Privy Council Appeal No. 44 of 1993

Abdul Rahman Showlag *Appellant*

v.

(1) Abdel Moniem Mansour
(2) First Union Corporation SA and
(3) Eaglesfield Limited *Respondents*

FROM

THE COURT OF APPEAL OF JERSEY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH MARCH 1994

Present at the hearing:-

LORD KEITH OF KINKEL
LORD JAUNCEY OF TULLICHETTLE
LORD BROWNE-WILKINSON
LORD WOOLF
LORD NOLAN

*[Delivered by **Lord Keith of Kinkel**]*

The late Sheikh Abdul Ahmed Showlag died on 27th May 1989. He had carried on a business as money broker and money changer in Saudi Arabia and had accumulated a very large fortune, estimated at between US$200 million and 300 million. This had included two deposits, together worth about £17.5 million, held in London banks. The first was a deposit of 1,533,173,358 Spanish pesetas held at the Banco Hispano Americano and the second was one of US$11,719,540.50 at the Bank of Tokyo. After the Sheikh's death his representatives discovered that these deposits no longer existed, having been transferred in late November and early December 1988 to an account at Banque Paribas, Switzerland, in the name of a company called Showlag S.A. This company had been incorporated in Panama by Abdel Moniem Mansour and was wholly owned by him. Mr. Mansour, an Egyptian national, had been employed by the Sheikh in connection with his business affairs in London. Mr. Mansour claimed that the money in the deposits had been gifted to him by the Sheikh at the end of November 1988.

Most of the money from the account of Showlag S.A. was dispersed by Mr. Mansour to a number of different countries, including Jersey and, as to the bulk of it, Egypt. The Sheikh's heirs believed that the money had been stolen by Mr. Mansour, and they instituted proceedings against him in various jurisdictions including England, where he was ordinarily resident, claiming a declaration that he was a constructive trustee of the money and other assets representing the money, and an accounting. Steps were taken to obtain interim freezing measures over assets in Jersey and Switzerland, as well as England. As regards Egypt, it was necessary in order to obtain a freezing order to secure the institution by the Attorney General there of a criminal prosecution against Mr. Mansour, who had by this time removed himself to Egypt, and this was done, the heirs being joined as partie civile. After sundry procedure the English action, to which Mr. Mansour had entered defences, was put down for trial on 26th November 1990. Mr. Mansour sought an adjournment but this was refused by Hoffman J. for reasons which need not be gone into. Mr. Mansour then withdrew instructions from the solicitors and counsel who had up to that point represented him, and the trial took place in his absence. On 5th December 1990 Hoffman J., having heard evidence which included affidavits furnished by Mr. Mansour for the purpose of earlier interlocutory proceedings, gave judgment for the plaintiffs in the action. The judgment contains a devastating destruction of Mr. Mansour's claim that the money was a gift.

The next developments took place in the Egyptian proceedings. On 31st December 1990 the Muharram Bey Court in Alexandria found Mr. Mansour guilty of having stolen the deposits in the two London banks and sentenced him to three years imprisonment with labour. The court declined to deal with the heirs' civil claim and ordered that it be referred to the competent civil court. However, Mr. Mansour appealed against that decision to the Misdemeanours Court of Appeal of East Alexandria, and on 23rd May 1991 that court allowed the appeal and set aside the judgment of the lower court. It appears that the heirs had also appealed against the refusal of the lower court to deal with their civil claim, and that appeal was rejected and the civil claim dismissed. The ground of the Court of Appeal's decision was that Mr. Mansour had indeed received the money in the two deposits as a gift by the Sheikh. The heirs and the public prosecutor appealed to the Court of Cassation to set aside the decision of the Misdemeanours Court of Appeal, *inter alia*, on the ground, so it appears, that one of the judges who had heard the argument had not been present at the deliberation of the judges nor signed the judgment whereas a judge who had not heard the argument had taken part in the deliberation and been party to the judgment. That appeal is still pending.

The two actions out of which the present appeal arises were commenced by the heirs in the Royal Court of Jersey in October 1989. There were two actions because sums

alleged to be part of the misappropriated deposits had on instructions emanating from Mr. Mansour been placed with two different financial institutions in Jersey, but the same issues arise in both actions, so that it is unnecessary to consider them separately. The remedies sought, in addition to injunctions of a holding character, were (1) a declaration that the relevant monies were held in trust for the estate of the late Sheikh, (2) an order for delivery up of the monies to the plaintiffs, with interest, and (3) damages for fraud. The Jersey proceedings were stayed pending the outcome of the litigation in England. Mr. Mansour in his original defence pleaded that the money in the deposits was gifted to him by the Sheikh. Following the judgment of Hoffman J. the plaintiffs moved to strike out the defences on the ground that the question whether or not there had been a gift was now *res judicata* for the purpose of the Jersey proceedings, and on 12th June 1991 the Judicial Greffier granted the motion. However, following the decision of the Misdemeanours Court of Appeal in Egypt on 23rd May 1991 Mr. Mansour on 2nd December 1991 applied to the Royal Court for reversal of the order of the Judicial Greffier and for leave to amend his defences so as to plead that the decision of 23rd May 1991 constituted *res judicata* as regards the issue of gift or no gift in the Jersey proceedings. On 23rd December 1991 the Royal Court allowed Mr. Mansour's appeal, apparently on the ground that it was uncertain as to the effect of the decision of the Misdemeanours Court of Appeal and desired further argument about that. It is not clear whether the Royal Court allowed Mr. Mansour to amend his defence so as to plead that the decision of the Misdemeanours Court of Appeal represented *res judicata* in Jersey. It may be that the question whether the amendment should be allowed was intended to await decision in the light of the further argument contemplated.

The heirs appealed to the Court of Appeal of Jersey. On 28th October 1992 that court (Sir Patrick Neill, Q.C., R.D. Harman Q.C. and A.C. Hamilton Q.C.) dismissed the appeal. The grounds for the decision appear to have been that the court was uncertain whether the Egyptian judgment qualified for recognition in Jersey as that of a court of competent jurisdiction and further that, if it did, the heirs having taken proceedings against Mr. Mansour in two different jurisdictions (England and Egypt) and obtained judgment in their favour in one but not in the other could not insist upon the favourable judgment being applied in Jersey, irrespective of whether that judgment was the first or the second to be delivered. The Jersey Court of Appeal concluded its own judgment by suggesting that instead of further proceedings directed to establishing the status of the Egyptian decision and the correct application of the doctrine of *res judicata* the parties might prefer the merits of the case to be litigated afresh in Jersey. The Court of Appeal of Jersey refused leave to the heirs to appeal to Her Majesty in Council on the ground that it had no power to do so in an

interlocutory matter. However, on report by the Board Her Majesty granted special leave to appeal on 12th May 1993.

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. Bracco* [1992] A.C. 443 Lord Bridge of Harwich said at page 484:-

> "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 have been decided against him by the foreign court."

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

However, here the Jersey court is faced with the unusual situation that there are two incompatible foreign judgments, each of which is accepted by the unsuccessful party to it as being for present purposes that of a court of competent jurisdiction and not open to challenge in Jersey on any of the traditional grounds such as fraud. The respondent takes no point upon the circumstance that the trial before Hoffman J. took place in his absence. The appellant contends that the judgment of Hoffman J., being earlier in time, should prevail over the decision of the Egyptian court. The respondent on the other hand maintains that if either of the judgments is to be treated as creating an estoppel *per rem judicata* it should be the later one. In their Lordships' opinion the choice must indeed lie between these alternatives. The course taken by the Court of Appeal of Jersey was to afford the appellant an opportunity to adduce argument and perhaps evidence, including expert evidence, directed to establishing that the Egyptian judgment had characteristics such as might persuade the court that it should not be recognised. It was further suggested that the preferable course might be to have the relevant issues on the merits relitigated in Jersey. It is hard to see that the first course could produce any useful result, since no indication is given as to the kind of considerations which a Jersey court might regard as sufficient to result in a denial of recognition to the Egyptian judgment, and if no such considerations emerged the problem would still remain of deciding whether to give effect to the judgment of Hoffman J. or to that of the Egyptian court. A trial of the merits of the case in Jersey would involve that multiplication of litigation which the doctrine of *res judicata* is designed to avoid.

In their Lordships' opinion 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. At the same time it is to be kept in mind that there may be circumstances under which the party holding the earlier judgment may be estopped from relying on it. In Spencer Bower and Turner Res Judicata page 331 it is said:-

> "385 ... where an estoppel *per rem judicatam* meets an estoppel by representation, there is a genuine cross-estoppel, in the strictest sense of the word. For here, A. having established a good estoppel by *res judicata* against B., B. confesses and avoids such estoppel by alleging and proving that A., by representation, has precluded himself from relying upon the *res judicata*. B. does not deny that he is estopped, but insists that A. is estopped from saying so ..."

In *Republic of India v. India Steamship Co. Ltd. (The Indian Grace)* [1993] A.C. 410 one of the questions at issue was whether the plaintiffs, consignees of a cargo of artillery shells carried in the defendants' vessel, who had obtained a judgment in their favour in an action in India for non-delivery of a small number of shells, were entitled to bring an action in England claiming damages for total loss of the cargo due to overheating as a result of a fire. The defendants pleaded that the plaintiffs were barred from bringing the action by section 34 of the Civil Jurisdiction and Judgments Act 1982. It was held that that would ordinarily be the position, but that the plaintiffs were entitled to plead that the defendants were estopped by representation from invoking section 34. In reaching that conclusion Lord Goff of Chieveley, who delivered the leading speech, referred to the passage from Spencer Bower and Turner which is quoted above.

The Indian Grace was, of course, a case where a foreign judgment was founded on as creating a bar *per rem judicatam* to proceedings in England by a plaintiff relying on the same cause of action. But similar principles must fall to be applied where the domestic court is dealing with two competing foreign judgments. If there are circumstances connected with the obtaining of the second judgment which make it unfair for the party founding on the first to seek to enforce it, then it may be proper to refuse to allow him to do so. It is not alleged by the respondent in the present case that there are any such circumstances here.

The view that where there are competing foreign judgments the earlier in time should receive effect to the exclusion of the later finds support from a consideration of the Judgments (Reciprocal Enforcement) (Jersey) Law 1960, which is for all practical purposes in identical terms to the corresponding United Kingdom Act of 1933. The Act provides for the registration in Jersey of any money judgment of a superior court originating in a country which affords reciprocal facilities and for its enforcement by execution. Article 6 deals with cases in which

registered judgments must, or may, be set aside. Article 6(1)(a) provides that such a judgment shall be set aside if the court is satisfied of various grounds, being those upon which traditionally a foreign judgment may be impeached, such as that the courts of the country in question had no jurisdiction, that the judgment was obtained by fraud, or that enforcement of it would be contrary to public policy in Jersey. Article 6(1)(b) provides that the registration of the judgment:-

> "may be set aside if the Royal Court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter."

This indicates, at the lowest, a preference for the earlier in date of two foreign judgments. It is true that the sub-paragraph does not exclusively contemplate that the two judgments will be incompatible, but it certainly covers that case. It is argued for the respondent that a complete discretion is given to the court whether or not to set aside a registered judgment which is later in time than the other one. It is not, however, reasonable that such should have been the intention. The discretion must be exercised in the light of certain recognised principles, so that the court will not refuse to set aside the registered judgment unless there exists some good ground for so refusing. Such grounds would no doubt be present if the earlier judgment was vulnerable to impeachment by virtue of one of the matters specified in Article 6(1)(a), or if there were present an estoppel by representation the possibility of which was recognised in *The India Grace*.

Article 9 of the Act of 1960 deals with the general subject of the recognition of foreign judgments. It provides:-

> " (1) Subject to the provisions of this Article, a judgment to which Part II of this Law applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the Island as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings.
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> (2) This Article shall not apply in the case of any judgment -
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> (a) where the judgment has been registered and the registration thereof has been set aside on some ground other than -
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> (i) that a sum of money was not payable under the judgment; or

(ii) that the judgment had been wholly or partly satisfied; or

(iii) that at the date of the application the judgment could not be enforced by execution in the country of the original court; or

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

(3) Nothing in this Article shall be taken to prevent any court in the Island recognising any judgment as conclusive of any matter of law or fact decided therein if that judgment would have been so recognised before the coming into force of this Law."

The effect of this Article is to make applicable for the purpose of regulating the recognition of foreign judgments as a general question the principles contained in Article 6. Thus where a judgment, had it been a registered judgment, would have been liable to have its registration set aside either under Article 6(1)(a) or under Article 6(1)(b), then it is not to receive recognition. So a judgment which is later in date than another foreign judgment which dealt with the same disputed matter is not to be recognised unless there exists some such ground as discussed above which would have led to refusal to set aside the later judgment had it been registered. Article 9(3), it would seem, has the purpose of preserving any common law rule as to the recognition of foreign judgments which prevailed before the coming into force of the law. However, there is no authority nor any other basis for holding that before the coming into force of the law there existed in Jersey any common law rule inconsistent with Article 9(2)(b). If any such rule did exist, it would give rise to extreme difficulties in connection with the application of Article 6(1)(b) to registered judgments. If, on the other hand, there were no such rule, no problem would arise.

It is of some significance to note that in the Brussels Convention of 1968 on jurisdiction and enforcement of judgments in civil and commercial matters there appears Article 27(5), which provides that a judgment (which means a judgment of another contracting state) shall not be recognised:-

"... if the judgment is irreconcilable with an earlier judgment given in a non-Contracting State involving the same cause of action and between the same parties, provided that the latter judgment fulfils the conditions necessary for its recognition in the State addressed."

Jersey is not one of the parties to the Convention, but the circumstance that this rule finds its place in this important international convention must be of some persuasive effect in the consideration of whether a similar preference for an earlier judgment in time may appropriately form part of Jersey law, in the absence of any contrary authority.

Some reference was made in the course of argument to the position in United States law, where the last-in-time rule appears to be applied in the case of conflicting judgments, at least when the matter arises in an inter-state context where the "full faith and credit" clause of the Constitution applies. In an article published in (1969) 82 Harvard Law Review 798 Professor Ruth B. Ginsburg (now a Justice of the United States Supreme Court) examines the basis of the rule, and suggests that it is not applicable in the international area. The rationale of the rule appears to be that the second judgment has the effect of deciding that the first judgment does not constitute *res judicata* so that the second constitutes *res judicata* of that issue as well as of any others that may have been raised. This is so whether or not the issue of *res judicata* was argued in the second proceeding by the party who was successful in the first, because on ordinary principles a party is not entitled to raise in a later proceeding a point which was open to him in an earlier one but which he did not take. Their Lordships do not consider that the position in the United States is of assistance for present purposes, but they observe that there would clearly have been no question of Hoffman J.'s judgment being capable of being founded on as *res judicata* for the purpose of the proceedings in Egypt, considering that these proceedings were primarily of a criminal character.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the orders of the Court of Appeal of Jersey and of the Royal Court should be set aside and that the order of the Judicial Greffier should be restored. The first respondent must pay the appellant's costs both before the Board and in the courts below.