

UPDATE

When will a Foreign Default Judgment be Enforced in the British Virgin Islands?

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A foreign judgment, including a default judgment, will be recognised and enforced in the British Virgin Islands if: the foreign court had jurisdiction over the parties; the judgment is for a debt or a fixed sum of money; and the judgment is final and conclusive. *Flat Point* is a reminder that, even if these requirements are satisfied, the Court may nevertheless refuse to exercise its discretion to enforce the judgment if it can be impeached on other grounds.

Introduction

In *Flat Point Development Limited v Canisby Limited* (Appeal No. ANUHCVP2016/0006, 7 December 2017), the Eastern Caribbean Court of Appeal considered whether a master of the Antigua High Court had erred in entering summary judgment on a common law claim to enforce a default judgment obtained in the Isle of Man.

The decision of the Court of Appeal, which is binding on the Courts of the British Virgin Islands (BVI), illustrates the potential issues that can arise in a claim for common law enforcement of a foreign judgment.

Overview of Recognition and Enforcement of Foreign Judgments in the BVI

As set out in our [guide](#), there are two procedures for obtaining recognition and enforcement of a foreign money judgment in the BVI, depending upon where the foreign judgment was obtained:

1. A simplified statutory process of registration is provided for under the Reciprocal Enforcement of Judgments Act 1922 in respect of judgments given in the High Court of England and Wales, the Court of Northern Ireland, the Court of Session in Scotland, and the courts of the Bahamas, Barbados, Belize, Trinidad and Tobago, Guyana, St Lucia, Grenada, Jamaica, and New South Wales (Australia).
2. For judgments from all other jurisdictions, it is necessary for the judgment creditor to bring a common law claim for enforcement of the judgment.

A common law claim for enforcement can often be brought to a swift conclusion by obtaining summary judgment. This is on the basis that the defendant has no real prospect of successfully defending the claim, given that the foreign judgment is generally determinative of the merits of the claim.

Generally speaking, a foreign judgment may be enforced in the BVI at common law by a claim for the amount due under the judgment if:

- (a) the foreign court had jurisdiction over the parties;
- (b) the judgment is for a debt or a fixed sum of money; and
- (c) the judgment is final and conclusive.

The jurisdiction requirement is generally satisfied if the person against whom the judgment was given:

1. was, at the time the foreign proceedings were commenced, present in the foreign country;
2. was a claimant or counter-claimant, in the foreign proceedings;

3. submitted to the jurisdiction of the foreign court by voluntarily appearing in the foreign proceedings; or
4. had, prior to the commencement of the foreign proceedings, agreed to submit to the jurisdiction of the foreign court, in respect of the subject matter of the proceedings. Most commonly, this occurs when a contract includes a jurisdiction clause.

Even if the above requirements are satisfied, the Court may nevertheless refuse to enforce the foreign judgment if it is satisfied that:

- (a) the foreign judgment has been obtained by fraud of the party in whose favour it is given, or of the court pronouncing it;
- (b) enforcement of the foreign judgment would be contrary to public policy; or
- (c) there was a denial of natural justice in the proceedings in which the foreign judgment was obtained.

The common law principles are also embodied in the Reciprocal Enforcement of Judgments Act.

Background

In June 2007, Canisby Limited (**Canisby**), a company incorporated in the Isle of Man, had lent money to Flat Point Development Limited (**Flat Point**), a company incorporated in Antigua and Barbuda, pursuant to a written agreement. The agreement expressly provided that it was governed by Manx law and that the parties submitted to the non-exclusive jurisdiction of the Manx Courts.

Flat Point defaulted on repayment of the loan and in July 2010, Canisby filed a claim in the Manx Court for repayment of the loan together with interest. The claim was served on Flat Point. In response to the claim, Flat Point filed an acknowledgment of service in which it indicated that it intended to defend the claim, rather than dispute the Manx Court's jurisdiction. Although the acknowledgment of service stated that judgment may be entered against the defendant if it did not file a defence within 28 days of service of the claim, Flat Point took no further steps in the proceedings.

Canisby claimed that the acknowledgment of service was defective in that it failed to provide an address for service in the Isle of Man. It filed an application to the Manx Court to set aside the acknowledgment of service and for the entry of default judgment on that basis. Canisby alleged that it had sent a letter to Flat Point in 2010, giving it notice of the application. However, Flat Point denied having received any such letter.

On 15 October 2010, Canisby's application was granted by the Manx Court and default judgment was entered in its favour against Flat Point. Again, Canisby alleged that it informed Flat Point of the existence of the default judgment by letter. Flat Point once again disputed that any such letter had been received.

On 25 August 2015, almost 5 years after the default judgment was entered, Canisby commenced a common law claim for enforcement of the default judgment in Antigua.

By its defence filed in the Antiguan proceedings on 6 October 2015, Flat Point alleged that the Manx Court did not have jurisdiction to hear the claim. It also disputed that the default judgment was final and conclusive, and raised issues of natural justice and public policy. Flat Point claimed that it had been unaware of the existence of the default judgment until it received notice of the Antiguan proceedings. It asserted that, had it been aware of the default judgment, it would have applied to set it aside. It also asserted that, insofar as this might now be impossible, due to the length of time since the default judgment was granted, this amounted to a breach of natural justice, such that the Antiguan Court should decline to enforce the Manx judgment.

Canisby applied for summary judgment on 13 October 2015.

The Master's Decision

The Master granted summary judgment. He was satisfied that Flat Point had agreed to submit to the jurisdiction of the Manx Court and that there was nothing to suggest that it had objected to the jurisdiction.

The Master also considered that the law is clear that a default judgment can be final and conclusive. In this case, notwithstanding that Flat Point had been served with the default judgment quite some time after it was obtained, it had been entirely within Flat Point's power to apply to set the judgment aside. Flat Point

had not done so. Accordingly, the Master was not satisfied that there had been any breaches of natural justice or other improprieties that prevented him from granting summary judgment.

Flat Point appealed from the Master's decision.

The Court of Appeal's Judgment

The Court of Appeal upheld Flat Point's appeal by majority. Rather unusually for the Court of Appeal, each of the three members of the Court delivered a separate judgment. The leading judgment of the majority was given by Blenman JA, with whom Henry JA [Ag] agreed. Webster JA [Ag] delivered a dissenting judgment.

Jurisdiction

The Court was in unanimous agreement that the Manx Court had jurisdiction over the parties by virtue of their agreement to submit to the non-exclusive jurisdiction of the Manx Court.

In addition, Henry and Webster JJA held that Flat Point had also submitted to the jurisdiction of the Manx Court by filing an acknowledgment of service, which contained no indication that Flat Point intended to dispute the jurisdiction of the Manx Court. This was so, notwithstanding the fact that the acknowledgment of service had subsequently been struck out.

Final and Conclusive

The Court held it to be settled law that a default judgment for a specific sum of money is final and conclusive for the purpose of bringing a subsequent claim to recover the judgment debt, even though it is liable to be set aside in the very court which rendered it.

Natural Justice and Public Policy

These were the issues upon which the members of the Court differed in their opinions.

Blenman and Henry JJA considered it highly significant that Flat Point had claimed not to have received notice of Canisby's application to set aside its acknowledgment of service and for the entry of default judgment. They considered that there was, therefore, a risk that the default judgment had been obtained in breach of natural justice (determined by reference to the law of the forum in which enforcement is being sought). In their view, the Master had been wrong to summarily determine this issue on the pleadings and written evidence. It should have properly been determined at trial following a proper cross-examination of the witnesses.

In his dissenting judgment, Webster JA considered it significant that Flat Point had filed its acknowledgment of service, from which it would have been aware that it had been required to file a defence within 28 days of service of the claim. Notwithstanding that knowledge, Flat Point had taken no further part in the Manx proceedings. He also stated that there was no evidence of Manx law, nor was he aware of any requirement of Antiguan law, that a defendant be notified of the entry of default judgment. Webster JA therefore did not consider that there was any basis for interfering with the Master's finding that there had been no breach of Flat Point's natural justice rights.

Webster JA said that it was not clear what aspect of the public policy of Antigua and Barbuda was affected by the proceedings to enforce the default judgment, although the majority appear to have decided the case on the basis that the natural justice and public policy issues were interrelated.

Conclusion

Whilst ultimately each case will turn on its own facts, the Court of Appeal's decision in *Flat Point Development Limited* is a useful reminder of the relevant principles that govern the recognition and enforcement of foreign judgments in the BVI. It also provides a good example of issues that can be raised by a judgment debtor that may potentially frustrate what is otherwise usually a relatively straightforward claim.

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