

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable/ Not Reportable / Redact

[2022] SCCA 58 (21 October 2022)

SCA 28/2020

(Arising in CS 23/2019)

In the matter between

Vijay Construction (Proprietary) Limited
(rep. by Mr. Leon Siegfried Kuschke SC and
Mr. Bernard Georges)

Appellant

and

Eastern European Engineering Limited
(rep. by Mr. Basil Hoareau)

Respondent

Neutral Citation: *Vijay Construction (Proprietary) Limited v Eastern European Engineering Limited* SCA 28/2020 [2022] SCCA 58 (Arising in CS 23/2019) (21 October 2022)

Before: **Anderson JA (Presiding), Young JA, Singh JA,**

Summary: **Enforcement of British Orders in Seychelles under REBJA**

Heard: 14 October 2022

Delivered: 21 October 2022

ORDER

- i. The appeal is hereby dismissed.
 - ii. The judgment of Carolus J in *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (CS23/2019) is upheld in its entirety.
 - iii. Costs are awarded in favour of the Respondent.
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JUDGMENT

A. Introduction

[1] On 10 October 2022, my learned brothers and I, were sworn into office as Justices of Appeal of the Seychelles Court of Appeal for the specific purpose of hearing *de novo* the appeal in *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd*. (SCA 28 of

2020) and all applications or motions that touch and concern this appeal. Later that day we held a case management conference (CMC) to consider the timetabling of two applications which had been made to the Court. These were for: (1) A Stay of our hearing of the appeal on, essentially, constitutional grounds; and (2) Amendment of the grounds of appeal. We heard both applications on 12 October 2022, and on that day gave judgment in respect of each. We dismissed the application for Stay of Proceedings, and we granted the application to amend the grounds of appeal. The reasons for these decisions are the subject of separate judgments by this Court issued today, 21 October 2022.

- [2] On 14 October 2022, we heard the appeal *de novo* in *Vijay Construction (Pty) Ltd v Eastern European Engineering Ltd.* (SCA 28 of 2020). At the end of the hearing, we reserved judgment, which we also deliver today, 21 October 2022.
- [3] It must at once be emphasized that this is a composite judgment of the entire Bench in which all three Justices of Appeal contributed fully. It is necessarily a unanimous judgment and there are no separate judgments. The judgment has been signed by all three of us. We thank Counsel for their industry and for the many courtesies they extended to us. We also thank the staff of the Judiciary of Seychelles for their unfailing support.
- [4] Our appointment to hear the appeal *de novo* has its genesis in the dissatisfaction of the appellant (“Vijay”) with the decision in 2020 by Carolus J, in *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (CS23/2019) [2020] SCSC 350 (30 June 2020). That decision was that the respondent (“EEEL”) was entitled to have enforced in Seychelles certain orders granted by the High Court of England. Vijay appealed to the Seychelles Court of Appeal in *Vijay Construction (Pty) Ltd v Eastern European Engineering Limited* (SCA28/2020) [2020] SCCA 23 (2 October 2020) (“*Vijay 2020*”) but this appeal was dismissed by majority. Vijay subsequently appealed to a differently constituted Court of Appeal arguing that *Vijay 2020* had been plagued with procedural irregularity that deprived it of a fair hearing. Vijay argued that the Court of Appeal had inherent power to set aside its previous decision and to hear the matter afresh. The Court of Appeal agreed that it had such powers and proceeded to set aside *Vijay 2020*, in *Vijay*

Construction (Pty) Ltd v Eastern European Engineering Limited And Vijay Construction (Pty) Ltd v Eastern European Engineering (MA 24 of 2020) [2022] SCCA 5 (21 March 2022) (“*Vijay 2022*”).

B. Outline of judgment

[5] The appellant launched 9 grounds of appeal to the decision in *Vijay 2020*, and later sought to submit 6 further grounds. There are inevitable overlaps and duplications of these grounds. We propose to address the grounds of appeal by the appellant and the response to them by the respondent under the headings at [6]. No discourtesy is intended to counsel if the exact numerical or alphabetical sequence in which the grounds were presented is not followed. We consider the outline we propose to be the best way of making the reading of the judgment digestible whilst dealing with all the issues raised by Counsel.

[6] Accordingly, we propose to consider:

1. Grounds of appeal.
2. Background to the appeal.
3. The statutory framework under which the enforcement of the UK Orders must be determined and whether and how the identification of the framework affects the appeal.
4. Whether the 2017 decision of the Court of Appeal refusing the enforcement of the French awards precludes registration of the English orders by reason of the principles of *res judicata* or abuse of process.
5. Whether the comments by the Trial Judge on the applicability of the New York Convention were merely obiter or challenged the integrity of the judgment. In the latter event, whether this Court may have recourse to Rule 31 (5) of the Court of Appeal Rules to cure this defect in the judgment.

6. Whether in all the circumstances of the case, the English orders can, and if so, should be recognized and enforced in Seychelles.
7. The order as to costs.
8. Conclusion.

C. Grounds of Appeal

[7] In its Notice of Appeal to SCA 28/20 the appellant raised 9 grounds of appeal as follows:

1. *The application of the Respondent, then Plaintiff, was brought under the wrong legal provision (section 3 of the Reciprocal Enforcement of British Judgments Act) which had been replaced by section 9 of the Foreign Judgments (Reciprocal Enforcement) Act and, as a consequence, (i) was bad in law and (ii) should have been summarily dismissed by the Trial Court.*
2. *The Learned Trial Judge erred [at paragraphs 80 and 154] in finding that a back-door entry to enforce an unenforceable award was just and convenient in a situation where the attempt was a clear flouting of a judgment of the Court of Appeal*
3. *The Learned Trial Judge erred in her finding [at paragraphs 55-56] that the Cooke and Cockerill Orders were judgments within the definition of the word in the Recognition And Enforcement of British Judgments Act.*
4. *The Learned Trial Judge erred [in paragraphs 63-65] in emphasizing the fact that the Appellant had had a money award made against it and that that had been recognised numerous times without remarking that this had never been disputed and that her duty was not to achieve moral fairness but to apply the law as it stood.*
5. *The Learned Trial Judge erred [in paragraph 76] in dismissing the authority of Rosseel and failing to realise that the authority was applicable to the Seychelles Court, which was being asked to enforce rights which had been determined by another tribunal outside the jurisdiction, which was precisely the case in Rosseel.*
6. *The Learned Trial Judge erred in finding [at paragraph 90] that the roundabout route*

taken by the Respondent in seeking to enforce an unenforceable award through the process of a British judgment could not be faulted because of the 'change of the Seychelles position' through its accession to the New York Convention. In doing so, and in surmising [in paragraph 91] that the Respondent could now possibly seek to enforce the award directly, the Learned Trial Judge showed that her whole judgment was predicated, not on the law as it stood at the time of the hearing in 2019 but on the law as she interpreted it while preparing her judgment without having given the parties an opportunity of disabusing her of her view.

- 7. The Learned Judge erred in failing to provide the Defendant with an opportunity to address the issue of 'back-door- entry' due to Seychelles' ratification of the New York Convention and in concluding that 'it can no longer be argued that the enforcement of arbitral award would be unconstitutional, unconscionable and contrary to public policy as since 2020 Seychelles is a party to the New York Convention and foreign arbitration awards are capable of being enforced' [paragraph 89]. This failure to provide a procedural opportunity is a breach of natural justice, as the Appellant would still argue that, in the unique circumstances of the case, the enforcement of the arbitral award would be unconscionable and contrary to public policy, and in breach of legitimate expectation.*
- 8. The Learned Trial Judge erred, having accepted that the British Orders were in the form of executory orders, in dismissing the submission *exequatur sur exequatur ne vaut* or similar arguments regarding double *exequatur*.*
- 9. The Learned Trial Judge erred in failing to apply the provisions of section 2A of the English Foreign Judgments (Reciprocal. Enforcement) Act to the matter.*

[8] In his judgement of 2 October 2020, Dingake JA (with whom Twomey JA concurred) (Fernando PCA, dissenting) indicated (at para 43) that the appellant had abandoned grounds 4 and 9 so that no further issues arose in relation to those grounds. In the *de novo* appeal before us the appellant confirmed the abandonment of grounds 4 and 9 so that these grounds are not further addressed by us.

[9] However, on 12 October 2022, the appellant applied to us for leave to amend the grounds of its appeal. They proposed adding the following six grounds:

1. *The petition of the Respondent to the Supreme Court seeking leave to have the 2015 Cooke J Order registered in the Court of Seychelles was made out of time in that the period of twelve months within which it ought by law to have been made had expired and no application for extension of time had been brought by the Respondent, or an extension granted by the Court.*
2. *The Supreme Court erred in granting the relief sought by the Respondent in the 2015 Cooke J Order produced to be registered and was neither an original, nor a validated or certified or otherwise duly authenticated copy, as required by the law, but a copy certified by a Seychelles Notary who was not proved to have had access to the original order. In any event, the Orders sought to be registered had not been annexed to the *Plaint*, as required by law, and the action should have been summarily dismissed for that omission.*
3. *The Respondent used the wrong procedure to bring the action seeking registration of the 2015 Cooke J Order and based its application on the wrong legal provision.*
4. *The pre-conditions for the court to exercise its powers to permit the issue for the initiating *Plaint* at the *ex parte* stage were not met because (a) neither the original England High Court Orders nor duly authenticated or certified copies were filed in the Supreme Court of Seychelles (b) twelve months' time limit had expired without any extension having been sought from or granted by the Court and (c) there was a fundamental and material procedural failure caused in and/or induced by the omission on the part of the Respondent's representative to disclose to the Court the applicable legal and procedural requirements and/or (d) the judgment of *Carolus J* is unsafe because of a proliferation of procedural irregularities of which the Honourable Judge was not made aware or which were not considered by the Judge.*
5. *One or more of the matters set out in paragraphs 1 to 4 above compromised the integrity of the judicial process in Seychelles and/or constituted abuse of the powers of the Seychelles Court, such as to enjoin or justify the refusal of the enforcement order sought as a matter of Seychelles public policy and/or discretion because it is not just to grant such order in the circumstances of the case.*

6. *Further, and in any event, the resort to the Supreme Court for permission to execute orders arising from Paris arbitration award via a British court mechanism after the substantive and definitive refusal by the Seychelles Court of Appeal to recognize that same award is (a) an abuse of process generally, (b) an impermissible subversion of that refusal by way of a collateral challenge, and/or (c) precluded by the principle established in Henderson v Henderson (1843) 3 hare 100 that a party is not to be harassed by staggered and fragmented suits in a court of justice.*

[10] The court granted leave to the appellant to modify its grounds of appeal except that we reserved the question of whether it would be just and equitable to allow the appellant to take the point of the 12-month limitation period for registration of the judgment in light of the clear prejudice that would be caused the respondent (see MA/34 2022). The appellant readily agreed not to take the 12-month limitation point and the case proceeded on the basis of the 9 grounds of appeal raised in the Notice of Appeal to SCA 28/20 as modified by the leave granted by this Court. At the end of the day, however, the appellant freely admitted that several of the 6 new grounds overlapped with the original 9 grounds, and all the grounds were largely argued cumulatively rather than seriatim.

D. The history of the dispute

[11] EEEL and Vijay entered into six contracts in relation to the construction of a hotel. Under these contracts, they agreed to submit disputes to arbitration under the Rules of Arbitration of the International Chamber of Commerce (ICC) in Paris. Disputes arose and were arbitrated in accordance with those rules. EEEL was largely successful. In his award of 14 November 2014, the arbitrator held that EEEL had validly terminated the six contracts and ordered Vijay to pay €15,963,858.90 damages along with costs.

[12] There has subsequently been litigation in relation to this award in three jurisdictions: France, the United Kingdom, and Seychelles.

[13] The litigation in France was by way of a challenge by Vijay to the award. This challenge was unsuccessful, with the Court d'Appel in Paris on 26 June 2016, dismissing

an application to set aside the award and an appeal against that decision being later abandoned.

[14] The litigation in the United Kingdom was initiated by EEEL. It sought enforcement of the award and judgment in terms of it. The initial events in this litigation were:

(a) On 18 August 2015, Cooke J granted leave to enforce the award and entered judgment in terms of it. This was on an ex parte application by EEEL.

(b) On 23 October 2015, Vijay applied to set-aside the 18 August 2015 judgment.

(c) On 14 June 2016, Flaux J stayed Vijay's application pending determination of the French proceedings.

[15] At about this time, EEEL applied directly to the Supreme Court in Seychelles for enforcement of the award. In doing so it relied in part on arts 146-150 of the Commercial Code of Seychelles and article 227 of the Seychelles Code of Civil Procedure which appeared to provide for enforcement of awards within the contemplation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. In the alternative, EEEL argued that under section 4 of the Courts Act, the Supreme Court had the jurisdiction of the High Court of England and Wales as at 22 June 1976 and that as that Court then had jurisdiction to enforce foreign arbitral awards, so too did the Supreme Court of Seychelles. We will refer to these proceedings as the "direct enforcement claim".

[16] In her judgment of 18 April 2017, Robinson J held that EEEL's argument based on articles 146-150 of the Commercial Code of Seychelles and article 227 of the Seychelles Code of Civil Procedure was unsuccessful; this on the basis that these were premised on Seychelles being a party to the New York Convention, which at the time, it was not. However, she found in favour of EEEL on the alternative argument. So, the direct enforcement claim was upheld in the Supreme Court.

- [17] On 13 December 2017, the Court of Appeal allowed Vijay’s appeal against the judgment of Robinson J (the December 2017 Court of Appeal judgment). It agreed with Robinson J in relation to the non-application of arts 146-150 of the Commercial Code of Seychelles and art 227 of the Seychelles Code of Civil Procedure but held that section 4 of the Courts Act did not confer on the Supreme Court the substantive jurisdiction of the High Court of England and Wales in relation to the enforcement of foreign awards. The direct enforcement claim was thus, ultimately, unsuccessful.
- [18] On 6 November 2017, shortly before the Court of Appeal’s judgment, Andrew Baker J lifted the stay of the application to set-aside the judgment of Cooke J. That application was then heard by Cockerill J on 8 and 9 October 2018. In a reserved judgment delivered on 11 October 2018, she dismissed the set-aside application.
- [19] On 31 January 2019, EEEL applied to register the orders of Cooke and Cockerill JJ. We will refer to this as the “registration application”. This application was successful before Carolus J and an appeal against her judgment was lodged with Court of Appeal. After the initial hearing of this appeal and before judgment, there was a dispute between the members of the Court as to whether the President of the Court of Appeal had the power to unilaterally reconvene the hearing and raise issues in relation to the appeal that had not been advanced by the parties. In the result there was a brief hearing at which the two judges who were of the view that it should not have been reconvened, did not engage with what was said. Subsequently written material responding to the issues raised by the President were lodged by the parties. In the result, the appeal was dismissed in *Vijay 2020*. This was by a majority, with the President of the Court of Appeal dissenting in sharp terms.
- [20] In *Vijay 2022*, the Court declared that *Vijay 2020* was void and should be set aside. This judgment too was not unanimous and there was a vigorously expressed dissent by Dodin J. The basis on which the Court of Appeal set aside *Vijay 2020* was the conclusion of the majority that there had been procedural irregularities. Essentially, these irregularities involved the non-engagement by the judges in the majority with the issues raised by the President and the arguments subsequently presented by the parties.

E. What is the statutory framework under which the case must be determined and how this affects the appeal (GROUNDS 1 & 3)

[21] The Reciprocal Enforcement of British Judgments Act 1922 (REBJA) provides for the registration by the Supreme Court of judgments of the High Court of England and Wales and that a judgment that has been so registered is “of the same effect as though obtained in Seychelles”. The present proceedings have been conducted largely on the basis that REBJA is the relevant statute.

[22] The first issue we must address is whether the REBJA has been overtaken by the Foreign Judgments (Reciprocal Enforcement) Act 1961 (FJREA).

[23] Section 9 of the FJREA provides:

“9. Power to apply Part I to the Commonwealth

- (1) The President may by order published in the *Gazette* direct that Part I of this Act shall apply to the Commonwealth and to judgments obtained in the Commonwealth as it applies to foreign countries and judgments obtained in the courts of foreign countries, and, in the event of the President so directing, this Act shall have effect accordingly and the Reciprocal Enforcement of British Judgments Act shall cease to have effect *except* in relation to any part of the Commonwealth to which the said Act extends at the date of the order.
- (2) If at any time after the President has directed as aforesaid an order is made under section 3 extending Part I to any part of the Commonwealth to which the Reciprocal Enforcement of British Judgments Act applies, the Reciprocal Enforcement of British Judgments Act shall cease to have effect in relation to that part of the Commonwealth.” (Emphasis added)

[24] Section 3(1) of FJREA provides:

“3. Power to extend Part I to foreign countries giving reciprocal treatment

(1) The President, if he is satisfied that, in the event of the benefits conferred by this part being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the Supreme Court, may by order published in the *Gazette* direct

(a) that this part shall extend to that foreign country; and

(b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purposes of this Act.”

[25] There was a Gazette notice issued under section 9(1) extending the FJREA to the Commonwealth but no notice under section 3(1) has been published.

[26] An awkward issue arises in relation to section 9 FJREA. It is whether the statute should be construed as having the italicised word, “except” in it. The word was there in the original ordinance. It is also in section 7 of the United Kingdom Foreign Judgments (Reciprocal Enforcement Act 1993 from which the text of section 9 of FJREA was borrowed, However, in a 1991 revision of the Laws of Seychelles (and subsequent revisions) it has been left out.

[27] If section 9 is construed with the word “except” included, the REJBA continued to apply to the enforcement of British judgments. Without it, there is a lacuna in that under section 9(1), the REJBA ceased to apply to the United Kingdom, but there never having been a notice under section 3, the FJREA would not provide for enforcement of British judgments.

[28] The revisions of the Laws of Seychelles are prepared and published pursuant to the Statute Law Revision Act 1990. Although the Commissioner appointed under that Act has wide powers under section 5 to, in effect, tidy up the statute book, he or she does not have power to make substantive alterations of the kind apparently effected by the omission of the word “except”. On the other hand, section 9(2) provides that a revised edition of the Laws of Seychelles:

“... shall, in respect of the enactments contained therein, be deemed to be, and shall be, without any question whatsoever, in all courts and for all purposes whatsoever, the sole authentic version of the laws in force ...”

[29] Consistently with section 9 (2) of FJREA, we must take the 1991 and subsequent versions of the FJREA as they appear in the Laws of the Seychelles as authentic. We are, however, entitled to interpret the FJREA as it appears in the Laws of Seychelles in accordance with context and legislative history and purpose. All of that makes it clear that the word “except” should be read into section 9(1) of FJREA which should be construed as if the word “except” is in it. Very properly this was substantially accepted by counsel for Vijay. On this basis, the case falls to be determined under the REBJA.

[30] We note in passing that further versions of the FJREA in revisions of the Laws of Seychelles should be corrected and as well, that attention be paid to revision of the notice published under section 9(1) FJREA and to the publication of a notice under section 3(1) of FJREA.

[31] The effect of the statutory scheme under the REBJA is as follows.

[32] “Judgment” defined in this way:

“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,”

[33] Section 3 provides:

“3. Registration of judgment obtained in the United Kingdom

(1) Where a judgment has been obtained in the High Court of England or of Northern Ireland or in the Court of Session in Scotland, the judgment creditor may apply to the court at any time within twelve 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 it considers it just and convenient that the judgment should be enforced in Seychelles, 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 the original 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

(d) the judgment was obtained by fraud; or

(e) the judgment debtor satisfies the 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 court.

F. Does the 2017 decision of the Court of Appeal preclude registration of the English orders by reason of res judicata, or principles of abuse of process

The general principles

[34] In the now eight years that have elapsed since the arbitral award, EEEL's primary object has been to recover the money that Vijay owes under the award. The direct enforcement claim that culminated in the December 2017 Court of Appeal judgment was with a view

to achieving that object. So too were the proceedings in the United Kingdom and the recognition proceedings before Carolus J. In that sense there is a substantial overlap between the two sets of Seychellois proceedings and it is this overlap that provides the basis for the arguments advanced by Vijay that we deal with in this part of our judgment.

[35] Overlaps of this kind sometimes raise issues as to the appropriateness of the second set of proceedings, as the following passage from Halsbury's Laws of England, 5th edition, Vol12, paragraph 1166 indicates:

“The law discourages relitigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be a retrial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions or that there should be collateral challenges to judicial decisions. There is a danger, not only of unfairness to the parties concerned but also of bringing the administration of justice into disrepute. The principles of res judicata, issue estoppel and abuse of process have been used to address this problem.”

[36] In the present contest it is necessary to address res judicata (in passing only) and abuse of process.

Res judicata

[37] Counsel for Vijay accepted that the legal issues between the parties in the two cases are sufficiently different to mean that the current proceedings are not precluded by the principles of res judicata. This is because the judgment of Carolus J in the registration proceedings is not inconsistent with any of the steps in the reasoning that led to the Court of Appeal in 2017, rejecting the direct enforcement application.

Abuse of process

[38] Rejection of res judicata leaves in play the possibility that the present proceedings are an abuse of process. This, in a sense as an extended version of the res judicata principle, was explained Sir James Wigram, Vice-Chancellor, in *Henderson v Henderson (1843)* 3 Hare 100, 67 ER 313

“... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter[s] which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

[39] There is now no absolute rule that it is an abuse of process to pursue in later proceedings a claim that could have been advanced in, or at the same time, as earlier proceedings as the House of Lords judgment, *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 29 shows. The conclusion in that case was whether second proceedings are an abuse of process should be judged broadly on the merits, taking account of all public and private interests involved and the facts of the case. For these purposes, the critical question is whether the plaintiff is misusing or abusing the process of the courts.

[40] The direct enforcement claim was commenced after the judgment of Cooke J. But the order of that Judge provided that:

“Within 14 days after service of the order [Vijay] may apply to set-aside the order. The award [sic] must not be enforced until after the end of that period, or until application made by Vijay within that period has been finally disposed of.”

[41] An application to set aside the order was made by Vijay in a timely way. In the result, up until the judgment of Cockerill J (which was not until 11 October 2018), the judgment of Cooke J could not have been enforced.

[42] The inability of EEEL to enforce the judgment prior to the judgment of Cockerill J meant that it was insufficiently final to amount to a “judgment” under the REBJA. This is

because the direction of Cooke J as to the non-enforceability of the judgment meant that, until Cockerill J's 11 October 2018 judgment, no money "was made payable" with the result that it was not a "judgment" for the purposes of the definition of "judgment". As well, and in any event, it could not have been sensibly argued that it was "just and convenient" to register in the Seychelles a judgment that could not be enforced in the home jurisdiction of the court that issued it.

[43] Against that background, EEEL is not to be criticised for not seeking recognition of the judgment of Cooke J at the same time as it was prosecuting the direct enforcement claim before Robinson J and later the Court of Appeal. For this reason, EEEL's conduct did not involve the particular form of abuse of process dealt with in the passage from *Henderson* we have just cited. Recognising this, Mr Kuschke SC for Vijay did not rely on that form of abuse.

[44] Mr. Kuschke's primary argument was that EEEL's registration application was a collateral attack on the 2017 Court of Appeal judgment of and an abuse of process for that reason. In advancing that submission, Mr Kuschke relied heavily on *Hunter v Chief Constable of the West Midland Police* [1982] AC 529, where Lord Diplock (at 541) said:

"... the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision adverse to the intending plaintiff reached by a court of competent jurisdiction in which a plaintiff had a full opportunity of contesting the matter was as a matter of public policy, an abuse of the process of the court."

[45] In that case the plaintiff (who was one of a group often referred to as "the Birmingham Six") had been convicted of serious offending (often referred to as "the Birmingham pub bombings"). Fundamental to his conviction were admissions he was alleged to have been made. His case at trial was that any admissions he may have made had been beaten out of him by the interviewing police officers. His evidence was rejected by the trial Judge on an admissibility challenge to the admissions and must have been similarly rejected by the jury (as the case against relied primarily on the admissions). His claim for damages for

assault in relation to the violence he alleged in relation to his admissions were struck out as an abuse of process as a collateral challenge to his convictions.

[46] *Hunter* (supra) is perhaps not the happiest of cases to rely on. The Court of Appeal of England and Wales later quashed the convictions of the Birmingham Six (see *R v McIlkenney* (1991) 93 Cr App R 287) and Hunter and the others were paid substantial compensation. That said, and as Lord Diplock pointed out in his speech, the substantial purpose of Hunter's claim for assault does not appear to have been to obtain damages; rather it was to undermine the basis on which he had been convicted and in that way challenge, at least in the court of public opinion, the legitimacy of the jury verdicts. For those reasons, the conclusion that his claims were an abuse of process is understandable. Indeed, there are many cases in which the same approach has been adopted, as the discussion in *Spencer Bower and Handley: Res Judicata* (5th edit, 2019) at 322-323 shows.

[47] In this area of the law, there is a need for caution. In *Brisbane City Council v Attorney-General for Queensland* [1979 AC 411 at 425, Lord Wilberforce noted that abuse of process principles

... ought only to be applied when the facts are such as to amount to an abuse, otherwise there is a danger of a party being shut out from bringing a genuine subject of litigation.

[48] As it happens, over the last 20 years, courts have been slower than they once were to find that proceedings are an abuse of process. In the case of the form of abuse of process referred to in *Henderson v Henderson* (supra), this shift in approach is exemplified by *Johnson v Gore-Wood & Co.* (supra). The same trend in relation to abuse of process on grounds of collateral attack (otherwise perhaps than in relation to collateral challenge to convictions) is exemplified by *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 where Lord Hoffman (at 702-703) expressed the view that the subsequent litigation would be an abuse of process only if it would be manifestly unfair to the defendant or would bring the administration of justice into disrepute.

[49] On the basis that a broad evaluative assessment is required, we must look at the situation in the round. Relevant to this are a number of considerations:

- (a) EEEL had been awarded a substantial sum of money in the arbitration.
- (b) As a matter of common sense and experience, the longer the time it takes to enforce a liability, the greater the risk to the creditor of non-payment.
- (c) EEEL could therefore be expected to pursue all practicable enforcement mechanisms as and when the opportunity to do so arose.
- (d) In this context pursuit of such enforcement mechanism sequentially if simultaneous pursuit was not possible is perfectly reasonable.
- (e) The English proceedings were underway when the direct enforcement proceedings were commenced and prosecuted and it would have been reasonably apparent to Vijay that if the direct enforcement claim failed, and the set-aside application in respect of the Cooke J judgment failed, further proceedings under REBJA were likely.
- (f) The recognition application is premised on a legal basis that it is completely different from the basis on which the direct enforcement proceedings were prosecuted and does not in any way challenge the factual or legal conclusions of the 2017 Court of Appeal judgment. Indeed, given that the Court of Appeal is an apex court, there is no way that the legal effect of its judgment can be challenged.
- (g) Of concern in *Hunter* was the likely effect of a judgment in Hunter's favour in the assault proceedings on public confidence in his convictions. In that case the civil proceedings were a direct attack on what had been central plank of the prosecution case against him in the criminal trial, namely that his admissions had been voluntary and were reliable. Success for Hunter in

the assault claim, if it had been allowed to go to trial, would not have had any direct legal effect on his convictions. But, in the court of public opinion, such success would have cast a major shadow over the safety of the jury verdicts, thus creating pressure for his release from prison and pardons and so on. In contradistinction, our dismissal of the appeal from the judgment of Carolus J says or implies nothing adverse in relation to the 2017 Court of Appeal judgment.

[50] Against this background, we see nothing in EEEL's conduct that would warrant treating it as an abuse of process. The registration application was not manifestly unfair to Vijay and its success does not bring the administration of justice in Seychelles into disrepute.

G. The New York Convention (GROUNDS 6 & 7)

[51] An aspect of the arguments advanced before us on behalf of the appellant was that the appellant's fair trial rights were violated by the eventual decision of Carolus, J now under scrutiny in this appeal in which she referred to the New York Convention.

[52] This argument is framed by Messrs. Kuschke, SC and Georges, counsel for the appellant this way. Counsel contends that between the conclusion of the evidential stage of this matter before Her Ladyship Carolus, J and the delivery of Her Ladyship's judgment, Seychelles became a party to the New York Convention. Before judgment, they contend, no submission was put before the court about the accession by Seychelles to the New York Convention and in what way such accession impacted the respective case of the parties. It was Her Ladyship they say, who in her judgment made the New York Convention a live issue. They make complaint of this matter because the judgment of Carolus, J was adverse to the case presented to the court on behalf of the appellant.

[53] Counsel for the appellant has referred us to several extracts from the Judgment of Carolus, J where she refers to the New York Convention. In some instances, the extracts

referred to reflected statements of fact which bore no connection or any prejudicial connection, in our view, to the basis of the Learned Judge’s decision.

[54] There was however one aspect of the judgment of the Learned Judge to which counsel for the appellant gave considerable emphasis. It is at paragraph 89 of the judgment, and it reads as follows:

“[89] the defendants argument that allowing enforcement of the Cooke and Cockerill Orders will allow the enforcement of the arbitral award and that as Seychelles has established that foreign arbitration awards are not enforceable in Seychelles, the plaintiff should not be allowed to use the “back door entry” by clothing the award in the garment of a British judgment to enforce it, may have carried much weight prior to the ratification by Seychelles of the New York Convention. However, this argument no longer holds much weight. As stated above, the Seychelles position has now changed and this argument no longer holds the strength it used to when the case commenced. It can no longer be argued that to allow enforcement of the arbitral award would be unconstitutional, unconscionable and contrary to public policy as since 2020 Seychelles is a party to the New York Convention and foreign arbitration awards are now capable of being enforced. The question of circumventing the constitutional order and of flouting the Executive’s decision not to put in place mechanisms for the enforcement of foreign arbitral awards no longer arises.”

[55] In response, we have concluded that it is not quite accurate to say that issues related to the New York Convention were introduced at the hearing by Carolus, J. We note that the record of this appeal contains submissions that were presented before the Learned Judge. Specifically, we refer to submissions signed by B. Georges, Attorney for the Defendant, (now the appellant) in these proceedings. In those submissions dated 16th September 2019, under the sub-heading “BACK DOOR ENTRY” Mr. Georges quoted extensively from the 2017 decision of the Court of Appeal where at paragraphs 101 to 104, there was extensive reference to the New York Convention. It is very evident to us that counsel in his submissions adopted the conclusions of the Court of Appeal in its decision of 2017

which touched and concerned the New York Convention and in which that Court explained that:

- (i) The New York Convention was consciously and deliberately repudiated and denounced by Seychelles.
- (ii) The New York Convention could only be operationalized by execution by The President of Seychelles followed by subsequent ratification by the National Assembly.

[56] The appellant's further contention was that the matters at paragraph (ii) above not having materialised, it was impermissible for Carolus J to usurp the powers of the National Assembly and the President and to implement the New York Convention into domestic law and more so to give effect to the New York Convention by resort to its execution by another state.

[57] We have given careful consideration to arguments on this matter made on the appellant's behalf and it is our considered view that the contents of paragraph 89 attributed to the Learned Judge (referred to earlier) was in direct response to matters related to the New York Convention raised before Her Ladyship by Counsel for the appellant. Accepting for present purposes that there was a process breach (as she had not gone back to counsel on the point), we see this aspect of the case as being of little moment. It is a fact that Seychelles is now a party to the New York Convention. Unsurprisingly, considering that accession, the submission to which she was responding was not repeated before us.

[58] We have heard counsel for Vijay on the issue in the course of the appeal which, of course, proceeded by way of rehearing. Having done so we are able to carry out afresh the evaluative exercise that was required (see Rule 31 (5)). Having conducted that exercise, we are of the view that the Learned Judge's decision to recognize and enforce the English judgments was correct.

H. Should the judgments of the High Court can and/or should be recognised and enforced in Seychelles

[59] Vijay has presented several overlapping arguments as to why the judgments of Cooke and Cockerill JJ cannot or should not be enforced in Seychelles. These arguments are conveniently brought together here because they are substantially based on similar reasoning. Many of the arguments have already been traversed but four require their own special treatment. Firstly, the Rosseel argument concerning the wariness of English courts of issuing judgments having extra-territorial effects. Secondly, the *exequatur sur exequatur ne vaut* ground of appeal is important and requires the closest of examination. Thirdly, the possible application of public policy to debar recognition and enforcement. And fourthly, the argument that it is not just and convenient to enforce the UK judgments requires consideration of a multitude of factors including reference to some of those already decided separately in this judgment.

Rosseel (GROUND 5)

[60] The appellant submits that the Trial Court erred in not being persuaded by the *Rosseel N.V v Oriental Commercial Shipping (UK) LTD and others* 1 WLR 2 November 1990, which is the authority for the proposition that the English Courts are wary of issuing judgements with extra-territorial effect based on the determination of the foreign Court. In *Rosseel* (supra) an arbitral award had been obtained in New York against the defendants. The plaintiffs applied to the English courts for leave to enforce the arbitral award in England, and for worldwide and local injunctions restraining the defendants from dealing with their assets. The Court granted injunctive relief in respect of the assets held within the jurisdiction of the English Court but refused to extend such relief beyond the jurisdiction on the ground that the appropriate Court for such an application would be either in New York or the foreign Court where assets were found.

[61] In rejecting the plaintiffs appeal against the judge's refusal to grant injunctive relief worldwide, the Court of Appeal stated:

“... there is all the difference in the world between proceedings in this country, whether by litigation or by arbitration, to determine rights of parties on the one hand, and proceedings in this country to enforce rights which have been determined by some other court or arbitral tribunal outside the jurisdiction.

Where this Court is concerned to determine rights then it will, in an appropriate case, and certainly should, enforce its own judgment by exercising what should be described as a long arm jurisdiction. But, where it is merely being asked under a convention or an Act of Parliament to enforce in support of another jurisdiction, whether in arbitration or litigation, it seems to me that, save in an exceptional case, it should stop short of making orders which extend beyond its own territorial jurisdiction.

I say that because, if you take a hypothetical case of rights being determined in state A and assets being found in states B to M, you would find a very large number of subsidiary jurisdictions – in the sense that they were merely being asked to enforce the rights determined by another jurisdiction – making criss-crossing long arm jurisdictional orders with a high degree of probability that there would be confusion and, indeed, resentment by the nations concerned at interference in their jurisdictions.

It seems to me that, apart from the very exceptional case, the proper attitude of the English Courts – and, I may add, courts in other jurisdictions, is to confine themselves to their own territorial area, save in cases in which they are the court or tribunal which determines the rights of the parties. So long as they are merely being used as enforcement agencies they should stick to their own....”

- [62] The appellant alleges that the Trial Judge failed to consider whether the award itself should be enforced but considered rather whether the awards as set out in the Cooke and Cockerill Orders should be enforced. The appellant further alleges that “The process of recognition and enforcement in London clearly had extra-territorial effect, because it

allowed the respondent to bring something different before the Seychelles Court for enforcement.” It was also alleged that the Trial Judge “stepped around” the authority of *Rosseel* “by making a distinction between an ‘outreach request’ in *Rosseel* and an ‘importing request’ in the matter before her and that in so doing she erred.

[63] We disagree. In our view the present case is different from *Rosseel*, where the parties sought extra-territorial injunctive orders. The *Rosseel* guidelines have been established as good law for the English courts as a basis to refuse to grant worldwide injunctive orders; but in the present case under consideration, the respondent is not seeking worldwide injunctive orders; it only seeks to enforce the English orders in Seychelles under the REBJA. The application before the Seychelles trial court did not raise any issue regarding English court making an extraterritorial order. The current case is therefore distinct and distinguishable from *Rosseel* which is therefore not applicable.

Exequatur sur exequatur ne vaut (GROUND 8)

[64] This ground of appeal contends that the Trial Court erred in allowing the recognition and enforcement in Seychelles of the UK Orders, notwithstanding that they may have been “judgments” within the meaning of section 2 of REBJA because they were executory Orders only and were not able to be further rendered executory in Seychelles.

[65] We agree that in considering this ground the Court should be guided, to the extent required, by the French jurisprudence on the matter given the parentage of section 227 of the French Civil Code, which is the foundational enforcement article of our law. As this Court made categorically clear in *Pillay v Pillay* [1973] MR 179, the jurisprudential basis for Seychelles private international law was French. The appellants conceded that the French foundation has been supplemented by British imports, of relevance here, REBJA and FJREA but contend that whether English principles are applied or the French Civil law ones are considered, the result will be the same, namely that the rendering executory of another executory order is not possible in Seychelles.

- [66] The appellant has placed reliance on Dicey, Morris & Collins on the Conflict of Laws (15th ed.) and a few cases including *Reading and Bates Construction Co. v Baker Energy Resources Corp* (1998) and a citation from *ED & F Man Sugar Ltd v Lendoudis* [2007] EWHC 2268 (Comm.), [2007] 2 Lloyd's Rep. 579) to persuade us to hold that the exequatur principle rendered it incompetent for the respondent to pursue the English execution order based upon the French execution order.
- [67] In essence the appellant's argument both in the Trial Court and in this Court was that the UK Orders being procedural enforcement Orders and having been granted without canvassing the merits of the claim are in the nature of exequatur Orders on the arbitral award and that accordingly on the basis of the maxim *exequatur sur exequatur ne vaut*, it would be impermissible to have an executory decision of another executory decision.
- [68] It does appear that there could be a preponderance of the authorities in several civil law countries adopting the non-merger theory that provides that a foreign judgment on an arbitral award does not merge with the arbitral award. (See: Albert Jan Van De Berg, "The New York Convention of 1958 towards a Uniform Judicial Interpretation (1981) p346)). According to this theory, the foreign judgment on the arbitral award is an enforcement order that should only have territorial effect in the issuing jurisdiction, whilst the arbitral award itself is left intact for enforcement in a different jurisdiction.
- [69] The following cases may be taken to support this approach: the Dutch case of *Comptoir Agricole du Pays Bas Normand v. Societe Neerlandaise Central Bureau*, (Judgment of the 22 October 1959, Cour d'Appel, Caen, Fr.,1961 JD Int.142); the French case *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices*, (France/ 29 June 2007); and the German cases of *Schieds VZ 285, 287* (2 July 2009, BGH, (2009), and *OLG Frankfurt am Main*, [2006] NJOZ 4360, 13 July 2005. Essentially, in these cases, the respective state took the view that it is only the arbitral award that may be relied upon in recognition and enforcement proceedings, not a foreign enforcement judgment or order on which the award had been based.

[70] The respected academician Maxi Sherer, in an article in the Journal of International Dispute Settlement Vol 3, No 3 (2013) pp 587-628,¹ having conducted extensive reviews of the issue of enforcement of foreign judgment on arbitral awards appears to have come down in favour of the exequatur principle. She writes:

“The better view is therefore to abandon the parallel entitlement approach and instead to allow only the enforcement of awards and not the enforcement of foreign awards judgments validating those awards.

The ancillary nature of award judgments is very clear under the parallel entitlement approach: when seeking to enforce the ancillary award judgment, the award creditor in fact seeks to obtain satisfaction of the initial adjudication in the award. the words of the Spanish Supreme Court, the claim’s real aim [i]s to enforce the arbitral award, It is therefore only consistent to limit the award creditor’s options to do exactly that, ie seek enforcement of the initial award and not of the ancillary award judgment.”

[71] On the other hand, the preponderance of authorities in common law countries like the United Kingdom, Australia, India, Israel, and the Eastern Caribbean Supreme Court² appears to have adopted the merger or parallel doctrine whereby when a judgment is given enforcing the arbitral award, the arbitral award is merged into the judgment and ceases to exist as an arbitral award but now operates as a foreign judgment. Under this approach, foreign judgments on arbitral awards are entitled to recognition and enforcement. The learned authors, Liberman and Scherer note in this regard that:

“The parallell doctrine allows the award creditor, having obtained a foreign confirmation judgment, to seek recognition and enforcement of that judgment, in lieu and in place of the award. In other words, the enforcing court grants effect to the foreign confirmation judgment, applying the forum’s foreign judgment principles.” (Linda Silberman and Maxi Scherer, “Forum Shopping and Post –Award Judgments” (2014) 2 PKU Transnational Law Review 115 -156)

¹ Effects of Foreign Judgments Relating to International Arbitral Awards: Is the ‘Judgment Route’ the Wrong Road?

² The point is not entirely clear but in *Richard Vento v Keithley Lake*, ECSC (Anguilla) 25 March 2015, at para 25, it was stated that a “party may choose to enforce the award in the same manner as a judgement” per Baptiste JA.

[72] The learned authors note that this approach is prevalent in the U.S as supported by case law and The U.S. Restatement on International Commercial Arbitration, which states:

“[o]nce an award has been confirmed by a foreign court at the arbitral seat, the prevailing party may seek to have it recognized or enforced either as an award or as a foreign judgment, or both” (Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration: 4-3(d) (Tentative Draft No. 2, 2012T).”

[73] Admittedly, not all these commentaries and cases make clear that the foreign award in one country (country A) was converted into a judgment in another country (country B) and then enforced as a judgment in another country (country C). However, the preponderance of dicta suggests that this may be acceptable. See for example the statement by Clancy JA in *Uniforet Pate Port-Cartier Inc v Zerotech Technologies Inc* 1998 CanLII 3817 (BC SC) at para 9: “It is not disputed that an arbitration award may be recognized and enforced in this province once it becomes a judgment of the foreign court.” Similarly, Dorgan JA in *Solecki v Stroud Resources Ltd* 2017 BSCS 1130 at para 42, stated: “...the common law provides a number of defences to the recognition and enforcement of foreign judgments, that is, fraud, denial of natural justice, or public policy.” And *Morgan Stanley and Co International Ltd v Pilot Lead Investments Ltd* 2006 4 HKC 93 states that without an express provision prohibiting the “laundering” of foreign judgments it is permissible to enforce a foreign judgment that is based upon a judgment granted and recognized in a third country.

[74] Returning to the specific characteristics of the Seychelles legislative framework, it appears that REBJA (and FJREA) have decisively skewed the Seychelles position towards the common law position and away from the civil law position. Specifically, in order to determine whether a recognition judgment or order can be registered under REBJA, one has to focus on the provisions of REBJA. There is no provision in REBJA which expressly or by implication excludes registration or a recognition judgment, or what the appellant refers to as a “superficial” or “formalistic” judgment. Section 3 (2) of the REBJA clearly sets out the grounds upon which a judgment cannot be registered. That section does not provide or suggest that a recognition judgment or an enforcement

judgment is not capable of being registered under the Act, merely because it is based upon an award obtained in another foreign country.

[75] In this regard, we find the observation of Poon J in *Morgan Stanley & Co International v Pilot Lead Investment* [2006] 4 HKC 93 rather apt. In *Morgan Stanley*, the judgment creditor had obtained default judgment against the debtor in the High Court of England (the “English judgment”). The judgment Creditor registered the English judgment in Singapore under the Singapore’s Reciprocal Enforcement of Commonwealth Judgment Act (the “Singapore Order”) in Hong Kong under the foreign Judgment (Reciprocal Enforcement) Ordinance. The Registrar refused the application of the judgment creditor and expressed the view that it was not the purpose of the Foreign Judgment (Reciprocal Enforcement) Ordinance to provide for the registration of “second hand judgment”. On appeal, Poon J said:

“24. [W]ith great respect, I disagree. In my view FJREO does not draw a distinction between: (a) a monetary judgment made by a superior court of a designated country; and (b) a judgment made by that superior court in proceedings founded on a judgment of a court in another country having as their objective the enforcement of that judgment. Once the prerequisites for registration are fully met, both judgment (a) and (b) made by that superior court may be registered...

25 [M]y interpretation of FJREO is supportable by the legislative history of the English Foreign Judgments (Reciprocal Enforcement) Act 1933, on which FJREO was modelled. Before 1982, the 1933 Act contained provision similar to those of FJREO. However, a new s.2A was added to the 1933 Act by the Civil Jurisdiction and Judgments Act 1982. Under s. 2A(c), the 1933 Act does not apply to a judgment or a recognized court which is a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their objective the enforcement of that judgment. In *Clarke v Fennoscandia Ltd* [2004] SC 197 (Scottish Outer House), Lord Kingarth observed at para 31 that:

...s.2A(c) ... was no doubt added, as many commentators have concluded, to avoid the “laundering” of judgments obtained in countries to which the 1933 Act

did apply, ie to prevent a party from obtaining a decree conform in respect of a “foreign” judgment in a country to which the Act did not apply and thereafter seeking enforcement by formal registration procedures under the Act in a country or countries which would not themselves contemplate the recognition and enforcement of the “foreign” judgment in question”.

[76] Whatever may be the situation or trend in civil law countries that continue to follow the exequatur doctrine, the decisive factor for this Court must be the strict reading and application of the definitions of “judgment” in both REBJA and FJREA. As seen earlier in this judgment, (at paras [32]-[33]) this compels to the conclusion that the UK Orders are “judgments” that could be registered and enforced in Seychelles as the Trial Court held. We have also read section 3 (1) and (2) of REBJA that sets out the requirements for registration of judgment under that Act with diligence and we find that the requirements contended for by the appellant are not prescribed by REBJA (or, indeed, FJREA), and cannot be sustained as that would amount to the Court legislatively importing provisions into the statute. This, of course, we cannot do. For these reasons we agree with the reasoning of Carolus J that the maxim *exequatur sur exequatur ne vaut* is not applicable to the Seychelles.

[77] Of at least passing interest in this context is the recent judgment of the third chamber of the European Court of Justice in *J v H Ltd* . This concerned the application of European Union regulations relating to the recognition and enforcement of judgments given by courts in member states. At a reasonably high level of generality, the scheme of the regulations is similar to that of the REBJA, in that there is scope for argument as to whether the judgment in respect of which recognition is sought is a judgment for the purposes of the regulations and, if it is, whether the court in which recognition is sought may decline recognition if it would be “manifestly contrary to public policy”.

[78] In issue was whether a judgment of the High Court of England and Wales (given after what was described as a “summary hearing”) enforcing a judgment of the Jordanian courts should be enforced in Austria. The question for the European Court of Justice was whether the English judgment was a judgment for the purposes of the regulations. The Court held that it was and noted that this

“conclusion is not invalidated by the fact, on the substance, that order was made to give effect to judgments delivered in a third State which are not, as such, enforceable in the Member States.”

[79] However, it remained open to the Austrian courts to determine whether it should refuse to enforce the judgment on grounds of public policy.

[80] The reason why this judgment is of at least interest in the context of this appeal is that the European Court of Justice took an approach that is broadly similar to the one we are adopting. Despite being within the *exequatur sur exequatur non vult* principle, the English judgment was still a judgment capable of recognition and enforcement but the policy considerations which underlie that principle could be addressed in the particular context of the case when determining whether enforcement should nonetheless be refused.

[81] From the foregoing, there seems to be no reason to deny the respondent the fruits of their victory in the UK Orders by reference to the origin of those orders in the French arbitral proceedings. The definition of “judgment” in REBJA simply does not stand in the way, or can reasonably or properly be made to stand in the way, of the enforcement of the UK Orders in Seychelles. The *exequatur* principle simply does not, in the context of the governing legislation in Seychelles, present a bar to the respondent enjoying the fruits of the UK judgment in Seychelles.

[82] The Cooke and Cockerill Orders were converted into judgments in terms of the UK Arbitration Act and as held by the Trial Judge, there is no legally sanctioned bar to register and enforce the UK Orders in Seychelles. We find the words of Potter J in the case of *Far Eastern Shipping Co v AKP Sovcomflot* (1995) 1 Lloyd’s Rep 1994, at page 9, to be apposite. Speaking on a similar point, the learned Judge stated as follows:

“It seems to me that, having elected to convert an award into an English judgment, the Plaintiff ought in principle to be subject to the same procedural rules and conditions as generally apply to the enforcement of such judgments... Taken separately or together, there is nothing in the text of either of those sections to suggest that, once judgment has

been entered in terms of the award, it shall for the purposes of enforcement be treated in any different manner from other judgment or Order...”

[83] Accordingly, our conclusion on this point is that the Trial Court was correct in holding that the Order of Mr. Justice Cooke dated the 18th of August 2015, and that of Mrs. Justice Cockerill dated 11th October 2018 be registered in terms of section 3(1) of the Reciprocal Enforcement of British Judgments Act.

Public Policy (GROUND 7)

[84] A foreign judgment may be refused recognition and enforcement if it is contrary to domestic public policy. However, common law courts have repeatedly shown themselves willing to enforce foreign judgments unless to do so does violence to some well-established principle or underlying concept of domestic law. For example, in *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (1984) [at p. 152], the United States Court of Appeals Circuit Court stated at p. 152, that: “...*the public policy defense should be construed narrowly. It should apply only where enforcement would violate our “most basic notions of morality and justice.”*”

[85] Counsel for Vijay cited the CCJ decision in *BCB Holdings Limited and another v The Attorney General of Belize* [2013] CCJ 5 (AJ) where it was said at para 57:

“While it is public policy that arbitral awards, and in particular foreign awards, should be enforced, it is also public policy that awards which collide with foundational principles of justice ought not to be enforced. These two facets of public policy may sometimes appear to be, but are really not, mutually inconsistent. When a municipal court considers whether to decline to enforce an award on public policy grounds, the court is not concerned with favouring or prejudicing a party to the arbitral proceedings. The Court is concerned with protecting the integrity of its executive function. In the process, the Court seeks simultaneously to guarantee public confidence in arbitral processes generally and to respect the institutional fabric of the country where the award is to be enforced.”

[86] We entirely accept these observations of the CCJ. However, *BCB Holdings* was a very different case from the one at bar. In *BCB Holdings* there were serious allegations that the foreign award was based upon a tax regime which was secretly and specially crafted, and which was at variance with the tax laws of Belize. As the legislature (which has the constitutional responsibility to impose taxes) had not been involved in the negotiation of this tax regime, the further allegation was that the tax agreement was unconstitutional and in breach of the separation of powers doctrine. No such allegations arise in the present case.

Just and convenient (GROUND 2)

[87] The appellant rightly pointed out that under REBJA enforcement is subject to two conditions, namely, that the none of the bars to registration in section 3 (2) (a) – (f) is present; and that the court considers it “just and convenient” in the circumstances of the case (section 3 (1)) to permit enforcement. The appellant is also right that the “just and convenient” criterion is separate and apart from the enumerated conditions that must be fulfilled. The “just and convenient” concept is more opaque and more open-ended and permits the court to exercise its discretion as to whether to permit enforcement.

[88] In developing its argument that it would not be just and convenient to permit enforcement of the UK orders the appellant resorted to two arguments that have already been encountered in this judgment: (i) that it was not proper for the respondent to try and enter through the back door (obtaining a judgment on the award so that the judgment could be enforced) when the front door (enforcing the award) was closed to it, and (ii) that a double exequatur was fundamentally impossible in law.

[89] There is no fundamental reason against raising these arguments in the present context again, since the court is enjoined to consider the totality of the circumstances of the case. What a single factor may not have achieved on its own could be achieved when other factors are brought into the basket of considerations. However, an immediate difficulty for the appellant is that the ‘back door’ argument and the ‘double exequatur’ argument are essentially the same so that each adds relatively little to the other. Arguments about

being vexed twice by the same litigation have been sufficiently answered in our discussion earlier regarding res judicata and abuse of process.

[90] Further, the court sought from counsel (on both sides) guidance from case-law as to the individual and collective circumstances where other courts have considered the “just and convenient” criterion of enforcement. Counsel was unable to provide assistance in this regard but the court found cases which discussed the concept and shared them with counsel for their comments, which were duly considered.

[91] In *Agbara v Shell Petroleum Development Co of Nigeria Ltd*, 2019 WL 06619915 (2019) there was lengthy litigation between Shell and the community of Ejama-Ebubu, Nigeria. Shell had been involved in the extraction of crude oil in the area. There was an oil spill owing to a rupture of a pipeline maintained by Shell in 1969 or 1970. The Ejama-Ebubu community approached the Courts in Nigeria in 2001 and sought damages. Shell disputed their responsibility to the oil spill and further claimed they had made substantial progress in clearing up the effects of the spill. Shell also failed to attend hearings and also failed to orally submit their defence to the Court. There were motions being filed by Shell, which further frustrated the proper hearing of the case, including a motion to set aside the proceedings and for the Judge to disqualify himself and/or withdraw from further consideration of the proceedings. The case lay dormant until 25 May 2010, and a judgment was eventually handed down on 14 June 2010 in favour of the Ejama-Ebubu community. Shell was ordered to pay damages including punitive damages.

[92] The Ejama-Ebubu community attempted to enforce the judgment in UK, and the question of “just and convenient” arose in the context of natural justice. Shell has submitted that is not just and convenient for the judgment to be enforced in the UK because they had suffered substantial breach of natural justice in the proceedings of Nigeria. Coppel QC (Sitting as a Deputy Judge of the High Court) stated that:

“I accept Shell's submission of principle that I must take into account a breach of natural justice which has occurred in the Nigerian proceedings when deciding whether it is " just and convenient" for the judgment to be enforced in the UK. " Just and convenient " is a broad expression and if the judgment has been obtained following a breach of natural

justice that must be of significance to the question whether it is just and convenient that the machinery of the High Court of England and Wales be made available for its enforcement.”

[93] In addition to the above, Coppel J further relied on Adrian Briggs’s textbook on Civil Jurisdiction and Judgments which stated, in reference to natural justice, that:

“A defence resembling that of lack of natural justice is framed [in s. 9(2) AJA] in terms of lack of due service. To the extent that the judgment did not fall within this provision, but was still rendered in breach of the rules of natural justice, it may well not be just and convenient to register it; and in any event, the Human Rights Act 1998 will apply to proceedings taken under this section.”

[94] In assessing the question of natural justice and the lack thereof as a justification to the exercise of discretion against registering the judgment, Coppel J held that this must be determined with due regard to international comity and respect for the Nigerian legal system. As such, he cautioned himself on the standard to use in determining natural justice, and found that while it is the English common law standards to be applied, it is pertinent to have an understanding of the Nigerian procedures. An assessment was undertaken in respect of two things – Shell’s inability to (i) cross-examine the witnesses of the Claimant; and, (ii) to present its defence. In considering these two, Coppel J found that it was not just and convenient to register the judgment in UK because of Shell suffered a serious breach of natural justice when they were prevented from being able to present their defence and in that case, the breach leads to the conclusion that it is not “just and convenient” for the judgment to be registered.

[95] In the case of *Yearwood v Yearwood* (Antigua and Barbuda) ANUHCVAP 2015/0018/ ANUHCVAP 2015/0019, the question of just and convenient to enforce a foreign judgment arose in the context of limitation statutes. The Eastern Caribbean Supreme Court had to, on appeal, determine whether or not to enforce foreign monetary judgments under section 3(1) of the Reciprocal Enforcement of Judgments Act. It was the contention of Robin Yearwood, that Christiana Yearwood having delayed approaching the courts for enforcement, the judgment was registered outside of the time limit provided by law, among other things. In our view, the questions was whether or not prescription could bar

a person from enforcing a judgment if the court considers it just and convenient. Amour JA, in relying on *Quinn v Pres-T-Con Limited* [1986] 1 WLR 1216, stated that the Court is required to direct its mind to whether or not it is just and convenient to extend time limitations prescribed by law.³ This, accordingly, requires the Court to have regard of the prejudice which the judgment debtor may suffer if the extension of time is granted.⁴

- [96] In respect of time limits, it is to be noted that the relevant statute in *Yearwood* allowed the court to extend such time where it considers it just and convenient. The more relevant takeaway in *Yearwood* is the one which relates to prejudice and the Court will have to ask itself – does the judgment debtor suffer any prejudice if the judgment is registered out of time? In any regard, being barred by prescription is not in question in this case.
- [97] The case of *Commission Import Export S. S. v. The Republic of the Congo*, 916 F.Supp.2d 48 (D.D.C. Jan. 8, 2013), may also be relevant in this context, although the words “just and convenient” were not used in the judgment. In that case the award creditor had obtained a judgment from the English High Court recognizing a foreign award in the U.K. He sought enforcement of this English judgment in the U.S. at a moment in time when an action to enforce the award was already time-barred. The District Court of the District of Columbia dismissed the action, taking issue with the award creditor’s “manoeuvre” trying to profit from the longer limitations period applying to foreign judgment enforcement actions, instead of the shorter limitations period applying to foreign awards.
- [98] None of these cases assist the appellant in this case. There is no question of any breach of natural justice (certainly none was pleaded in the Trial Court) nor is there any allegation of an attempt to secure enforcement of a foreign judgment after limitation in the natural forum has expired or of a “manoeuvre” of profiting from the longer limitations period applying to foreign judgment enforcement actions as contrasted with shorter limitations period for foreign awards. Issues of res judicata and abuse of process have already been discussed and discarded in this judgment (see, paras [37]-[50], *supra*).

³ Paragraphs 41 – 43.

⁴ Paragraph 43.

[99] Simply put, the appellant has run out of runway to launch arguments convincing to the court that it would not be just and convenient to enforce the UK orders.

I. Costs

[100] In the Trial Court, both the appellant and respondent prayed for costs. A number of litigation proceedings have been initiated by both parties since the main initiation of 2019 when the respondent filed a Plaint for the registration of the Cooke and Cookrill JJ Orders on 31 January 2019. Even before the proceedings of the main hearing of the appeal *de novo* on its merits, the parties filed motions (namely Motion to stay proceedings and Motion for Leave to File Additional Grounds). Each of these would be covered by the costs which we award below.

J. Conclusion

[101] The appeal is hereby dismissed.

[102] The judgment of Carolus J in *Eastern European Engineering Ltd v Vijay Construction (Pty) Ltd* (CS23/2019) is upheld in its entirety.

[103] Costs are awarded in favour of the Respondent.

Anderson JA

I concur

Young JA

I concur

Singh JA

Signed, dated and delivered at Ile du Port on 21 October 2022.