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[HOUSE OF LORDS]

OWENS BANK LTD. APPELLANTS

AND

BRACCO AND ANOTHER RESPONDENTS

B

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BRACCO AND ANOTHER APPELLANTS

[CONJOINED APPEALS]

C

1991 Jan. 21, 22, 23; Parker, Balcombe and Ralph Gibson L.JJ.
 Feb. 11, 12, 13;
 March 27

D

1992 Feb. 10, 11, 12, 13; Lord Griffiths, Lord Bridge of Harwich,
 April 1 Lord Ackner, Lord Goff of Chieveley
 and Lord Browne-Wilkinson

E

Conflict of Laws—Foreign judgment—Jurisdiction to enforce—Judgment against defendants in St. Vincent court—Defendants alleging fraud—Application by plaintiff to register St. Vincent judgment—Application opposed on ground of fraud—Whether defendants required to adduce fresh evidence—Administration of Justice Act 1920 (10 & 11 Geo. 5, c. 81), s. 9

F

Practice—Stay of proceedings—Jurisdiction under European Convention—Judgment against defendants by St. Vincent court—Defendants alleging fraud—Proceedings in Italian courts raising issue of fraud—Defendants seeking stay of English proceedings to register St. Vincent judgment—Whether jurisdiction Convention of European Communities applying to non-contracting states—Whether stay to be granted—Civil Jurisdiction and Judgments Act 1982 (c. 27), Sch. 1, arts. 21, 22

G

The plaintiff bank brought an action in the High Court of St. Vincent and the Grenadines claiming payment of a loan of Sw.Fr. 9m. alleged to have been made to the second defendants, an Italian company, and supported by loan documents, signed by the first defendant, the president of the defendant company, containing provisions giving the St. Vincent court jurisdiction in the event of a dispute. The first defendant denied the transaction and alleged that the documents were forgeries. The second defendants denied that the first defendant had had authority to enter into any transaction. The St. Vincent court gave judgment for the bank against both defendants in the sum of Sw.Fr. 10,543,372 together with interest on the principal sum and costs, and its judgment was upheld by the St. Vincent Court of Appeal. Proceedings were also started in Italy between the parties in which the issue of fraud was raised. The defendants had assets within the English jurisdiction, and the bank made an application under section 9 of the Administration

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of Justice Act 1920¹ to register the judgment of the St. Vincent court. The defendants resisted the application and applied for orders that the court should decline jurisdiction, pursuant to articles 21 and 22 of the Convention scheduled to the Civil Jurisdiction and Judgments Act 1982, in favour of the Italian court, and, alternatively, that the English proceedings should be stayed pending the final determination of the Italian proceedings. The judge dismissed the defendants' application and subsequently, on the bank's application, ordered that an issue be tried as to whether the judgment proposed to be registered fell within one of the cases excluded from registration by section 9(2) of the Act of 1920, namely that it had been obtained by fraud or was in respect of a cause of action that could not be entertained by the registering court for reasons of public policy or other similar reason. On the defendants' appeal against the first judgment, the Court of Appeal held that the Convention on jurisdiction did not apply to proceedings for the recognition and enforcement of the judgments of non-contracting states and in particular to proceedings under the Act of 1920 and that in any event if the Convention did apply the English court was not obliged to decline jurisdiction in favour of the Italian court under article 21 and had no power to stay the proceedings under article 22, since both articles were concerned with original proceedings and not the enforcement of judgments already obtained. On the bank's appeal against the second judgment the Court of Appeal held that a foreign judgment could not be registered under the Act of 1920 where the defendants raised a *prima facie* case that it had been obtained by fraud until the issue had been decided and that there was no requirement similar to that necessary for setting aside an English judgment to bring fresh evidence to establish fraud. The Court of Appeal dismissed both appeals. On further appeals by the bank and the defendants, the House of Lords determined that the defendants' appeal depended on questions that it was necessary to refer to the European Court of Justice and accordingly ordered that further proceedings on that appeal be stayed.

On the bank's appeal:—

Held, dismissing the appeal, that section 9(2)(d) of the Administration of Justice Act 1920, in denying registration to a Commonwealth judgment if it was shown to have been obtained by fraud, was to be construed as having adopted the approach of the common law courts to the finality of a foreign judgment; that, accordingly, there was no requirement, as there was in the case of an action to set aside an English judgment on the ground of fraud, that the fraud should be established by fresh evidence that had not been available to the defendant at trial and could not with reasonable diligence have been discovered by him before judgment had been delivered; and that that difference was one of substantive law and the common law rule embodied in section 9(2)(d) of the Act of 1920 could not be altered save by legislation (post, pp. 480A–B, 483D–484A, 488E–G, 489B, F–490B).

Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295, C.A. and *Vadala v. Lawes* (1890) 25 Q.B.D. 310, C.A. applied.

Decision of the Court of Appeal, post, pp. 448H et seq.; [1992] 2 W.L.R. 127; [1991] 4 All E.R. 833 affirmed.

¹ Administration of Justice Act 1920, s. 9: see post, pp. 482D–483D.

- A The following cases are referred to in the opinion of Lord Bridge of Harwich:
- Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295, C.A.
Jet Holdings Inc. v. Patel [1990] 1 Q.B. 335; [1988] 3 W.L.R. 295; [1989] 2 All E.R. 648, C.A.
Syal v. Heyward [1948] 2 K.B. 443; [1948] 2 All E.R. 576, C.A.
Vadala v. Lawes (1890) 25 Q.B.D. 310, C.A.
- B The following additional cases were cited in argument in the House of Lords:
- Abidin Daver, The* [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470, H.L.(E.)
Adams v. Cape Industries Plc. [1990] Ch. 433; [1990] 2 W.L.R. 657; [1991] 1 All E.R. 929, C.A.
- C *Bank of Australasia v. Nias* (1851) 16 Ad. & E. 717
Birch v. Birch (1902) 86 L.T. 364, C.A.
Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591; [1975] 2 W.L.R. 513; [1975] 1 All E.R. 810, H.L.(E.)
Boswell v. Coaks (No. 2) (1894) 86 L.T. 365n., H.L.(E.)
Castrique v. Imrie (1870) L.R. 4 H.L. 414, H.L.(E.)
- D *Codd v. Delap* (1905) 92 L.T. 510, H.L.(E.)
Flower v. Lloyd (1877) 6 Ch.D. 297, C.A.
Flower v. Lloyd (1879) 10 Ch.D. 327, C.A.
Godard v. Gray (1870) L.R. 6 Q.B. 139
Henderson v. Henderson (1843) 3 Hare 100
Houlditch v. Donegall (1834) 2 Cl. & F. 470, H.L.(I.)
House of Spring Gardens Ltd. v. Waite [1991] 1 Q.B. 241; [1990] 3 W.L.R. 347; [1990] 2 All E.R. 990, C.A.
- E *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529; [1981] 3 W.L.R. 906; [1981] 3 All E.R. 727, H.L.(E.)
Kingston's (Duchess of) Case (1776) 20 St.Tr. 355, 537n.
McIlkenny v. Chief Constable of the West Midlands [1980] Q.B. 283; [1980] 2 W.L.R. 689; [1980] 2 All E.R. 227, C.A.
Ochsenbein v. Papelier (1873) L.R. 8 Ch.App. 695
- F *Phosphate Sewage Co. Ltd. v. Molleson* (1879) 4 App.Cas. 801, H.L.(Sc.)
Reg. v. Humphrys [1977] A.C. 1; [1976] 2 W.L.R. 857; [1976] 2 All E.R. 497, H.L.(E.)
Sennar, The (No. 2) [1985] 1 W.L.R. 490; [1985] 2 All E.R. 104, H.L.(E.)
Young v. Bristol Aeroplane Co. Ltd. [1944] K.B. 718; [1944] 2 All E.R. 293, C.A.
- G The following cases are referred to in the judgment of the Court of Appeal:
- Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295, C.A.
Adams v. Cape Industries Plc. [1990] Ch. 433; [1990] 2 W.L.R. 657; [1991] 1 All E.R. 929, C.A.
Bank of Australasia v. Nias (1851) 16 Ad. & E. 717
Boswell v. Coaks (No. 2) (1894) 86 L.T. 365n., H.L.(E.)
Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.)
- H *Flower v. Lloyd* (1879) 10 Ch.D. 327, C.A.
Harrods (Buenos Aires) Ltd., In re [1992] Ch. 72; [1991] 3 W.L.R. 397; [1991] 4 All E.R. 334, C.A.
Henderson v. Henderson (1843) 3 Hare 100

- House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241; [1990] 3 W.L.R. 347; [1990] 2 All E.R. 990, C.A. A
- Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335; [1988] 3 W.L.R. 295; [1989] 2 All E.R. 648, C.A.
- Kingston's (Duchess of) Case* (1776) 20 St.Tr. 355, 537n.
- McIlkenny v. Chief Constable of the West Midlands* [1980] Q.B. 283; [1980] 2 W.L.R. 689; [1980] 2 All E.R. 227, C.A.
- Ochsenbein v. Papelier* (1873) L.R. 8 Ch.App. 695 B
- Phosphate Sewage Co. Ltd. v. Molleson* (1879) 4 App.Cas. 801, H.L.(Sc.)
- Russell v. Smyth* (1842) 9 M. & W. 810
- Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155
- Sennar, The (No. 2)* [1985] 1 W.L.R. 490; [1985] 2 All E.R. 104, H.L.(E.)
- Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460; [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843, H.L.(E.)
- Syal v. Heyward* [1948] 2 K.B. 443; [1948] 2 All E.R. 576, C.A. C
- Vadala v. Lawes* (1890) 25 Q.B.D. 310, C.A.
- Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] A.C. 581; [1975] 2 W.L.R. 690, P.C.
- Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718; [1944] 2 All E.R. 293, C.A.

The following additional cases were cited in argument in the Court of Appeal: D

- Abidin Daver, The* [1984] A.C. 398; [1984] 2 W.L.R. 196; [1984] 1 All E.R. 470, H.L.(E.)
- Gubisch Maschinenfabrik KG v. Palumbo* (Case 144/86) [1987] E.C.R. 4861, E.C.J.

INTERLOCUTORY APPEALS from Sir Peter Pain, sitting as a judge of the Queen's Bench Division. E

The plaintiff, Owens Bank Ltd., obtained a judgment against the defendants, Fulvio Bracco and Bracco Industria Chimica S.p.A., in the High Court of St. Vincent and the Grenadines in January 1988. On 6 March 1990 the plaintiff in ex parte proceedings obtained from Sheen J. a *Mareva* injunction and an order for registration of the St. Vincent judgment under the Administration of Justice Act 1920, on undertaking to issue on the same day an originating summons seeking those forms of relief. The defendants were given liberty to set aside the registration and the plaintiff was precluded, until after the hearing of the originating summons inter partes, from executing the judgment. On 2 April 1990 the defendants applied for an order that the court should decline jurisdiction in favour of the Italian courts, that the order of Sheen J. should be set aside or, alternatively, that the English proceedings should be stayed pending determination of the Italian proceedings. On 19 July 1990 Sir Peter Pain, sitting as a judge of the Queen's Bench Division, dismissed the defendants' application. F

By a notice of appeal dated 31 August 1990 the defendants appealed on the grounds, inter alia, that (1) the judge was wrong in law in holding that (i) the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 contained in Schedule 1 to the Civil Jurisdiction and Judgments Act 1982, did not apply to the proceedings before him, and (ii) articles 21 and 22 of the Convention H

- A did not apply to enforcement proceedings, nor to issues arising in enforcement proceedings; (2) the judge ought to have held that (i) the Convention did apply to the proceedings before him, (ii) those proceedings involved the same cause of action and were between the same parties, within the meaning of those expressions in article 21 of the Convention, as the Italian civil proceedings defined in the defendants' summons and in particular the enforcement proceedings brought in Italy by the plaintiff, (iii) the relevant Italian civil proceedings were brought in Italy before those proceedings were brought in England in March 1990, (iv) by virtue of article 21, the court, being a court other than the court first seised, must decline jurisdiction in favour of the Italian court, and (v) if, contrary to the defendants' primary contention in (ii) above, the present proceedings brought by the plaintiff did not involve the same cause of action or were not between the same parties within the meaning of those expressions in article 21 as the Italian civil proceedings, those proceedings and the Italian civil proceedings were related actions or were deemed to be related actions within the meaning of that expression in article 22 and the court might stay its proceedings; (3) the judge was wrong in law in failing to take any account or any proper account of the decision of the European Court of Justice in *Gubisch Maschinenfabrik KG v. Palumbo* (Case 144/86) [1987] E.C.R. 4861 and the principles expressed therein; (4) if the judge was correct in deciding that article 21 did not apply, he was wrong in deciding that article 22 did not apply, and, if article 22 applied, should have stayed the proceedings; alternatively, he should have exercised his discretion to stay the proceedings; (5) further or alternatively, the judge was wrong in law in holding that the court did not have power under section 9 of the Act of 1920 or inherent power to stay those proceedings independently of the express power referred to in article 22; and (6) the judge did not, in the light of his decision, decide whether to exercise his discretion to stay the proceedings, alternatively, if he did so, he exercised that discretion wrongly, and ought to have exercised his discretion so as to stay the English proceedings in favour of the case being determined by the Italian courts.

On 9 November 1990 the judge ordered, inter alia, the trial of issues between the plaintiff and the defendants as to whether the registration order of 6 March 1990 and all subsequent proceedings should be set aside on the ground that the judgment proposed to be registered fell within one or more of the cases in which a judgment might not be ordered to be registered under section 9 of the Administration of Justice Act 1920.

By a notice of appeal dated 6 December 1990 the plaintiff appealed on the grounds that (1) the judge was wrong in law in holding that (i) the principles applicable to a refusal to register a foreign judgment pursuant to the provisions of the Act of 1920 on the ground that such judgment had been obtained by fraud were different as regards cause of action fraud from those applicable to the setting aside of an English judgment on such grounds, and (ii) in particular in deciding whether or not to register a foreign judgment alleged to be affected by cause of action fraud the court was entitled and bound to have regard to evidence

which did not entirely change the aspect of the case, was not likely to be decisive, had been available or could with reasonable diligence have been obtained for use at the trial at which the foreign judgment was given; (2) the judge ought to have held that the “fresh evidence” relied on by the defendants did not entirely change the aspect of the case, was not likely to be decisive, had been available or could with reasonable diligence have been obtained for use at the trial at which the St. Vincent High Court judgment was given; (3) the judge was wrong in law in holding that the experts’ reports and the statements of Eugenio Accatino relied on by the defendants were sufficient to establish a prima facie case that the St. Vincent High Court judgment had been obtained by fraud; and (4) the judge ought to have held that the reports and the statements were hearsay and were accordingly inadmissible as evidence and/or insufficient to establish such prima facie case, alternatively, they were in any event insufficient to establish such prima facie case.

By a respondent’s notice dated 24 December 1990 the defendants sought to affirm the judge’s order of 9 November 1990 on the grounds that (1) in circumstances where the judge rightly decided that the evidence relied on by the defendants in support of the allegation that the foreign judgment was obtained by fraud was sufficient to show that there was a triable issue as to whether the judgment had been so obtained, the defendants were entitled in law to have that issue determined by the English court, whether or not there was any “fresh evidence” to support the allegation that the foreign judgment had been obtained by fraud; (2) alternatively, if fresh evidence was required, there was sufficient fresh evidence; (3) further or alternatively, that if fresh evidence and/or fresh evidence of a particular quality would normally be required by the English court, it should not be so required in circumstances where, as in the present case, the defendants had attempted in the foreign court to raise issues and adduce evidence which would be relevant to whether the foreign judgment had been obtained by fraud, but the plaintiff had successfully opposed the adducing of that evidence and the raising of those very issues, which had accordingly not been before, or decided on by, the foreign court; and (4) further, under the provisions of the Administration of Justice Act 1920 the burden was on the plaintiff judgment creditor to satisfy the English court that none of the bars listed in section 9 of that Act applied, and the plaintiff had not so satisfied the court.

The facts are stated in the judgment of the court.

Barbara Dohmann Q.C. and *Thomas Beazley* for the defendants.
Martin Mann Q.C. and *Michael Gadd* for the plaintiff bank.

Cur. adv. vult.

27 March 1991. The following judgment of the court was handed down.

PARKER L.J. This is the judgment of the court to which all its

A members have contributed. We have before us two appeals for determination, first an appeal by the defendants, Fulvio Bracco and Bracco Industria Chimica S.p.A., against a judgment of Sir Peter Pain, sitting as a High Court judge in chambers, given on 19 July 1990, to which the plaintiff, Owens Bank Ltd. ("the bank"), is the respondent, and, secondly, an appeal by the bank from a judgment also of Sir Peter Pain given on 9 November 1990 to which the defendants are respondents.

B Both appeals arise out of an application by the bank under section 9 of the Administration of Justice Act 1920 to register a judgment of the High Court of St. Vincent and the Grenadines (Singh J.) entered on 29 January 1988. Such judgment, against the defendants jointly and severally, was in the sum of Sw.Fr. 10,543,372 together with interest on the principal sum of Sw.Fr. 9m. and costs.

C An appeal from that judgment was dismissed by the Court of Appeal of St. Vincent and the Grenadines in December 1989. There has been no further appeal to Her Majesty in Council nor has there been any action in St. Vincent seeking to set aside the judgment on the ground of fraud. It is however, inter alia, on that ground that the defendants seek to resist the bank's application to register the judgment.

D *The background*

The bank's claim in the St. Vincent action was simple but remarkable. It was that, on 31 January 1979, Mr. Armando Nano, the then managing director of the bank and acting on its behalf, had lent to Bracco Industria Chimica S.p.A. the sum of Sw.Fr. 9m., which had then been handed over in cash by Nano to Bracco, who was the president of Bracco Industria Chimica S.p.A. acting on its behalf, or his own behalf. The loan was made, it was said, on terms agreed orally including, inter alia, that it should be repayable in three tranches of Sw.Fr. 2m., 3m., and 4m. on 27, 28 and 29 August 1979. This transaction was said to have taken place in the Hôtel du Rhône, Geneva, and was sought to be supported by three receipts, four acknowledgements and a letter on Hôtel du Rhône paper all of which were said to have been signed by Bracco ("the loan documents"). The documents included provisions that gave the High Court of St. Vincent and the Grenadines jurisdiction in the event of dispute.

Bracco denied the transaction in toto asserting that no loan had been agreed or made, that no cash had been handed over and that the loan documents were forgeries never having been signed by him. Bracco Industria Chimica S.p.A. asserted that if Bracco had entered into any such transaction he had no authority whatsoever to do so.

The bank is a St. Vincent company but Bracco Industria Chimica S.p.A. is an Italian company and Bracco resides in that country. Nano is also an Italian. The jurisdiction of the St. Vincent courts thus rested on the jurisdiction provisions in the loan documents. That jurisdiction was challenged and was decided in favour of the bank by Renwick J. on the hearing of an application to strike out the action for want of jurisdiction. From that decision there was no appeal. The point was sought to be raised again at the trial before Singh J. but he held that the matter had already been determined.

During the course of the bank's case in St. Vincent, the defence admitted that the signatures on the receipts and acknowledgements were the signatures of Bracco. After the bank's case was closed, however, the defence intimated that they wished to set up a new defence, namely, that the signatures on the receipts and acknowledgements were genuine signatures but that they had originally appeared in the wide margins of a contract concerning a wholly different matter, that the margins with the signatures had been cut off and that Nano or someone on his behalf or on behalf of the bank had then typed in the rest of what appeared on the document. The contentions with regard to the letter were more complex but it is not necessary to set them out. Singh J. ruled that the defendants were not entitled to set up this defence at such a late stage and his ruling was upheld on appeal. Singh J. accepted the evidence of Nano and accordingly gave judgment for the bank.

The foregoing is a very much simplified account of the litigation in St. Vincent. It is however sufficient for present purposes. It will be apparent from it that there could be no possibility other than that either Nano or Bracco was committing perjury and trying deliberately to deceive the court. By accepting the evidence of Nano, Singh J. found, in effect, that it was Bracco who was attempting to deceive it.

Before the St. Vincent action was tried, the matter of the genuineness of the loan documents had already been raised elsewhere. Bracco in response to a demand for repayment in November 1980 had stated in a letter of 4 December 1980 that the documents were false and had never been signed by him, and there had been both criminal and civil proceedings in Italy in which the question of fraud had been raised. Between the judgment in the High Court of St. Vincent and the dismissal of the appeal therefrom yet further proceedings had been commenced in Italy including (1) civil proceedings at the suit of both defendants seeking declarations of non-liability to the bank and (2) proceedings by the bank to enforce the St. Vincent judgment. After the St. Vincent appeal was dismissed, yet further proceedings both criminal and civil were commenced in Italy. It is unnecessary to go into the details of any of those proceedings. It is sufficient to say that the issue of fraud is squarely raised but has not yet been decided.

The proceedings the subject of the appeal

On 7 March 1990 on the ex parte application of the bank two orders were made by Sheen J. The first order was for a *Mareva* injunction against Bracco Industria Chimica S.p.A. given upon the bank undertaking by counsel, inter alia, forthwith to issue an originating summons in the form initialled by the judge. That summons sought registration of the St. Vincent judgment and, in effect, the continuation of the *Mareva* injunction.

The second order, somewhat surprisingly in the light of the first order, ordered the St. Vincent judgment to be registered pursuant to the Act of 1920, gave liberty to the defendants to apply to set aside the registration at the first hearing of the originating summons if they had grounds for so doing and ordered that execution on the judgment should not issue until after such hearing or any extension granted by judge or,

A if an application to set aside the registration were made, until such application had been disposed of.

On 2 April 1990 the defendants issued an originating summons seeking orders, inter alia, that the aforementioned orders of Sheen J. and all subsequent proceedings be set aside. Various alternative forms of relief were advanced but for present purposes the defendants' contentions as revealed by the summons may be summarised as follows.

B (1) The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, the 1971 Protocol on the interpretation of the Convention and the Accession Convention 1978, all as defined in section 1(1) of the Civil Jurisdiction and Judgments Act 1982, apply to proceedings for registration and enforcement under the Act of 1920. (2) The Italian civil proceedings were commenced before the bank's application under the Act of 1920 and raised the question whether the St. Vincent judgment was obtained by fraud. (3) This court must, by virtue of article 21 of the 1968 Convention, therefore decline jurisdiction in favour of the Italian courts. (4) Alternatively, if article 21 is inapplicable, article 22 is applicable and the court can and should stay the proceedings here. (5) If the 1968 Convention does not apply, or notwithstanding that it does apply neither article 21 nor article 22 applies, the court has power at common law to stay the proceedings here and should do so. (6) Alternatively the court should order issues to be tried whether registration is prohibited on the facts by section 9(2)(d) and (f) of the Act of 1920. (7) It is in all the circumstances in any event not just and convenient to order registration.

D We shall deal first with the applicability of the 1968 Convention and the effect of articles 21 and 22.

E *Convention points*

By way of preliminary it is first necessary to consider shortly the nature of the proceedings here. The long title to the Act of 1920 includes the words "to facilitate the reciprocal enforcement of judgments and awards in the United Kingdom and other parts of His Majesty's Dominions or Territories under His Majesty's protection." The provisions for such facilitation are contained in Part II. Section 9(1) enables a judgment creditor, who has obtained a judgment in a superior court of a dominion or territory to which Part II extends, to apply within 12 months after the date of the judgment to the High Court to have the judgment registered. Upon such an application the court may, if in all the circumstances it thinks it just and convenient that the judgment should be enforced in the United Kingdom, order the judgment to be registered.

G It is to be noticed that registration is discretionary. What the court has to consider is whether it is just and convenient that the judgment should be enforced in the United Kingdom. The power to register is, however, limited by section 9(2) which provides that a judgment shall not be registered in the cases set out in paragraphs (a) to (f) of the subsection. We set out (d) and (f) since they are or may be relevant to matters with which we shall deal later:

H "(d) the judgment was obtained by fraud; or . . . (f) the judgment was in respect of a cause of action which for reasons of public

policy or for some other similar reason could not have been entertained by the registering court.” A

We can now turn to the 1968 Convention which appears as Schedule 1 to the Civil Jurisdiction and Judgments Act 1982 by which it is given the force of law. The preamble is in the terms following:

“The high contracting parties to the Treaty establishing the European Economic Community, desiring to implement the provisions of article 220 of that Treaty by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals; anxious to strengthen in the community the legal protection of persons therein established; considering that it is necessary for this purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements; . . .” B C

This preamble appears to us to indicate clearly, as one might expect, that the Convention is concerned with the jurisdiction of the courts of contracting states inter se and the reciprocal recognition and enforcement of the judgments of the courts of contracting states inter se. We say “as one might expect” because it would be surprising if contracting states were seeking to affect the position of persons over whom their courts had no jurisdiction or to concern themselves with the recognition or enforcement of judgments of the courts of non-contracting states. The latter would depend on the particular arrangements between a particular non-contracting state and whichever of the contracting states was addressed. At least prima facie the reciprocal recognition and enforcement of the judgments of non-contracting state A in contracting states B and C must depend wholly on the arrangements between state A and states B and C respectively. It has nothing whatever to do with anyone else. D E

Is there then anything in the body of the Convention to support or militate against what appears to us to be the clear intention indicated by the preamble? F

The Convention is divided into a number of Titles of which we are principally concerned with the first three only: Title I “Scope;” Title II “Jurisdiction” and Title III “Recognition and Enforcement.” Title I contains only article 1. It provides that the Convention shall apply “in civil and commercial matters whatever the nature of the court or tribunal.” The courts and tribunals referred to must plainly be the courts and tribunals of contracting states only. G

Title II contains articles 2 to 24 and is divided into eight sections. Section 1 is headed “General provisions.” Articles 2 and 3 provide that, subject to the provisions of the Convention, persons domiciled in a contracting state shall be sued in the courts of that state and may only be sued in another contracting state by virtue of the rules set out in sections 2 to 6 of Title II. Article 4 deals with cases where the defendant is not domiciled in a contracting state. In such cases the jurisdiction of the courts of each contracting state is, subject to the provisions of article 16, to be determined by the law of that state and as against such a H

A defendant a person domiciled in a contracting state may avail himself in that state of the rules of jurisdiction there in force including in particular certain rules which by article 3 are inapplicable as against persons who are domiciled in a contracting state. This contrast is in our view of significance for it indicates what might be termed the internal intention of the Convention.

B There follow in section 2 of Title II provisions concerning special jurisdiction for enabling a person domiciled in one contracting state to be sued in another contracting state. Again the Convention is dealing with internal matters. The same can be said also of sections 3 and 4 dealing with insurance and consumer contracts.

C We come then to section 5, "Exclusive jurisdiction." Article 16 provides that in five cases certain courts shall have exclusive jurisdiction regardless of domicile. The fifth of such cases, article 16(5), is "in proceedings concerned with the enforcement of judgments." In such a case exclusive jurisdiction is given to "the courts of the contracting state in which the judgment has been or is to be enforced." This is the only provision in Title II which deals with jurisdiction in such cases. With it must be considered articles 19 and 23 which provide:

D "19. Where a court of a contracting state is seised of a claim which is principally concerned with a matter over which the courts of another contracting state have exclusive jurisdiction by virtue of article 16, it shall declare of its own motion that it has no jurisdiction."

E "23. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court."

F In our view article 19 cannot apply to proceedings concerned with the enforcement of a judgment of a non-contracting state. It envisages a claim in a contracting state which does not have exclusive jurisdiction, which is principally concerned with a matter over which the courts of another contracting state do have conclusive jurisdiction. Such a situation cannot occur in the case of enforcement proceedings. Nor do we consider that article 23 can apply. It refers to actions within the exclusive jurisdiction of several courts and can, in our view, have no application to enforcement proceedings for in such a case exclusive jurisdiction is given only to the courts of the contracting state in which the judgment is to be enforced.

G Thus far everything appears to us to reinforce rather than detract from the indication to be drawn from the preamble. We have not as yet mentioned articles 21 and 22 which are relied on by the defendants and we shall return to them in detail hereafter. Suffice it for the present to say that we find nothing in either to indicate a wider scope for the Convention than is indicated in the preamble.

H We move to Title III. Article 26 provides that a judgment given in a contracting state shall be recognised in the other contracting states without any special procedure being required. This is beyond question reciprocal recognition of the judgments of the courts of contracting states inter se. By article 27 a judgment, which must mean a judgment

of a contracting state—see article 25—shall not be recognised in certain cases. They are five in number. The first four are plainly internal cases. The fifth is: A

“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 this latter judgment fulfils the conditions necessary for its recognition in the state addressed.” B

This is the only provision to which we were referred which mentions judgments of non-contracting states. It is a provision of some importance. It envisages a judgment given in a non-contracting state, followed by a judgment in a contracting state between the same parties and involving the same cause of action which is irreconcilable with it, followed by a question of recognition of the later judgment in another contracting state. In such a case the later judgment is not to be recognised if, but only if, the earlier judgment fulfils the conditions for recognition in the contracting state in which the question of recognition arises. Here, surely, is explicit acceptance that as between a non-contracting state and a contracting state the recognition of the judgment of the non-contracting state is a matter wholly dependent upon the arrangements between the non-contracting state and the contracting state and that those arrangements will prevail in the event of conflict if the judgment of the non-contracting state precedes the irreconcilable judgment of the contracting state. If it does not, the later judgment will be recognised as between contracting states. No provision is made or needs to be made with regard to any conflict between the two judgments in such a case. As to enforcement, article 31 provides: C D

“A judgment given in a contracting state and enforceable in that state shall be enforced in another contracting state when, on the application of any interested party, the order for its enforcement has been issued there.” E

Here again the Convention is dealing explicitly only with the reciprocal enforcement of judgments of contracting states *inter se*. F

Nothing in the further provisions of the Convention suggest any wider intention than is indicated by the preamble and the provisions to which we have already referred. We conclude therefore, as did Sir Peter Pain, that it has no application to proceedings for the recognition and enforcement of the judgments of non-contracting states and in particular to proceedings under the Act of 1920.

We go on to consider whether, if we are wrong in that conclusion, either article 21 or article 22 applies. Article 21 provides: G

“Where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states, any court other than the court first seised shall of its own motion decline jurisdiction in favour of that court. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.” H

In our view this article could not avail the defendants. The courts of this country would have, by article 16(5), exclusive jurisdiction in proceedings

A under the Act of 1920 and in any event the article is clearly directed to proceedings which may lead to a judgment, i.e. original proceedings and not to proceedings to enforce a judgment which has been obtained in original proceedings, such enforcement proceedings being expressly dealt with under Title III and expressly committed by article 16(5) to the courts of the contracting state in which the original judgment has been or is to be enforced. Article 22 provides:

B “Where related actions are brought in the courts of different contracting states, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.

C “A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

“For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

D Here again the article is in our view concerned with original proceedings or actions and not with proceedings for the enforcement of judgments obtained in original proceedings. Moreover the provisions in the last paragraph appear to show that it is only intended to apply where its application would avoid the risk of irreconcilable judgments from separate proceedings and lead to both actions being heard and determined together. These requirements cannot apply where enforcement proceedings are pending in different contracting states, each of which has by article 16(5) exclusive jurisdiction over the proceedings to enforce a foreign judgment in its own jurisdiction.

E Miss Dohmann submitted that the concluding phrase of the second paragraph of article 22 would be surplusage if this were so. The second paragraph is not easy to follow. It envisages a situation where the court second seised has power to consolidate related actions, i.e. related actions without its own jurisdiction. In such a situation it may decline jurisdiction over the second action but only if the court first seised has jurisdiction over both actions. This must mean it would have jurisdiction if, the second court having declined jurisdiction, the plaintiff could recommence the action in the court first seised. Thus far we see no difficulty. We are however not clear why the paragraph should only apply when the court second seised has power to consolidate. Be that as it may, Miss Dohmann’s point does not appear to us to override the, to us, clear meaning of the final paragraph. In our view the apparent surplusage can be explained by the fact that whereas the first paragraph provides only for a stay of the second action the second deals with a refusal of jurisdiction. In such a case it may have been thought necessary to make it doubly clear that the second court should only decline jurisdiction where the plaintiff had a clear right to resort to the first court.

We conclude therefore that even if the Convention does in general apply the court here is not obliged to decline jurisdiction under article

21 and has no power to stay the bank's proceedings under the first paragraph of article 22 or decline jurisdiction under the second paragraph of that article.

It is convenient now to turn to the question whether, as Sir Peter Pain held, an issue arises in the bank's application for registration under the Act of 1920, for if it does not no question of staying the proceedings can arise. This depends on the question whether, in a challenge to registration of a foreign judgment, or by way of defence to an action to enforce such a judgment, on the ground that it was obtained by fraud, the respondent or defendant is bound by the rules of evidence applicable in such a case to the enforcement of an English judgment or whether, as Sir Peter Pain held, the more liberal rules applicable where the judgment attached is a foreign judgment apply.

If the latter is the case Mr. Mann for the bank accepts that there is clearly such an issue. If the former is the case Miss Dohmann, while not formally accepting that there would be no issue, did not pursue any argument that there would still be such an issue. In our view she was right to take this course. Under the rules applicable in the case of an English judgment there would clearly be no issue. Accordingly Mr. Mann contends that what may be called "the English rules" apply whilst Miss Dohmann contends for the "foreign rules."

Which of them is right depends essentially on whether we are bound by the decisions in *Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295 and *Vadala v. Lawes* (1890) 25 Q.B.D. 310, or whether, notwithstanding those decisions, we are free to hold and should hold that the English rules apply also in the case of foreign judgments.

The authority of Abouloff v. Oppenheimer & Co.

Miss Dohmann submitted that the question whether the defendants have put forward a sufficient case of fraud to require that issue to be tried and all the questions arising in the trial of that issue are to be decided by the principles of common law by reference to which the Act of 1920 was passed, including those established by the decisions in *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295 and *Vadala v. Lawes*, 25 Q.B.D. 310. A judgment debtor on a foreign judgment may, therefore, defend himself in this country by showing that the judgment was obtained by fraud and it matters not that the fraud alleged has already been investigated by the foreign court even though, in such a case, the pleas of fraud will involve a retrial in this country of the matters adjudicated upon by the foreign court. It also matters not that the unsuccessful party in the foreign proceedings refrained from raising the plea of fraud in those proceedings although the facts were known to him at all material times. The judge was, therefore, wrong to require "sufficient fresh evidence to support the allegations" of fraud on the authority of *McIlkenny v. Chief Constable of the West Midlands* [1980] Q.B. 283, which was not a decision on a foreign judgment; but, if fresh evidence is required by law, the judge was right to hold that the requirement was satisfied.

Before stating the submissions made by Mr. Mann for the bank, which have raised questions of fundamental importance in the law of

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A enforcement of foreign judgments which are not covered by the 1968 Convention, it is necessary to state briefly the course of the development of the common law on this subject. The first method of enforcement here of a foreign judgment was by an action upon the judgment. The foreign judgment, in the absence of statute, could have no direct operation in England and Wales because of the principle of the territoriality of a court's jurisdiction. At first, the basis for enforcing the foreign judgment by action in this country was thought to be the doctrine of comity but that was later replaced by the doctrine of obligation, namely, that the judgment of a court having competent jurisdiction over the defendant imposed on him an obligation to pay the sum for which judgment had been given: see *Russell v. Smyth* (1842) 9 M. & W. 810, 819; *Schibsby v. Westenholz* (1870) L.R. 6 Q.B. 155 and the cases cited in *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), vol. 1, p. 420. It followed that anything which may properly be held to negative that obligation was a defence to the action upon the judgment. It is pointed out by the editors of *Dicey & Morris, The Conflict of Laws*, at p. 421, that the right, which the plaintiff seeks to enforce in such proceedings, is a right created and defined by English law and not by foreign law. Thus, in order for the foreign judgment to be enforced in this country, it is essential that the foreign court should have had jurisdiction over the defendant, not in the sense of the foreign law but according to the rules of our law: see *Adams v. Cape Industries Plc.* [1990] Ch. 433, 513H; and the defences which may be pleaded by the defendant in an action upon a foreign judgment, such as that the judgment was obtained by fraud, are themselves creatures exclusively of English law.

E Two principles of our law were liable to be brought into direct conflict in such proceedings: the first was that no man should be permitted to take advantage of his own wrong, such as by enforcing for his benefit a judgment which he had procured by fraud; and the second was that the decision of a court of competent jurisdiction, including a foreign court, was not examinable upon its merits, whether as to decisions of law or of fact. Since it was clearly established that "Fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of courts of justice:" see *per De Grey C.J.* in the *Duchess of Kingston's Case* (1776) 20 St.Tr. 355, 537n., 544n., the resolution of the conflict between those principles in a particular case might depend on whether our law would permit the judgment debtor to raise again, for decision in our costs, allegations of fraud which he had raised against the plaintiff in the foreign court and which had been rejected by the foreign court, or allegations of fraud which he might have, but had not raised in that court, or whether our law would limit the judgment creditor to allegations of fraud which are based on facts which the judgment debtor had been unable to raise in the foreign court through ignorance of them. In short, the questions were whether the foreign court was to be trusted to have decided correctly, if raised before it, the issue whether the claim was fraudulently made, just as it was trusted to decide all other questions of law and fact; and whether a party to proceedings in a foreign court was to be required to bring forward for decision before

that court all matters of defence and evidence in support of them, available to him, as was a party to proceedings in this country: see *Henderson v. Henderson* (1843) 3 Hare 100, 115, *per* Wigram V.-C., cited in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] A.C. 581, 590.

In *Bank of Australasia v. Nias* (1851) 16 Ad. & E. 717 a judgment had been obtained in the court of New South Wales by plaintiffs against the chairman of the banking company for £175,000 for damages for breach of contract by the company. By a statute of New South Wales the action against the chairman was effective to establish the liability of the shareholders in the banking company and the judgment had the same effect beyond the territory of New South Wales which it would have had if the shareholders had been personally served with the proceedings. The court, Lord Campbell C.J. and Patteson, Coleridge and Wightman JJ., held that, although in an action on a foreign or colonial judgment the judgment is examinable to a certain extent, as for the purpose of showing want of jurisdiction, or that the defendant was not summoned, or that the judgment was fraudulently obtained, yet such judgment was not examinable upon the merits, as for the purpose of showing that the contract sued upon was not made, or was procured by fraud, or that the judgment was erroneous. The court held in particular that the plea, that the contractual promises in respect of which the judgment was obtained had been procured by the fraud of the plaintiffs and others in collusion with them, was bad in law as a defence by a shareholder to an action upon the judgment. They explained collusion, in words upon which Mr. Mann has much relied, as follows, at pp. 735-737:

“We do not think that there would be any advantage in going over the authorities seriatim, attempting either to reconcile them or to contrast them. It may be enough to say that the dicta against retrying the cause are quite as strong as those in favour of this proceeding; and, being left without any express decision, now that the question must be expressly decided, we must look to principle and expediency. The pleas demurred to might have been pleaded, and *if there be any foundation for them, they ought to have been pleaded, in the original action. They must now be taken to have been in due manner decided against the defendant.* How far it would be permitted to a defendant to impeach the competency, or the integrity, of a foreign court from which there was no appeal, it is unnecessary here to inquire: for no imputation is cast upon the court by which this judgment was pronounced; and we are bound to take judicial notice that by the law and constitution of this empire there is an appeal from it to Her Majesty, who would refer the appeal to the Judicial Committee of Her Privy Council. I will not take notice of the fact of there having been an appeal; but I may say that either there has or there has not been an appeal; and in either case it seems contrary to principle and expediency for the same questions to be again submitted to a jury in this country. A regular mode having been provided by which an erroneous judgment of a colonial court may be examined and reversed, that mode ought

- A to be pursued. Before the Judicial Committee, the judges there presiding would fairly examine the judgment and only set it aside if it was unjust. But, although perfectly regular and just, it may be set aside if the same questions are again to be submitted to a jury. Although the onus probandi is now to be shifted to the defendant, he is to be at liberty to adduce new witnesses, whom he may suborn, to prove that the company never made the promises which were the foundation of the judgment, or that these promises were obtained by the fraud and covin of the plaintiffs. The documents by which the original cause of action was established in a distant quarter of the globe may be lost or not forthcoming; and the witnesses who truly swore to it may be dead or absent. The defendant may have failed in an appeal to the Judicial Committee, or may be conscious that there is no ground for it; and, if he has this opportunity of again contesting his liability, he may, from the loss of evidence by the plaintiffs, or from a temptation to bring forward false evidence himself, unconscientiously resist the payment of a just demand which had been solemnly adjudicated by a competent tribunal. No hardship whatsoever is cast upon him by requiring him to follow the course to obtain redress against an unjust or erroneous judgment which the law has provided for him. Is it to be said that the peril to the plaintiffs may be obviated by establishing a rule that the cause shall be retried upon the very evidence given in the court below, the jury acting as a Court of Appeal? But there is no authority for this limitation of the inquiry; and these pleas must be lead to a new trial, not to an appeal, upon the merits of the judgment which has been pronounced." (Emphasis supplied.)
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- The effect of that decision, which was upon the sufficiency of a plea in law without reference to the nature of the evidence which might be said to be available in support of it, was to apply the rule in *Henderson v. Henderson*, 3 Hare 100 to the defence to an action on a foreign judgment at least so far as concerns an allegation of fraud affecting the cause of action upon which the judgment creditor had based his claim as distinct from an allegation of fraud affecting the conduct of the proceedings or of the court itself. In effect, in such a case, the rules applied to the questioning of a foreign judgment were the same as those which were applicable by an English court to any attempt to set aside an English judgment. Our law had long permitted the party against whom an English judgment had been given to bring an independent action to set aside the judgment on the ground that it had been obtained by fraud, but strict limits were imposed in order to preserve the principle that a judgment which brings litigation to an end should not be too easily disturbed. In particular the court would not permit the new action to proceed unless the plaintiff would put forward fresh evidence, discovered since the first trial, being evidence which could not have been produced then with reasonable diligence, and which is such that, if it had been put forward at the trial, it would in probability have caused a different conclusion to be reached: see *Dicey & Morris, The Conflict*
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of *Laws*, 11th ed., vol. 1, p. 467, citing *Boswell v. Coaks* (No. 2) (1894) 86 L.T. 365n. A similar rule was applied in Scotland as appears from *Phosphate Sewage Co. Ltd. v. Molleson* (1879) 4 App.Cas. 801, 814, where Earl Cairns L.C. said:

“As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been, ascertained by me before.”

In 1882 this court decided *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295. The plaintiff claimed on a Russian judgment whereby the defendants had been ordered to return to the plaintiff certain goods, or to pay to her their value. The defence alleged that the plaintiff obtained the foreign judgment by fraudulently representing to the foreign court that the goods were not then in her possession and by fraudulently concealing from the foreign court that the goods were in her possession. The plaintiff demurred to that defence and then contended that, assuming the facts to be as alleged, the plaintiff was nevertheless entitled to enforce the Russian judgment. It was argued for the plaintiff that it was consistent with the defence that the question as to the alleged fraud was investigated in the Russian courts and decided against the defendant and that, on the authority of *Bank of Australasia v. Nias*, 16 Ad. & E. 717 the English court could not inquire into the merits of the case. Lord Coleridge C.J. clearly rejected any contention that the rules applicable to the raising of fraud as a defence to an action on a foreign judgment were the same as those applicable to an attempt to set aside in this country a judgment of an English court. He held, at pp. 301–302:

“the question for the courts of this country to consider is whether, when a foreign judgment is sought to be enforced by an action in this country, the foreign court has been misled intentionally by the fraud of the person seeking to enforce it, whether a fraud has been committed upon the foreign court with the intention to procure its judgment. . . . An ingenious attempt has been made to take this case out of the general proposition, and to call in aid another equally clear proposition, namely, that the courts of this country in dealing with a foreign judgment will not inquire whether the foreign court pronounced a judgment correct in point of law, or right and accurate in point of fact, and that inasmuch as the defence now relied upon might have been, and perhaps was, brought before the

A foreign court which decided against the allegation of fraud, the foreign court, in the words of De Grey C.J., was mistaken and not misled. The answer to that contention has been given in the course of the argument for the defendants. We are to decide whether the courts at Tiflis have been misled by the fraud of the plaintiff; but the question whether they were misled, never could have been submitted to them, never could have been in issue before them, and therefore never could have been decided by them. The English courts are not either retrying or even rediscussing any question which was or could have been submitted to the determination of the Russian courts."

Baggallay L.J. said, at p. 303:

C "If the judgments had not been improperly obtained, the right of the plaintiff would be clear. In using the words 'improperly obtained,' I desire to be understood as not limiting them to a case where a fraud has been perpetrated upon the foreign court itself. I apply them also to a case where a fraud has been perpetrated and the foreign court was not ignorant of the facts on which the assertion of fraud was based."

Brett L.J. said, at p. 306:

E "I will assume that in the suit in the Russian courts the plaintiff's fraud was alleged by the defendants, and that they gave evidence in support of the charge: I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it . . ."

F *Vadala v. Lawes*, 25 Q.B.D. 310 was decided in 1890 in this court by Lindley and Bowen L.JJ. The facts of that case raised again the question whether, in an action here on a foreign judgment, the defendant could plead as a defence that the plaintiff had obtained the judgment by fraud when that very allegation had been considered by the foreign court and rejected. The plaintiff had obtained judgment on the judge's direction, but the Divisional Court had directed a new trial on the ground that such a defence was open to the defendant. The argument for the plaintiff in this court was supported by reference to authorities which included *Bank of Australasia v. Nias*, 16 Ad. & E. 717; *Flower v. Lloyd* (1879) 10 Ch.D. 327; *Henderson v. Henderson*, 3 Hare 100 and *Ochsenbein v. Papelier* (1873) L.R. 8 Ch.App. 695. It was submitted for the plaintiff that the decision in *Abouloff*, 10 Q.B.D. 295 must be read with reference to the special circumstances of the case, and could not have been intended to overrule the long current of previous authorities. To say that the English court is not retrying the question as decided by the foreign court, if all the facts were before the foreign court, merely because the question of fraud was not submitted to it, would be to fritter away the rule that the merits cannot be retried by the English court. The attempt to persuade this court to modify or to depart from

the decision in *Abouloff* did not succeed. In a judgment with which Bowen L.J. agreed, Lindley L.J. said, at pp. 316–317:

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“But we now come to another and a more difficult question, and that is, whether this defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule . . . that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English court or of a foreign court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits.

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“Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295. At the time when that case was decided, namely, in 1882, there was a long line of authorities including *Bank of Australasia v. Nias*, 16 Ad. & E. 717, *Ochsenbein v. Papelier*, L.R. 8 Ch.App. 695 and *Cammell v. Sewell* (1860) 5 H. & N. 728, all recognising and enforcing the general proposition, that in an action on a foreign judgment you cannot retry the merits. But until *Abouloff's* case the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without reopening the merits, had never come forward for explicit decision. That point was raised directly in the case of *Abouloff v. Oppenheimer & Co.* and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this court you have to consider whether the foreign court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but in that case the court faced the difficulty that you could not give effect to the defence without retrying the merits. The fraud practised on the court, or alleged to have been practised on the court, was the misleading of the court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the court below was or was not false, was the very question of fact that had been adjudicated on in the foreign court; and, notwithstanding that was so, when the court came to consider how the two rules, to which I have alluded, could

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A be worked together, they said: 'Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to retry the merits, you are entitled to do so according to the law of this country,' I cannot read that case in any other way."

B The rule thus established with reference to foreign judgments has been criticised by distinguished academic authors: see the references in *Dicey & Morris, The Conflict of Laws*, 11th ed., vol. 1, p. 469, note 66, from which it seems that the rule applied in Canada is different. The rule has, however, not been doubted as to its authority in any judgments in this court or in the House of Lords. Decisions in which the rule has been recognised and applied will be noted later in this judgment.

C We have, hitherto, been considering the enforcement of foreign judgments by proceedings at law in this country. Some foreign judgments have long been enforceable under statute. The Judgments Extension Act 1868 (31 & 32 Vict. c. 54) applied to United Kingdom judgments but the terms of that statute need not be considered here. The Act of 1920, under which the bank seeks to register the St. Vincent judgment, provided for the reciprocal enforcement of the judgments of the superior courts within the United Kingdom and corresponding courts of other territories within the Commonwealth. Part of the submissions for the bank rests on the terms of the Act of 1920 and reference must be made to some of them. The power to register a foreign judgment which is given by section 9(1) of the Act of 1920 is discretionary:

E "the court may, if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly."

The remaining provisions of section 9, which need to be set out in full, are as follows:

F "(2) No judgment shall be ordered to be registered under this section if—(a) the original court acted without jurisdiction; or (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or . . . (d) the judgment was obtained by fraud; or . . . (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court. (3) Where a judgment is registered under this section—(a) the judgment shall, as from the date of registration, be of the same force and effect, and proceedings may be taken thereon, as if it had been a judgment originally obtained or entered up on the date of registration in the registering court; (b) the registering court shall have the same control and jurisdiction over the judgment as it has over similar judgments given by itself, but in so far only as relates to execution under this section; . . . (4) Rules of court shall provide—(a) for service on the judgment debtor of notice of the registration of a judgment under this section; and

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(b) for enabling the registering court on an application by the judgment debtor to set aside the registration of a judgment under this section on such terms as the court thinks fit; and (c) for suspending the execution of a judgment registered under this section until the expiration of the period during which the judgment debtor may apply to have the registration set aside."

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The statute contains no provision for rules by reference to which the court is required to decide whether a prima facie case has been raised by a judgment debtor to the effect that the judgment was obtained by fraud, or whether such a contention has been established in law. Parliament is to be taken to have intended that such questions be decided by reference to the common law which, as Parliament knows, is developed by the courts to meet particular cases as they arise.

The Foreign Judgments (Reciprocal Enforcement) Act 1933 was based on reciprocity and is capable of being applied, and has been applied, to countries outside the Commonwealth. We do not find it necessary for the purposes of this case to consider the language of the provisions of the Act of 1933. It is sufficient to note that, by section 4, "the registration of [a foreign judgment] . . . (a) shall be set aside if the registering court is satisfied . . . (iv) that the judgment was obtained by fraud." . . . Again, in this Act, no rules are enacted with reference to the decision of any issue as to whether the judgment was obtained by fraud.

The submission for the bank: Abouloff v. Oppenheimer & Co.

Mr. Mann's submissions were directed to showing that the evidence put forward by the defendants did not in law justify a direction for the trial of the alleged issue of fraud. We believe that those submissions can be fairly summarised as follows. (1) The principles on which the court will, at common law, refuse to recognise or to enforce a foreign judgment are the same as those on which the court will set aside an English judgment. (2) Those principles apply to a decision of the question whether a foreign judgment is shown to have been obtained by fraud under the Act of 1920. (3) In particular, once a judgment has been registered under the Act of 1920 it has effect, by virtue of section 9(3)(a) thereof, as if it were an English judgment. Therefore, on fraud being raised by the judgment debtor, the court, in exercising its discretion whether or not to direct an issue to be tried, is, by implication, directed to apply the principles which the court would apply on application to set aside an English judgment. (4) The principles applicable to the setting aside of an English judgment are those which were laid down in *Bank of Australasia v. Nias*, 16 Ad. & E. 717 and in *Boswell v. Coaks (No. 2)*, 86 L.T. 365n., and which have been recently expressed in *McIlkenny v. Chief Constable of the West Midlands* [1980] Q.B. 283, 333 by Goff L.J.:

"where the issue at the first trial was which of two parties or their witnesses was committing perjury, it is not sufficient merely to aver that the judgment was obtained by perjury since that is no more

A than to say the decision ought to have gone the other way. There must be sufficient fresh evidence to support the allegation."

(5) This court went wrong in *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295. Neither *Abouloff* nor *Vadala v. Lawes*, 25 Q.B. 310 was distinguishable on its facts from *Bank of Australasia v. Nias*, 16 Ad. & E. 717 which, in *Ochsenbein v. Papelier*, L.R. 8 Ch.App. 695, had received the stamp of approval of the Court of Appeal. (6) This court is free to decline to follow *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295 and *Vadala v. Lawes*, 25 Q.B.D. 310, under the principles stated in *Young v. Bristol Aeroplane Co. Ltd.* [1944] K.B. 718, 729 in that (a) the court is entitled to decide which of two conflicting decisions of this court it will follow, i.e. it should follow the decision in *Bank of Australasia v. Nias*, 16 Ad. & E. 717 as approved in *Ochsenbein v. Papelier*, L.R. 8 Ch.App. 695; (b) the court should hold itself bound to refuse to follow *Abouloff's* case, 10 Q.B.D. 295 on the ground that it cannot stand with a decision of the House of Lords, namely *Boswell v. Coaks (No. 2)*, 86 L.T. 365n. which settled the general principles; and (c) this court should hold itself free not to follow *Abouloff's* case, 10 Q.B.D. 295 on the ground that the decision was there made per incuriam in that the court acted in apparent ignorance of previous decision of courts of co-ordinate jurisdiction which covered the facts in *Abouloff's* case, namely, the cases which established the Chancery practice for the setting aside of English judgments and the decision in *Phosphate Sewage Co. Ltd. v. Molleson*, 4 App.Cas. 801.

(7) The attempt to raise the issue of fraud in the bank's enforcement proceedings falls clearly within the mischief perceived by the court in *Bank of Australasia v. Nias*, 16 Ad. & E. 717 and described in the passage cited: the defendants did appeal the judgment in St. Vincent and their appeal was dismissed; and the defendants could have appealed to the Privy Council but did not do so, perhaps because they were conscious that there was no ground for such appeal. As we understood his submissions, Mr. Mann did not seek to uphold the judge's ruling that, if the rule in *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295 is to be applied, there was now a requirement of fresh evidence.

Conclusion: the authority of Abouloff v. Oppenheimer & Co.

We have found it impossible to accept the submissions for the bank on this part of the case. The decisions in *Abouloff's* case and *Vadala v. Lawes*, 25 Q.B.D. 310 are, in our judgment, clearly binding on this court. In particular, it is clear to us that the rules for setting aside an English judgment on the ground that it was obtained by fraud are not the same as those applicable in registration proceedings or in a common law action to the raising of an issue of fraud with reference to a foreign judgment. As to the point that the defendants could have, but did not, appeal to the Privy Council, we have noted what was said in *Bank of Australasia v. Nias*, 16 Ad. & E. 717 on the matter. It was part of the reasoning on which the conclusion in that case was reached. It was not, however, and could not now be treated as, a separate rule applicable to judgments of countries which retain such a right of appeal.

In *Abouloff's* case, 10 Q.B.D. 295 the court declined to apply the principles stated in *Bank of Australasia v. Nias*, 16 Ad. & E. 717, namely, that a judgment debtor in this country could not raise as a defence an allegation that the judgment creditor's cause of action had been fraudulently advanced, whether that allegation had or had not been put forward in the foreign court. One part of the court's reasoning in *Abouloff's* case, 10 Q.B.D. 295, namely, that the question whether the Russian court had been misled, in deciding that the plaintiff had not advanced a fraudulent claim, was a question which had not been and could not have been considered by that court, is one which seems to use, with respect, to be unconvincing. Any court, in considering whether a claim is honest or fraudulent, having regard to the evidence of both sides, must, if it is acting in good faith, be considering and deciding whether the claimant is trying to mislead the court; and, in the absence of significant fresh evidence not before the foreign court, it seems to us that, in substance, the court in *Abouloff's* case was being asked to consider again the same question which the Russian court had decided. The decision in *Abouloff's* case was, no doubt, based at least in part on the court's view of what was the better course, having regard to policy and expediency, just as was, explicitly, the preceding decision in *Bank of Australasia v. Nias*, 16 Ad. & E. 717. In *Vadala v. Lawes*, 25 Q.B.D. 310, that part of the reasoning in *Abouloff's* case, 10 Q.B.D. 295, which we have said we find to be unconvincing, was acknowledged by Lindley L.J. to be the meeting of technical argument by technical answer and he did not attach much importance to it, but, in agreement with Bowen L.J., he declined to depart from the decision in *Abouloff*. Criticisms of the case, and the fact that a different rule might have been developed by the common law, seemed to us to be of no force for the purpose for which they are put forward. The court in *Abouloff's* case made a decision that the rules relating to the defence to an action on a foreign judgment were not the same as those applying to the setting aside of an English judgment. It is of no relevant effect that the court might have decided the case differently.

Next, the submission that *Bank of Australasia v. Nias*, 16 Ad. & E. 717 was approved in *Ochsenbein v. Papelier*, L.R. 8 Ch.App. 695 in such a way that the two cases constitute decisions of this court in conflict with *Abouloff's* case, 10 Q.B.D. 295, seems to us to be unsustainable. In *Ochsenbein's* case Papelier sued Ochsenbein in the court of Queen's Bench upon a judgment obtained by Papelier at Nancy in France. Ochsenbein then filed a bill in Chancery against Papelier alleging that the French judgment had been obtained by fraud, in that Papelier had by deceit caused Ochsenbein not to defend the French proceedings; that Ochsenbein had thereby no defence to the action at law; and that Papelier should be enjoined from proceeding at law. The injunction was refused by Lord Selborne L.C. and Mellish L.J. on the ground that, if the foreign judgment was shown to have been obtained by fraud it was void as much at law as it was in equity. There was therefore no need for the equitable remedy claimed. Both Lord Selborne L.C. and Mellish L.J. referred, without adverse comment, to *Bank of Australasia v. Nias*, 16 Ad. & E. 717 and, Mellish L.J. said, at pp. 700-701:

"It was always held that a foreign judgment could be impeached at law . . . on the ground . . . that the judgment was fraudulently

A obtained. But the doubt was whether the court could not enter into
 the merits, and whether, when the action was brought in this
 country, the foreign judgment was more than a prima facie case, to
 which the defendant might plead that the matter was improperly
 decided. That doubt was settled in the case of *Bank of Australasia*
 v. *Nias*, 16 Ad. & E. 717, which showed that the merits could not
 B be opened again, and that if the question between the parties had
 been decided by a foreign court with jurisdiction, that decision was
 conclusive; but if the foreign judgment was obtained by fraud, that
 would be an answer to any proceedings founded on that judgment."

The distinction between alleged fraud, which if proved would destroy
 the cause of action, such as was put forward in *Bank of Australasia* v.
 C *Nias*, and fraud such as was alleged by Ochsenbein, which was unknown
 to him and therefore not considered by the foreign court, was not
 expressly examined. It did not require to be examined. That sort of
 alleged fraud, which was held in *Bank of Australasia* v. *Nias* not to give
 rise to a defence in proceedings on a foreign judgment, was, quite
 plainly, not alleged by Ochsenbein. The case does not, in our view,
 contain any implicit ruling that the common law courts required the
 D same quality of evidence to raise a plea of fraud as a defence to an
 action on a foreign judgment as was required by the Chancery courts
 with reference to the setting aside of an English judgment.

Next, as to the submission that there is an inconsistent decision of
 the House of Lords, namely, that in *Boswell v. Coaks* (No. 2), 86 L.T.
 365n., there is, in our judgment, a short answer. *Abouloff's* case, 10
 E Q.B.D. 295 was a decision upon the enforcement of a foreign judgment.
 The decision in *Boswell v. Coaks* in the House of Lords was made in
 proceedings to set aside an English judgment on the ground that it was
 obtained by fraud. It decided, in our view, nothing with reference to
 foreign judgments. Reliance on *Boswell v. Coaks*, in this context,
 becomes irrelevant upon the failure by Mr. Mann to demonstrate that
 the rules for foreign judgments are the same as for English judgments.

F Finally, the decision in *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D.
 295 was very plainly not, in our judgment, in any sense per incuriam. It
 is as impossible to suppose that the judges who decided that case were
 ignorant of the rules of practice to set aside English judgments as it
 would be to hold that the failure to cite or to refer to *Phosphate Sewage*
 Co. Ltd. v. *Molleson*, 4 App.Cas. 801 affected in any way the validity of
 G the decision. *Phosphate Sewage Co. Ltd. v. Molleson* was, again, and
 was expressly stated to be, not a case of enforcement of a foreign
 judgment.

The decisions in *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295
 and *Vadala v. Lawes*, 25 Q.B.D. 310 have been consistently treated by
 this court as binding authorities. Some of the later decisions must be
 mentioned, but we do not find it necessary to refer to all which were
 H cited. In *Syal v. Heyward* [1948] 2 K.B. 443 the issue arose in
 enforcement proceedings with reference to an Indian judgment under
 the Act of 1933. This court refused to apply the rules applicable to the
 setting aside of an English judgment and applied the rule stated in

Abouloff v. Oppenheimer & Co., 10 Q.B.D. 295 as explained in *Vadala v. Lawes*, 25 Q.B.D. 310 citing the passage from the judgment of Lindley L.J. which is set out above.

In *Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335 an action was brought to enforce a judgment of the superior court of California. The defence included the contention that the judgment had been obtained by fraud. The defendant appealed to this court from an order giving the plaintiff summary judgment for the amount of the foreign judgment. Staughton L.J., with whose judgment Nicholls L.J. agreed, said, at p. 344:

“That doctrine [based on the decision in *Abouloff*] has encountered criticism from academic writers . . . A possible view which is taken by some is that the fraud relied on must be extraneous or collateral to the dispute which the foreign court determines. But, in my judgment, it is 100 years too late for this court to take that view. The decisions in *Abouloff* . . . and *Vadala* . . . show that a foreign judgment cannot be enforced if it was obtained by fraud, even though the allegation of fraud was investigated and rejected by the foreign court.”

As to *House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241, which is considered later in this judgment with reference to issue estoppel arising from a foreign judgment, it is sufficient to note at this point that this court again held itself bound by *Abouloff's* case, 10 Q.B.D. 295 and *Vadala v. Lawes*, 25 Q.B.D. 310.

As to the point put forward on the terms of the Act of 1920, there is, in our judgment, no force in it. The meaning of the provisions in section 9 of that Act is, we think, clear. The intention is that there should be no effective registration of a foreign judgment, if a prima facie case is put forward to the effect that it was obtained by fraud, until that issue has been decided. It is contemplated by section 9(4) that the court may, in a particular case, order on an ex parte application that a judgment be registered before it is known whether the judgment debtor will claim to challenge the registration on any of the grounds set out in section 9(3). If the court does so order, execution of the judgment so registered must be suspended until the expiration of the period during which the judgment debtor may apply to have the judgment set aside: see R.S.C., Ord. 71, rr. 2 to 9, made pursuant to section 9(4) and section 11 of the Act of 1920. In particular, it is to be noted that when the application is made ex parte, the court, under Ord. 71, r. 2, may direct a summons to be issued.

In the present case the court ordered registration on the ex parte application and directed a summons to be issued, because, in discharge of its obligation on an ex parte application, the bank had informed the court of the fact that the defendants were contending that the judgment had been obtained by fraud. There was, we think, clearly some confusion, because it cannot be right to direct registration and, at the same time, order that a summons be issued for determination of the question whether the judgment should be registered. It is, however, clear that no harm was caused by this element of confusion. The

A essential point at this stage is that, in our judgment, it is impossible to attribute to Parliament, from the words used in section 9, any intention that, if the court should order registration, subject to the judgment debtor's right to apply to have that registration set aside, the rules then applicable to the question whether the judgment debtor has any defence against enforcement are to be the same as if he were applying to have an English judgment set aside. It is, in our view, wholly clear that the words in section 9(3)(a), to the effect that, from the date of registration, the foreign judgment is to be of the same effect as if it had been a judgment originally obtained in the courts of this country, are directed to a judgment registered after the decision of any question raised by the judgment debtor under section 9(2).

C It is, therefore, clear that in the bank's proceedings under the Act of 1920 the rule in *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295 is to be applied. That rule did not include, as the above citations from the judgments in *Abouloff's* case and *Vadala v. Lawes*, 25 Q.B.D. 310 make clear, any requirement of fresh evidence whether in the limited sense derived by the judge from *McIlkenny* [1980] Q.B. 283, or any other terms. The decision in *McIlkenny* was not directed to the enforcement of a foreign judgment. The question to be considered on the evidence in this case is whether a prima facie case had been put forward by the defendants that the St. Vincent judgment had been obtained by fraud. In our judgment, there is clearly such a prima facie case. We accordingly agree with Sir Peter Pain that there is an issue to be tried.

E There remain for consideration the two questions to be answered. (1) Has the court power to grant a stay of the English enforcement proceedings pending the resolution in Italy of the same issue? (2) If so, should the court, as a matter of discretion, grant a stay in the circumstances of the present case?

Jurisdiction

F Rule 33 in *Dicey & Morris, The Conflict of Laws*, 11th ed., p. 389 is in the following terms:

G “(1) English courts have jurisdiction, whenever it is necessary to prevent injustice, to stay . . . an action or other proceeding in England . . . (2) As a general rule in order to justify a stay of English proceedings (a) there must be another forum to whose jurisdiction the defendant is amenable in which justice can be done between the parties at substantially less inconvenience or expense and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court. (3) [Concerns the 1968 Convention].”

H This passage is supported by copious citation of authority and we accept it as an accurate statement of the relevant principles. The jurisdiction is frequently invoked in circumstances covered by the Latin tags “forum non conveniens” and “lis alibi pendens,” but these are no more than convenient labels to describe particular fields in which the general principle, the prevention of injustice, may be applicable. The principles

applicable to staying of actions on the basis of forum non conveniens have recently been restated by the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460, from which it is apparent that the tag may be inapt to describe the relevant principles, since the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. Stated thus, it is apparent that the English court must always be the appropriate forum to determine whether a foreign judgment should be enforced in England. So we agree with the judge when he said:

“In relation to enforcement, there is no question of forum conveniens, nor is there any ground for compelling a judgment creditor to elect as to his forum. He is perfectly entitled to seek enforcement until his judgment debt is satisfied. The English court must control enforcement in England. There is no good ground for subordinating the English proceedings to the proceedings in Italy.”

However, in the course of proceedings in England to enforce a foreign judgment an issue may arise which may also have arisen in a foreign court. That foreign court may, or may not, be the court of the country from which the judgment to be enforced originates. In the present case that issue is whether the St. Vincent judgment was obtained by fraud. That issue has also arisen in the Italian courts. It might have been, but was not, raised as such in the courts of St. Vincent. The question is: in these circumstances does the English court have power to stay the English enforcement proceedings until the issue has been determined in Italy? It seems to us to be irrelevant whether we approach this question under the label *lis alibi pendens*, or whether we approach it by considering whether the Italian court is the appropriate forum for the determination of this particular issue: the question is still one of the application of the general principles set out in rule 33 from *Dicey & Morris*.

We find it helpful to approach this question by considering first whether, if the Italian courts were to reach a decision on the issue before it comes to be tried in England, that decision would create an issue estoppel binding on the parties in the English enforcement proceedings. It is now well established that issue estoppel can be based on a foreign judgment: see *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853 and *The Sennar (No. 2)* [1985] 1 W.L.R. 490, although the doctrine must be applied with caution because of the uncertainties arising from the differences of procedure in foreign countries. Further, this court in *House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241 held that a decision that a foreign judgment had not been obtained by fraud raised an issue estoppel against defendants who sought to raise the same allegations in English proceedings to enforce the judgment. In that case the judgment sought to be enforced was a 1982 judgment given by Costello J. in the High Court of the Republic of Ireland. In 1985 the defendants started proceedings in the Republic of Ireland claiming that the 1982 judgment had been obtained by fraud. That action was heard and dismissed by Egan J. in the High Court of Ireland in 1987. The plaintiffs sought to enforce the 1982 judgment in

- A England by an action at common law and the defendants again sought to raise the defence that the 1982 judgment had been obtained by fraud. This court (Fox, Stuart-Smith and McCowan L.JJ.) upholding the judgment of Sir Peter Pain, held that the 1987 judgment (which was not itself impeachable for fraud: see *per* Stuart-Smith L.J., at p. 251E) created an issue estoppel which prevented the defendants from contending here that the 1982 judgment had been obtained by fraud. So, clearly, a decision by a foreign court that a foreign judgment has, or has not, been obtained by fraud can create an issue estoppel in English proceedings to enforce that judgment.
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- There are two respects in which *House of Spring Gardens Ltd. v. Waite* differs from the present case. (1) The English proceedings to enforce the Irish judgment were at common law: they were not under any of the statutes, i.e. the Administration of Justice Act 1920, the Foreign Judgment (Reciprocal Enforcement) Act 1933 and the Civil Jurisdiction and Judgments Act 1982, which make express provision for the enforcement of foreign judgments. Nevertheless we are satisfied—and in the course of argument we were referred by Miss Dohmann to the reports of the committees which led up to the enactment of the Acts of 1920 and 1933—that the process of enforcement of foreign judgments under the statutory provisions is not a procedure which is different in kind, although it may differ considerably in detail, to the procedure at common law. Accordingly, the fact that in the present case the issue whether the St. Vincent judgment was obtained by fraud arises under section 9(2)(d) of the Act of 1920 is not of itself sufficient to preclude the principles of *House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241 being applicable.
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- (2) The decision which gave rise to the issue estoppel was a decision of the court of the country (Ireland) from which the judgment to be enforced originated. At first blush this might appear to be a highly material factor and in many cases it will undoubtedly be so. But it cannot be said that the courts of the country from which the judgment originates are necessarily best qualified to determine whether the judgment was, or was not, obtained by fraud. The allegation may be that the fraud consisted of the bribery of a judicial officer and there may be evidence which gives some credence to that allegation. In those circumstances there may be a lack of confidence in a decision by the same court that there was no fraud. In our judgment, there is no especial significance in the fact that it is the court of the originating country which decided the issue which gives rise to an estoppel: of greater importance is the necessity for observing the requirement to be cautious to which reference was made in *Carl Zeiss Stiftung v. Rayner & Keeler (No. 2)* [1967] 1 A.C. 853. This is particularly so where, as in the case of a judgment of the courts of country A enforcement proceedings may be started by the judgment creditor in the courts of England and Wales and of countries B and C. The judgment debtor may have substantial assets in this jurisdiction, but very few assets in countries B and C. He raises the issue that the original judgment was obtained by fraud in all three countries but may, on grounds of expense or availability of evidence, be unwilling to deploy his full case in
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countries B and C. In those circumstances it may be that, *in the particular case*, a judgment in country B that the original judgment in country A had been obtained by fraud would not create an issue estoppel in our courts. As Lord Reid said in the *Carl Zeiss* case [1967] 1 A.C. 853, 918: A

“I can see no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment, but there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his full case in a trivial case: it might be most unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in that case went against him.” B C

His third reason for caution was the difficulty of establishing whether the judgment said to give rise to an issue estoppel was a final judgment on the merits. To the like effect was Lord Wilberforce, at p. 967. D

In our judgment, therefore, *House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241 does lay down a general principle, which is binding on us, that a decision by a foreign court, whether or not a court of the country from which the judgment originates, that a foreign judgment was, or was not, obtained by fraud *can* create an estoppel in English proceedings to enforce that judgment, although it will always be necessary to be cautious in the particular case. We do not accept Mr. Mann’s submission, unsupported by authority, that, as a matter of policy, no issue estoppel can arise in enforcement proceedings. E

So, in theory at any rate, if the Italian courts were to reach a decision that the St. Vincent judgment was, or was not, obtained by fraud, before that issue comes to be tried in England, that decision *could* create an issue estoppel binding on the parties in the English enforcement proceedings. Accordingly, in our judgment, there must be a power in the English court to stay the trial in England of the issue whether the St. Vincent judgment was obtained by fraud pending the trial of the same issue in Italy. It could be productive of great injustice to allow the issue to go ahead in England when the same issue could be better tried in Italy and the Italian decision could be determinative of the issue for the purposes of the English proceedings. F G

Discretion

The judge clearly considered that he had a discretion to stay the English proceedings but that it was inappropriate now to exercise that discretion. He said: H

“As a matter of discretion it might have been right to stay the English proceedings pending a decision in Italy were such a decision

A imminent and were it reasonably likely to give rise to an issue
 estoppel in the English proceedings, and I have *House of Spring*
Gardens Ltd. v. Waite in mind. But the evidence does not show
 that a decision in Italy is imminent: rather the reverse. In saying
 this I make it clear that I am not making any criticism of the Italian
 courts, which have obviously been pursuing the matter vigorously.
 B Nor can I have any confidence that the decision in Italy will take a
 shape which will give rise to issue estoppel in view of the complex
 nature of the Italian proceedings and, in particular, their relationship
 to the criminal proceedings against Mr. Nano and Mr. Layne."

This court would in any event be reluctant to interfere with the
 exercise by a judge of first instance of a discretion based on the
 C circumstances of the particular case. But in our judgment there is no
 valid basis for asserting that the judge exercised his discretion wrongly.
 Admittedly, there are strong grounds for the defendants' submission
 that the Italian courts may be the appropriate forum to decide the issue
 whether the St. Vincent judgment was obtained by fraud. Those grounds
 may be summarised as follows.

D (1) The Italian courts have been seised of the issues between the
 parties since 1968. (2) The main protagonists, Nano and Bracco, as well
 as the majority of the witnesses, are native Italian speakers, with little
 or no knowledge of the English language. This court is well aware of the
 difficulties attendant on evidence given through translators. (3) Nearly
 all the relevant documents are in Italian. Crucial original documents are
 in the custody of the Italian courts and cannot be released until the
 E conclusion of the Italian criminal proceedings. (4) Italy is the place of
 the domicile and residence of both defendants. The majority of the
 witnesses are domiciled and resident in Italy. None of the witnesses is
 domiciled or resident in England. The bank is neither domiciled nor
 resident in England, nor does it carry on business here. (5) The experts
 F appointed by the Italian court and on behalf of each party are Italian
 and have prepared and written their reports in Italian. Again translation
 would present very great difficulties. (6) What is called "the
 Cambridgeshire factor," i.e. the accumulated expertise of the Italian
 lawyers and experts: see *Spiliada Maritime Corporation v. Cansulex Ltd.*
 [1987] A.C. 460, 485.

All these are factors of great weight to which may be added one
 other factor. Although, for the reasons we have given, this is not a
 G Convention case, both the United Kingdom and Italy are members of the
 European Economic Community and are parties to the 1968 Convention.
 In our judgment, the English courts should adopt a communautaire, and
 not a national and chauvinistic, approach to the determination of this
 question: cf. *In re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72, 99A-B,
 per Bingham L.J.

H Despite these strong factors in favour of an Italian forum, there are,
 as the judge recognised, two main objections to the grant of a stay at
 the present time. First, it is by no means clear to us that the Italian
 proceedings will inevitably lead to a decision whether the St. Vincent

judgment was obtained by fraud. The only evidence to this effect is the following statement in an affidavit by Mr. Woodall, an English solicitor for the defendants: A

“In the judgment enforcement proceedings in Italy the issue whether the St. Vincent judgment was obtained by fraud arises and will have to be determined by the Italian courts.”

However, an examination of an English translation of the pleadings in the Italian enforcement proceedings, which were in the agreed core bundle before us, makes it clear that the issue whether the St. Vincent judgment was obtained by fraud is only one, and described as a subordinate issue, of several defences raised by the defendants. In the absence of any convincing evidence from an Italian lawyer, we are not satisfied that the Italian courts will necessarily have to determine the issue whether the St. Vincent judgment was obtained by fraud if one of the defendants’ other and principal defences were to succeed. B C

Secondly, we do not interpret the judge’s statement that a decision on the issue in Italy is not imminent as being, as Miss Dohmann submits, an impermissible comparison between the relative merits of the legal systems of this country and Italy; rather it is a ground for refusing now to stay the English proceedings. We can find nothing wrong in this. That is not to say that there may not come a time when the defendants will be able to satisfy the English court that the issue whether the St. Vincent judgment was obtained by fraud will necessarily arise in the Italian enforcement proceedings in a form that could create an issue estoppel in the English proceedings and that a decision on this issue in Italy is sufficiently proximate that, taking all other relevant matters into consideration, a stay of the English proceedings would not cause undue hardship to the bank. That time has not yet come. D E

In the result we dismiss both the appeal of the bank and the appeal of the defendants. The issue of fraud directed by Sir Peter Pain to be tried will proceed.

We add in conclusion that pending the determination of the issue the question whether it is just and convenient to enforce the St. Vincent judgment here cannot be determined and that we are indebted to counsel for their very full and clear skeleton arguments. The fact that we have not dealt specifically with all the points made in them implies no disrespect. The omission to do so stems solely from the need to prevent a long judgment being even longer. F

Although we have power to refer questions as to the interpretation of the Convention to the European Court of Justice we do not consider that in this case we should exercise that power. G

*Appeals dismissed with costs.
Leave to appeal refused.*

H

18 July. The Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Griffiths and Lord Jauncey of Tullichettle) allowed a petition by the defendants for leave to appeal in respect of the first

- A appeal and also allowed a petition by the plaintiff bank for leave to appeal in respect of the second appeal.

Solicitors: Clifford Chance; Charles Russell.

M. F.

- B The defendants and the plaintiff bank appealed.

On the hearing of the appeals, the House of Lords ordered that further proceedings on the defendants' appeal be stayed pending a reference to the European Court of Justice: see *per* Lord Bridge of Harwich, post, p. 480f.

- C *Martin Mann Q.C.* and *Michael Gadd* for the plaintiff bank. When an application is made under R.S.C., Ord. 71, r. 9 in registration proceedings (whether under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933) for a trial to be directed as to an issue of fraud consisting of alleged perjury by parties or their witnesses, the court should apply the same rules as apply at common law to the setting aside of an English judgment. Though much criticised, *Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295 is held to have decided that at common law different rules apply to foreign judgments. The issue on this appeal is whether or not *Abouloff* should be overruled. The fraud relied on by the defendants consists of allegations of perjury by the bank's witnesses at the trial in St. Vincent and of forgery of documentary evidence. The first allegation amounts to nothing more than that the decision ought to have gone the other way; E the second allegation can only be made good, if at all, with the aid of evidence that could have been made available with reasonable diligence at the trial.

- Overruling *Abouloff* involves qualifying rule 44 of *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), vol. 1, pp. 467, 468–469. The judgments in *Abouloff* ignore completely the doctrines of cause of action and issue estoppel and the relationship between these and the doctrine of obligation. They are therefore wrong in principle. The rules ought to be the same, at least where a judgment on the merits in a common law jurisdiction is in question. Indeed, they were the same until *Abouloff*. For the English rules as to the circumstances in which an English judgment can be impeached for fraud consisting of perjury, see *McIlkenny v. Chief Constable of the West Midlands* [1980] Q.B. 283, 333c–f, 335c, approved in *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529, 545e. The cases show that the fraud and fresh evidence rules have merged into one and that they are of equal application whether the judgment in question is English or foreign. [Reference was made to *Bank of Australasia v. Nias* (1851) 16 Ad. & E. 717; *Henderson v. Henderson* (1843) 3 Hare 100; *Phosphate Sewage Co. Ltd. v. Molleson* (1879) 4 App.Cas. 801; *Russell v. Smyth* (1842) 9 M. & W. 810; *Godard v. Gray* (1870) L.R. 6 Q.B. 139; *Dicey & Morris, The Conflict of Laws*, vol. 1, p. 418, r. 35, pp. 420–421, r. 42, pp. 460–462, n.65, p. 468, n.66, p. 469, pp. 467–471; *The Sennar (No. 2)* [1985] 1 W.L.R. 490, 493–494; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*
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(No. 2) [1967] 1 A.C. 853; *Duchess of Kingston's Case* (1776) 20 St.Tr. 355, 537n.; *Flower v. Lloyd* (1877) 6 Ch.D. 297; (1879) 10 Ch.D. 327, 333; *Boswell v. Coaks* (No. 2) (1894) 86 L.T. 365n.; *Birch v. Birch* (1902) 86 L.T. 364, 368–369; *Ochsenbein v. Papelier* (1873) L.R. 8 Ch.App. 695; *Vadala v. Lawes* (1890) 25 Q.B.D. 310; *Syal v. Heyward* [1948] 2 K.B. 443; *Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335; *House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241; *Codd v. Delap* (1905) 92 L.T. 510 and K. W. Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (1948), Pt. I, ch. 1, p. 28.]

According to the judgments in *Abouloff*, the technical justification for departing from the general rule that a judgment cannot be reviewed on its merits is that the foreign court has never had the opportunity of deciding whether it was misled. If correct, such reasoning would apply with equal force to the setting aside of an English judgment for such fraud. Accordingly, the *Abouloff* decision can only be justified, if at all, on the ground of policy.

Such a policy is both objectionable and wrong. It is wrong since it both conflicts with the common law doctrine of obligation (see *Dicey & Morris, The Conflict of Laws*, 11th ed., vol. 1, pp. 420–421) and is inconsistent with the policy evident in, e.g., *The Abidin Daver* [1984] A.C. 398 where it was recognised that the essential change in the attitude of the English court to litigation in foreign jurisdictions of the kind before it was that judicial chauvinism had been replaced by judicial comity. The modern policy should be both of general application where otherwise a foreign court is competent to decide legal issues between parties and of equal application whether the context be jurisdiction over the lis or enforcement. A policy that requires an English court to arrogate to itself the responsibility of deciding that the foreign court was deceived, especially where the foreign court has its own procedure for setting aside judgments obtained in such circumstances, is aberrant. It is also inconsistent with the general principle of non-reviewability of judgments that is inherent in the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) (Civil Jurisdiction and Judgments Act 1982, Sch. 1) (“the 1968 Convention”), articles 27(1) and 29: see p. 128, para. 192 of the Schlosser Report on the Convention (Official Journal 1979, No. C. 59, p. 71). Certainty and consistency are fundamental principles of English law. Inconsistent policies are undesirable.

Barbara Dohmann Q.C. and *Thomas Beazley* for the defendants. The appeal is about a refusal to register a judgment under the Act of 1920. The decision in the appeal thus falls under the Act. It is not principally concerned with the position at common law. There is no warrant for the limitation that the bank seeks to put on the plain words of section 9(2)(d). The Act absolutely prohibits an order for registration if the foreign judgment sought to be registered was obtained by fraud. It does not prohibit such registration only in circumstances where an English judgment could be set aside for fraud.

The court cannot, when a *prima facie* case of fraud on the foreign court is established, abnegate the duty to investigate whether fraud exists. That is plain from the words of the Act itself. To determine

A whether there is a prima facie case, one does not need fresh evidence: see *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295. That case decided, as a matter of common law, not to extend the principles applicable to setting aside English, or United Kingdom, judgments to foreign judgments.

B *Abouloff v. Oppenheimer & Co.* deals with the enforcement of a foreign judgment by action on that judgment. The rules that applied to the enforcement of domestic English judgments were not extended to foreign judgments. As to Brett L.J.'s limitation, at p. 307, the critical point is that it has to be the plaintiff who obtains the judgment by fraud: the rule does not apply if a witness tells lies and the plaintiff does not know it. In *Vadala v. Lawes*, 25 Q.B.D. 310, the Court of Appeal held, in direct contrast to the domestic rules, that it did not matter that the English court in the enforcement proceedings would investigate the same issues as the foreign court had investigated or that the evidence on those issues would be the same as that before the foreign court. *Codd v. Delap*, 92 L.T. 510 constitutes House of Lords authority that the defendants are not obliged to satisfy the rules that apply to domestic English judgments.

C The *Duchess of Kingston's Case*, 20 St.Tr. 355, 537n., 544n., does not say anything about an evidentiary rule. *Bank of Australasia v. Nias*, 16 Ad. & E. 717, which was a case of demurrer to assumpsit, does not demonstrate that, if there is fraud on the foreign court, fresh evidence is required. *Castrique v. Imrie* (1870) L.R. 4 H.L. 414 says that a foreign judgment stands on its merits, whether it is erroneous or not, but it is clear that it is not a fraud case. It says nothing about any fresh evidence being required. *Ochsenbein v. Papelier*, L.R. 8 Ch.App. 695, which shows that fraud renders the judgment a nullity, and *Godard v. Gray*, L.R. 6 Q.B. 139 make no reference to any evidentiary rule. [Reference was also made to *Houlditch v. Donegall* (1834) 2 Cl. & F. 470 and *Henderson v. Henderson*, 3 Hare 100.]

E The conclusion in paragraph 35 of the Report of the Committee appointed by the Lord Chancellor to consider the Conduct of Legal Proceedings between Parties in this Country and Parties Abroad and the Enforcement of Judgments and Awards (1919) (Cmd. 251) ("the Sumner Committee Report") is clearly in contradistinction to the Judgments Extension Act 1868, which established a scheme for registration of United Kingdom judgments quite different from that of the Act of 1920. The Act of 1920 should be read in the light of the mischief that was to be dealt with, the intention that Parliament clearly had on the plain wording of the Act, and English law at that point. *Abouloff v. Oppenheimer & Co.* and *Vadala v. Lawes* represented the common law at the time when the Act of 1920 was passed. One cannot construe the Act of 1920 in the light of *The Abidin Daver* [1984] A.C. 398.

F By section 9(1) the discretion given to the court in England not to register a foreign judgment is over and above the bar for fraud in subsection (2). Even if there were no bar, the court would still have to be satisfied that it was just and convenient that the judgment should be enforced. "Just and convenient" is habitually given a very wide application.

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The Foreign Judgments (Reciprocal Enforcement) Act 1933 contains no qualification of section 4(1)(a)(iv). Like the Act of 1920, it provides that the registration of a foreign judgment that was obtained by fraud must be set aside. Again, so far as a defence to enforcement based on fraud is concerned, the Act of 1933, in effect, followed the common law and the Act of 1920: *Dicey & Morris, The Conflict of Laws*, 11th ed., vol. 1, p. 487, n. 27. [Reference was made to *Syal v. Heyward* [1948] 2 K.B. 443.]

In *Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335, *House of Spring Gardens Ltd. v. Waite* [1991] 1 Q.B. 241 and *Adams v. Cape Industries Plc.* [1990] Ch. 433, 569A, the Court of Appeal did not suggest that the earlier decisions were not binding on it or that those decisions were in any way affected by developments of the law in cases involving challenges to *English* judgments in the English courts.

Enforcement in England of the judgment of a contracting state under the 1968 Convention is a separate matter governed by that Convention.

Phosphate Sewage Co. Ltd. v. Molleson, 4 App.Cas. 801; *Boswell v. Coaks* (No. 2), 86 L.T. 365n. and *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529 are all cases on the approach that the English court should take on an application to set aside or otherwise challenge an *English* judgment.

There is no criticism of the *Abouloff* case in *Reg. v. Humphrys* [1977] A.C. 1. Nor is there any conflict between *Abouloff* and the common law doctrine of obligation: see *Dicey & Morris, The Conflict of Laws*, 11th ed., rr. 42 (p. 461) and 44 (p. 467). The construction of the Act of 1920 is not a question of general legal policy. For the House of Lords to overrule the *Abouloff* decision would involve issues of general policy. Overruling the decision (1) would be such an important departure from the established rule that it should be left to Parliament, (2) would change the common law and (3) would have consequences beyond the Acts of 1920 and 1933 and would affect judgments from every country of the world. *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 629–630, 637–638, 648–649 shows that one should look at the law as understood by Parliament in 1920, not at what it may or might actually have been.

Fraud is regarded, rightly, by English law as a particularly offensive matter. There is a real distinction between fraud and other issues. The plaintiff who has obtained a foreign judgment by fraud is not just a litigant who has benefited from a mistake of fact or law by the foreign court; he is a litigant who has deliberately caused the foreign court to come to a wrong decision. The general rule that foreign judgments are conclusive as to their merits, even if the judgment is wrong, may be justified as tending to increase the international enforceability of such judgments; it does not follow that it should be extended to benefit such a plaintiff.

In the case of an English judgment, the defendant will have been found liable by the English court itself. The domestic rules are intended to prevent that same court being asked to retry the case on the evidence that either was or should have been before it at the first trial. The English court has satisfied itself on the evidence before it that the

- A plaintiff's claim is justified and warrants enforcement. In the case of a foreign judgment, the English court has not reached any such decision. A justification for the restrictive domestic rules is that the English legal system operates so as to give a fair result. English law does not, and should not, assume that this is always so in foreign jurisdictions. Factors such as the rules of procedure and evidence and the training and experience of the legal profession and the judiciary would have to be considered. Further, the English court cannot be certain that there is sufficient opportunity, according to English standards, for the defence of fraud to be raised in all foreign jurisdictions and cannot be satisfied in all cases as to the quality of justice. The choice of the foreign court was that of the plaintiff, not the defendants. Distinguishing between different foreign legal systems is invidious. Refusal to enforce the foreign judgment in England does not cause that foreign judgment to be set aside and does not cause further litigation in the foreign court. Whatever the decision of the English court, the plaintiff still has his judgment in the foreign court.

- A foreign judgment of a court of competent jurisdiction is enforceable at common law by action on the judgment. The cause of action arises when the judgment is obtained, but not before. The foreign court cannot in its judgment have decided the question whether its judgment was obtained by fraud. Enforcement of a foreign judgment in England at common law proceeds on a different basis from that of the enforcement of an English judgment in England. The English judgment creditor does not *sue* on his English judgment as a cause of action. In the case of a foreign judgment, if the cause of action, namely that foreign judgment, was obtained by fraud, the plaintiff cannot successfully sue on the cause of action. There may be cases, as is the fact in the present case, where the court in a country other than that of the original judgment has already ruled in such a way as to show that the original foreign judgment was obtained by fraud. That decision may not create, or may not yet have created, an estoppel on the issue. It would be particularly undesirable in such a case that the original foreign judgment should be enforceable in England without the English court even having the opportunity of deciding whether it was obtained by fraud.

- As to estoppel, there is a balance to be drawn between contributory negligence on the one hand and fraud on the other. A foreign judgment creditor cannot be allowed to reap a benefit obtained by his fraud simply because the other party was negligent. Estoppel is a matter of unconscionability.

- Mann Q.C.* in reply. The Act of 1920 does not set out to repair a defect in the common law. It facilitates enforcement and adopts exclusionary conditions supplied by the common law. It does not change them or affect them in any way: see section 9(2)(f) as to policy requirements of the registering court, which suggests acceptance by the legislature of a certain "mobility" of policy. It is a fortiori with the common law. The legislature can be presumed not to have intended to interfere with the common law's mobility, that is, its ability to evolve. "Correcting" the *Abouloff* rule to make it consistent with principle would not conflict with the aims of the Act.

Their Lordships took time for consideration.

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1 April. LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons which he gives, I, too, would dismiss the bank's appeal with costs.

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LORD BRIDGE OF HARWICH. My Lords, these proceedings arise out of an application by Owens Bank Ltd. ("the bank") to register under section 9 of the Administration of Justice Act 1920 a judgment of the High Court of St. Vincent and the Grenadines dated 29 January 1988 (affirmed by the Court of Appeal of St. Vincent and the Grenadines on 29 December 1989) against Fulvio Bracco and Bracco Industria Chimica S.p.A. ("Bracco" and "Bracco S.p.A.") for a sum in excess of Sw. Fr. 10m. After initial registration on the bank's ex parte application the matter came before Sir Peter Pain, sitting as a High Court judge in chambers, on the application of Bracco and Bracco S.p.A. (1) that the registration be set aside or the proceedings stayed pursuant to the provisions of the Civil Jurisdiction and Judgments Act 1982; or alternatively (2) that an issue be tried under section 9(2)(d) of the Act of 1920 as to whether the St. Vincent judgment had been obtained by fraud. Sir Peter Pain heard the two issues separately. He gave judgment on issue (1) in favour of the bank, refusing to set aside the registration or stay the proceedings under the Act of 1982. He gave judgment on issue (2) in favour of Bracco and Bracco S.p.A. ordering that an issue be tried as to whether the St. Vincent judgment had been obtained by fraud. Both parties appealed and both appeals were dismissed by the Court of Appeal (Parker, Balcombe and Ralph Gibson L.JJ.) ante, pp. 448 et seq. Both parties have further appealed by leave of your Lordships' House, but your Lordships determined that the appeal of Bracco and Bracco S.p.A. on issue (1) depends upon questions which it is necessary to refer to the European Court of Justice and accordingly ordered that further proceedings on that appeal be stayed. Thus it is only the appeal of the bank on issue (2) that now falls to be decided.

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The events leading to the litigation are clearly and succinctly summarised in the judgment of the Court of Appeal, ante, pp. 449-450, and I gratefully adopt their account which reads:

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"The bank's claim in the St. Vincent action was simple but remarkable. It was that, on 31 January 1979, Mr. Armando Nano, the then managing director of the bank and acting on its behalf, had lent to Bracco Industria Chimica S.p.A. the sum of Swiss Fr. 9m., which had then been handed over in cash by Nano to Bracco, who was the president of Bracco Industria Chimica S.p.A. acting on its behalf, or his own behalf. The loan was made, it was said, on terms agreed orally including, inter alia, that it should be

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A repayable in three tranches of Sw.Fr. 2m., 3m., and 4m. on 27, 28 and 29 August 1979. This transaction was said to have taken place in the Hôtel du Rhône, Geneva, and was sought to be supported by three receipts, four acknowledgements and a letter on Hôtel du Rhône paper all of which were said to have been signed by Bracco ('the loan documents'). The documents included provisions that gave the High Court of St. Vincent and the Grenadines jurisdiction in the event of dispute.

B "Bracco denied the transaction in toto asserting that no loan had been agreed or made, that no cash had been handed over and that the loan documents were forgeries never having been signed by him. Bracco Industria Chimica S.p.A. asserted that if Bracco had entered into any such transaction he had no authority whatsoever to do so.

C "The bank is a St. Vincent company but Bracco Industria Chimica S.p.A. is an Italian company and Bracco resides in that country. Nano is also an Italian. The jurisdiction of the St. Vincent courts thus rested on the jurisdiction provisions in the loan documents. That jurisdiction was challenged and was decided in favour of the bank by Renwick J. on the hearing of an application to strike out the action for want of jurisdiction. From that decision there was no appeal. The point was sought to be raised again at the trial before Singh J. but he held that the matter had already been determined.

D "During the course of the bank's case in St. Vincent, the defence admitted that the signatures on the receipts and acknowledgements were the signatures of Bracco. After the bank's case was closed, however, the defence intimated that they wished to set up a new defence, namely, that the signatures on the receipts and acknowledgements were genuine signatures but that they had originally appeared in the wide margins of a contract concerning a wholly different matter, that the margins with the signatures had been cut off and that Nano or someone on his behalf or on behalf of the bank had then typed in the rest of what appeared on the document. The contentions with regard to the letter were more complex but it is not necessary to set them out. Singh J. ruled that the defendants were not entitled to set up this defence at such a late stage and his ruling was upheld on appeal. Singh J. accepted the evidence of Nano and accordingly gave judgment for the bank.

F "The foregoing is a very much simplified account of the litigation in St. Vincent. It is however sufficient for present purposes. It will be apparent from it that there could be no possibility other than that either Nano or Bracco was committing perjury and trying deliberately to deceive the court. By accepting the evidence of Nano, Singh J. found, in effect, that it was Bracco who was attempting to deceive it.

G "Before the St. Vincent action was tried, the matter of the genuineness of the loan documents had already been raised elsewhere. Bracco in response to a demand for repayment in November 1980 had stated in a letter of 4 December 1980 that the

documents were false and had never been signed by him, and there had been both criminal and civil proceedings in Italy in which the question of fraud had been raised. Between the judgment in the High Court of St. Vincent and the dismissal of the appeal therefrom yet further proceedings had been commenced in Italy including (1) civil proceedings at the suit of both defendants seeking declarations of non-liability to the bank and (2) proceedings by the bank to enforce the St. Vincent judgment. After the St. Vincent appeal was dismissed, yet further proceedings both criminal and civil were commenced in Italy. It is unnecessary to go into the details of any of those proceedings. It is sufficient to say that the issue of fraud is squarely raised but has not yet been decided.”

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Since the judgment of the Court of Appeal was delivered the First Criminal Division of the Milan Civil and Criminal Court has delivered judgment convicting Nano and a co-defendant of certain charges brought against them and holding the loan documents to be forgeries. Nano and the co-defendant were each sentenced to six years' imprisonment, but these sentences are suspended pending appeal.

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Section 9 of the Act of 1920 provides:

“(1) Where a judgment has been obtained in a superior court in any part of His Majesty's dominions outside the United Kingdom to which this Part of this Act extends, the judgment creditor may apply to the High Court in England or Ireland, or to the Court of Session in Scotland, at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly. (2) No judgment shall be ordered to be registered under this section if—(a) the original court acted without jurisdiction; or (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or (d) the judgment was obtained by fraud; or (e) the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment; or (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court. (3) Where a judgment is registered under this section—(a) the judgment shall, as from the date of registration, be of the same force and effect, and proceedings may be taken

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- A thereon, as if it had been a judgment originally obtained or entered
up on the date of registration in the registering court; (b) the
registering court shall have the same control and jurisdiction over
the judgment as it has over similar judgments given by itself, but in
so far only as relates to execution under this section; (c) the
reasonable costs of and incidental to the registration of the judgment
B (including the costs of obtaining a certified copy thereof from the
original court and of the application for registration) shall be
recoverable in like manner as if they were sums payable under the
judgment. (4) Rules of court shall provide—(a) for service on the
judgment debtor of notice of the registration of a judgment under
this section; and (b) for enabling the registering court on an
application by the judgment debtor to set aside the registration of a
C judgment under this section on such terms as the court thinks fit;
and (c) for suspending the execution of a judgment registered under
this section until the expiration of the period during which the
judgment debtor may apply to have the registration set aside.
D (5) In any action brought in any court in the United Kingdom on
any judgment which might be ordered to be registered under this
section, the plaintiff shall not be entitled to recover any costs of the
action unless an application to register the judgment under this
section has previously been refused or unless the court otherwise
orders.”

- E It is not in dispute that if the loan documents were indeed forgeries
and the account given by Nano in his evidence in the court in St.
Vincent of the transaction on 31 January 1979 at the Hôtel du Rhône in
Geneva was a fabrication, the St. Vincent judgment was obtained by
fraud. But it is submitted for the bank that the language of section
9(2)(d) must be construed as qualified by the common law rule that the
unsuccessful party who has been sued to judgment is not permitted to
challenge that judgment on the ground that it was obtained by fraud
F unless he is able to prove that fraud by fresh evidence which was not
available to him and could not have been discovered with reasonable
diligence before the judgment was delivered. Here, it is said, there is
no such fresh evidence. This is the rule to be applied in an action
brought to set aside an English judgment on the ground that it was
obtained by fraud. The rule rests on the principle that there must be
G finality in litigation which would be defeated if it were open to the
unsuccessful party in one action to bring a second action to relitigate the
issue determined against him simply on the ground that the opposing
party had obtained judgment in the first action by perjured evidence.
Your Lordships were taken, in the course of argument, through the
many authorities in which this salutary English rule has been developed
and applied and which demonstrate the stringency of the criterion which
the fresh evidence must satisfy if it is to be admissible to impeach a
H judgment on the ground of fraud. I do not find it necessary to examine
these authorities. The rule they establish is unquestionable and the
principle on which they rest is clear. The question at issue in this
appeal is whether a defendant who is seeking to resist the enforcement

against him of a foreign judgment, either by an action on the foreign judgment at common law or under the statutory machinery for the enforcement of foreign judgments, is placed in the same position as if he were a plaintiff in an action seeking to set aside the judgment of an English court on the ground that it was obtained by fraud and can therefore only rely upon evidence which satisfies the English rule.

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. But this is subject to the special defence that the foreign judgment was obtained by fraud. The starting point in considering the scope of that defence is the decision of the Court of Appeal in *Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295. The plaintiff had obtained judgment against the defendant in a Russian court, the District Court of Tiflis, for the return of certain goods or payment of their value, which was affirmed on appeal by the High Court of Tiflis. She sought to enforce the judgment by action in England. To this action the defendants pleaded that the judgment had been obtained by the fraud of the plaintiff and her husband by falsely representing to the courts in Russia that the goods in question were not in their possession when in fact they were. On demurrer to this plea the Court of Appeal, affirming the Queen's Bench Division, held that the defence pleaded was good. The judgments are particularly instructive in the context of the present appeal in so far as they address and reject the very argument which your Lordships are now invited by the bank to affirm. The argument is summarised in the judgment of Lord Coleridge C.J., at pp. 299–300:

“It has been argued that the defence is bad, mainly on the ground that upon these pleadings it must be taken that these allegations of fraud were brought before the courts at Tiflis; that the defendants did state to those courts that the goods were not in their possession but in the plaintiff's; that the courts had jurisdiction to examine this defence, and did examine it, and came to a conclusion against the defendants; and therefore that, whether this conclusion was right or wrong on the matters of fact, the question of the plaintiff's alleged fraud cannot now be tried or litigated in the courts of this country.”

In the course of a lengthy judgment rejecting this argument Lord Coleridge C.J. said, at pp. 300–301:

“it is enough for me to say that the English courts do enforce obligations created by judgments, but that it has always been held in the courts of this country to be an answer to an action upon a judgment, that that judgment has been obtained by the fraud of the party seeking to enforce it. This principle has been laid down in the broadest terms by De Grey C.J. in the answer to the two questions of the House of Lords in the *Duchess of Kingston's Case* (1776) 20 St.Tr. 355, 537, 544n. namely, that ‘fraud is an extrinsic, collateral act; which vitiates the most solemn proceedings of courts

- A of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal.' In that case one of the questions put to the judges was whether a sentence of the spiritual court against a marriage in a suit for jactitation of marriage was conclusive evidence, so as to stop the counsel for the Crown from proving the marriage in an indictment for bigamy; and speaking of this sentence De Grey C.J. says: 'Like all other acts of the highest judicial authority, it is impeachable from without: although it is not permitted to show that the court was mistaken, it may be shown that they were misled.' I believe that the principle has never been either better or more tersely and neatly stated than it was in the foregoing passages; and, as it appears to me, the question for the courts of this country to consider is whether, when a foreign judgment is sought to be enforced by an action in this country, the foreign court has been misled intentionally by the fraud of the person seeking to enforce it, whether a fraud has been committed upon the foreign court with the intention to procure its judgment. From the time of the decision in the *Duchess of Kingston's Case* until the present time it has been held that fraud of that kind can be pleaded in the courts of this country to an action on a judgment, and that, if it can be proved, it vitiates the judgment and discharges the defendant from the obligation which would otherwise be thereby created."
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Lord Coleridge C.J. concludes his judgment by saying, at p. 303:

- E "I think, therefore, on the broad ground that no man can take advantage of his own wrong, and that it is a principle of law that no action can be maintained on the judgment of a court either in this country or in any other, which has been obtained by the fraud of the person seeking to enforce it, that the defence is good . . ."

The other two members of the court addressed the plaintiff's argument more specifically and equally rejected it. Baggallay L.J. said, at p. 304:

- F "It has been contended on the part of the plaintiff that having regard to the terms of the defence it is fair to infer that all the facts, so far as regarded the goods being in the possession of the plaintiff, were or might have been before the Russian courts, and that although they erroneously decided in favour of the plaintiff, they were mistaken and were not misled. If all the facts from which the fraud is to be inferred had been before the foreign court, and that court did not infer fraud from them, and if an English court was called upon to give effect to the judgment obtained by the person who perpetrated the fraud, I should be prepared to hold that that foreign judgment could not be enforced in the English court."
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- H Brett L.J. said, at p. 306:

"I will assume that in the suit in the Russian courts the plaintiff's fraud was alleged by the defendants, and that they gave evidence in support of the charge: I will assume even that the defendants gave

the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and that the fraud was committed, the defendants will be entitled to succeed in the present action."

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In *Vadala v. Lawes* (1890) 25 Q.B.D. 310 the plaintiff sued to enforce the judgment of an Italian court holding the defendant liable on certain bills of exchange. The defence pleaded, *inter alia*, that the bills were fraudulent. The question whether it was open to the defendant, by this plea, to invite the English court to determine the very issue which had been decided against him by the Italian court came in due course before the Court of Appeal. Delivering the leading judgment, with which Bowen L.J. agreed, Lindley L.J. said, at pp. 316–317:

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"But we now come to another and a more difficult question, and that is, whether this defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English court or of a foreign court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits. Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff v. Oppenheimer*, 10 Q.B.D. 295. At the time when that case was decided, namely, in 1882, there was a long line of authorities including *Bank of Australasia v. Nias* (1851) 16 Ad. & E. 717, *Ochsenbein v. Papelier* (1873) L.R. 8 Ch.App. 695, and *Cammell v. Sewell* (1860) 5 H. & N. 728, all recognising and enforcing the general proposition, that in an action on a foreign judgment you cannot retry the merits. But until *Abouloff's* case the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without reopening the merits, had never come forward for explicit decision. That point was raised directly in the case of *Abouloff v. Oppenheimer*, and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court."

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A After a careful examination of the judgments in *Abouloff v. Oppenheimer & Co.* Lindley L.J. concluded, at pp. 319–320:

B “when I come to look at the defendants’ argument, and the whole judgment, I cannot conceal from myself that it has been decided to the effect I have already mentioned; and that, therefore, it is competent in point of law for the defendant in this action to raise this defence, and to satisfy the jury, if he can, that the Italian court was misled by the fraud of the plaintiff, that fraud consisting in this—that the plaintiff knowingly placed before the Italian court bills of exchange which he alleged to be commercial bills, when in truth and in fact he knew them to be nothing of the sort, but bills for gambling transactions. And if the jury were to find in fact, not only that the bills were for gambling transactions, but, further, that the Italian court has been imposed on by the fraud, that is a good defence according to the case of *Abouloff v. Oppenheimer*.”

D These decisions have been criticised by academic writers and have not been followed by the Canadian courts: see *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987), vol. 1, p. 469, n. 66. But they have been followed and applied by the Court of Appeal in *Syal v. Heyward* [1948] 2 K.B. 443 and *Jet Holdings Inc. v. Patel* [1990] 1 Q.B. 335 and must stand as establishing the relevant English law unless and until overruled by your Lordships’ House.

E Mr. Mann, for the bank, submits that the time has come when they should be overruled either as having been wrongly decided in the first place or, alternatively, even if the original decisions could have been justified 100 years ago, on the ground that they rest on a principle which is unacceptable today and out of accord with the approach of the courts to other issues arising in the field of private international law.

F I appreciate the force of this submission and, if the issue were governed only by the common law, I would think it necessary to examine in detail both the relevant authorities prior to *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295 and the elaborate arguments skilfully deployed by Mr. Mann in support of his general thesis. But that is not the position. As I have pointed out, enforcement in the United Kingdom of the judgments of courts in the Commonwealth is governed by section 9 of the Act of 1920 which is here directly in issue. The enforcement in the United Kingdom of the judgments of courts in countries with which this country has concluded reciprocal enforcement arrangements is governed by the Foreign Judgments (Reciprocal Enforcement) Act 1933. That is not here directly in issue, but it provides by section 4(1)(a)(iv) that registration of a judgment, which will have been effected ex parte under section 2, is to be set aside if the registering court is satisfied “that the judgment was obtained by fraud” and thus appears to raise an issue of construction which it would, I think, be difficult to differentiate from that raised here by section 9(2)(d) of the Act of 1920. Subject to possible penalties in costs, it is still open to a foreign judgment creditor to resort to a common law action to enforce his foreign judgment, but such resort is now only necessary in the case of judgments delivered in countries to which, in

the absence of reciprocal enforcement arrangements, the Act of 1933 has not been extended. In these circumstances it seems to me clear that before considering the possibility of overruling *Abouloff v. Oppenheimer & Co.* and *Vadala v. Lawes*, 25 Q.B.D. 310 it is necessary first to determine the scope of the fraud defence available to a judgment debtor resisting statutory enforcement in reliance on section 9(2)(d) of the Act of 1920.

The Act of 1920 was preceded by the report in 1919 of a committee chaired by Lord Sumner, Report of the Committee Appointed by the Lord Chancellor to Consider the Conduct of Legal Proceedings between Parties in this Country and Parties Abroad and the Enforcement of Judgments and Awards (1919) (Cmd. 251). One proposal with respect to reciprocal enforcement within the British Empire which was considered by the Sumner Committee was the adoption of a draft Bill, which had been circulated in 1916 to overseas governments within the Empire, and which followed the lines of the Judgments Extension Act 1868 (31 & 32 Vict. c. 54). The Act of 1868 made the judgments of superior courts in England, Scotland and Ireland reciprocally registrable on satisfying purely formal requirements, whereupon they became enforceable as if they were judgments of the courts in which they were registered. The Sumner Report points out that the adoption of this principle of strict reciprocity would give to all judgments of courts within the Empire an equal status and currency in all parts of the Empire and that some overseas governments had commented adversely on this principle. The committee accepted the criticism and recommended a much more cautious approach, the reasons for which the report explains in detail. This caution leads to the specific recommendations in paragraph 35 (a) and (b) which were in due course directly implemented by section 9(1) and (2)(a) to (e) of the Act of 1920.

Even without reference to the Sumner Report section 9(2)(d) would have to be construed with reference to the common law as understood in 1920. But the context in which the recommendations which came to be embodied in section 9(2) were made leaves no room for doubt. If the Sumner Committee had embraced the strict reciprocity principle of the Act of 1868 and recommended giving to Commonwealth judgments the full status and currency of United Kingdom judgments, this would still have left such judgments open to challenge on the ground that they had been obtained by fraud in so far as the fraud could be established within the strict limits of the English rule. Having rejected that principle, the committee's recommendation that it should be one of the express bars to the enforcement of a Commonwealth judgment that it had been obtained by fraud can only have been intended to apply the much wider rule which the court had applied to foreign judgments in *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295 and *Vadala v. Lawes*, 25 Q.B.D. 310 and section 9(2)(d) must be construed accordingly.

Confronted with this difficulty Mr. Mann submitted that section 9(2)(d) should nevertheless be held to do no more than embody a common law principle which was still capable of development and adaptation. The fact that Parliament had given legislative expression to the principle should not be allowed to arrest that process or to freeze

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A the principle immutably in the form which the common law gave it in 1920. More specifically he submitted that the difference in the basis on which the court will allow a judgment to be challenged on the ground that it was obtained by fraud as between a plaintiff seeking to set aside an English judgment on the one hand and a defendant resisting enforcement of a foreign judgment on the other hand is a matter of procedure, not of substantive law, and that accordingly nothing in

B section 9(2)(d) need inhibit the House from adapting and modernising the procedure applicable to the enforcement of judgments under section 9 by confining the judgment debtor's attack on the foreign judgment within the strict limits of the English rule.

I cannot accept this submission. The difference in question is not, in my opinion, one of procedure but of substantive law and is of

C fundamental importance. An English judgment, subject to any available appellate procedures, is final and conclusive between the parties as to the issues which it decides. It is in order to preserve this finality that any attempt to reopen litigation, once concluded, even on the ground that judgment was obtained by fraud, has to be confined within such very restrictive limits. In the decisions in *Abouloff v. Oppenheimer & Co.* and *Vadala v. Lawes* the common law courts declined to accord the

D same finality to foreign judgments, but preferred to give primacy to the principle that fraud unravels everything. In the Judgments Extension Act 1868 Parliament provided for full reciprocal enforceability as between the judgments of the superior courts in the different jurisdictions within the United Kingdom, with the effect that a judgment given in one jurisdiction and registered in another would enjoy the same finality

E as a judgment given in that jurisdiction, with no obstacle placed in the way of registration. By contrast, the judgment creditor seeking registration under the Act of 1920 must first surmount the obstacles which section 9(2) places in his way and section 9(2)(d), construed, as I think it must be, as an adoption of the common law approach to foreign judgments, specifically denies finality to the judgment if it can be shown to have been obtained by fraud.

F I recognise that, as a matter of policy, there may be a very strong case to be made in the 1990s in favour of according to overseas judgments the same finality as the courts accord to English judgments. But enforcement of overseas judgments is now primarily governed by the statutory codes of 1920 and 1933. Since these cannot be altered except by further legislation, it seems to me out of the question to alter

G the common law rule by overruling *Abouloff v. Oppenheimer & Co.* and *Vadala v. Lawes*. To do so would produce the absurd result that an overseas judgment creditor, denied statutory enforcement on the ground that he had obtained his judgment by fraud, could succeed in a common law action to enforce his judgment because the evidence on which the judgment debtor relied did not satisfy the English rule. Accordingly the whole field is effectively governed by statute and, if the law is now in

H need of reform, it is for the legislature, not the judiciary, to effect it.

I would dismiss the bank's appeal with costs.

LORD ACKNER. My Lords, I have had the advantage of reading in

draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons which he gives, I, too, would dismiss the bank's appeal with costs.

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LORD GOFF OF CHIEVELEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Bridge of Harwich. I agree with it and for the reasons which he gives, I, too, would dismiss the bank's appeal with costs.

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LORD BROWNE-WILKINSON. My Lords, I, too, would dismiss the bank's appeal for the reasons given by my noble and learned friend, Lord Bridge of Harwich.

Bank's appeal dismissed with costs.

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Solicitors: Charles Russell; Jaques & Lewis; Clifford Chance.

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END OF VOLUME 2 OF APPEAL CASES FOR 1992