

## **ENFORCEMENT OF FOREIGN JUDGMENTS IN ENGLAND: NO ASSETS, NO PROBLEM?**

### *Introduction*

Enforcement of a judgment in the UK can bring significant advantages to a judgment creditor, irrespective of whether the debtor actually has assets within the jurisdiction. Taking such a step can help increase the pressure on the judgment debtor as well as opening up access to the enforcement tools of the English court, for example worldwide freezing and disclosure orders as well as the possibility of an order under CPR 71 that the debtor be cross examined as to their assets.<sup>1</sup> Moreover, obtaining enforcement of a judgment in England facilitates faster enforcement steps in the event that the debtor at some future point moves assets into the jurisdiction. If nothing else, it increases pressure on a debtor shutting England down as a potential location for their future dealings. This article will seek to set out in brief the mechanisms for obtaining the enforcement of a foreign judgment in England and to discuss in more detail the particular issues to be considered when neither the debtor nor his assets are present within the jurisdiction.

### *Member State Judgments*

No issues arise regarding judgments given by courts of other EU Member States. Enforcement is automatic pursuant to the provisions of the Brussels I (Recast) Regulation and a judgment creditor can proceed directly to taking enforcement steps against the debtor as they would ordinarily be entitled to pursuant to an English judgment. This is the case whether or not the debtor has assets located in the jurisdiction. There is no separate requirement for a declaration of enforceability and thus no opportunity at which the English court can consider the desirability or the likelihood of success of enforcement in England. The debtor can of course apply to challenge the enforceability of the judgment but the grounds on which such a challenge can be made are limited to those listed under Article 45 of the Regulation. The presence, or lack thereof, of assets within the state in which enforcement is sought is irrelevant for these purposes.

### *Judgments from states with which the UK does not have a reciprocal enforcement treaty.*

By way of contrast, enforcement of a judgment given by a court of a country with which the UK has no reciprocal enforcement treaty in place requires the creditor to commence a new, freestanding claim. Such proceedings are usually described as enforcement at common law. From a doctrinal point of view the English court treats the foreign court judgment as creating a debt which can be sued on in proceedings in England. The end result of these proceedings will be a new, freestanding, English judgment which the creditor can enforce as they would any other English judgment.

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<sup>1</sup> For a more comprehensive discussion of this and some of the other issues raised in this blog post see Kupelyants '*Recognition and enforcement of foreign judgments in the absence of the debtor and his assets within the jurisdiction: reversing the burden of proof*' (2018) 14(3) J Priv Int L 455

In order to successfully enforce the foreign judgment the creditor is required to show that: (i) the foreign court had jurisdiction over the defendant pursuant to the English jurisdictional rules (i.e. that the defendant was present in the foreign country when they were served or submitted to the jurisdiction of the foreign court); and (ii) that the foreign judgment is final. The fact that the enforcement proceeds by way of a debt claim also means that the judgment must be for a liquidated sum.

When dealing with a judgment debtor who is present within the jurisdiction, commencing enforcement proceedings is reasonably straightforward. The claim form can be served on the defendant debtor under the CPR in the usual way and proceedings are commenced. No issue is likely to arise as to the court's jurisdiction irrespective of the location of assets within England. Provided the requirements for enforcement of a foreign judgment set out above are made out, the creditor can proceed to take enforcement steps as they would ordinarily be entitled to under English law.

Where the defendant judgment debtor is not present within the jurisdiction, however, further difficulties arise. A claim to enforce a foreign judgement is, after all, a new freestanding claim. Thus, a claimant will need to obtain the permission of the court pursuant to CPR 3.36 to serve the claim form outside of the jurisdiction. This is the case regardless of whether the defendant in question is domiciled inside or outside the EU since proceedings regarding the enforcement of a judgment from a non-member state have been interpreted as falling outside the scope of the Brussels Regime.<sup>2</sup> Permission may be granted where the claimant can show a) that there is a serious issue to be tried and; b) that the claim falls within one of the grounds or gateways of jurisdiction listed in PDB6 paragraph 3 – for claims to enforce a judgment the relevant provision can be found at subparagraph 10: “*A claim is made to enforce any judgment or arbitral award.*”. The question as to whether this gateway is restricted to claims where the defendant has assets within the jurisdiction was considered by the Court of Appeal in *Tasarruff Meduati Sigorta Fonu v Demirel* [2007] EWCA Civ 799 (“Demirel”).

*Demirel* concerned a claim to enforce at common law three judgments given against the defendant in Turkey. The claimant originally applied for, and obtained, two orders: one for permission to serve the enforcement proceedings out of the jurisdiction and another for a worldwide freezing injunction and disclosure of assets. The freezing injunction was eventually set aside on the basis that, disclosure of assets having been given and there being none in the jurisdiction, it would serve no useful purpose. Permission to serve out in respect of two of the Turkish judgments was also set aside on the grounds it was accepted that they were not final. In respect of the third judgment, however, the High Court upheld its original order finding that there was a serious issue to be tried as to whether the judgment was final.

The court held that there was no such restriction implicit in gateway 10. That was the ordinary and natural meaning of the rule. There had been no express limitation included by the draftsman and there was no reason to interpret the rule in such a way as to render creditors with judgments from states where there was no reciprocal enforcement treaty in a significantly worse position to those with judgments from states with one. On a more pragmatic level the court considered that its jurisdiction should not be limited so as to exclude a judgment creditor who wished to enforce where assets may come into the

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<sup>2</sup> CJEU in Case C-129/92 *Owens Bank v Bracco* This is despite the fact that English enforcement proceedings proceed by way of a separate claim on a foreign debt and are unquestionably ‘civil and commercial’ in nature.

jurisdiction in the future or where there may be a third party within the jurisdiction who could be compelled to call the defendant's assets into the jurisdiction.

However, that is not the end of the matter. Permission to serve outside of the jurisdiction is, after all, discretionary and once it has been established that the claim does properly fall within one of the jurisdictional gateways set out in PD6B para 3 the court must nevertheless be convinced that service out is in the interests of justice. Whether or not to exercise such discretion is usually determined by the court using a '*forum conveniens*' analysis, whereby the court must be satisfied that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute.<sup>3</sup> In enforcement cases, at first glance such a discussion appears to be open and shut. In relation to a claim for enforcement in England, England is clearly the most appropriate forum for that dispute. In fact it is the only forum for the trial of the dispute. It would be absurd to suggest otherwise. Nevertheless, considering enforcement in a wider context rather than solely within the confines of a particular set of proceedings, it is easy to conceive of arguments that, in circumstances where there are no assets within England there may be other jurisdictions, where there are assets, in which it is clearly more appropriate for enforcement proceedings to take place. For instance, were the court asked to enforce a judgment from a US court against a Norwegian defendant who had no assets in the UK but was known to have bank accounts in France the English court may rationally reach the conclusion that France was the more appropriate forum for enforcement proceedings.

These arguments however, confuse principles of enforcement jurisdiction and adjudicative jurisdiction. When considering jurisdiction as to the substance of a dispute in general the aim of relevant rules is to identify one forum in which to determine the claim and then ensure that once seized it has exclusive authority to do so. Multiplicity of *fora* and parallel proceedings are undesirable in international litigation and the English doctrines of *forum non conveniens* on the one hand and anti-suit injunctions on the other have developed (in part) in an attempt to avoid and manage such jurisdictional conflicts. When considering jurisdiction at the enforcement stage however pursuing simultaneous proceedings in a number of different jurisdictions can be an effective and, in some cases a necessary tactic in order to obtain full satisfaction of a judgment. Moreover, the risk of conflicting judgments or factual findings is much less relevant as regards enforcement proceedings. Such proceedings consider solely the enforceability of a judgment under each individual state's national laws and thus in each case the specific considerations such as public policy of the forum will vary from state to state.

Against this background, the suggestion that there is another more appropriate forum or another jurisdiction in which recovery of assets is more likely cannot, in and of itself, render the pursuit of simultaneous enforcement proceedings in England inappropriate. Thus it is necessary to consider such proceedings on their own merit. Ultimately it should remain a matter for the creditor as to how they choose to go about enforcing their judgment.

Arguments as to *forum conveniens* were not considered in detail in *Demirel*, rather it was argued before the court that it should not exercise its discretion to permit service out on the basis that the proceedings would serve no useful purpose. The court accepted that it '*should not automatically exercise its discretion in favour of permitting service out of the jurisdiction*

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<sup>3</sup> As per Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Limited* [2011] UKPC 7 at [71]

*unless it is just to do so and that it will ordinarily not be just to do so unless there is a real prospect of a legitimate benefit to the claimant from the English proceedings*” however the court further accepted that such a benefit could be ‘*indirect or prospective*’. Thus this was not intended to be tantamount to a requirement that it be shown that there were assets in the jurisdiction but that nevertheless, if there were not, a claimant would have to show there was some other real benefit to be derived from the proceedings.

Whilst there are clearly advantages to a judgment creditor of enforcing a judgment in England as set out above it is unlikely that the mere availability of these steps and/or remedies would constitute a ‘legitimate benefit’ within the context of the test laid out in *Demirel*. Rather, the benefit to the claimant should be assessed on a case-by-case basis, taking into account all of the circumstances to establish whether taking any of those steps they can [reasonably] expect any legitimate benefit from the proceedings. It is important to note that on an application for permission to serve out, where limited documentary evidence is available, the court will not need to be satisfied to a high level of probability. They only need show a good arguable case that there will be legitimate benefits and the court has been clear that these can include potential future benefits.

On the facts of *Demirel* the court was satisfied that there was a legitimate benefit to be gained from the proceedings. It considered, in particular, the facts of the underlying fraud claim against the defendant and the propensity of defendants to such proceedings to utilise the international banking system to hide their ill-gotten gains. There was further evidence that the defendant had already done so. The court considered that London being such a large centre of the international banking market it was not unlikely that the defendant would have assets in the jurisdiction at some future time. Moreover the limitation period for a claim to enforce a foreign judgment (6 years pursuant to s.24 Limitation Act 1980) was about to expire and refusal of permission would have left the defendant free to bring funds into London with impunity, there being no risk of future enforcement proceedings against him.

### *Analysis*

*Demirel* itself suggests a very low threshold for finding a legitimate benefit. The court’s finding that it was possible that the defendant would have assets within the jurisdiction at some point in the future appears to have been based solely on London’s position as an international financial centre and the fact that he was the beneficiary of two Cayman trusts. There was no evidence that he had held bank accounts or had other assets in England at any point in the past. Given the weight that was placed on the facts of the underlying fraud claim one could be forgiven for thinking that the court considered that there was one rule for fraudsters and one rule for everyone else.

One further wonders whether, if the threshold for such a benefit is intended to be so low, the legitimate benefit test serves any purpose at all. If the test is reduced to preventing only vexatious and oppressive claims then surely such claims would stand to be struck out as an abuse of process in any event.<sup>4</sup> The court’s reasoning that some *de minimis* test for

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<sup>4</sup> In this regard it has been suggested that the legitimate benefit test should be abandoned in favour of a test of abuse of process, thereby placing the burden of proof upon the defendant (see Kupelyants op.cit). This however overlooks the fact that such applications are typically made *ex parte*.

jurisdiction was necessary appeared to be partially inspired by counsel for *Demirel's* submission that great care should be taken before requiring a foreign litigant to answer proceedings in England. However, supporting authority for this statement was derived from a case dating from 1885 and, as the court itself appeared to acknowledge, is out of step with what sophisticated commercial parties can expect in modern international business dealings. Views to the effect that service of process abroad is an impingement on the sovereignty of a foreign state and should therefore be exceptional have fallen out of favour in the senior courts in recent times.

Clearly the Court's intention that the test would be fact sensitive and considered on a case-by-case basis does not lend itself to a rigid structure. It is regrettable, however, that the Court saw fit to impose such a vague test without providing any guidance in this context as to the factors to be taken into account in its application. Given the principles discussed above it is submitted that the test should not be given any wider interpretation than restrict only such cases which are vexatious or are otherwise liable to be struck out as an abuse.

### *Conclusions*

There are several clear benefits to enforcing a judgment within the jurisdiction where there are no assets present. No difficulties exist in respect of judgments from Member State courts or in instances where the debtor is present within the jurisdiction. Where service out is required the debtor will, however, need to show some practical benefit to be derived from the proceedings. This step should not be unduly burdensome to the applicant and should be confined to declining jurisdiction over vexatious or oppressive cases. Creditors seeking permission to serve out of the jurisdiction would be best served by focussing on factors linking the debtor to the jurisdiction, whether directly or indirectly, and in particular evidence of past business dealings involving banks or other institutions with connections to England and Wales.