The Recognition and Enforcement of Foreign Judgments at Common Law in Nigeria

By:

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Introduction

Judicial authority, such as *Alfred C Toepfer Inc v Edokpolor (1965)* NCLR 89, establish that a creditor of a foreign judgment may bring an action at common law in Nigeria, by which action he/she, in effect, seeks recognition and/or "enforcement" of that foreign judgment[1]. The common law action has not been abolished by statute or disapproved judicially but, sadly, it is not widely understood or used by practitioners/courts in Nigeria. This is unfortunate, especially where the statutory mechanism[2] for the enforcement of foreign judgments is certainly limited but otherwise shrouded in confusion[3]. This paper argues for a reawakening of the common law action.

The construction placed on the statutory regime

It is impossible properly to assess the scope for the common law action in Nigeria without first addressing the statutory mechanism for the enforcement of foreign judgments. The common law action only works in the space which has been left for it by the applicable statutory regime. Moreover, tactically, judgment creditors are likely to favour registration of the foreign judgment under that statutory regime, where such registration is permitted, given the "better protection" which such regime affords them, at least theoretically, when compared with the common law[4].

With that in mind, the authorities yield the following propositions:

1. the Reciprocal Enforcement of Foreign Judgments Ordinance 1922 (the '1922 Ordinance') is still in force and applies to those jurisdictions to which it was extended by Proclamation prior to the passing of the Foreign Judgments (Reciprocal Enforcement) Act 1961[5] (the '1961 Act');
2. the provisions of the 1961 Act only come into effect upon the making of an order by the Minister of Justice (pursuant to Section 3 of the 1961 Act)[6] and no such order has yet been made; but
3. notwithstanding proposition 2, Section 10(a) of the 1961 Act does have effect, thereby providing the time limit within which the application to register a foreign judgment in Nigeria must be made[7]. Moreover, Section 10(a) of the 1961 Act applies even where the foreign judgment is from a jurisdiction to which neither the 1922 Ordinance nor the 1961 Act has been extended[8].

Difficulties generated by the legal profession's approach to proposition 1

Proposition 1 holds, it is submitted, and, of itself, generates no difficulty for the continued existence and/or growth of the common law action. That said, the legal profession's approach (and that of the courts) to proposition 1 has been problematic.

Two points are worth making here; both are demonstrative of problems which beset the current state of the law. First, insufficient attention has been paid to the consequence of proposition 1, meaning that its import has not been fully understood. This may, of course, be the result of practitioners and judges

concentrating on establishing and endorsing proposition 1 (which process is still ongoing, given the difficult relationship between proposition 1 and proposition 3 [9]). Even so, difficulty remains. By way of example: Section 3(1) of the 1922 Ordinance provides that an application for registration be made "at any time within twelve months after the date of the judgment, *or such longer period as may be allowed by the court*…" (italics added). Where one would have expected argument as to why the court should have, in the legitimate exercise of its discretion, extended the time within which the application could be made, one finds none[10]. A chance to establish when a judgment creditor might appeal to the court's discretion[11], and, correlatively, when he might have to fall back on the common law action, has been missed.

The second point follows from the first. While, as noted, tactically less advantageous than registration under the statutory regime, Section 3(4) of the 1922 Ordinance allows a judgment creditor to bring an action at common law on the foreign judgment, rather than have it registered under the 1922 Ordinance itself[12]. In circumstances where courts have not heard substantial argument on the Section 3(1) discretion and/or have exhibited a hostile attitude towards extending the time within which to make the application for registration[13], one would have expected a much greater role carved out for the common law action; one remains disappointed. And doubly so because, while not free from all controversy[14], the common law action may be brought within a longer period of time than the 1922 Ordinance permits (if one discounts the fact that the court may, at its discretion, extend time thereunder). At a stroke - so long as the judgment debtor could demonstrate that the other requirements had been met[15] - reliance on the common law action would remove the judgment creditor's need to act as swiftly as the 1922 Ordinance has been made to require[16].

Difficulties generated directly by proposition 3

The language in which Section 10(a) of the 1961 Act is couched gives rise to similar problems as those described when dealing with the first point under the previous sub-heading. Leaving those to the side, it is the second sentence of proposition 3 which poses the most significant risk to the continued life (such as it is) of the common law action in Nigeria. If "registration" is contemplated (or

somehow required) when dealing with judgments from jurisdictions to which the statutory regime has not been extended, the common law action (which has nothing at all to do with “registration” of a foreign judgment) is rendered completely useless[17].

Several cases may be cited which combine to paint a rather gloomy picture in this regard. *Teleglobe America Inc v 21st Century Technologies*[18]is, as far as one can tell, the judiciary’s first (and so most egregious) brushstroke but others have since been added[19]. Taken collectively, they suggest that there is no room left for the common law action, even though there is Supreme Court authority which suggests that the statutory regime was not designed to kill it off.

To be sure, the statutory regime, properly construed, applies only to foreign judgments from a narrow field of jurisdictions. If this is thought to be a problem, the answer does not lie, it is submitted, in a distorted interpretation and application of that statutory regime. Supplementing (a narrow) statutory regime by allowing a judgment creditor to resort to the common law action makes sense: it recognises that the necessary reciprocity which underpins the statutory regime is absent in the majority of circumstances while, at the same time, preserving the judgment creditor’s ability to obtain the debt which the judgment debtor is said to owe, at least in circumstances where Nigerian legal policy (as set out in the rules which govern the common law action) thinks that he should. Judgments which treat this idea with kindness, or at least do not dismiss it out of hand, are to be welcomed[20].

Difficulties generated indirectly by proposition 3

If proposition 3’s formulation is the product of perceived problems either with the statutory regime or the common law action itself, that is most unfortunate. For, rather than alleviating those problems, proposition 3 rather ensures that they will continue, at least until action on the part of the legislator (which action appears to be some way off).

Removing the common law action from view means that the rules which govern that common law action cannot be changed by the judiciary (which change might allow certain kinks within those rules to be ironed out). To be sure, the

common law world has not stood still in relation to the enforcement of foreign judgments: interesting questions remain to be explored. For instance, there is ongoing debate as to the circumstances in which a foreign court should be accorded international jurisdiction over the judgment debtor[21] and different views have been expressed regarding whether the common law may be used to enforce judgments from supra-national tribunals[22]. Consideration of these questions in Nigeria has been stymied by the side-lining of the common law action.

Perhaps even more importantly, with an eye to the future, deliberately obscuring the common law action prevents one from taking a clear view of the current Nigerian legal system, insofar as it relates to the enforcement of foreign judgments, and so, in turn, prevents an assessment of the merits of signing up to international projects, like the recent (and still draft) Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The answer to such questions is of supreme importance if Nigeria wishes to attract (legal) business from the continent as a whole. Those answers must be reached using all of the information available, which is why the common law action must somehow be revived.

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[1]*Alfred C Toepfer Inc v Edokpolor* (1965) NCLR 89. More recently, see: *Wilbros West Africa v Mcdonnel Contract Mining Ltd* (2015) All FWLR 310.

[2] The overarching statutory regime for enforcement of foreign judgments comprises the Reciprocal Enforcement of Foreign Judgments Ordinance 1922 and the Foreign Judgments (Reciprocal Enforcement) Act 1961.

[3] Olawoyin, *Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Law* (2014) 10 JIPL 129, 140.

[4]CSA Okoli and RF Oppong, *Private International Law in Nigeria* (Hart, 2020) 360.

[5]*Macaulay v RZB of Austria* (2003) 18 NWLR 282.

[6]*Marine & General Assurance Company Plc v Overseas Union Insurance Ltd* (2006) 4 NWLR 622; *Grosvenor Casinos Ltd v Ghassan Halaoui* (2009) 10 NWLR

309.

[7]*Witt & Busch Ltd v Dale Power Systems PLC* (2007) 17 NWLR 1.

[8]*Teleglobe America Inc v 21st Century Technologies Ltd* (2008) 17 NWLR 108.

[9]*VAB Petroleum Inc v Momah* (2013) 14 NWLR 284.

[10] By way of example, see *Macaulay*, *supra* fn. 5, and *Marine & General*, *supra* fn. 6.

[11] For a recent example of when an English court might be likely to exercise a similar discretion, see: *Berhad v Frazer-Nash Research Ltd*[2018] EWHC 1848 (QB).

[12] Though, where he does so, he is subject to a costs penalty where the conditions in Section 3(4) of the 1922 Ordinance are not satisfied.

[13] See the cases cited *supra* fn. 10.

[14] Compare, for instance, the competing views of the proper period of limitation as expressed by Olaniyan, *The Commonwealth model and conundrum in the enforcement of foreign judgement regime in Nigeria*, (2014) Commonwealth Law Bulletin, 40:1, 76, 88 (who seemingly advocates a standard 12 year time limit) and Okoli and Frimpong Oppong "Private International Law in Nigeria"(Hart Publishing, 2020), at 358-359 (who state that it depends on the state of Nigeria in which the action is brought).

[15] As to which, see Okoli and Frimpong Oppong, *supra* fn. 14 at 351-358.

[16]In this respect, Ogbuagbu JSC's judgment in *Grosvenor*, *supra* fn. 6, at 334-335 is particularly disappointing. See: Okoli and Frimpong Oppong, *supra* fn. 14, at 373.

[17] See, to similar effect, Olaniyan, *supra* fn. 14, 88.

[18]*Supra* fn. 8.

[19] See, *inter alia*, *African Reinsurance Corp v Gilar Cosmetic Store* (2010) All FWLR 1194 (concerning a judgment from Liberia) and *Obasi v Mikson*

Establishment Industries Ltd (2016) 16 NWLR 335 (concerning a judgment from Niger).

[20] *Wilbros*, *supra* fn. 1. Even there, however, Counsel took great pains to say that this was not an attempt to enforce a foreign judgment and the reasoning of the court in relation to that submission is not always easy to understand.

[21] Compare the position adopted by the Supreme Court of Canada in (originally)*Beals v Saldanha* 2003 SCC 72 and (more recently) *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 with that of the English Supreme Court in *Rubin v Eurofinance SA* [2012] UKSC 46.

[22] Compare the decision of the South African Constitutional Court in *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22 with that of the Ghanaian Supreme Court in *Republic v High Court (Commercial Division) Accra, ex parte AG NML Capital and Argentina*, Civil Motion No J5/10/2013. For a Nigerian perspective, see: Adigun, *Enforcing ECOWAS judgments in Nigeria through the Common Law Rule on the Enforcement of Foreign Judgments* (2019) 15 JIPL 130.

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