The Representation of the Brunei Investment Agency and Bandone Sdn Bhd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Allo, Morgan
Judgment Date:	16 September 2008
Neutral Citation:	[2008] JRC 152
Reported In:	[2008] JRC 152
Court:	Royal Court
Date:	16 September 2008

Text

[2008] JRC 152

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Allo **and** Morgan.

In the Matter of the Representation of the Brunei Investment Agency and Bandone Sdn Bhd

And in the Matter of Karinska Limited and Greencap Limited

Between
The Brunei Investment Agency and Bandone Sdn Bhd
Representors
and

(1) Fidelis Nominees Limited

and

(2) Rostand Nominees Limited

and

(3) Karinska Limited

and

(4) Premier Circle Limited

and

(5) Second Circle Limited

and

(6) Third Circle Limited

and

(7) Greencap Limited

and

(8) Duli Yang Teramat Mulia Paduka Seri Pengiran Digadong Sahibul Mal Pengiran Muda Haji Jefri Bolkiah (known as His Royal Highness Prince Jefri Bolkiah ("Prince Jefri")
Respondents

Advocate K. J. Lawrence **for the Representors**.

Advocate F. B. Robertson **for the Eighth Respondent**.

Advocate R. J. Macrae **for the First, Second and Third Respondents**.

Advocate M. H. D. Taylor **for the Fourth, Fifth, Sixth and Seventh Respondents**.

Authorities

Lane v Lane [1985-86] JLR 48.

Compass Trustees Limited v McBarnett [2002] JLR 321.

Judgments (Reciprocal Enforcement) (Jersey) Law 1960.

Trusts (Jersey) Law 1984.

IMK Family Trust [2008] JRC 136.

The Conflict of Laws 14th edition, Dicey, Morris and Collins.

The Origin and Development of Jersey law, an Outline Guide by Stéphanie Nicolle.

Ball v King [2006] JRC 171.

Mrs F M v ASL Trustee [2006] JRC 020A.

In the matter of B Trust [2006] JLR 562.

In the matter of H Trust [2006] JLR 280.

In the matter of H Trust [2007] JRC 187.

In the matter of the Turino Retirement Trust [2008] JRC 100.

Schibsby v Westenholz (1870) LR 6 QB 155.

Adam v Cape Industries Plc (1990) Ch 433.

Showlag v Mansour [1994] JLR 113.

ex parte Wimborne [1983] JJ 17.

Sadler v Robins (1808) 1 Camp. 253.

Pro Swing Inc v Elta Golf Inc (2006) SCC 52.

Injunctions and Specific Performance (2nd edition, 1992) Sharpe.

Morguard Investments Limited v De Savoye (1993) S.C.R.10777.

Miller v Gianne and Redwood Hotel Investment Corporation (2007) CILR18.

Mbasogo and another v Logo Limited and others (2007) QB 846.

Attorney General in and for the United Kingdom v Heinemann Publishers Australia Pty Limited (1988) 165 CLR 30n.

Government of the Islamic Republic of Iran v The Barakat Galleries Limited (2008) 1 All ER 1177.

Arab Monetary Fund v Hashim (unreported).

City of Gotha and Federal Republic of Germany v Sotheby's, (9 September 1998, unreported).

Grupo Torras SA v Al-Sabah (1999) CLC 1469.

Attorney General of Zambia (for and on behalf of the Republic of Zambia) v Meer Care &

Desai (a Firm) (2007) EWHC 952 (Ch).

In the matter of the Esteem Settlement and the No. 52 Trust (Abacus (C.I.) Limited as Trustee [2002] JLR 53.

The King of Two Sicilies v Willcox (1851) 1 Sim (NS) 401.

Colombian Government v Rothschild (1826) 1 Sim 94.

United States of America v Wagner (1867) LR 2 CH App 582.

King of Spain v Hullett (1828) II Bligh (NS) 31.

Emperor of Austria v Day and Kossuth (1861) 3 De GF & J 217.

United States v McCrae (1867) LR 3 Ch App.

King of Italy v de Medici Tornaquinci (1918) 34 TLR 623.

Don Jose Ramos Yzquierdo Y Castaneda v Clydebank Engineering and Shipbuilding Company Limited (1902) AC 524 (HL(Sc)).

Bandone and the Brunei Investment Agency v Sol Properties Inc and others Cause No. 86 of 2008.

Minories Finance Ltd v Ayra Holdings Limited [1994] JLR 149.

European Convention on Human Rights.

Human Rights (Jersey) Law 2000.

COMMISSIONER:

1 In this case, the first representor ("the BIA"), seeks orders for the transfer of shares in two Jersey companies, beneficially owned by the eighth respondent ("Prince Jefri") to the second representor ("Bandone") under principles of comity. The Jersey companies concerned and the nominee shareholders (comprising the first to seventh respondents) rested upon the wisdom of the Court and were released from participating in the hearing.

Background

2 Prince Jefri is the youngest brother of His Majesty the Sultan and Yang-di Pertuan of Brunei Darussalam ("the Sultan"). In February 2000, the BIA and the government of Brunei Darussalam began proceedings against Prince Jefri in the High Court of Brunei Darussalam, alleging misappropriation and misapplication of more than 15 billion US dollars of State funds by Prince Jefri whilst he had been the Minister of Finance for Brunei Darussalam and chairman of the BIA. These proceedings were compromised in May 2000

on the terms of a settlement agreement ("the Settlement Agreement") dated 12th May 2000 and the proceedings were stayed by a "Tomlin order" dated 13th May 2000 in conventional form.

3 The core terms of the Settlement Agreement were that Prince Jefri was to be relieved of the civil claims against him, any potential criminal proceedings in respect of the alleged misappropriation and misapplication of State funds and that he would effectively be rendered immune from all liabilities owed by him and his family to other third parties as at the date of the Settlement Agreement. In exchange, Prince Jefri was to disclose to the BIA what had become of the BIA's funds and return to the BIA the remainder of those funds and any and all assets acquired with those funds.

4 While some assets were returned by Prince Jefri in 2000 and 2001, he refused to transfer many other assets, including the shares in the Jersey companies, which continue to be beneficially held by him through nominees.

5 In 2004, the BIA applied in Brunei Darussalam for summary enforcement of the Settlement Agreement under the liberty to apply contained in the Tomlin order.

6 On 25th March 2006, the High Court of Brunei Darussalam ordered Prince Jefri to perform his obligations under the Settlement Agreement, including in particular his obligation to transfer the shares in the Jersey companies to the BIA, or at its direction ("the Brunei Judgment"). The BIA has nominated Bandone to receive the shares in the Jersey companies.

7 Prince Jefri's appeal to the Court of Appeal of Brunei was dismissed on 20th May 2006. Two further appeals to the Privy Council were dismissed on 8th November 2007. In the second of its two judgments, the Privy Council made the following observations:-

> " ***The Government and the BIA case is clear and simple.*** Prince Jefri settled the claims made against him by signing the Settlement Agreement under which he was to restore the assets that he was said to have misappropriated. He has not carried out the obligations he accepted under that Agreement. None of this is, or can be, disputed. The case is a simple one. The complications are introduced by Prince Jefri's search for a means of extricating himself from the obligations he has accepted under the Settlement Agreement and, after careful examination of all the evidence, these complications fall away."

8 Shortly after the decisions of the Privy Council, Prince Jefri did release into the sole custody of the BIA various valuable diamonds, but he has since refused to transfer to the BIA or Bandone any of the other assets which he owns and which he is obliged to transfer pursuant to the terms of the Settlement Agreement.

9 In January 2008, the BIA and Bandone obtained judgment in the High Court of Malaysia ordering the transfer to Bandone of the shares in the ultimate holding company of a US hotel and on 5th June 2007 the BIA and Bandone obtained judgment in the Grand Court of the Cayman Islands substituting Bandone for Prince Jefri as the registered shareholder of the ultimate holding company of a further US hotel. Other proceedings commenced by the BIA and Bandone for the recovery of assets are currently pending in the courts of Singapore, Japan and Malaysia and we are informed that further proceedings for the recovery of assets in other jurisdictions are being prepared.

Representors' case

10 The representors submit that pursuant to the principles of comity recognised by the Court in *Lane v Lane* [1985-86] JLR 48 and *Compass Trustees Limited v McBarnett* [2002] JLR 321 and by reference to the principles set down by the Privy Council in *Pattni* as to the basis on which the common law may recognise and give effect to the *in personam* rights as validly determined by a foreign court, this Court should recognise the *in personam* determination of the parties' rights by the courts of Brunei Darussalam as binding upon Prince Jefri and his privies and be prepared to give such relief as may be appropriate to enable the decisions made by the foreign court to be given effect to in Jersey.

11 Prince Jefri, whilst accepting that he is personally bound by the Settlement Agreement, and the Brunei Judgment, says the Court cannot make the orders sought in these proceedings for the following reasons:-

We take the arguments in that order.

(i) That in reality, this is an application to enforce a foreign judgment which under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 ("the 1960 Law"), which Prince Jefri submitted governed the enforcement of all foreign judgments, or at English common law (which should be followed in Jersey) is not permitted in the case of a non money judgment. There is no residual jurisdiction to enforce foreign non money judgments and in particular, the doctrine of comity is not relevant to the question of foreign judgments whether or not they are for a definitive sum. Alternatively any residual jurisdiction is confined to the court's supervisory jurisdiction under Article 51 of the Trusts (Jersey) Law 1984.

(ii) To give effect to the Brunei Judgment would be to give extra territorial effect to the public laws of a foreign state.

(iii) The Brunei Judgment purports to take effect *in rem* over matters which are exclusively in the remit of this Court and constitute an exorbitant use of the Brunei court's jurisdiction.

(iv) To the extent that the Court has a discretion to give effect to the Brunei Judgment, it should not do so given that (a) there is no mutuality of remedy as between the

parties, given that the BIA and Bandone are immune from suit, (b) the underlying Brunei proceedings did not adhere to the principles of natural justice applied by this Court, (c) Prince Jefri has a substantial counterclaim in existing proceedings in New York against the BIA in relation to certain Brunei properties and (d) there are public policy grounds against doing so relating to the desirability of fundamental changes to the law being properly a matter for the legislature and to Jersey's standing as a reliable and independent offshore jurisdiction.

Enforcement of a foreign judgment

12 Whether you describe the representors' application as enforcing a foreign judgment or giving effect to it, the real issue is whether the Court should make the orders requested with or without reconsidering the merits. The representors understandably wish to avoid the potential delay and expense of a hearing on the merits. Although not available at the time of the hearing, Birt, Deputy Bailiff, in *IMK Family Trust* [2008] JRC 136 put it this way:-

> " ***We consider that "enforcement" of a foreign judgment means the situation where the judgment creditor comes to this Court and requests that this Court give effect to the judgment in Jersey, either by registration (in the case of judgments covered by the [Judgments (Reciprocal Enforcement) (Jersey) Law 1960) 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"***.

13 Using "enforcement" in that sense (which we shall do in this judgment), it is clear that the representors are seeking to enforce the Brunei Judgment.

14 Dicey, Morris and Collins, The Conflict of Laws 14th edition ("Dicey") at paragraph 14-003, when considering the distinction between enforcement and recognition, make it clear that it is the person in whose favour the judgment is pronounced who may seek to have that judgment executed or otherwise carried out as against the person against whom it is given.

15 In relation to private international law, the Jersey courts have consistently had regard to English common law (see The Origin and Development of Jersey law, an Outline Guide by Stéphanie Nicolle, para 15.33) and in particular to the rules in Dicey. For recent examples see *Ball v King* [2006] JRC 171 at paragraph 27 and *IMK Family Trust* at paragraph 37.

16 The 1960 Law has only been extended to England and Wales, Scotland, Northern Ireland, the Isle of Man and Guernsey and would not therefore apply to any judgments issuing from Brunei. Whilst article 8 provides that no proceedings for the recovery of the sum payable under a judgment to which the law applies, other than proceedings by way of registration of a judgment, shall be entertained by any court in Jersey, there is nothing to support Prince Jefri's submission that the 1960 Law governs the enforcement of all other foreign judgments

to the exclusion of the Court's inherent jurisdiction. That would mean that the Court had no inherent power to enforce judgments from territories other than those listed above and we reject the submission. We are therefore concerned with the inherent jurisdiction of the Court to enforce foreign judgments.

17 The enforcement of a foreign judgment under English common law is dealt with under Rule 35(1) of Dicey, but 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."***

18 Dicey comments on clause 1 of Rule 35 as follows:-

> " ***For a claim to be brought to enforce a foreign judgment, the judgment must be for a definite sum of money, which expression includes a final order for costs, e.g. in a divorce suit.*** It must order X, the defendant in the English action, to pay to A, the claimant, a definite and actually ascertained sum of money; but if a mere arithmetical calculation is required for the ascertainment of the sum it will be treated as being ascertained; if, however, the judgment orders him to do anything else, e.g. specifically perform a contract, it will not support an action, though it may be res judicata".

19 Prince Jefri submits that the courts in *Lane* (and the trust cases which followed it namely, *Compass*; *Re Fountain Trust*; *Mrs F M v ASL Trustee* [2006] JRC 020A; *In the matter of B Trust* [2006] JLR 562; *In the matter of H Trust* [2006] JLR 280; *In the matter of H Trust* [2007] JRC 187; and *In the matter of the Turino Retirement Trust* [2008] JRC 100) fell into

error in so far as the doctrine of comity was relied upon in order to give effect to foreign judgments. Comity is not a basis for the recognition and enforcement of judgments and has been explicitly rejected as such by the English courts in *Schibsby v Westenholz* (1870) LR 6 QB 155 and *Adam v Cape Industries Plc* (1990) Ch 433. In *Schibsby*, Blackburn J stated at paragraph 159:-

> " ***The judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce"***.

This principle (the theory of obligation) was cited with approval by the Court of Appeal in *Showlag v Mansour* [1994] JLR 113 at 118. Accordingly, it is argued that the recognition and enforcement of judgments in Jersey is to be dealt with exclusively by rules of law, namely by the English common law rule set out in Dicey at Rule 35(1) and that in the premises the Court has no jurisdiction to enforce a non money judgment.

20 Rule 35(1) does not appear to have been considered in *Lane* (as far as can be ascertained from the judgment), in which it was held that where there was a declaration of a competent English court, properly made, submitted to by the same parties and not appealed, the doctrine of comity required that the declaration of the English court be given effect to, provided that it was clear that the defendant had had every opportunity to raise all relevant defences at that hearing.

21 The facts in *Lane* were that on 15th November 1977 the Family Division of the English High Court ordered by consent that the wife should transfer to the husband all her estate and interest in a property in Jersey of which they were the joint owners and to execute a power of attorney in favour of the person nominated by the husband and/or such other documents as were necessary to effect the transfer. The wife executed the power of attorney as ordered but for reasons, which were later accepted by both the English and Jersey courts, the transfer had not been effected by 23rd February 1983 when the husband died. On his death, the property vested in the wife by right of survivorship and she cancelled the power of attorney. In March 1984 the husband's heir to his Jersey realty, his eldest son and principal heir and one of his executors, applied to the Family Division and obtained a declaration from Sheldon J. ([1986]) 1 FLR at 288) that the consent order of 15th November 1977, in so far as it remains unperformed, remained valid and enforceable against the wife, notwithstanding the death of the husband. No consequential orders or directions were given by the Family Division. The proceedings in Jersey were pursued by the husband's heir to his Jersey realty (the plaintiff) against the wife (the defendant).

22 The plaintiff submitted that the Court ought, as a matter of comity, to enforce the declaration of the Family Division and that the method of doing so would be to invoke the Court's equitable jurisdiction. Quoting from page 60 of the judgment of Crill, Deputy Bailiff:-

> " ***That same sense of fairness was expressed in a different manner by Sheldon, J ([1986] 1 FLR at 288).*** It offends this court's sense of fairness that whereas Mr Lane completed what he had undertaken to do in November 1977,

> and to some extent Mrs Lane also, except for the formal passing of the appropriate contract, she should now be able to keep 'Cramond'. However, are we able to do anything about it? We were told by Mr Barlow, an experienced Chancery barrister, that if the position were reversed and an English court were asked to make a similar order, it would do so".

23 Thus, on the basis of evidence from English counsel that the English courts would have reciprocated if the roles were reversed, the Court used comity as its reason for invoking its equitable jurisdiction which (following *ex parte Wimborne* [1983] JJ 17) it equated to "équité" or fairness.

24 It is clear that the Court was familiar with English common law rules as set out in Dicey in that it applied Rule 185(2) of the 1973 edition (see page 56 line 22 of the judgment) in finding that the declaration of the Family Division was conclusive between the parties. Rule 185(2) equates to Rule 42(2) of the current edition which provides:-

> " ***A foreign judgment cannot, in general, be impeached on the ground that the court which gave it was not competent to do so according to the law of the foreign country concerned"***.

25 We note that there was no judgment of the Family Division which the plaintiff in *Lane* was in a position to enforce. She was not a party to the 1977 consent order which was made in favour of the husband, who had since died. Although she and the defendant were parties to the declaration of March 1984, a declaratory judgment is not capable of enforcement (see Dicey paragraph 14-003).

26 Thus the plaintiff was not a judgment creditor and did not have a judgment in her favour capable of enforcement. Apparently working outside the English common law rules in relation to enforcement of foreign judgments, the plaintiff relied upon the doctrine of comity as a means by which to invoke the jurisdiction of the Court in order for it to give effect to the declaration of the Family Division.

27 Whether or not it was necessary for the court in *Lane* to have addressed Rule 35(1) of Dicey, the BIA is before us seeking to enforce a judgment in its favour and in our view we should work within the English common law rules which have direct application. We should either apply Rule 35(1) or amend it in so far as it is applied in Jersey.

28 According to Dicey, the restriction in Rule 35(1) on the enforcement of non money judgments is derived from the case of *Sadler v Robins* (1808) 1 Camp. 253, some two centuries ago (see note 62 page 574). The world has changed considerably since then and the restriction has been the subject of reappraisal by the Canadian and Cayman Islands courts. In *Pro Swing Inc v Elta Golf Inc* (2006) SCC 52, the Supreme Court of Canada held that there was a compelling case for adapting the common law rule that prevented the enforcement of foreign non money judgments. Quoting from the majority judgment:-

> " ***Modern-day commercial transactions require prompt reactions and effective remedies.*** The advent of the internet has heightened the need for appropriate tools. On the one hand, frontiers remain relevant to national identity and jurisdiction, but on the other hand, the globalisation of commerce and mobility of both people and assets make them less so. The law and the justice system are servants of society, not the reverse. The court has been asked to change the common law. The case for adapting the common law rule that prevents the enforcement of foreign non money judgments is compelling. But such changes must be made cautiously."

The court recognised that departing from the fixed sum component of the traditional common law rule would open the door to equitable orders such as injunctions which are key to effective modern day remedies:-

> " ***The recognition and enforcement of equitable orders will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to collect a debt .....*** such a change must be accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system".

29 Supervision of orders often means re-litigation and the expenditure of judicial resources and the Court referred to the following extract from Injunctions and Specific Performance (2nd edition, 1992) by Sharpe at para 7.480:-

> " ***From this perspective, the supervision concern differs from other criteria determining the availability of specific relief.*** It is based not upon the weighing of relative advantage and disadvantage to the parties but rather on the weighing of the advantage of doing justice by granting specific relief against the general cost to society of having justice administered. By way of contrast to specific relief, damage awards do hold certain advantages. A money judgment is final and enforcement is left to the administrative rather than the judicial machinery of the court. The cost of enforcement is largely borne by the parties. A decree for specific performance does involve a substantially higher risk that further judicial resources will be required. The more complex or extended the performance, the more likely further proceedings will be needed to ascertain whether the defendant has complied with his or her obligations. This fear of extended and complex litigation and the need for repeated requests for judicial intervention may be seen as a legitimate concern. The cost to society of providing the resources necessary to implement specific performance decrees is properly considered by the court when weighing the advantages the specific relief might otherwise offer".

The Canadian court did not develop exhaustively the criteria a court should take into account but both the majority and minority judgments emphasised the need for caution.

30 Prince Jefri submitted that the decision in *Pro Swing* should itself be viewed with caution because in Canada comity is treated as a basis for the enforcement and recognition of judgments, whereas it has been explicitly rejected as such by the courts of Jersey and England. It cites the Canadian case of *Morguard Investments Limited v De Savoye* (1993) S.C.R.10777 as authority for that proposition. *Morguard* was concerned with the recognition and enforcement of judgments within the provinces of Canada. It is clear from the judgment (page 17) that the Canadian courts have until recent years unanimously accepted English authority when dealing with the recognition of foreign judgments which was inevitable until 1949 when appeals to the Privy Council were abolished. It pointed out that those rules were developed in 19th century England and flew in the face of the obvious intentions of the Canadian constitution to create a single country where there is a strong need for the enforcement throughout the country of judgments given in one province. In the view of the majority judgment in *Pro Swing*, *Morguard* led the way to developing common law to better serve the interests of all litigants, foreign and domestic and it quoted from the following passage in *Morguard*:-

> " ***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 appear parochial. The business ***community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power.*** Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal".

31 It seems to us that the Canadian court was not treating comity as a basis for the enforcement and recognition of foreign judgments but was using comity as a tool for adapting or reshaping the common law rule (see Dicey paragraph 1-011).

32 The case of *Pattni* concerned an application to enforce in the Isle of Man an order of the Kenyan High Court for the transfer by the respondent of shares in an Isle of Man company. The facts are therefore very similar to the case before us. The Privy Council was concerned with a preliminary issue as to whether the judgment of the Kenyan court was a judgment *in rem* which the Kenyan court had no jurisdiction to make. The Privy Council expressed the following opinion:-

> " ***As presently advised, though the arguments did not address the point (or it may be need to under the terms of the two preliminary issues presently in issue), their Lordships would think it clear that, where a court in state A makes, as against persons who have submitted to its jurisdiction, an in personam judgment regarding contractual rights to either movables or intangible property (whether in the form of a simple chose in action or shares) situate in state B, the courts of state B can and***

should recognise the foreign court's in personam determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such rights in state B. The extent to which this is possible might be limited by the law of state B, as the situs or in the case of shares as the place of incorporation of the relevant company (in this case, as both)".

33 Prince Jefri argues that these comments of the Privy Council are obiter and certainly the Privy Council itself acknowledged that there had been no argument on the point. In *Miller v Gianne and Redwood Hotel Investment Corporation* (2007) CILR18, the Chief Justice of the Grand Court of the Cayman Islands held that this was no basis for doubting that the Privy Council had disapproved *Sadler* from which, as previously noted, the restriction under English common law appears to have been derived. In our view the clear implication of the Privy Council's judgment was to remove the bars that had been raised by way of preliminary points against the recognition and enforcement of the Kenyan order in the Isle of Man so that it was now enforceable in the Isle of Man. Certainly the opinion of the Privy Council given in this context, even if strictly obiter, carries very substantial weight and gives a clear indication as to the direction in which this court should be proceeding.

34 The Cayman Islands court in *Miller*, following *Pro Swing* and *Pattni*, held that the ability to enforce directly foreign judgments and orders made *in personam* is no longer confined in the Cayman Islands to judgments for debt or a definite sum of money. The Chief Justice commented that the jurisdiction to provide relief by way of recognition of foreign non monetary judgments may well have existed in equity even before the emergence of the rule which was derived from the case of *Sadler*:-

" ***The inclination in the modern jurisprudence now to grant recognition and enforcement by way of equitable remedies such as specific performance, injunctive or declaratory relief and pleas of res judicata, may well be regarded as a re-emergence of that jurisdiction which has always existed in equity, even if rendered dormant over the years in deference to the limitations of the traditional common law rule.*** For an elucidatory discussion of the subject see White, Enforcement of Foreign Judgments in Equity, (1980-82) 9 Sydney Law Review at 630-648".

35 The reasons which have compelled the courts in Canada and the Cayman Islands to change the common law rule are equally compelling here. In our view the restriction in relation to non money judgments under English common law (Rule 35(1) of Dicey) should, in its application to this jurisdiction, be amended so as to give the court a discretion (consistent with that exercised in *Lane*) to enforce non-monetary judgments but, for the reasons set out in *Pro Swing*, it is a discretion that is to be exercised cautiously. That discretion is not confined, and we can see no good reason to confine it, to the Court's supervisory jurisdiction under Article 51 of the Trusts (Jersey) Law 1984.

Giving effect to public laws of a foreign state

36 Prince Jefri submits that the Court should not give effect to the Brunei Judgment on the basis that to do so would be to directly or indirectly enforce the public law of a foreign state. Rule 3 of Dicey provides that:-

> " ***English courts have no jurisdiction to entertain an action:***
>
> ***(1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or***
>
> ***(2) founded upon an act of State"*** .

37 Prince Jefri argues that to give effect to the Settlement Agreement and/or the Brunei Judgment would constitute an extraterritorial expression by Brunei and the Sultan as its Head of State of sovereign power within the meaning annunciated by the English Court of Appeal in *Mbasogo and another v Logo Limited and others* (2007) QB 846 or in the alternative that the State of Brunei and/or the Sultan have a clear "governmental interest" in the enforcement of the Settlement Agreement in the Brunei Judgment as annunciated by the Australian courts in *Attorney General in and for the United Kingdom v Heinemann Publishers Australia Pty Limited* (1988) 165 CLR 30n and as approved by the English Court of Appeal in the *Government of the Islamic Republic of Iran v The Barakat Galleries Limited* (2008) 1 All ER 1177. This was not a submission advanced by Prince Jefri before the Malaysian or Cayman Island courts.

38 Prince Jefri points to the following features of the Settlement Agreement in support of this submission:-

> (i) The parties include the Head of State of Brunei Darussalam as represented by his Government and the BIA;
>
> (ii) The subject matter of the agreement is the assets of the Head of State;
>
> (iii) The agreement compromised claims by the state based upon alleged misappropriation by a former member of government;
>
> (iv) The conclusion of the agreement is motivated by the desire to maintain the stability of the State of Brunei (in its current form) and the integrity of its Head of State and their financial affairs; and
>
> (v) It purports to bind the public prosecuting/criminal authorities of Brunei, criminal proceedings being proceedings brought in the public interest and not for any vindication of private law or individual rights.

39 It is for the Court to characterise the claim of the BIA (see *Mbasogo* para 50) which we have no doubt is a 'patrimonial claim' in which the BIA seeks to recover property due to it

under the provisions of the Settlement Agreement and this irrespective of the features relied upon by Prince Jefri. It is not a claim to enforce a public law or to assert sovereign rights or governmental interests. As was stated by the English Court of Appeal in *Mbasogo* at paragraphs. 42-43:-

> " ***As Lord Denning MR made clear in the Ortiz case, his judgment was influenced by the article by Dr F A Mann 'Prerogative Rights of Foreign States and the Conflict of Laws'*** 40 TR Gro Soc 25, ***to which we have referred at para 26 above.*** Dr Mann said, at p 34:
>
> ' ***Where the foreign state pursues a right that by its nature could equally well belong to an individual, no question of a prerogative claim arises and the state's access to the courts is unrestricted.*** Thus a state whose property is in the defendant's possession can recover it by an action in detinue. A state which has a contractual claim against the defendant is at liberty to recover the money due to it. If a state's ship has been damaged in a collision, an action for damages undoubtedly lies. On the other hand, a foreign state cannot enforce in England such rights as are founded upon its peculiar powers of prerogative. Claims for the payment of penalties, for the recovery of customs duties or the satisfaction of tax liabilities are, of course, the most firmly established examples of this principle'.
>
> ***We agree*** .
>
> ***In a later article on 'The International Enforcement of Public Rights'*** (1987) 19 New York University of International Law and Politics 603, 629-630 ***Dr Mann said that the decisive question is whether the plaintiff asserts a claim that, by its nature, involves the assertion of a sovereign right.*** Quoting Grotius, he suggested that claims are capable of international enforcement if they arise from acts that may be done not only by the King, but also by anyone else: 'actus qui a rege sed ut a quovis alio fiant' .
>
> ***Again we agree"*** .

40 As was made plain from the decision of the English Court of Appeal in *Islamic Republic of Iran*, claims by states to recover their stolen property do not fall within the 'public law' preclusionary rule expressed by Dicey and cannot be characterised as being claims in respect of which the 'central interest of the state bringing the action is governmental in nature' and therefore ought not to be entertained (see paragraphs 112-121).

41 The representors point out numerous recent examples of the English courts entertaining such patrimonial claims and recognising such 'patrimonial rights' in the context of foreign states or asset holding agencies of foreign states seeking the recovery in England of misappropriated state assets namely:-

> *Arab Monetary Fund v Hashim* (unreported) - claim by an agency holding assets for certain Arab States brought against its former chairman to recover

misappropriated assets and their proceeds;

City of Gotha and Federal Republic of Germany v Sotheby's, (9 September 1998, unreported) (Moses J) — claim to recover a painting said to belong to the German State - referred to at paragraph 135 of Islamic Republic of Iran;

Grupo Torras SA v Al-Sabah (1999) CLC 1469 - claims by wholly owned subsidiary companies of the Kuwait Investment Agency ('KIA') against (amongst others) a former chairman of the KIA office in London and director of the companies for losses ultimately suffered by the companies and the KIA and recovery of assets owned by them as a consequence of the fraudulent conduct of its former officer;

Attorney General of Zambia (for and on behalf of the Republic of Zambia) v Meer Care & Desai (a Firm) (2007) EWHC 952 (Ch) — claims by the state to recover misappropriated states assets from its former president, other Government officials and third parties;

Islamic Republic of Iran - claim to recover ancient artifacts belonging to the State of Iran:-

> " ***..... when a state owns property in the same way as a private citizen there is no impediment to recovery***" (at paragraph 136).

42 The Jersey courts have also entertained and recognised such patrimonial claims, for example the *Esteem Settlement* series of judgments, in which the Jersey Court presided over claims by wholly owned subsidiaries of the KIA in parallel proceedings to the *Grupo Torras* litigation described above (see for example *In the matter of the Esteem Settlement and the No. 52 Trust (Abacus (C.I.) Limited as Trustee* [2002] JLR 53).

43 As is plain from the decisions of the English Court of Appeal in *Mbasogo* and *Islamic Republic of Iran* the ability of a foreign state, government or sovereign to sue in England to protect its 'patrimonial'/proprietary rights and the recognition of such rights by the English courts has never been doubted and is of some antiquity as illustrated by the following cases:-

Other examples included: *King of Spain v Hullett* (1828) II Bligh (NS) 31; *Emperor of Austria v Day and Kossuth* (1861) 3 De GF & J 217 (referred to in *Mbasogo* paragraphs 22-27, *Barakat* paragraphs 112 & 129); *United States v McCrae* (1867) LR 3 Ch App and *King of Italy v de Medici Tornaquinci* (1918) 34 TLR 623, referred to in *Barakat* paragraphs 128, 136.

(i) *The King of Two Sicilies v Willcox* (1851) 1 Sim (NS) 401 in which the plaintiff claimed title to a ship situated in England and purchased with state funds stolen from the state. The plaintiff's title to the ship was recognized and given effect to by the English court:-

> " ***The case upon the record is a simply told tale, uniform from beginning to end, of the rebellious subjects of an absolute sovereign having taken the opportunity of the state of rebellion to possess themselves of some part of the Royal property which belonged to the Plaintiff King.*** He succeeded in putting down the rebellion; and the parties who were in rebellion having made use of their actual power over the Royal fund, to send it, in the shale of bills to this country, did not acquire any right to the property as against their sovereign ... [I]t seems to my mind, to be laid down as clear as any proposition can be, that the independent sovereign of a State is competent, in this country, to sue for his personal rights ..."

(ii) *Colombian Government v Rothschild* (1826) 1 Sim 94, at 104 in which it was held that:-

> " ***....a foreign state is as well entitled as any individual to the aid of this Court in the assertion of its rights***".

(iii) *United States of America v Wagner* (1867) LR 2 CH App 582 at 591 in which it was held that:-

> " ***The right of a foreign state which has been recognized by Her Majesty, whether it be a monarchy or a republic, to sue in the Courts of this country for public property belonging to the state, has not been, and cannot be, denied***."

44 It is equally clear that the English courts will entertain claims made by foreign states, governments or sovereigns or their agents which are claims to enforce contractual rights.

45 In *Don Jose Ramos Yzquierdo Y Castaneda v Clydebank Engineering and Shipbuilding Company Limited* (1902) AC 524 (HL(Sc)) Lord Robertson said (at page 531):-

> " ***....the question here is whether or not the right parties are suing; and it appears to me to be perfectly immaterial to consider for this purpose whether or not the ultimate interest may be in the King of Spain or in whom it may be.*** The shipbuilders here have entered into an express contract with a person who is called in the contract the Minister of Marine of Spain to build certain ships; and what is incident to that contract, the right to enforce that contract and to enforce the penalties under that contract, is in the contracting party. That contracting party has brought the action, and it appears to me that it is impossible to say that there is no right in him to sue ... Here is a lawful contract entered into between parties ascertained, and the simple question is whether that is a contract which can be enforced in this country by the present appellants. (Per Lord Halsbury at page 529).
>
> ***There is nothing in the municipal law of Scotland which places any obstacle which is unknown in England in the way of the enforcement of***

contracts, and therefore in the way of the making of contracts, with foreign governments. The judgment is rested, and rested solely, on grounds common to both England and Scotland."

46 Thus the representors submit that under English common law a direct claim by a foreign state, government or sovereign to recover property or to enforce a contract will not be held non-justiciable and the same principles should apply in Jersey. If the law were otherwise, it would mean that Jersey would be a jurisdiction were funds stolen from foreign states, governments and sovereigns could be remitted and held by the wrongdoers, without risk of the rightful owners being able to recover them through the courts, and where no contract with a foreign state, government or sovereign could be enforced.

47 We agree with the representors that it must follow that a claim by the BIA in Jersey based upon the Settlement Agreement:-

(i) entered into voluntarily by Prince Jefri in Brunei Darussalam and governed by the laws of Brunei Darussalam;

(ii) which effected a compromise of the original claim;

(iii) which vests beneficial title to the assets the subject of the Settlement Agreement in the BIA, cannot possibly fall foul of the preclusionary rule stated in Dicey. Therefore, it must equally be the case that proceedings by the BIA to have its *in personam* rights under the Settlement Agreement (as determined by the Courts of Brunei Darussalam) recognised in Jersey cannot be precluded by the relevant rule.

Judgment In rem

48 Prince Jefri submits that the Brunei Judgment:-

(i) purports to take effect *in rem* over matters which are exclusively within the remit of this Court; and

(ii) constitutes an exorbitant use of the Brunei court's jurisdiction given its intended *in rem* effect and being directed at (a) the Jersey companies when there is no evidence that any of the underlying Brunei proceedings have been served on them or that they have otherwise participated in the Brunei proceedings or submitted to the jurisdiction of the Brunei court and (b) the Jersey nominee shareholders who were not parties to the Settlement Agreement or the Brunei proceedings. Accordingly, the Brunei Judgment should not be given effect to by this Court.

49 This was the issue dealt with by the Privy Council in *Pattni* on facts that as we have said are very similar. The respondents had agreed to sell to the appellant their shareholdings in a Manx company. The Kenyan judge gave judgment for the appellant and issued an order

requiring the respondents " ***to transfer all the 100% shares in***" the company to the appellant " ***as per the said sale and purchase agreement***". It was held by the Privy Council that a judgment to have effect *in rem*, had to be a determination regarding the status or disposition of property which was to be valid as against the whole world and not merely between the parties. An order purporting actually to transfer or dispose of the property was to be distinguished from a judgment determining the contractual rights of parties to property. The obvious aim and effect of the Kenyan judgment was to establish and give effect to the parties' rights *inter se*, with regard to the shares and affairs of the company and that it did not constitute or involve any adjudication *in rem* relating to those shares, nor did it purport actually to transfer or deal with the shares as opposed to determining the parties' rights and duties relating to them. The order requiring the respondents to transfer the shares in the company was a classic order *in personam* for specific performance of an agreement which had been found by the judge to exist and which had been breached by the respondents.

50 This same argument was run by Prince Jefri before the Cayman Islands court (in the proceedings brought there by the representors seeking similar relief in relation to companies beneficially owned in that jurisdiction by Prince Jefri (*Bandone and the Brunei Investment Agency v Sol Properties Inc and others Cause No. 86 of 2008*)) and rejected on the authority of *Pattni*. We too reject the submission. The Brunei Judgment is a judgment *in personam*.

Grounds for not exercising discretion

51 Prince Jefri put forward a number of reasons for the Court not exercising its discretion to enforce the Brunei Judgment which we take in turn.

Mutuality.

52 It was argued that there is no mutuality of remedy as between the parties given that the BIA and Bandone are immune from suit. The Privy Council did not deal with this issue as it was precluded from doing so by the terms of the Brunei (Appeals) Order No. 2396, the statutory instrument giving the Privy Council jurisdiction to consider appeals from Brunei, but it was dealt with by the Brunei Court of Appeal which found that the BIA is amenable to suit. Prince Jefri argues that the Court of Appeal only addressed itself to the question of amenability to suit rather than immunity. It is not disputed that the BIA is a statutory corporation which can sue and in the normal course be sued, and has therefore no immunity *rationae personae*. However, Prince Jefri's submission is that by reason of Article 84B of the Constitution of Brunei the representors are immune *rationae materiae* from claims where they are acting on behalf or pursuant to the instructions of the Sultan. In other words, the representors are not liable to any proceedings whatsoever in respect of any acts done or not done with the authority of the Sultan.

53 We agree with the judgment of the Cayman Islands court in *Bandone* that this submission is bound to fail. The Court of Appeal of Brunei was considering the BIA's possible immunity from suit specifically in connection with the obligations imposed upon it by the Settlement Agreement and found in Prince Jefri's favour in that respect, namely that the BIA can be ordered by the High Court there to perform its remaining Settlement Agreement obligations. In any event, the matter having been determined by the courts of Brunei Darussalam he is estopped from attempting to raise the issue in these proceedings (see *Minories Finance Ltd v Ayra Holdings Limited* [1994] JLR 149 at 162).

Fair Trial

54 Again Prince Jefri's submissions in relation to this issue were put to and rejected by the Cayman court in *Bandone* and we adopt its reasoning. It pointed out that the Privy Council dealt with these submissions conclusively.

55 It is, however, the case that this Court, unlike the Cayman Islands court, is bound by the European Convention on Human Rights ("the Convention") and pursuant to Article 71(1) of the Human Rights (Jersey) Law 2000, we cannot exercise our powers in any way which is incompatible with a Convention right, namely in this case Prince Jefri's right under Article 6 of the Convention to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Privy Council considered the principles enshrined in Article 6 of the Convention (see para 26 of its judgment on the procedural issue). In doing so, it confined itself to proceedings by the BIA to enforce summarily Prince Jefri's obligations under the Settlement Agreement into which he admittedly entered and concluded that there were no grounds to say that Prince Jefri could not receive a fair trial in relation to such proceedings. (Paras 26 - 32 of the judgment on the procedural issue). Having regard to the findings of the Privy Council we are satisfied that to enforce the Brunei Judgment is not incompatible with Prince Jefri's Convention rights.

Counter-claim in New York

56 Prince Jefri seeks a stay of these proceedings pending determination of a claim he is bringing against the BIA in New York in relation to certain properties in Brunei. New York has been chosen because of concerns both as to the immunity of the BIA in the courts of Brunei and that he will not receive a fair trial. His claim may need to be set off against any liabilities owed by him to the BIA which set off will not engage the immunity of the BIA. The assets in Jersey should be preserved for that purpose. This application is made in the face of the New York courts refusing to impose a restraining order on assets there for the same purpose.

57 A similar application was made to and refused by the Cayman Island courts in *Bandone* which pointed out that in the judgment of the Supreme Court of the State of New York (6 th March 2008) Helen E. Freedman, J. found that Prince Jefri would suffer no irreparable harm

in the absence of a preliminary injunction, that he had not shown likelihood of succeeding on the merits and that the balance of equities did not weigh in his favour. We too reject the application for the same reasons (page 19 *Bandone*).

Public policy considerations

58 Prince Jefri submits that a significant number of holding companies and other offshore vehicles have been established in Jersey against the background of the Island's reputation as a significant and independent offshore financial centre. The establishment of such structures has no doubt been undertaken on the basis and understanding that they would be subject to the laws of Jersey as they existed at the material time including presumably the laws and rules relating to the enforcement of claims against assets held in Jersey. To enforce foreign orders in the circumstances of this case would represent in his submission a fundamental change to the law relating to recognition and enforcement of foreign judgments, which would be undesirable. Such a change should be a matter for the States of Jersey to consider after proper consultation and debate.

59 Whilst we accept that consistency in law is important, the Court, in following English common law rules of private international law, has the power to adapt those rules to reflect the requirements of this jurisdiction. As stated in *Morguard*, those rules were developed in the main in the 19th century and there is a compelling case for the reappraisal of the restriction on the enforcement of foreign non money judgments in order to meet modern needs. The law is there to reflect the interests of all litigants, whether plaintiffs or defendants and in our view public policy dictates that the courts should at least have the discretion, to be exercised cautiously, of enforcing foreign non-money judgments given by courts of competent jurisdiction without reconsidering the merits. In making this change to English common law rules as applied in Jersey we are following the lead given by the Supreme Court of Canada in *Pro Swing* and the clear opinion expressed by the Privy Council in *Pattni*, noting that the Cayman Islands (and it would seem the Isle of Man) have made the same change.

Exercise of our discretion

60 The caution with which our discretion is to be exercised in this incremental evolution of the English common law (Rule 35(1) of Dicey) as applied in Jersey militates against our attempting to define the criteria that the court should take into account beyond saying that it is a discretion that should be exercised on the facts of this case for the following reasons:-

(i) The Brunei court had jurisdiction to make the Brunei Judgment in accordance with the requirements set out in Rule 35(1) of Dicey and it is final and conclusive.

(ii) The terms of the Brunei Judgment and of the orders sought in this application are clear and specific.

(iii) The first to seventh respondents, who have raised no concerns as to the terms of the order sought, know exactly what they have to do. There is little likelihood of further supervision being required by the Court.

(iv) We will not be required to extend greater judicial assistance to the representors than we would to our own litigants.

(v) In our view there are no grounds upon which we should refuse to exercise our discretion. On the contrary, we are mindful of the observations of the Privy Council referred to in paragraph 7 above.

61 Accordingly, in the exercise of our discretion and for the reasons set out above, we grant the application and make the orders set out in paragraph (C) of the prayer to the representation.