

## Royal Court enforces non-money judgment of the High Court of Brunei Darussalem

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 [2008] JRC 152

Royal Court (Commissioner J A Clyde-Smith, Jurats Allo and Morgan), judgment 16 September 2008

### Introduction

This case arises in the context of ongoing attempts in several jurisdictions by the Brunei Investment Agency (BIA) to secure the return of assets by Prince Jefri Bolkiah. It comes a month after the Royal Court's important judgment *In the matter of IMK Trust, Mubarak v Mubarik* [2008] JRC 136, which clarified the basis for enforcement of foreign judgments involving Jersey trusts (see separate Carey Olsen briefing note, *An Important Trust Case - Jersey Royal Court Decision in Mubarak v Mubarik*, September 2008).

In *Mubarak* the Deputy Bailiff touched on, but did not need to decide, the extent to which a foreign non-money judgment (a judgment which is not for a definite and ascertained sum of money, such as an order for specific performance of a contract) would be enforced in Jersey, noting "*if we have correctly understood the position under English law, it may be that Jersey law has gone somewhat further*". The task for the Royal Court in the *Representation of the Brunei Investment Agency and Bandone* was to determine how far Jersey law had gone.

### Facts

In proceedings commenced in the High Court of Brunei in 2000, the BIA and the Government of Brunei alleged that

Prince Jefri misappropriated and misapplied more than US\$15 billion of state funds while he was Minister of Finance and chairman of the BIA. Those proceedings were compromised by way of a settlement agreement and Tomlin Order in May 2000, which required Prince Jefri to disclose to the BIA what had become of the BIA's funds and to return to the BIA the remainder of those funds and any assets acquired with those funds.

Prince Jefri returned some assets in 2000 and 2001, but refused to transfer many other assets including shares in two Jersey companies (Karinska Limited and Greencap Limited) which were held for him by Jersey nominees.

In March 2006 the High Court of Brunei ordered Prince Jefri to perform his obligations under the settlement agreement, including his obligation to deliver the shares in the Jersey companies to the BIA or its nominee (Bandone) (the **Brunei Judgment**). Appeals by Prince Jefri to the Court of Appeal of Brunei and to the Privy Council were dismissed. The BIA and Bandone brought enforcement proceedings in several jurisdictions including Malaysia, the Cayman Islands, Singapore, Japan, and Jersey.

The Jersey proceedings sought an order of the Royal Court recognising the Brunei Judgment as binding upon Prince Jefri and his privies and such relief as appropriate to enable the Brunei Judgment to be given effect in Jersey (i.e. orders to allow the shares in Karinska Limited and Greencap Limited to be transferred to Bandone). The Jersey nominee shareholders indicated that they would abide by the decision of the Royal Court, and were released from participation in the hearing.



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### Principles of conflicts of law

#### English common law

Rule 35(1) of Dicey, Morris & Collins *The Conflicts of Laws* (14th edition, 2006) provides that a judgment of a foreign court can only be enforced if it is for a debt or definite sum of money and the foreign court had jurisdiction for the purpose of Rule 35 over the judgment debtor. A declaratory judgment, or a judgment awarding specific performance, is not enforceable at common law because it is not a judgment for a debt or a sum of money. A judgment which requires more than a mere arithmetical calculation to ascertain the sum due to be paid will not be enforced, although it may be determinative between the parties to it of the factual and legal issues that it decides (i.e. *res judicata*).

Dicey explains that while enforcement of foreign judgments was once thought to be based on the doctrine of comity (mutual assistance between courts of foreign jurisdictions), the basis is now understood to be that a judgment of a court of competent jurisdiction over the judgement debtor imposes a duty or obligation on him or her to pay the sum for which judgment is given.

#### Jersey law

The Judgments (Reciprocal Enforcement) (Jersey) Law 1960 provides for the enforcement of certain judgments of superior courts of "reciprocating countries" (at the date of this article England and Wales, Scotland, Northern Ireland,

the Isle of Man and Guernsey). Where the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 does not apply, the enforceability of a foreign judgment is governed by common law. In determining the common law of Jersey the Courts have had regard to the English rules of conflicts of law, however the Jersey Courts have tended to rely on the doctrine of comity rather than the theory of obligation.

In *Lane v Lane* [1985-86] JLR 48 the Royal Court of Jersey considered whether to enforce an order of the Family Division of the High Court of England requiring transfer of an interest in Jersey real property (i.e. it was not a judgment for a sum of money). The Court 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 enabled the declaration of the English court to be given effect to, provided that it was clear that the defendant had every opportunity to raise all relevant defences at that hearing. In coming to this conclusion the Court did not explain why Rule 35(1) of Dicey did not apply or would not be followed.

In *Mubarak*, the Deputy Bailiff noted that the theory of obligation does not fit well with the enforcement of non-money judgments. The language of the judgment in *Lane v Lane* suggested that enforcement of non-money judgments was discretionary, rather than a matter of entitlement (as is the case with money judgments). However it was not necessary to resolve that matter in the *Mubarak* case.



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### Decision on the Representation of the Brunei Investment Agency and Bandone SDN BHD

One of Prince Jefri's numerous submissions was that the decisions of Jersey Courts which had relied on the doctrine of comity to give effect to foreign judgments, including *Lane v Lane*, were incorrectly decided. Prince Jefri argued that the only basis for enforcement of foreign judgments is the theory of obligation as explained in Dicey. In consequence, he submitted, the Royal Court had to follow the English rules of common law described above, and had no jurisdiction to enforce non-money judgments such as the order for transfer of the shares in Karinska Limited and Greencap Limited to the BIA/Bandone.

The Court noted that in the past foreign non-money judgments were not enforceable because to enforce them would require the local court to get involved in supervision and policing of such orders (in particular in the case of equitable remedies such as injunctions and orders for specific performance). However, both Canadian and Cayman Island Courts have recently doubted the absolute rule against enforcement of non-money judgments of a foreign court, and the Privy Council in *Pattni v Ali* [2007] 2 AC 85 (Isle of Man) had made observations which supported enforcement of foreign non-money judgments.

The Court decided to modify Rule 35(1) of Dicey for Jersey law purposes rather than rely on the doctrine of comity. The Court did not state whether it considered that *Lane v Lane* was correctly decided. The Royal Court held that Rule 35(1) should be amended to give the Court discretion (consistent with that exercised in *Lane v Lane*) to enforce non-money judgments. The Court will exercise the discretion cautiously,

given the issues of supervision which may arise.

The Court did not list criteria that should be taken into account in future cases invoking the Court's discretion to enforce foreign non-money judgments, but held that the discretion should be exercised in the present case for the following reasons:

- The Brunei Court had jurisdiction to give judgment in accordance with the requirements set out in Rule 35(1) of Dicey and the Brunei Judgment was final and conclusive.
- The terms of the Brunei Judgment and the orders sought in the application to the Royal Court were clear and specific.
- The Jersey nominees and the Jersey companies had raised no concerns as to the terms of the orders sought and knew exactly what they would have to do. There was little likelihood of further supervision being required by the Court.
- The Court would not be required to extend greater judicial assistance to the BIA/Bandone than it would to its own litigants.
- There were no grounds upon which the Court should refuse to exercise its discretion. On the contrary, the Court was mindful of the observations of the Privy Council on Prince Jefri's attempts to extricate himself from the obligations he had accepted under the settlement agreement.



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### Comment

The Royal Court has not overruled *Lane v Lane*, so whether the doctrine of comity continues to be an independent ground for giving effect to foreign judgments in Jersey remains to be seen. However, where a party seeks to enforce a non-money judgment of a foreign court submitted to by the parties who are before the Royal Court (or their privies) the Royal Court will apply Rule 35(1) of Dicey, as modified in this case, and will have discretion to enforce the non-money judgment.

In this case the shares were held for Prince Jefri by the Jersey nominees. This meant that the nominees could be regarded as Prince Jefri's privies, and the Brunei Judgment could be enforced against them as if they were party to it. Had the shares been held on a discretionary trust, enforcement of the Brunei Judgment would have raised additional issues.

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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