE ISLE OF MAN

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13.1	Introduction	169
13.2	Enforcement by registration	170
13.3	Enforcement at common law	172
13.4	Issue of execution	174
13.5	Enforcement of execution	175
13.6	Future developments	176

### 13.1 INTRODUCTION

This chapter provides an outline of the possible avenues of recovery for parties who have obtained judgment outside the Isle of Man ('a foreign judgment') against Isle of Man based companies, trusts or individuals or against a party who has assets within this jurisdiction. It sets out details of the three methods of recovering money owed under a foreign judgment:

- (1) statutory registration of the foreign judgment;
- (2) commencement of a common law action in the Isle of Man based on the existence of foreign judgment;
- (3) commencement of a common law action in the Isle of Man based on the original cause of action that is the subject matters of the foreign judgment.

The final stage in the enforcement of a foreign judgment is the enforcement of the execution that will hopefully be obtained in the Isle of Man. This chapter

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briefly explains how and when execution is obtained in the Isle of Man and what methods are available to enforce the execution.

## **13.2 ENFORCEMENT BY REGISTRATION**

Where a party ('the judgment creditor') has obtained a foreign judgment for a debt or definite sum of money he may be able to enforce that judgment in the Isle of Man in one of three ways. Firstly, it may be possible to commence registration proceedings under the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968 (the Act). Secondly, if the registration procedure is not available, the judgment creditor may commence a common law action within the Isle of Man based on the foreign judgment. Thirdly, where neither of the above methods is available or appropriate, the judgment creditor may seek to recover the money owed under the foreign judgment indirectly, by commencing a fresh action in the Isle of Man based on the underlying cause of action that gave rise to the foreign judgment.

### **Statutory registration proceedings**

The Act makes provision for the enforcement in the Isle of Man of judgments given in prescribed 'superior courts' of countries which afford reciprocal treatment to judgments given in the Isle of Man. At present, there are only seven such countries:

- (1) the United Kingdom;
- (2) Guernsey;
- (3) Jersey;
- (4) Surinam;
- (5) Israel;
- (6) Italy;
- (7) the Netherlands.

The prescribed 'superior courts' of these countries are listed in Appendix 13.1 (below).

A foreign judgment of a superior court ('the original court') can be registered only if it is final and conclusive and there is payable thereunder a sum of money (not being a sum in respect of taxes, fines or similar penalties). It should be noted that a UK judgment in respect of VAT<sup>1</sup> can be registered in the Isle of Man. A foreign judgment will be treated as final and conclusive notwithstanding

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<sup>1</sup> Value added tax.

that an appeal may be pending. Registration will not be permitted, however, if, at the date of the application for registration:

- (1) the foreign judgment has been wholly satisfied; or
- (2) the foreign judgment could not be enforced by execution in the country of the original court.

An application for the registration of a foreign judgment must be made by petition and supported by affidavit. The affidavit must include a statement by the deponent that to the best of his information and belief the foreign judgment, if registered, is not liable to be set aside (see below). There must be exhibited to the affidavit a certified copy of the foreign judgment, authenticated by the seal of the original court and, where the foreign judgment is not in English, a certified translation of the foreign judgment.

The application for registration is made *ex parte* to the High Court and will be heard by a Deemster<sup>2</sup> in Chambers who will normally make an order *nisi* for registration. However, the Deemster may direct that notice of the petition be given to the party against whom the foreign judgment was given ('the judgment debtor'). Once the order *nisi* is made, execution will not issue until after the expiration of a period fixed by the court within which an application may be made by the judgment debtor to set aside the registration.

After the order *nisi* is made, the judgment creditor must serve a notice of the registration on the judgment debtor at his last known residence or place of business by recorded delivery with certificate of delivery or in such other manner as the presiding Deemster may direct. The person serving the notice of registration must, within three days of service, indorse the notice with the date on which service was effected together with the date on which such endorsement was made. If this is not done, the judgment creditor will not be at liberty to obtain execution on the registered judgment without the leave of the court.

After the order *nisi* is made, the judgment debtor may apply within the time prescribed by the High Court to set aside the registration on any of the following grounds:

- (1) that the original court did not have jurisdiction in the circumstances of the case;
- (2) that he did not receive notice of the original proceedings in sufficient time for him to defend and did not appear;

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<sup>2</sup> A Deemster is a judge of the courts of the Isle of Man.

- (3) that the judgment was obtained by fraud; or
- (4) that enforcement of the judgment would be contrary to public policy in the Isle of Man.

The first of these is the ground most commonly invoked to set aside registration and the Act, section 4(2) provides an exhaustive list of situations where the original court is deemed to have had jurisdiction (see Appendix 13.2 (below) for the text of section 4(2)). If the foreign judgment cannot be brought within the terms of section 4(2) it is not registrable because, for the purposes of the Act, it would be a foreign judgment of a court which had no jurisdiction in the circumstances of the case.

A foreign judgment once registered shall, for the purposes of execution, be of the same force and effect as if the foreign judgment had been a judgment originally given in the High Court and entered on the date of registration.

If that period expires and no application to set aside has been made (or no application for an extension of time to set aside has been made) the order for registration becomes absolute and execution in the Isle of Man may be applied for by the judgment creditor.

Finally, it must be noted that if the registration procedure under the Act applies to a judgment, no proceedings for the recovery of a sum payable under that judgment, other than by way of registration, will be entertained by the High Court.

### **13.3 ENFORCEMENT AT COMMON LAW**

If the registration procedure under the Act is not available, the judgment creditor may commence a default action in the High Court, on the debt created by the foreign judgment, and claiming the amount owed under the foreign judgment, provided that such judgment is final and conclusive and is not in respect of taxes, fines or similar penalties or contrary to public policy. This method of giving effect to a foreign judgment is not dependent on the reciprocal treatment of Isle of Man judgments in the foreign country.

The procedure for commencing a default action in the Isle of Man is relatively straightforward. The judgment creditor (who will be the plaintiff) must issue and serve a summons and statement of claim, together with acknowledgement of service forms on the judgment debtor (the defendant). This service must be effected by the Coroner who is the process server and judgments enforcement officer in the Isle of Man. However, if the defendant is resident outside the Isle

of Man, it will be necessary to apply to the High Court for leave to serve the proceedings out of the jurisdiction. In the event that such service cannot be effected in one of the prescribed manners, it may be open to the plaintiff to apply to the court for an order for substituted service.

The statement of claim (which briefly sets out the nature of the plaintiff's claim) will include a claim for the amount adjudged to be due by the defendant to the plaintiff under the terms of the foreign judgment of the original court, together with a claim for interest and costs. If the original court judgment is in a currency other than sterling, the plaintiff may claim in that currency.

If the defendant fails to acknowledge service of the summons and statement of claim or fails to serve his defence within the prescribed time, the plaintiff may apply for judgment in default. This application is made administratively to the Chief Registrar who will within seven working days enter judgment in the Isle of Man and issue execution. The execution may be stayed, however, if the parties have agreed that the judgment debt will be discharged by instalments.

If the defendant serves a defence within the prescribed time the plaintiff will be required to prove his claim to the satisfaction of the High Court. The defendant may be able to defend the action by claiming, *inter alia*, that the original court had no jurisdiction in the circumstances of the case (ie that the defendant did not submit to the jurisdiction of the original court), that the judgment was obtained by fraud or that enforcement of the judgment would be contrary to public policy in the Isle of Man.

If the claim is for a sum of £5,000 or less it will be dealt with by the Isle of Man small claims court. A claim for a greater sum may be referred to the small claims court with the agreement of the parties.

### **Common law action based on the original cause of action**

Where the judgment creditor has obtained a foreign judgment which is neither registrable under the Act nor enforceable by a common law action based on the judgment, he may wish to commence a new action in the Isle of Man based on the original cause of action. Although this course of action may result in the judgment creditor recovering the money owed under the foreign judgment, it is entirely independent of that judgment and is based solely on the cause of action which the judgment creditor has against the judgment debtor (eg breach of contract).

Where the amount sought to be recovered is a debt or definite sum of money the judgment creditor may commence a default action in the Isle of Man against the



judgment debtor (as above). However, where the amount sought to be recovered is unquantified (eg a claim for damages) the judgment creditor must commence an ordinary civil action (as above) and will generally be required to serve a statement of case (the document which outlines his case in detail). In either case, if the judgment debtor disputes the claim, the action will continue through the normal procedural steps (defence, discovery, interlocutory motions, etc) with the obvious delays and costs consequences. It is important to note that there is no Manx equivalent to the English summary judgment procedure.

Whether the proceedings are by way of default action or ordinary civil action, the judgment creditor should ensure that the Isle of Man is the appropriate jurisdiction to deal with the matter. If not, it will be open to the judgment debtor, if he contests the proceedings, to raise the defence of lack of personal jurisdiction and/or *forum non conveniens* (ie that the Isle of Man is not the most suitable forum for trying the action).

### 13.4 ISSUE OF EXECUTION

When the judgment creditor has successfully registered the foreign judgment or obtained a judgment of the High Court pursuant to one of the above methods, he must then obtain execution on that judgment.

Under the statutory registration procedure, execution may issue once the order for registration is made absolute. In order to obtain execution on a registered judgment, the judgment creditor must lodge with the General Registry an Affidavit of service of the notice of registration and of any order made by the court in relation to the registered judgment. The affidavit must have exhibited to it the certificate of delivery or other proof of service together with a copy of the notice of registration duly indorsed.

In default action proceedings the judgment creditor may apply for execution when applying for judgment. This involves making an application to the Chief Registrar who will, within seven days, enter judgment and issue execution.

In the case of an ordinary civil action, the judgment creditor may apply for execution at the time of applying for judgment, although if some form of arrangement for satisfying the judgment has been agreed, he may postpone his application for execution.

### 13.5 ENFORCEMENT OF EXECUTION

The final stage in the enforcement of a foreign judgment is the enforcement of the execution. The judgment creditor places the execution in the hands of the Coroner (the judgments enforcement officer in the Isle of Man) who has the power, subject to certain exceptions, to arrest and sell sufficient of the judgment debtor's Isle of Man assets to satisfy the judgment debt and to inquire as to the judgment debtor's means. The Coroner must keep the seized property under arrest for a period of 28 days during which time the judgment debtor may make arrangements to satisfy the debt. At the expiration of the 28-day period, the property may be advertised for sale.

In the event that the Coroner cannot enforce the execution directly by arrest and sale, the judgment creditor may enforce the execution indirectly by way of:

- (1) garnishee proceedings;
- (2) instalment order; or
- (3) attachment of earnings order.

#### Garnishee proceedings

The Coroner has the power to arrest the debts owing to the judgment debtor in the hands of a third party and any money so recovered is deemed to have been obtained from the judgment debtor. The exercise of this power does not require a court order, although if the third party disputes the debt due to the judgment debtor, it may be necessary (or more appropriate) to apply for an order, by way of formal garnishee proceedings, directing the third party to pay the debt directly to the judgment creditor.

#### Instalment order

If the judgment debtor has an income, it is possible for either the judgment debtor or the judgment creditor to apply to have the debt discharged by way of instalments. Such an application will prevent execution from issuing, or if already issued, will stay the execution so long as the instalments are maintained as agreed. An application for the discharge of a judgment debt by instalments is heard by a Deemster who will inquire as to the means of the judgment debtor and make an order having regard to all the circumstances of the case.

#### Attachment of earnings order

Where the judgment debtor is an employee, the judgment creditor (or the Coroner with the permission of the judgment creditor) may apply to the High

Court for an order directing that the employer deduct from the judgment debtor's earnings such sums as may be specified in the order. If the judgment debtor opposes such an application, the High Court will only make an order if it is satisfied that the judgment debtor has failed to comply with an instalment order without cause and has the means to satisfy the debt within a reasonable time by instalments deducted from his earnings.

Finally, if it can be shown that the judgment debtor, being an individual, has had the means to pay and has 'refused or neglected or refuses and neglects' to pay, the court may order the imprisonment of the debtor.

### **Other considerations and potential problems**

Whenever contemplating any litigation, the prospective plaintiff should always attempt to ascertain whether the prospective defendant has sufficient, or indeed any, assets within the jurisdiction to satisfy any eventual judgment. For this reason, it is advisable to instruct an inquiry agent to investigate the judgment debtor's means before issuing any proceedings.

If the judgment creditor suspects that the judgment debtor may attempt to remove or dissipate any or all of his assets in order to frustrate the enforcement of a future judgment against him, the judgment creditor may apply to the court for a *Mareva*<sup>3</sup> injunction restraining the judgment debtor from removing his assets from the jurisdiction or otherwise disposing of or dealing with his assets.

If the judgment debtor is an Isle of Man company, it may be necessary to apply to have the company liquidated to pay the debt. This process can be time consuming and it is not possible for present purposes to be specific as to the various issues that do or might arise should such action be necessary.

## **13.6 FUTURE DEVELOPMENTS**

It is possible that further reciprocal arrangements will be entered into with other countries. At the time of writing we are not aware of any such proposals.

The Isle of Man is likely to see introduced in 2009 a wholesale replacement of the current rules of the High Court. It is not anticipated that this change will impact materially on the law relating to the enforcement of foreign judgments.

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<sup>3</sup> So named after the decision in *Mareva Compania Naviera SA v International Bulk Carriers SA* [1975] 2 Lloyd's Rep 209.

## **APPENDIX 13.1**

### **JUDGMENTS (RECIPROCAL ENFORCEMENT) (ISLE OF MAN) ACT 1968**

#### **List of Superior Courts**

##### **1. UNITED KINGDOM**

- House of Lords
- Court of Appeal (in England and Wales)
- High Court of Justice (in England and Wales)
- Court of Session and the Sheriff (in Scotland)
- Supreme Court of Judicature (in Northern Ireland)

Note: a judgment of the county courts in England and Wales may be registered under the 1968 Act if it has been transferred to the High Court of Justice in England and Wales pursuant to the County Courts Act 1984, section 106.

##### **2. GUERNSEY**

- Royal Court sitting as an Ordinary Court or as a Full Court
- Court of Appeal of Guernsey

##### **3. JERSEY**

- Royal Court of Jersey
- Court of Appeal Jersey

##### **4. SURINAM**

- Hof van Justitie van Surinam
- Kantongerecht in het Eerste Kanton
- Kantongerecht in het Derde Kanton

**5. ISRAEL**

- Supreme Court
- District Courts
- Rabbinical Courts
- Christian Religious Courts
- Moslem Religious Courts
- Druze Religious Courts

**6. ITALY**

- Corte d'Appello
- Tribunale

**7. NETHERLANDS**

- Hoge Raad der Nederlanden
- Gerechtshoven
- Arrondissementsrechtbanken

**8. NETHERLANDS ANTILLES**

- Hoge Raad der Nederlanden
- Hof van Justitie der Nederlandse Antilles
- Gerecht in Eerste Aanleg

## APPENDIX 13.2

### JUDGMENTS (RECIPROCAL ENFORCEMENT) (ISLE OF MAN) ACT 1968

#### Section 4(2)

4 (2) For the purposes of this section, the courts of the country of the original court shall, subject to the provisions of subsection (3) of this section, be deemed to have had jurisdiction —

- (a) in the case of a judgment given in an action *in personam* —
  - (i) if the judgment debtor, 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 release of, property seized, or threatened with seizure, in the proceedings, or of contesting the jurisdiction of that court; or
  - (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court; or
  - (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of 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; or
  - (iv) if the judgment debtor, being a defendant in the original court, was at the time when proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
  - (v) if the judgment debtor, 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 the proceedings in the original court situate in the country of that court;
- (c) in the case of a judgment given in an action other than any such action as mentioned in paragraph (a) or paragraph (b) of this subsection, if the jurisdiction of the original court is recognised by the law of the Isle of Man.

## CHAPTER 14

### GUERNSEY

*John Greenfield and Alistair Wrench\**

14.1	Enforcement	181
14.2	Enforcement at common law	182
14.3	Statutory enforcement	185
14.4	Methods of execution	189
14.5	Conclusion	191

#### 14.1 ENFORCEMENT

It is first important to note the distinction between mere recognition of a foreign judgment and its actual enforcement as helpfully set out in Dicey, Collins & Morris, *The Conflict of Laws*.<sup>1</sup> As they explain 'It is plain that, while a court must recognise every foreign judgment which it enforces, it need not enforce every foreign judgment which it recognises', and there are many examples of where a recognised judgment is not capable of enforcement, such as a judgment dismissing a claim or counterclaim (unless it orders the unsuccessful party to pay costs) or a declaratory judgment (one declaring the status of a person or a title to a thing). However there are many instances where a foreign judgment is capable of enforcement by the Guernsey court.

When it comes to issues of enforcement, as noted, Guernsey is not a member state of either the European Union or European Economic Area, and is not a

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<sup>1</sup> 14th edn (London: Sweet & Maxwell, 2006), p 657.



signatory to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters<sup>2</sup> as amended (the Brussels Convention), or the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters<sup>3</sup> (the Lugano Convention).

Under the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957 as amended<sup>4</sup> (JREGL) Guernsey is able to reciprocally enforce judgments only with those countries with whom it has reached bilateral statutory accommodation,<sup>5</sup> provided always that the judgment to be enforced is that of a 'superior court'.

However, given the scarce representation on the list of reciprocating countries, and the global reach of Guernsey's finance industry, it is unsurprising that the predominant method of enforcement is under the common law.

## 14.2 ENFORCEMENT AT COMMON LAW

In the event that the JREGL does not apply then the common law, which draws heavily upon English precedent, prevails, whereby the judgment creditor must sue on the foreign judgment itself and, if the matter is placed on the pleading list then apply for summary judgment on the grounds that the defendant has no real prospect of successfully defending the claim.<sup>6</sup>

Considering the similarity in procedure then Dicey, Morris & Collins comment in *The Conflict of Laws*<sup>7</sup> with regards to English common law prove just as true of Guernsey when they say that 'The speed and simplicity of this procedure ... mean that foreign judgments are in practice enforceable at common law much more easily than they are in many foreign countries'.

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<sup>2</sup> 27 September 1968.

<sup>3</sup> 16 September 1988.

<sup>4</sup> See the Judgments (Reciprocal Enforcement) (Amendment) Law, 1994, and the Judgments (Reciprocal Enforcement) Ordinances dated 1973 to 1991 and Judgments (Reciprocal Enforcement) Rules 1972 and 1975.

<sup>5</sup> Reciprocating countries are England and Wales, Scotland, Northern Ireland, the Republic of Italy, the Isle of Man, the Netherlands, the Netherlands Antilles, Surinam, Jersey and Israel, see the Judgment (Reciprocal Enforcement) (Amendment) Ordinance 1991, No 1 and No 2.

<sup>6</sup> *Grant v Easton* (1883) 13 QBD 302 (CA); *Colt Industries Inc v Sarlie (No 2)* [1966] 1 WLR 1287 (CA).

<sup>7</sup> 14th edn (London: Sweet & Maxwell, 2006), p 471.

### Common law – in personam

It is essential to the recognition or enforcement in Guernsey of a foreign judgment that the foreign court should have had jurisdiction according to Guernsey rules of the conflict of laws which are themselves based along English law principles. The Guernsey rules used to determine correct jurisdiction therefore will be similar to those expounded by Buckley LJ in the case of *Emanuel v Symon*<sup>8</sup> as follows:

In actions *in personam* there are five cases in which the courts of this country will enforce a foreign judgment: (1) where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.

Should these criteria be met and a foreign judgment be sued upon and placed in the pleading lists then it is impeachable only in the following limited grounds:

- (1) the foreign court did not have jurisdiction to give that judgment; or
- (2) judgment obtained by fraud (on the part of either the court of the party in whose favour judgment was given);<sup>9</sup> or
- (3) where enforcement would be contrary to public policy; or
- (4) where the proceedings in which the judgment was obtained were contrary to natural justice.<sup>10</sup>

Failure to employ the JREGL where it would have been applicable is also likely to be a successful defence, albeit a temporary one.

<sup>8</sup> [1908] 1 KB 302.

<sup>9</sup> A foreign judgment which has been obtained by fraud will not be recognised or enforced in Guernsey. The judgment is impeachable whether the fraud was on the part of the court or on the part of the successful party. It is immaterial that the fraud has already been investigated by the foreign court, although in such a case the plea of fraud may involve a re-trial in Guernsey of the matters adjudicated upon by the foreign court, and it is immaterial that the unsuccessful party in the foreign proceedings refrained from raising the plea of fraud in those proceedings although the facts were known to him at all material times.

<sup>10</sup> A foreign judgment can be impeached if the proceedings in which the judgment was obtained were contrary to natural justice. Proceedings are not regarded as having been contrary to natural justice merely because the foreign court admitted evidence which was inadmissible under Guernsey law, nor because of a mere procedural irregularity on the part of that foreign court, provided that the unsuccessful party was given an opportunity to present his case. The objection that the foreign proceedings were contrary to natural justice cannot be taken in Guernsey if it could have been or was taken before the foreign court.

In the absence of any one or more grounds of impeachment, a judgment of a foreign court which is final and conclusive on the merits is conclusive in Guernsey between parties and privies as to any issues upon which it adjudicates. It is not impeachable or examinable on the merits, whether for error of fact or of law. However it is probable that a foreign judgment will not be recognised if it shows in its face a perverse and deliberate refusal to apply generally accepted doctrines of private international law.

### Common law – in rem

A judgment *in rem* may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation. It is thus judgment vesting in a person the possession of or property in a thing, or decreeing the sale of a thing in satisfaction of a claim against the thing itself, or a judgment as to a status of a person. A judgment *in rem* pronounced by a court of competent jurisdiction is conclusive and binding in Guernsey, not only between parties and privies, as in the case of a judgment *in personam*, but against all the world.

For actions *in rem* the question of jurisdiction is determined by the locus of the assets concerned at the time of the proceedings. When relating to judgment *in rem* relating to movables this means that a judgment will be recognised and enforced if the movables were situated in the foreign country concerned at the time of the proceedings. In the case of immovables, it means more simply that the foreign judgment will be recognised if the movables are situated in the relevant foreign country.<sup>11</sup> Again it is much more rare that enforcement of an action *in rem* will be sought abroad for reasons such as the immovability of realty. This is as opposed to recognition.

### Judgments given in default

While this is an area that has received little substantive argument within the Guernsey courts it would seem likely that it is not possible to directly enforce default judgments under Guernsey common law, any more than it is in England and Wales.<sup>12</sup> As Lord Selbourne ruled:<sup>13</sup>

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<sup>11</sup> See Dicey, Morris & Collins, *The Conflict of Laws*, 14th edn (London: Sweet & Maxwell, 2006), pp 611 et seq.

<sup>12</sup> For further discussion on this point see Dicey, Morris & Collins, *ibid*, pp 588 et seq.

<sup>13</sup> *Sirdar Gurdial Singh v Rajah of Faridkote* [1894] AC 670 at 683–684 (PC).

a decree pronounced *in absentem* by a foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the courts of every nation, except (when authorised by special local legislation) in the country of the forum by which it was pronounced.

However, while a default judgment might not prove a cause of action in and of itself, it can be used as evidence in a common law application for summary judgment.

### **Methods of executing judgment**

For details as to how a successful application for enforcement of a foreign judgment under common law can be executed, then please see material section below.

### **Power to make judgments unenforceable if there is no reciprocity**

It is, however, important to note that judgments by not all foreign courts need be enforced. If, for example, it appears to the States that the recognition and enforcement accorded by another court to judgments given by the Royal Court are substantially less favourable than those accorded by the Royal Court to that court then the States may by ordinance decide that no proceedings for the recovery of any sum alleged to be payable under a judgment of a court of that country shall be entered in any Guernsey courts. The States may also revoke any previous ordinance made.

## **14.3 STATUTORY ENFORCEMENT**

As mentioned above the relevant legislation covering the enforcement of foreign judgments in Guernsey is the JREGL.

Reciprocating countries are stipulated by Ordinance, and the necessary Ordinance validating and acknowledging the bilateral agreement for reciprocity in judgments lists which courts of a particular jurisdiction are considered superior courts, for example, insofar as England and Wales are concerned, 'the House of Lords, the Court of Appeal and the High Court of Justice'.

This view was held in the Jersey case of *Re Hardwick*<sup>14</sup> in accordance with the Reciprocal Enforcement (Jersey) Law, 1960 and followed in Guernsey in *Highseal Windows Limited v Gary Martel and Graham Carroll t/a The Conservatory Centre*,<sup>15</sup> that the English county courts are not a superior court for the purposes of the JREGL. Several commentators including Advocate Dawes in his work *Laws of Guernsey* have pointed out that this position might now be somewhat outdated considering the unlimited jurisdiction more recently enjoyed by the county courts when it comes to issues of, for example, contract and tort. However prior to this decision being reconsidered, for such situations the Guernsey court will adopt the common law position in England before statute intervened and the plaintiff is entitled to sue on the foreign judgment in the Guernsey court as explained in the above section dealing with common law.

A judgment given on appeal by a superior court from a court which is not a superior court, is not a judgment to which the JREGL will apply.

### Jurisdiction

Whether the original court will be deemed to have had jurisdiction will vary according to whether the judgment was given in an action in personam; in an action in respect of immovable property or an action in rem where the subject matter was movable property.

Where the action was *in personam* the original court will have had jurisdiction if:

- (1) the judgment debtor submitted to the jurisdiction or was plaintiff or counterclaimed in the proceedings, or was resident in (or being a body corporate, had its principal place of business in) the jurisdiction; or
- (2) there was a prior agreement between the parties submitting to the jurisdiction of that court, or the courts of that country; or
- (3) the judgment debtor has an office, or place of business in the country and the proceedings relate to a transaction effected through, or at that office.

Where the action was in respect of immovable property/an action *in rem* where the subject matter was movable property, the original court have had jurisdiction if the property in question was in the country during the time of the proceedings.

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<sup>14</sup> [1995] JLR 245.

<sup>15</sup> 2 January 2001, unreported.

In all other cases jurisdiction will be conferred in an action where the jurisdiction of the original court is recognised by the laws of Guernsey.

### **Does the JREGL apply?**

Providing the original superior court had jurisdiction under the JREGL, the judgment must be; final and conclusive (notwithstanding any pending appeal); for a definite sum of money (not related to taxes, or other similar charges, fines or penalty) and not more than six years old (from the date the judgment was given and if there was an appeal from the date of the last judgment).

A relevant action *in personam* will not, for the purposes of the JREGL, include any matrimonial cause or matter, administration of Estates, insolvency, winding up of companies, lunacy, or guardianship of infants.<sup>16</sup>

### **Application to register judgment in Guernsey**

Once it is confirmed that a foreign judgment can apply in Guernsey, an application will need to be made for leave to register the judgment in Guernsey so that it may then be enforced in Guernsey (ie the Sheriff can arrest assets to satisfy the judgment in the normal way).

This application for leave to appeal is made *ex parte* to the Ordinary Division of the Royal Court and must be supported by an affidavit<sup>17</sup> exhibiting a certified copy of the foreign judgment and must state that, to the best of the applicant's knowledge or belief that:

- (1) The judgment creditor is entitled to enforce the judgment; and
- (2) The balance of the judgment is still outstanding (ie all, or part); and
  - (a) the judgment is enforceable within the originating jurisdiction; and
  - (b) the judgment is not liable to be set aside; and
  - (c) the amount of any interest due; and
  - (d) any foreign currency judgments must state a Guernsey equivalent by reference to the rate of exchange at the date of the judgment.

Notice of the application needs to be given to the Court by at least noon the day before the day of the sitting.

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<sup>16</sup> The JREGL, s 1(2).

<sup>17</sup> Sworn and dated before, then signed by a Notary Public.

In the case of a part satisfied judgment, registration will only be given for an amount outstanding<sup>18</sup> however, the judgment can be registered for the reasonable costs of and incidental to registration.

The order must also state the period during which the debtor can apply to set aside the registration as set out below.

### **Conditions the court may attach to an order for registration**

Under the JREGL, section 5.5 the court may, *inter alia*, make conditions:

- (1) For provision for security for costs to be paid by the applicant;
- (2) For prescribing matters to be proven and the manner of proof;
- (3) For service of notice on the judgment debtor;
- (4) Fixing the time within an application to set aside must be made;
- (5) Prescribing the methods by which questions relating to the effect of the original judgment shall be determined.

### **Effect of registration**

Subject to the provisions relating to setting aside judgments, a registered judgment shall be of the same force and effect as if the judgment had been given in the Royal Court of Guernsey on the date of registration, so that:

- (1) Proceedings may be taken;
- (2) Interest will run; and
- (3) The Royal Court can control execution of the registered judgment

### **Judgment debtor's right to set aside the registration**

Notice in writing of the registration of the judgment must be served on the judgment debtor by the judgment creditor through means of HM Sergeant and it must state the full particulars of the registered judgment (including details of the judgment creditor) and the fact that a registration order has been made.

The judgment debtor will then have 14 days from the date of service of the notice of registration to apply to have the registration set aside.<sup>19</sup> Execution will not be permitted until after that time has elapsed. This period of 14 days may be

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<sup>18</sup> The JREGL, s 4(4).

<sup>19</sup> The Judgments (Reciprocal Enforcement) (Amendment) (Guernsey) Rules, 1975.

extended by an amount prescribed by Ordinance<sup>20</sup> in the case of the judgment debtor not being present in the Bailiwick, or to a fixed period of 60 days where notice was served by substituted service.

Execution will not be permitted if an application to set aside can, or has been made. The application to set aside is made by way of summons supported by an affidavit and must satisfy the Royal Court that an appeal against the judgment is pending, or to be brought. Further to the JREGL, section 6(1)(a) the registration will then be set aside if, *inter alia*, it can be shown that:

- (1) The JREGL does not apply to the judgment; or
- (2) The original Court had no jurisdiction; or
- (3) The judgment debtor did not receive sufficient notice of the original proceedings to enable him to defend and did not appear; or
- (4) The judgment is fraudulent; or
- (5) contrary to public policy in Guernsey; or
- (6) The applicant does not have the right to enforce the judgment vested in him.

Further by section 6(1)(b) the court *may* set aside the registration if 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 had been the subject of a final and conclusive [as well as presumably inconsistent] judgment by a court having jurisdiction in the matter.

Alternatively, the application may be adjourned until the appeal has been disposed of in the original court.

As set out above, subject to the provisions relating to setting aside judgments, a registered judgment shall be of the same force and effect as if the judgment had been given in the Royal Court of Guernsey on the date of registration. The Royal Court can therefore control execution of the registered judgment from the date of registration. For enforcing a registered judgment see below section on enforcement of judgments in Guernsey.

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<sup>20</sup> As Advocate Dawes set out in Laws of Guernsey 'If the judgment debtor is absent from the Islands of Guernsey, Herm and Jethou the period of 14 days is increased according to where in the world the judgment debtor is. The period is fixed by reference to the (now repealed but apparently still relied upon) 1936 Ordonnance au sujet des termes a ecrire ... Thus, if the judgment debtor is in Jersey the period is six days, eight days if in Britain but 180 days if in the South Sea Islands. For reciprocal enforcement purposes the 14 day period is extended by only half of the relevant terme a ecrire'.



## 14.4 METHODS OF EXECUTION

Once the permitted period for the judgment debtor to make an application to set aside the registration has passed, the judgment creditor may make an *ex parte* application to the court, which may then grant leave to enforce the registered judgment. The court will however not give its consideration to the enforcement of the judgment unless the application is supported by the correct proof of service as follows:

- (1) Personal service within the jurisdiction – a certificate of service by HM Sergeant in prescribed form.
- (2) Personal service outside the jurisdiction – an Affidavit of service in prescribed form.
- (3) Substituted service by a newspaper advertisement – a copy of an issue of the relevant newspaper.

Should the judgment creditor want a certified copy of the judgment and a certificate of the particulars of the action, he may make an application with an accompanying fee to the Bailiff who will direct the Greffier to issue them.

A judgment, whether registered (under the JREGL) or summary (under common law), can be enforced against a debtor's personalty and realty.

### **Personalty**

Goods can be arrested and on application sold through the agency of HM Sheriff. If there are numerous creditors a procedure called '*Detastre*' may be employed to realise all the debtor's non-excluded personalty. Wages can also be arrested.

### **Realty**

Judgment can also be registered against the debtor's realty subject to any prior charges. This method has the advantage of affording some priority. Realisation of the realty can be forced by a procedure called '*Saisie*'. Care should be taken, however, by a judgment creditor in adopting this approach since, once the decision to enforce against realty has been made, all rights to enforce against personalty are lost.

## 14.5 CONCLUSION

In conclusion then we can see that in a limited number of countries it is possible to enforce the judgment of foreign superior courts through the JREGL while in all other cases a relatively simple and straightforward common law solution, based very closely on the English precedent, prevails.

The effect of the JREGL is restricted by the definition of a relevant action *in personam*; the need to prove the jurisdiction of the original Court and the types of judgment that can be registered. However, taking these limitations into account, it can often be a useful tool for judgment creditors, who have obtained judgment outside Guernsey and who have good grounds to believe that there are valuable assets within Guernsey, for enforcing that judgment in Guernsey.

## CHAPTER 15

### JERSEY

*Mike Cushing and David Benest\**

15.1 Introduction	193
15.2 Statutory enforcement	194
15.3 Customary law rules	200

#### 15.1 INTRODUCTION

In the recent case of *IMK Family Trust*,<sup>1</sup> Deputy Bailiff Birt said this:

We consider that ‘enforcement’ of a foreign judgment means the situation where the judgment creditor comes to [the Royal Court] and requests that [it] give effect to the judgment in Jersey, either by registration ... or by giving a judgment in identical form to the foreign judgment without reconsidering the merits, which can then be enforced against the debtor here in Jersey in the same way as any other Jersey judgment.<sup>2</sup>

We thus consider the provisions for statutory registration and, where such remedy is not available, the ‘enforcement’ of a foreign judgment at common or customary law.

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<sup>1</sup> [2008] JRC 136.

<sup>2</sup> Ibid, at para 62.

## **15.2 STATUTORY ENFORCEMENT**

As a general rule, foreign judgments cannot be directly enforced in Jersey and it is necessary for the holder of a foreign judgment to commence fresh proceedings before the Royal Court of Jersey to seek to enforce his rights in Jersey.

The principal exception to this general rule is where the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 (the 1960 Law) applies. Statutory provision is also made in Jersey for the recognition and enforcement of certain foreign matrimonial orders (under the provisions of the Recognition of Divorces and Legal Separations (Jersey) Law 1973 and the Maintenance Orders (Facilities for Enforcement) (Jersey) Law 2000) and for the enforcement of foreign arbitral awards under the provisions of the Arbitration (Jersey) Law 1998.

### **The 1960 Law – registration of a foreign judgement**

The 1960 Law makes provision for the registration by the Royal Court on the application of the judgment creditor, of certain foreign judgments. Once registered (and provided that the registration is not set-aside), the effect is that: (1) proceedings may be taken in Jersey on the registered judgment; (2) the Royal Court will have the same control over the execution of the registered judgment; and (3) the registered judgment shall be of the same force and effect in Jersey, as if the judgment was a judgment of the Royal Court entered on the date of registration.

The registration provisions under the 1960 Law are limited to judgments of the superior courts of countries which have been designated as reciprocating countries. The superior courts to which the 1960 Law applies are: the House of Lords, Court of Appeal and the High Court of England and Wales; the Court of Session and the Sheriff Court of Scotland; the Supreme Court of Judicature of Northern Ireland; Her Majesty's High Court of Justice of the Isle of Man (including the Staff of Government Division); and the Court of Appeal and Royal Court of Guernsey.

Provision is made in the 1960 Law for orders to be made by Jersey's legislature to extend the scope of the 1960 Law to judgments of the superior courts of other reciprocating jurisdictions. As at the date of writing the authors are not aware of any proposals for the 1960 Law to be extended to other territories.

The 1960 Law does not apply to all judgments of the superior courts of the reciprocating countries. Registration will only be ordered by the Royal Court if the following conditions are met: the judgment must be: (1) final and

conclusive; (2) it must be a judgment under which a sum of money is payable; and (3) the foreign court giving the judgment must have had appropriate jurisdiction. Certain matters are therefore noteworthy:

- (1) '*Final and conclusive*': what amounts to a final and conclusive judgment as between the parties was considered by the Royal Court in *In the Matter of Bells Application*<sup>3</sup> in relation to an application for the registration of a summary judgment on a debt obtained in the English High Court.

Following the position adopted in England under the Foreign Judgments (Reciprocal Enforcement) Act 1933, the Royal Court held that an application for registration of a foreign judgment for the recovery of a debt cannot be brought unless the judgment finally and conclusively (subject to any appeal to a higher court) settles the existence of the debt so as to become *res judicata* between the parties. In the instant case the Royal Court went on to conclude that a summary judgment of the English High Court was final and conclusive and therefore capable of registration under the 1960 Law. The fact that a judgment may be subject to or capable of appeal in the country of the original court does not mean that the judgment is not final and conclusive. Such a judgment is, therefore, capable of registration under the 1960 Law. The 1960 Law, Article 7(1) does, however, give power to the Royal Court, on the application of a judgment debtor, either to set aside the registration of a judgment or adjourn an application to set aside the registration for such period as appears to the Royal Court sufficient to enable the judgment creditor to take the necessary steps to have any pending or intended appeal disposed of in the country of the original court.

- (2) The judgment will not be a judgment of a superior court if it is a judgment given on appeal from a court which is not a superior court. In *Re Hardwick*<sup>4</sup> the Royal Court decided that a judgment obtained in an English county court was not capable of registration under the 1960 Law, despite the fact that the county court proceedings had, before the date of the application for registration of the judgment in Jersey, been transferred to the English High Court for enforcement.
- (3) The judgment must be one for a sum of money which has not been wholly satisfied. Where, therefore, the judgment is in respect of diverse matters, so that only some of the matters contained in the judgment are capable of

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<sup>3</sup> [1995] JLR 23.

<sup>4</sup> [1995] JLR 245.

registration under the 1960 Law, registration may be ordered to the extent of those matters alone (Article 4(5)).

- (4) The judgment must be capable of being enforced by execution in the country of the foreign court.
- (5) The judgment must not be in respect of taxes or other charges of a like nature or in respect of a fine or other penalty. This statutory provision reflects the Jersey customary law rule that the Jersey court will not enforce the penal and revenue laws of another state – *In Re Bamford*.<sup>5</sup>
- (6) The application for registration must be made within six years from the date of the judgment of the foreign court. Where there has been an appeal in the country of the original court in respect of the judgment, the six-year period runs from the last judgment given in the proceedings (Article 4(1)).

### **Making the application for registration**

The procedure for making an application to the Royal Court for the registration of a foreign judgment under the 1960 Law is governed by the Judgments (Reciprocal Enforcement) Rules 1961 (the Rules).

The application for registration must be made by summons with an affidavit in support (Rule 4). The Rules expressly provide that on an application for registration, the Royal Court may order the judgment creditor to provide security for the costs of the application for registration and for any proceedings which may subsequently be brought for the setting aside of the registration (Rule 5).

The application for registration may be made *ex parte*. The supporting affidavit must:

- (1) exhibit a certified copy of the judgment issued by the original court and authenticated by the seal of the original court;
- (2) exhibit a translation into English where appropriate;
- (3) state to the best of the information and belief of the maker of the affidavit that:

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<sup>5</sup> [2002] JLR N[34].

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- (a) the applicant is entitled to enforce the judgment;
  - (b) as at the date of the application for registration the judgment has not been wholly satisfied and what amount of the judgment remains unsatisfied;
  - (c) the judgment is capable of enforcement by execution in the country of the original court; and
  - (d) if the judgment were to be registered, the registration would not be, or be liable to be, set aside under the provisions of the 1960 Law;
- (4) specify the amount of interest (if any) which has become due under the law of the country of the original court as at the date of the application for registration;
  - (5) where the judgment sum is expressed in a foreign currency, state the amount of the sum in the currency of Jersey at the exchange rate prevailing at the date of the judgment;
  - (6) state the full name, title, trade or business and the usual or last known place of abode or of business of both the judgment creditor and the judgment debtor; and
  - (7) where only some of the provisions of the judgment are capable of registration under the 1960 Law, state the provisions in respect of which registration of the judgment is sought.

Where registration of the foreign judgment is ordered, the judgment creditor must serve notice on the judgment debtor (either by personal service within the jurisdiction of the Royal Court or in accordance with the applicable rules for service out of the jurisdiction) providing full details of the judgment registered, the judgment creditor's name and address for service and stating the right of the judgment debtor to apply to the Royal Court to have the registration set aside. The order for registration of the foreign judgment will specify the period within which notice of any application to set aside the registration must be given.

### **Setting aside registration of the judgment**

Any judgment registered under the 1960 Law is not capable of enforcement in Jersey until after the expiry of the period specified by the Royal Court for the making by the judgment debtor of any application to set aside the registration. The Rules further provide that if an application is made to set aside the registration of a judgment, the judgment shall not be enforceable in Jersey until the application to set aside has been disposed of.

An application to set aside the registration of a judgment must be made by summons with an affidavit in support. The 1960 Law provides that on an application by the judgment debtor to set aside the registration of a judgment,

the registration of the judgment *must* be set aside where the Royal Court is satisfied that:

- (1) the judgment is not one to which the 1960 Law applies or the judgment creditor has not complied with the procedure for registration of the judgment;
- (2) the judgment debtor did not (even if the proceedings were properly served in accordance with the law of the foreign court) receive notice of the proceedings in the foreign court in sufficient time to enable him to defend those proceedings and did not appear in those proceedings;
- (3) the judgment was obtained by fraud;
- (4) the enforcement of the judgment would be contrary to public policy in Jersey;
- (5) the person applying for registration in Jersey did not have the rights which are sought to be enforced in Jersey under the foreign judgment; or
- (6) the foreign court did not have jurisdiction (as to which see below).

The 1960 Law provides that the registration of a foreign judgment *may* be set aside where the Royal Court is satisfied that the judgment relates to a dispute which had previously to the date of the judgment in the foreign court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter ie that the dispute to which the judgment of the foreign court relates was *res judicata* at the time of the foreign court's judgment. As already stated, the Royal Court may also set aside the registration of a judgment in circumstances where an appeal is pending in the foreign court or the Royal Court is satisfied that the personal applying to set aside the registration is entitled to and is intending to appeal against the judgment.

### **Jurisdiction of the foreign court**

As set out above, the 1960 Law provides that the Royal Court must, on the application of the judgment debtor, set aside the registration of any judgment in relation to a dispute where the foreign court did not have jurisdiction.

- (1) In the case of a judgment given in an action *in personam*, the foreign court will be deemed to have had jurisdiction only if:
  - (a) the judgment debtor had submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings other than to seek the release of property seized or threatened with seizure in those proceedings or to contest the jurisdiction of the foreign court;
  - (b) the judgment debtor was a plaintiff in the foreign proceedings;
  - (c) the judgment debtor counter-claimed in the foreign proceedings;



- (d) prior to the commencement of the foreign proceedings the judgment debtor had agreed to submit to the jurisdiction of that court or the courts of that country;
  - (e) when the foreign proceedings were instituted, the judgment debtor was resident in or, if a corporation, had its principal place of business in the country of the foreign court; or
  - (f) the judgment debtor had an office or place of business in the country of the foreign court and the foreign proceedings were in respect of a transaction effected through or at that office or place of business.
- (2) In the case of a judgment given in an action where the subject matter of the proceedings is immovable property or in an action *in rem* where the subject matter is movable property, the foreign court will be deemed to have jurisdiction only if the property in question was at the time of the foreign proceedings situate in the country of that court. The 1960 Law does not deal expressly with the situation where, in relation to an action *in rem* concerning movable property, the movable property is situate in the country of the foreign court at the time that the foreign proceedings are instituted but that the property is removed from that country prior to the foreign judgment being obtained. The view of the authors is that in those circumstances the Royal Court would be likely to construe the provisions of the 1960 Law as deeming the foreign court to have had jurisdiction. This point has not, however, fallen for consideration by the Royal Court.
- (3) In the case of a judgment given in any other action, the foreign court will be deemed to have jurisdiction if the jurisdiction of the foreign court is recognised by the law of Jersey.
- (4) Notwithstanding what is set out at paragraphs 1 to 3 above, the foreign court will not be deemed to have had jurisdiction if:
- (a) the subject matter of the foreign proceedings was immovable property outside the country of the foreign court;
  - (b) the foreign proceedings were brought contrary to an agreement whereby the dispute in question was to be determined otherwise than proceedings in the courts of the country of the foreign court (save where paragraphs (1)(a), (b), (c) or (3) above apply); or
  - (c) the judgment debtor was a person entitled to immunity in the jurisdiction of the foreign court under rules of public international law and did not submit to the jurisdiction of the foreign court.

### 15.3 CUSTOMARY LAW RULES

As noted, the procedure for the registration of a judgment of a foreign court is in many senses restrictive, confined as it is to the strictures of the 1960 Law and in particular to the enforcement of money judgments from the foreign courts of a limited number of jurisdictions. The Law, however, does not provide an exclusive regime so as to circumscribe the Royal Court's inherent jurisdiction to enforce foreign judgments at common law.

Foreign judgments may be enforced under the customary law, so that there is jurisdiction in the Royal Court to enforce the judgments from those countries where there is not a reciprocal enforcement regime and, given more recent authority, where the judgment is a non-monetary one.

Whilst English judicial authority is not binding on the Royal Court, Jersey has, generally, in matters touching the conflict of laws, followed the position under English common law. As to the enforcement of foreign judgements, that is most conveniently set out in Dicey, Morris & Collins, *The Conflict of Laws*.<sup>6</sup>

Although, the enforcement of a foreign judgment at English common law is dealt with under Rule 35(1) of Dicey, it is helpful to set out both Rules 34 and 35(1) which are as follows:

Rule 34 – A judgment of a court of a foreign country (hereinafter referred to as a foreign judgment) has no direct operation in England 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.

Rule 35 – (1) Subject to the Exceptions hereinafter mentioned and to Rule 55 (international conventions), a foreign judgment *in personam* given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 36 to 39, and which is not impeachable under any of Rules 42 to 45, may be enforced by a claim or counterclaim for the amount due under it if the judgment is:

- (a) 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 other penalty); and
- (b) final and conclusive, but not otherwise.

<sup>6</sup> 14th edn (London: Sweet & Maxwell, 2006), at Rule 35.

Until the recent decision of the Royal Court in *Brunei Investment Agency and Bandone Sdn Bhd and Others v Fidelis Nominees Ltd and Others*,<sup>7</sup> there was some uncertainty as to the Royal Court's jurisdiction to enforce a foreign non-monetary judgment. In *IMK Family Trust*<sup>8</sup> Birt DB, in *obiter* comment, considered that the customary law position in Jersey may historically have gone somewhat further, being more flexible in its approach, than the common law in England and Wales. Reviewing the authority of *Lane v Lane*<sup>9</sup> the Deputy Bailiff considered that the language of the judgment was consistent with the Royal Court having a discretion as to whether to enforce a non-monetary judgment; the question was, however, left open.

In the *Brunei* case the matter was dealt with definitively, holding that the Royal Court, adapting to modern day circumstances, should have a discretion to give effect to foreign non-monetary judgments.

The case contains a comprehensive review of the various international authorities in this area including those coming from the Canadian and Cayman Islands courts and their reasoning for a departure, in this respect, from the English common law position. In effect, what is said is that the world is now a smaller place – a community. The Royal Court quoted with approval the Canadian case of *Morguard Investments Limited v De Savoye*:<sup>10</sup>

The world has changed since the above rules [concerning the recognition and enforcement of foreign judgments] were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns parochial. The business community operates in a world economy and we correctly speak of a world community ... 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.

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<sup>7</sup> [2008] JRC 152.

<sup>8</sup> [2008] JRC 136.

<sup>9</sup> [1985–6] JLR 48.

<sup>10</sup> (1990) 3 SCR 1077.

Although *Morguard* was dealing with the recognition and enforcement of judgments within the provinces of Canada, the sentiment and reasoning was echoed in *Pro Swing Inc v Elta Golf Inc*<sup>11</sup> in which the Supreme Court of Canada removed the restriction on the ability to enforce foreign non-money judgments, within Canada itself. This is a restriction also removed in Cayman.<sup>12</sup>

The Royal Court also took support from the opinion, though *obiter*, of the Privy Council in the case of *Pattni v Ali*.<sup>13</sup>

The ability to enforce a non-monetary judgment remains, however, a discretion. There is no right to enforce a non-monetary judgment. It is, further, a discretion to be exercised cautiously.

The Royal Court in *Brunei* did not set out any general principles to be applied, but exercised its discretion in favour of enforcement on the facts of the case before it. It did that for the following reasons: (1) the court in the *Brunei* case had jurisdiction in accordance with Rule 35(1) and its judgment was final and conclusive; (2) the terms of the *Brunei* judgment and of the order sought in Jersey were clear and specific; (3) there was little likelihood of further supervision being required by the Royal Court; (4) the Royal Court was not being asked to extend greater judicial assistance to the applicants than it would extend to its own litigants; (5) there were no grounds upon which the court might refuse to exercise its discretion.

Of course, a foreign judgment, even though it may now be a non-monetary one, must nevertheless meet the other requirements set out in Rule 35 before it might be enforced. Jersey's case law dealing with the recognition and enforcement of foreign judgments is limited. The general principles which can be extracted from the Jersey case law on the recognition by the Jersey Courts, are as follows.

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<sup>11</sup> (2006) SCC 52.

<sup>12</sup> See *Miller v Gianne and Redwood Hotel Investment Corp* 2007 CILR 18.

<sup>13</sup> [2007] 2 AC 85.

The Royal Court will recognise a foreign judgment where: (1) the judgment is of a court of competent jurisdiction in the territory in which it was pronounced;<sup>14</sup> (2) the judgment is final and conclusive;<sup>15</sup> and (3) the judgment is not open to impeachment on any ground.<sup>16</sup>

Where the judgment is recognised, this will give rise to an estoppel *per rem judicatum*. In *Rahman Showlag v Mansour*,<sup>17</sup> the Privy Council stated on an appeal from the Jersey Court of Appeal that:

It is common ground between the parties that the doctrine of *res judicata* forms part of the Law of Jersey and that it applies to foreign judgments. In *Owens Bank Limited v Braco (2)*, Lord Bridge of Harwich said: [1992] AC at 484:

<sup>14</sup> As is the position under the 1960 Law, a fundamental requirement for the recognition or enforcement of a foreign judgment under Jersey law is that the foreign court should have had jurisdiction in relation to the matters the subject of the foreign proceedings according to Jersey conflict of laws principles. In the area of conflicts of laws, the Jersey courts have tended to follow English common law principles in relation to conflicts of laws.

<sup>15</sup> In *Abdel Rahman v Chase Bank (CI) Trust Co Ltd* [1990] JLR 59, the Royal Court cited with approval English Court of Appeal authority setting out the well established principle that even though a judgment may be subject to further appeal or under appeal, it is still final and conclusive so as to enable an action to be brought on it.

<sup>16</sup> There is little Jersey authority which addresses the circumstances in which a judgment of a foreign court is open to impeachment. At first instance in *Rahman Showlag v Mansour* [1991] JLR 367, the Royal Court indicated that only in exceptional circumstances would it decline to recognise a judgment of a foreign court of competent jurisdiction. The Royal Court went on to say (obiter) that such exceptional circumstances would arise where the method by which the foreign court had come to its final decision was contrary to Jersey views of substantial justice. The Royal Court also indicated that it may decline to recognise a foreign judgment where 'special circumstances' exist, such as fresh material becoming available or a development in the law post-judgment which shows quite clearly that the case had been wrongly decided either in fact or in law. (Note that the decision in this case was overturned on appeal to the Privy Council although the Privy Council did not deal expressly with the circumstances in which the court might exercise a discretion not to recognise a foreign judgment. It appears, in any event, that the comments of the Royal Court in relation to 'special circumstances' were limited to the exercise of discretion where an issue estoppel is alleged.) In the context of an application to seek to enforce in Jersey an order of the English High Court in matrimonial proceedings, the Royal Court in the more recent case of *In Re The Fountain Trust* [2005] JLR 359 had regard to whether the method by which the English High Court had come to its decision was contrary to Jersey views of substantial justice.

<sup>17</sup> [1994] JLR 113.

‘A foreign judgment given by a Court of competent jurisdiction over the Defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced in an action on the judgment by an English Court in which the Defendant will not be permitted to reopen issues of either fact or law which had been decided against him by the foreign Court’

This statement holds good in Jersey as it does in England.

The Privy Council considered in *Rahman Showlag* which of two competing foreign judgments set up the *res judicata* stating that:

the correct general rule is that where there are two competing foreign judgments, each of which is pronounced by a Court of competent jurisdiction and is final and not open to impeachment on any ground, then the earlier of them in time must be recognised and given effect, to the exclusion of the later.

The Privy Council went on to state that it must be borne in mind that there may be circumstances in which a party holding a competing judgment which is earlier in time may be estopped from relying on it.