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	Delivered:	**17/05/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION

Between:

MICHAEL RICHARD MULHERN

and

JACQUELINE PATRICIA MULHERN

Applicants/Appellants

-and-

THE AUSTRALIAN GOVERNMENT

and

THE COMMONWEALTH OF AUSTRALIA

Respondents

Mr Mulhern appeared in person for the appellants
There was no appearance on behalf of the respondents

Before: Keegan LCJ and Scoffield J

SCOFFIELD J (*delivering the judgment of the court*)

Introduction

[1] The applicants/appellants bring this appeal, by way of notice of appeal dated 20 February 2023, against the Order of McAlinden J made on 9 January 2023 whereby he dismissed the appellants' appeal to the High Court. The grounds of the appeal are stated simply in the following terms:

> "An Error in fact and in law was made by the Honourable Justice McAlinden [sic] to dismiss."

[2] The genesis of the present proceedings was an application on the part of the applicants for an order under RCJ Order 71 to register and enforce a foreign judgment. The application was made by way of ex parte docket lodged on 18 November 2022 which sought an order under Order 71, with Mr Mulhern indicating to court staff that he wished to register a foreign judgment in Northern Ireland. Mr and Mrs Mulhern were the intended applicants, and the intended defendants were listed as the Australian Government and the Commonwealth of Australia. The application was dismissed by Master Bell on 21 November 2022, with no order as to costs. Mr Mulhern told us that the Master reached his decision without a hearing.

[3] The applicants appealed to the High Court against the Master's order by notice dated 25 November 2022. On 9 January 2023, McAlinden J dismissed the appeal and affirmed the order of the Master. The judge's reasoning is set out pithily in the order itself, in the following terms:

> "THE JUDGE ORDERED that the appeal be dismissed and that the said order be affirmed, there being no judgment from Australia to enforce."

[4] Mr Mulhern appeared before us in person. We consider that he was given a full opportunity to explain the basis of his application and how he contended the judge below had erred. We are grateful to him for his submissions. As his application has been dealt with on an ex parte basis, there was no appearance for the respondents.

The relevant statutory provisions

[5] Order 71 of the Rules of the Court of Judicature (Northern Ireland) 1980 is entitled 'Reciprocal Enforcement of Judgments.' Part 1 of Order 71 deals with reciprocal enforcement under the Administration of Justice Act 1920 ("the 1920 Act") and/or the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("the 1933 Act"). We return to the provisions of those Acts shortly.

[6] Order 71 sets out the procedure by which an applicant may seek to register a foreign judgment under those Acts for enforcement in this jurisdiction. Rule 1 provides that the powers conferred on the High Court by Part II of the 1920 Act or Part I of the 1933 Act may be exercised by a judge in chambers and a master. Rule 2 provides that an application under section 9 of the 1920 Act of 1920 or under section 2 of the 1933 Act to have a judgment registered in the High Court may be made ex parte, although the court hearing the application may direct a summons to be issued. In this case, the application has at all times been dealt with on an ex parte basis (although the respondents' position is clear from correspondence, referred to below, from the office of the Australian Government Solicitor (AGS)).

[7] Importantly, rule 3 sets out the evidence required in support of an application to register a foreign judgment. Amongst other things, the application for registration must be supported by an affidavit exhibiting the judgment or a verified or certified or otherwise duly authenticated copy thereof; and stating to the best of the information or belief of the deponent that the judgment creditor is entitled to enforce the judgment.

[8] The starting point for any such application, therefore, is the foreign judgment which is sought to be registered for enforcement. The word "judgment" is defined for the purposes of the relevant part of the 1920 Act in section 12(1), as follows:

> "The expression "judgment" means any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place."

[9] Similarly, the 1933 Act provides for registration of certain foreign judgments. No detailed argument was provided to us, or below it seems, in relation to which of the Acts would be the appropriate Act under which the application should be made. In the event, it makes no difference to the outcome of this case; but we proceed on the basis that the 1933 Act is the relevant provision in the case of seeking to enforce a money judgment obtained in Australia: see also the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994 (SI 1994/901) ("the 1994 Order"). Section 11(1) of the 1933 Act defines "judgment" as follows:

> ""Judgment" means a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party."

[10] Article 4 of the 1994 Order, dealing specifically with reciprocal enforcement of judgments as between Australia and the United Kingdom, provides as follows:

> "The following judgments shall be judgments to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 applies, that is to say—
>
> (a) any judgment, decree, rule, order or other final decree for the payment of money (other than in respect of taxes or other charges of a like nature or an order requiring the payment of maintenance)

given by a recognised court in respect of a civil or commercial matter;

(b) an award in proceedings on an arbitration conducted in Australia under the law applying there if the award has become enforceable in the same manner as a judgment in that country;

(c) a judgment or order given or made by a recognised court in criminal proceedings for the payment of money in respect of compensation or damages to an injured person."

The hearing below

[11] A transcript of the hearing before McAlinden J in the King's Bench Division on 9 January 2023 has been obtained and is before us. Mr Mulhern appeared in person (as he has done before us). He told us that the judge below had not had the opportunity of pre-reading the relevant papers in advance of the hearing on 9 January 2023; but it is clear to us from the transcript that Mr Mulhern had an opportunity to open the key documents to the judge and that the judge had a firm grasp of the case the applicants were making.

[12] The judge opened the hearing by indicating that there was one issue which needed to be addressed "head on", namely what was the order of the foreign court which the applicants wished to register and enforce in this jurisdiction. Mr Mulhern indicated that it was a judgment of the Federal Court of Australia but, on being pressed to show the judge a copy of the order, referred to a filed notice of discontinuance.

[13] The documents provided to the court disclose that there were proceedings in the Federal Court of Australia (FCA) by which the appellants in these proceedings – both noted to be Australian citizens who had been made bankrupt but who had been living in New York in the United States of America – were making an application against the Official Receiver in Australia. Those proceedings bore the court reference NSD371 of 2015. On 23 September 2022, a notice of discontinuance in those proceedings was filed by Mr Mulhern indicating that they, as applicants, were to "discontinue the whole of the proceeding." However, the notice then continues as follows:

> "The discontinuance is by the applicants on the following terms:
>
> 1. The respondent agrees to pay just compensation to the Applicant (on behalf of the USA based Mulhern Applicants) with respect to damages of an agreed

> sum of SEVEN HUNDREN AND FIFTY MILLION DOLLARS ($750,000,000.00) plus interest from 18 February 2020 to 30 June 2022 in the amount of SEVENTY FIVE MILLIONO AND SIXTY SIX THOUSAND TWO HUNDRED AND FIFTY THREE DOLLARS AND NINE CENTS ($75,066,253.09).
>
> 2. Each party bear their own costs of and incidental to the proceedings with the exception of the Respondent paying costs of $350,000.00 pursuant to the Order of Justice Rangiah of 11 August 2015."

[14] This notice is signed by both applicants (the Mulherns) and the signatures are dated 30 June 2022. It appears to be the appellants' case that these proceedings were discontinued after a settlement was reached between them and the Australian authorities by which the Australian Government would pay them $750m, plus interest. They contend that the notice of discontinuance was served on the Australian Government Solicitor (AGS) on 25 August 2022 before being filed with the court.

[15] For its part, from the papers before us, it seems that the Australian Government wholly disputes any notion that it entered into a settlement with the applicants or incurred any liability towards them. Mr Mulhern relies upon the failure of a particular government solicitor (Ms Buchanan) to take issue with the terms of his notice of discontinuance, once served upon her, in support of a contention that that in some way represents an acceptance of its contents. In addition, he relies upon a failure on the part of the Australian Government to "appeal" against the notice of discontinuance; and upon the fact that the FCA permitted the notice of discontinuance to be filed on the court file.

[16] In correspondence from Ms Buchanan of the AGS dated 10 November 2022 to the applicants' then-instructed Northern Ireland solicitors (Hunt Solicitors), which McAlinden J considered in the course of the hearing before him, the following is stated:

> "While your letter refers to an order from proceeding NSD 371 of 2015 being attached, we note that no order was attached to your letter. However, your email attaches a document purporting to be a 'Notice of discontinuance' in Federal Court of Australia proceeding NSD 371 of 2015.
>
> Your correspondence is entirely misconceived. Your email refers to a 'settlement' and finalisation of payments to your client. The Official Receiver has never agreed to pay any sums to your clients, nor have your clients ever demonstrated an entitlement to any such payments.

> Your clients commenced proceeding NSD 371 of 2015 on 2 April 2015 against the Official Receiver after having unsuccessfully brought a number of proceedings against other parties seeking orders for the annulment or discharge of their bankruptcies. In proceeding NSD 371 of 2015 against the Official Receiver your clients sought various declarations relating to the issuing of bankruptcy notices on your clients.
>
> The Official Receiver obtained summary judgment against your clients. The Federal Court found that your clients had no reasonable prospect of obtaining any of the declarations sought. The Court dismissed your clients' application with costs save for an order in relation to 'costs (if any) thrown away' by reason of a delay in filing the summary judgment application. A copy of the Federal Court's judgment in *Mulhern v Official Receiver* [2015] FCA 807 and the entered order dated 10 August 2015 are attached. The Federal Court's judgment also sets out your clients' extensive unsuccessful litigation history against other parties prior to that proceeding.
>
> Proceeding NSD 371 of 2015 was therefore finalised adversely to your clients by an order of the Federal Court of Australia on 10 August 2015. Since that order your clients have, on numerous occasions, sent various documents purporting to be a 'Notice of discontinuance' in relation to the proceedings and asserting an entitlement to compensation and costs. Your clients have also been informed on numerous occasions that the Notice of discontinuance is misconceived and that our client rejects that it owes any of the sums claimed by your clients. An example of that correspondence is attached. Contrary to what appears to be stated in your correspondence, there has never been any 'settlement', our client has never agreed to pay any amounts to your clients and nor do your clients have any entitlement to such payments."

[17] Mr Mulhern disputes the respondents' denial of liability towards him and his wife. However, on being pressed by McAlinden J as to the judgment or order of the court which he wished to be registered for enforcement in this jurisdiction, Mr Mulhern repeatedly referred to the notice of discontinuance in the terms noted above. He made the point that this had been drafted by counsel. The judge made the point that he had seen nothing evidencing that the respondents had actually agreed to pay anything to the applicants. Mr Mulhern maintained that the terms of the notice represented what had been negotiated between the parties. However, McAlinden J

pointed out that the relevant statutory provisions (set out above) required the judgment to be enforced to be a judgment or order given or made by a court.

[18] In the course of the hearing below, McAlinden J summarised his approach – after having given Mr Mulhern more than a fair opportunity to explain what judgment he had applied to register – in the following terms:

> "I do not have a judgment which I can register. I am not going to listen any more to your submissions in relation to the merits of your case because that is not what I'm here to do. I'm here to register a judgment. I don't have a judgment. I have a disputed notice of discontinuance. Without more, I cannot do anything for you. I'm sorry, there is nothing I can do because I don't have a judgment and you're going to have to get a judgment in the Australia courts for this sum of money if you want it registered here and the material that you've provided me with does not constitute a judgment."

Consideration

[19] It is clear that there is a considerable history to the dispute between the Mulherns and the Australian authorities. In the presentation of his case before this Court, Mr Mulhern took some time to explain a good deal of the background history from the perspective of himself and his wife. It is unnecessary to set all of that out here. In summary, it seems that Mr Mulhern and his family operated a successful property development business in the United States and then Australia for some time but that, latterly, the business in Australia ran into difficulties leading to Mr and Mrs Mulhern being made bankrupt in Australia, amidst a swathe of litigation.

[20] Mr Mulhern's communications are replete with reference to 13 years of injustice, including alleged oppression and perversion of the course of justice. He contends that he was kept "hostage" by the Australian authorities for a number of years by virtue of their seizure of his passports and travel documents, which inter alia led to illness on the part of his wife. A fundamental aspect of the Mulherns' concern appears to be that they were adjudicated bankrupt by an Australian Court (after earlier civil proceedings had been determined against them) at a time when they were resident in the United States, such that (in their view) the Australian courts had no jurisdiction over them. In addition, they contest the validity of the debt which gave rise to the bankruptcy. However, none of that is relevant for present purposes. The key issue in this appeal, as it was before the judge below and the Master before him, is whether there is any enforceable court judgment or order which can and should be registered in this jurisdiction.

[21] The proceedings in which the purported agreement Mr Mulhern wishes to enforce is said to have arisen – NDS 371/2015 – were proceedings by which

Mr Mulhern sought an annulment or discharge of his bankruptcy, several years after the event. The respondent was the Official Receiver, largely (it seems) on the basis that the Official Receiver had acted wrongly in various respects as regards the issue of bankruptcy notices to the Mulherns.

[22] Mr Mulhern has referred in email correspondence to a "binding settlement agreement entered into between former Prime Minister Scott Morrison commonwealth government dated 23 June 2020 and the effected Mulhern's Solicitor instructed legal counsel's [sic]." This was also the subject of debate between Mr Mulhern and the judge below, with the judge describing this document merely as "an offer" made by the applicants to resolve proceedings. A letter purporting to be from a barrister practising in Brisbane (described by Mr Mulhern in his submissions before us as a "friend" of his) suggests that "the position of the Mulherns is that an agreement has been breached with the Commonwealth, via the AGS, with respect to the payment of damages in the amount of $750,000,000.00." However, this is set out in the form of a recitation of instructions which have been provided to him; and provides no objective evidence of any such agreement actually having been reached. Analysis of the correspondence suggests that the alleged agreement is suggested to have arisen by virtue of non-response on the part of AGS to an offer which had been put to it by or on behalf of the Mulherns. Mr Mulhern also suggested that his lawyers had quantified the sum claimed but had done so on the basis of the US-Australia Free Trade Agreement.

[23] So too in respect of the claimed settlement arising from failure to take issue with the terms of the applicants' notice of discontinuance: the applicants appear to proceed on the basis that if they requested or demanded payment of a sum and the mere request was acknowledged in any way or not immediately repudiated, some form of binding agreement results. The judge was correct to proceed on the basis that there was no persuasive evidence of any legally binding agreement having been reached.

[24] In any event, even had such an agreement been reached, that would be insufficient for it to be registered as enforceable in Northern Ireland. The judge correctly required the applicants to prove that there was a recognised foreign judgment to enforce. In the first instance, a certified copy of such a judgment should be provided. That simple step was not, and has not ever, been taken in this case.

[25] The attachments to the AGS letter referred to at para [16] above were not provided in the documents which Mr Mulhern has furnished to this court. However, the judgment of the FCA referenced in the letter is publicly available, for instance on the AustLII website (the Australasian Legal Information Institute online case-law database). We have considered the judgment and order of Rangiah J, which appears to entirely corroborate the contents of the AGS letter cited above. The Mulherns' originating application in those proceedings was dismissed on 10 August 2015.

[26] There is reference to Rangiah J's order awarding the applicants costs in the sum of $350,000. Mr Mulhern contends that the Australian Government was required to pay them that sum, since a date in 2015, but has failed to do so. On analysis of this contention, it relates to an order that the respondent to the Mulherns' application pay costs thrown away, "if any", as a result of the Official Receiver's late filing of an application for summary judgment (in respect of which the judge extended time after the event). The application for summary judgment was filed one week late. No sum of wasted costs appears to have been quantified; but the suggestion that this would have given rise to costs liability in the order of the sum claimed by the applicants appears entirely fanciful. The substantive costs of those proceedings were awarded to the respondent, the Official Receiver, whose application for summary judgment against the applicant was successful on the basis that the Mulherns had no reasonable prospect of obtaining the relief they sought.

[27] In his submissions before us, it was clear that Mr Mulhern founded his application on the notice of discontinuance referred to above and the fact that this had been "uplifted" by the court. On further enquiry, it was clear that this was simply a reference to the notice having been accepted by the registrar of the court. (The accompanying notice of filing states that the document was lodged electronically with the FCA and had been accepted for electronic filing under the court's rules.) Mr Mulhern did not contend that the notice had been considered or endorsed by a judge. We are at a loss to understand why such a notice would be accepted when the originating application to which it related had been dismissed over seven years previously. In any event, we are entirely satisfied that this document is neither a judgment nor order of an Australian court capable of being registered and enforced under the 1933 Act. That provision relates to an enforceable judicial determination that a sum is due. The notice of discontinuance issued on behalf of the applicants, on disputed and self-serving terms, does not come close to what is required.

Conclusion

[28] We express no view on the merits of the many complaints Mr Mulhern has about how he was treated in Australia, about which he clearly feels very strongly. Those are not for us to consider on the application he has made, which was for registration of a foreign judgment.

[29] As to that application, we see no error in the judge's approach or analysis. On the contrary, the result was inevitable. We would go further and suggest that the applicants' application under Order 71, in the absence of a certified judgment to enforce, may in fact be characterised as an abuse of the process of the High Court in Northern Ireland.

[30] The appeal is therefore dismissed and the order of McAlinden J, in turn affirming the order of Master Bell, is affirmed. Had the intended respondents played any active role in these proceedings we would have been minded to award them the

costs of the proceedings against the applicants. In the event, that is not necessary and there will be no order as to costs.