[2007–09 Gib LR 321]

CALYON v. MICHAILIDIS, PHILLIPS and HARLAND

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Rodger of Earlsferry, Lord Brown of Eaton-under-Heywood, Lord Mance, Sir Henry Brooke and Sir Robin Auld): July 23rd, 2009

Civil Procedure—abuse of process—general principles—Gibraltar proceedings abuse of process if identical issue raised and fully considered in previous foreign proceedings—if no indication in foreign proceedings of facts relied upon, decision not evidence of facts since Gibraltar court unaware of weight to be given to decision and should require facts to be established independently

Civil Procedure—abuse of process—general principles—to demonstrate abuse of process, re-litigation in Gibraltar court of issue decided in foreign proceedings to be manifestly unfair, bringing administration of court into disrepute—heavy burden of proving abuse of process not satisfied if issue not fully considered in foreign proceedings

Conflict of Laws—recognition of foreign proceedings—judgments in personam—foreign judgment in personam between two parties not binding on different parties in Gibraltar proceedings—each party entitled to construct own case independently

The respondents brought proceedings in the Supreme Court against the appellant bank for allegedly assisting in the dishonest misappropriation of funds held on trust for them.

The respondents' relative, Mr. Christo Michailidis (Christo), who was domiciled in Greece, was the apparent owner of a collection of high-value classic antique furniture ("the Collection"). After Christo's death in 1999 intestate, the second and third respondents were appointed administrators of his English estate. In early 2000, the Collection was sold by Mr. Symes, Christo's alleged business partner and a prominent dealer in antiques who lived with Christo in London where the Collection was housed. Mr. Symes then opened multiple bank accounts, including a bank account with the appellant, into and from which he transferred the proceeds of sale of the Collection. In February 2001, the first respondent (who was one of Christo's heirs under Greek law) commenced proceedings against Mr. Symes in the English High Court to recover the value of the Collection. Together with the first respondent, one of the other heirs to the Collection claimed ownership of it in these English proceedings. The administrators

claimed that the Collection was part of Christo's estate as, although he had acquired certain assets as a result of his business partnership with Mr. Symes, certain assets (including the Collection) belonged to Christo independently of the partnership. At the same time, Mr. Symes commenced proceedings in the Athens Court of First Instance against the respondents seeking a declaration that he was the owner of the Collection and that he had the right to sell it. In July 2001, following disputes as to which proceedings should proceed, the English court decided that the administrators' claim based on the alleged partnership should proceed but stayed the claim based on Christo's independent ownership of assets as well as the other claims to ownership. In March 2003, Mr. Symes was adjudicated bankrupt and the Greek proceedings continued between the respondents and Mr. Symes' trustees in bankruptcy.

The respondents then discovered that part of the proceeds of sale of the Collection had been deposited in the appellant bank's Gibraltar branch. In April 2004, they brought the present proceedings in the Gibraltar Supreme Court against the appellant alleging that it had assisted in the misappropriation of funds by Mr. Symes. In June 2004, the Greek court declared that the respondents had become legal owners of the Collection as Christo's heirs and administrators and the appellant in the present proceedings was subsequently notified of the Greek proceedings for the first time. The respondents then applied to the Gibraltar Supreme Court for summary judgment on the basis that they were the lawful owners of the Collection as determined by the Greek court. The Supreme Court (Dudley, Ag. C.J.) held that the Greek judgment could not be admitted as evidence and dismissed the application for summary judgment. On appeal, the Court of Appeal (Stuart-Smith, P., Aldous and Otton, JJ.A.) declared that the respondents were the owners of the Collection.

On further appeal, the appellant submitted that the Court of Appeal was wrong to decide in favour of the respondents because (a) the Greek judgment should not be recognized as evidence of the respondents' ownership of the Collection as it was a judgment *in personam* (since the property had never been in Greece and subject to the jurisdiction of the Greek courts) which meant that it was only binding as between the parties; (b) it could not be bound by the Greek decision since it had not been present at, or aware of the Greek proceedings at the time they took place and the Gibraltar court was required to carry out its own fact-finding exercise—the rule dictating that the appellant should be given the opportunity to construct its own case without being bound by the Greek court's decision applied to its case; (c) the Greek judgment could not, in any case, be considered as evidence of the facts relied on by the court as it contained no information as to that evidence; (d) the appellant was not estopped in the present proceedings from challenging the respondent's ownership of the Collection, as the issue was not *res judicata* because it had not been fully considered by the Greek court; (e) the respondents had adduced no substantive evidence to support their claim of ownership to the Collection, without which there could be no abuse of process in their having to prove

the essential element of their case, since they had not satisfied the heavy burden of proof that it would be manifestly unfair and bring the administration of the court into disrepute if they had to re-litigate the issue; and (f) Mr. Symes had sold the Collection as its legal owner—he had acquired it lawfully through his business partnership with Christo and had not misappropriated the proceeds of sale which were lawfully deposited into one of his accounts held with them.

In reply, the respondents submitted that summary judgment should have been granted in their favour because (a) although the judgment was *in personam*, the Greek court had conclusively determined that they were the owners of the Collection; (b) they did not have to establish their case afresh as the Gibraltar courts were bound by the Greek court's decision and no further fact-finding was necessary to prove their claim to ownership; (c) the Greek judgment should at least be recognized as persuasive evidence and given sufficient consideration pursuant to art. 33(1) of Council Regulation (EC) No. 44/2001 which stated that "a judgment given in a Member State shall be recognised without any special procedures being required"; (d) the appellant was estopped *per rem judicatam* from challenging their ownership of the Collection since the issue had been fully considered and decided by the Greek court; (e) the appellant's challenge to their ownership of the Collection amounted to an abuse of process since the issue could not be re-litigated as it had already been decided by the Greek court and they (the respondents) could rely on that decision without adducing further evidence; and (f) Mr. Symes had no authority to sell the Collection because either Christo's father had owned the Collection which he then gave to Christo personally, or title to it had passed to his wife (the first respondent) after his death—in neither situation did the Collection belong to Mr. Symes through the alleged partnership and it had therefore been unlawfully sold since they were its owners as Christo's heirs and administrators.

Held, allowing the appeal:

(1) The decision of the Court of Appeal would be quashed and that of the Supreme Court dismissing the respondents' application for summary judgment would be restored. The Greek judgment could not bind parties not present at the proceedings since it was a judgment given *in personam* which was only binding between the parties involved (*i.e.* Mr. Symes and the respondents). The appellant was not therefore precluded from disputing the ownership of the Collection as it had only been made aware of the proceedings after the judgment had been given and it should be allowed to construct its own case without being bound by findings in the Greek proceedings, especially as it was not a party to them (para. 21).

(2) The court could not consider the Greek judgment as evidence of the facts it had relied on as it gave no indication of those facts, without which the court could not determine how much weight to give to the decision. The doctrine of *res judicata* did not preclude the appellant from disputing the issue of ownership since it had not been fully considered in the Greek

judgment and the Gibraltar court should require the facts of the case to be established independently (para. 21; para. 27; para. 30; para. 32).

(3) For the current proceedings to have been an abuse of process, the respondents should have demonstrated why it would have been manifestly unfair and brought the administration of the court into disrepute if the issues were to be re-litigated. Since they had adduced no substantive evidence in support of their claim to ownership, they had not satisfied the heavy burden of proving that re-litigating the issue would amount to an abuse of process. They had to be prepared to prove their case, which was neither unfair nor did it bring the administration of justice into disrepute (para. 37).

Cases cited:

(1) *Bradford & Bingley Bldg. Socy.* v. *Seddon*, [1999] 1 W.L.R. 1482; [1999] 4 All E.R. 217; [1999] Lloyd's Rep. P.N. 657, referred to.

(2) *Bragg* v. *Oceanus Mutual Underwriting Assn. (Bermuda) Ltd.*, [1982] 2 Lloyd's Rep. 132; [1982] Com. L.R. 165, referred to.

(3) *Business, Enterprise & Regulatory Reform Secy.* v. *Aaron*, [2009] Bus. L.R. 809; [2009] C.P. Rep. 10; [2009] BCC 375; [2009] 1 B.C.L.C. 55; [2009] Lloyd's Rep. 1; [2008] EWCA Civ 1146, referred to.

(4) *Castrique* v. *Imrie*, [1861–73] All E.R. Rep. 508; (1870), L.R. 4 H.L. 414; 39 L.J.C.P. 350; 3 Mar. L.C. 454; 19 W.R. 1, referred to.

(5) *Conlon* v. *Simms*, [2008] 1 W.L.R. 484; [2007] 3 All E.R. 802; [2006] EWCA Civ 1749, referred to.

(6) *Duchess of Kingston's Case*, *Re* (1776), 168 E.R. 175; 2 Sm. L.C. 593, referred to.

(7) *Hall & Co.* v. *Simons*, [2002] 1 A.C. 615; [2000] 3 W.L.R. 543; [2000] 3 All E.R. 673; [2000] 2 F.L.R. 545; [2000] 2 F.C.R. 673; [2001] P.N.L.R. 6; [2000] Fam. Law 806, referred to.

(8) *Hollington* v. *F. Hewthorn & Co. Ltd.*, [1943] K.B. 587, *dicta* of Goddard, L.J. applied.

(9) *Hunter* v. *Chief Const. (W. Midlands Police)*, [1982] A.C. 529; [1981] 3 W.L.R. 906; [1981] 3 All E.R. 727, referred to.

(10) *Land Securities Plc.* v. *Westminster City Council (No. 1)*, [1993] 1 W.L.R. 286; [1993] 4 All E.R. 124; [1992] N.P.C. 125; (1992), 65 P. & C.R. 387, referred to.

(11) *Papadimitriou*, *In re*, 2001–03 MLR 282, referred to.

(12) *Phillips* v. *Symes*, [2008] 1 W.L.R. 180; [2008] 2 All E.R. 537; [2008] 1 All E.R. (Comm) 918; [2008] 1 Lloyd's Rep. 344; [2008] 1 C.L.C. 29; [2008] I.L.Pr. 21; [2008] UKHL 1, referred to.

(13) *Three Rivers District Council* v. *Bank of England (No. 3)*, [2003] 2 A.C. 1; [2000] 2 W.L.R. 1220; [2000] 3 All E.R. 1; [2000] Lloyd's Rep. Bank. 235; [2000] 3 C.M.L.R. 205; [2000] E.L.R. 583, referred to.

(14) *Trade & Indus. Secy.* v. *Bairstow*, [2004] Ch. 1; [2003] 3 W.L.R. 841;

[2004] 4 All E.R. 325; [2003] C.P. Rep. 46; [2003] BCC 682; [2003] 1 BCLC 696; [2003] EWCA Civ 321, referred to.

T. Mowschenson, Q.C. for the appellants;
A. Steinfeld, Q.C. for the respondents.

1 **LORD RODGER OF EARLSFERRY,** delivering the opinion of the Board: In the Paris of the 1920s and 1930s, Eileen Gray designed and made furniture in a style which would today be described as art deco. Subsequently, her work was neglected until, towards the end of her long life, in the 1970s her designs came to be recognized as classics and the value of her furniture rose accordingly. This appeal concerns the ownership of one collection of her furniture.

2 Christo Michailidis ("Christo") came from a Greek shipping family, his father being Alexander Joseph Michailidis, who died in 1995, and his mother being Irene Michailidis ("Mrs. Michailidis"), who is the first defendant in the present proceedings. His sister is Despina Papadimitriou ("Mrs. Papadimitriou"). Members of the family have long been interested in collecting art and antiquities. From about the 1970s, Christo lived with Mr. Robin Symes, a prominent dealer in antiquities, in a house (formerly two houses) at 1–3 Seymour Walk in Kensington. That was the position when, on July 5th, 1999, Christo died as a result of a fall during a dinner party in a villa in Umbria. At the time of his death he was domiciled in Greece and, under Greek law, Mrs. Michailidis and Mrs. Papadimitriou were his heirs. In February 2001, the second and third claimants, Jonathan Guy Anthony Phillips and Robert Andrew Harland, were appointed administrators of Christo's estate in England ("the administrators").

3 Christo's untimely death was to lead to a web of intricate and hard-fought litigations in various jurisdictions concerning the affairs of his family and Mr. Symes. For instance, a case in the English courts, relating to a statue of the Egyptian Pharaoh, Akhenaten, reached the House of Lords on a procedural point (see *Phillips* v. *Symes* (12)). There was also litigation in the Isle of Man about the Seymour Walk house, title to which was vested in a Panamanian company, with the shares being held under an Isle of Man trust (see *In re Papadimitriou* (11)). So the present case against Calyon in Gibraltar has to be seen as only one strand in this web of cases.

4 For a long time before Christo's death, the Seymour Walk house was home to a collection of some 14 items of Eileen Gray furniture, including tables, chairs, mirrors and lacquered screens. This is "the Collection" whose ownership gives rise to the issue in the appeal. After Christo's death, Mr. Symes continued to live in the house but in the spring of 2000 he sold the Collection through a Parisian dealer, Robert Vallois, for $15m.

It appears that in April of that year the Collection was removed from the house at Seymour Walk and flown to Switzerland for delivery to the buyer.

5 Mr. Symes caused the proceeds of the sale of the Collection to be paid in two directions: $4.4m. (less Mr. Vallois's commission) to a Panamanian company, Xoilan Trader Inc., and $10.4m. to another Panamanian company, Tradesk Inc., operating from Liechtenstein.

6 On or about May 3rd, 2000, Mr. Symes caused a company, Lombardi Co., to be incorporated in the British Virgin Islands.

7 On May 8th, 2000, the $10.4m. was withdrawn from Tradesk's account and transferred to the account of a Liechtenstein foundation of which Mr. Symes was the beneficiary. On June 7th, Mr. Symes caused a deposit guarantee account to be opened in the name of Lombardi Co. with the Gibraltar branch of Calyon, the present appellant. Calyon is the corporate and investment banking arm of Crédit Agricole SA. On June 28th, the $10.4m. in the Liechtenstein foundation's account was remitted to Lombardi's Gibraltar account. This enabled Calyon's London branch to grant Mr. Symes' company, Robin Symes Ltd. ("RSL"), a term loan facility in the sum of $10.3m.

8 After Mr. Symes had drawn down and disbursed most of this facility for his own or RSL's purposes, the facility was repaid in full by a payment of some £9.86m. emanating from Lombardi Co.'s account with Calyon's Gibraltar branch. In October 2001, the balance of the account was disbursed elsewhere for Mr. Symes' purposes.

9 The Michailidis family had not been aware of the sale of the Collection. When they found out, they took the view that Mr. Symes had had no right to sell it—the Collection had belonged to Christo and had passed to his heirs on his death. It is fair to say that members of the family have given a number of versions of how they came to acquire the Collection. In the particulars of claim in the present action the claimants said that before Alexander Michailidis' death, the Collection belonged to him either exclusively or jointly with his wife, Mrs. Michailidis, the first claimant. They then give two possible versions of what followed. Either, on some unknown date Alexander had given the Collection to Christo or alternatively, following Alexander's death, the Collection or his half-share in it passed to his wife, the first claimant. Either way, it did not belong to Mr. Symes. In the English High Court proceedings which their Lordships will mention in a moment, another version of Christo's acquisition of the Collection was advanced. In the course of the hearing before the Board, however, Mr. Steinfeld, Q.C., on behalf of the claimants, indicated that their position now was that Alexander and Mrs. Michailidis had given the Collection to Christo. That version seems to accord with the terms of the Greek judgment of June 2004, part of which their Lordships recite in para. 15 below.

10 On February 12th, 2001, very shortly after their appointment, the administrators wrote to Mr. Symes asking about the whereabouts of the Collection. By this time Mr. Symes had, however, moved to Switzerland and the administrators were told this. On February 23rd, 2001, the administrators and Mrs. Papadimitriou therefore issued the claim form in proceedings against Mr. Symes and RSL in the Chancery Division of the English High Court. Various issues were raised, including questions as to the existence of an alleged partnership between Christo and Mr. Symes and more especially, an allegation that Christo had acquired the Collection for himself and/or his sister, Mrs. Papadimitriou.

11 Meanwhile, also on February 23rd, 2001, Mr. Symes and RSL had issued proceedings in the multi-member Court of First Instance in Athens, joining the administrators and Christo's heirs, Mrs. Papadimitriou and Mrs. Michailidis, as defendants. In those proceedings Mr. Symes and RSL in effect claimed negative declaratory relief as to the matters which were in dispute in the English proceedings, including, in particular, a declaration that he had been the owner of the Collection.

12 A dispute arose as to which set of proceedings should go ahead. In July 2001, in the English proceedings, Hart, J. held that Mrs. Papadimitriou's claim should be stayed, as should the administrators' claims that certain assets, including the Collection, belonged to Christo independently of the partnership business. The English proceedings relating to the administrators' claims based on the alleged partnership were to go ahead, however (see *Phillips* v. *Symes* (12)).

13 In these circumstances Mrs. Michailidis, Mrs. Papadimitriou and the administrators entered the proceedings in the Greek court. On October 12th, 2001, Mrs. Michailidis and Mrs. Papadimitriou counter-claimed against Mr. Symes and RSL, asserting, in particular, that they had been the owners of the Collection after Christo's death and that Mr. Symes had misappropriated and sold it. Due to changes in procedure, the Greek proceedings may have come on for determination more quickly than Mr. Symes had anticipated. At all events, in October 2002 he applied to waive his action in the Greek court. This would, he contended, also put an end to the proceedings on the counterclaim. That application was eventually refused by the Greek court.

14 It is unnecessary for present purposes to examine the progress of the Greek proceedings in detail but two events which occurred during those proceedings should be noted: First, in March 2003, Mr. Symes was adjudicated bankrupt and administrative receivers were appointed to RSL. The counter-claimants' proceedings in Athens continued against the trustees in bankruptcy and the receivers. Secondly, in about March 2004, Mrs. Michailidis and the administrators discovered that (as already described) part of the proceeds from the sale of the Collection had been deposited in

the Gibraltar branch of Calyon. On April 7th, 2004, Mrs. Michailidis issued the present proceedings against Calyon in the Supreme Court of Gibraltar. In broad terms, she claimed that Calyon had dishonestly assisted Mr. Symes to misappropriate moneys held on trust for her. In due course, the administrators were added as claimants. Calyon put in a defence, part of which was to deny the claimants' allegation that they had been the owners of the Collection at the time it was said to have been misappropriated.

15 On June 30th, 2004, the Athens court delivered its judgment. In particular, the court upheld the claims of Mrs. Michailidis and Mrs. Papadimitriou that they had been the owners of the Collection and held that each of them was entitled to €5,428,942 corresponding to her share in the value of the Collection, and €150,000 as financial satisfaction for moral damage by reason of the misappropriation of their property. In translation, the part of the judgment dealing with the ownership of the Collection was to this effect:

> "The second counter-plaintiff [*i.e.* Mrs. Michailidis] had acquired the ownership of the above-described pieces of furniture together with her husband Alexandros Michailidis in Paris in the years 1971–72, when she had bought them in order to enrich the family collection of antiquities and other works of art. Then, in 1974–75, the second counter-plaintiff and her husband had transferred the ownership of the said moveable objects to their son, Christos Michailidis, by virtue of a donation, in order to be placed in the 1–3 Seymour Walk house in London. Therefore, Christos Michailidis became in a derivative manner the owner of said pieces of furniture and after his death the counter-plaintiffs became owners therefore, each by a 50% indivisible share. At this point note should be made that, despite the fact that the counter-plaintiffs respond to the procedural burden they bear with respect to the proof of their joint ownership, as specified hereinabove, over the disputed moveable objects (items in the first defendant's personal collection of antiquities and other works of art and furniture designed by Eileen Gray). By way of their invocation and production of the means of evidence previously mentioned (sworn testimonies of witnesses in court, affidavits, documents etc.), the counter-defendants, nevertheless, neither produce nor invoke in their written submission (in the extent they are present and represented before this court) any means of evidence whatsoever, whose assessment would provide the court with the possibility to reach a different conclusion—other than the one reached pursuant to the above in connection with the acquisition of the disputed objects."

As was remarked earlier, this finding of the Greek court presumably explains why, in the present proceedings, the claimants now put their

claim to the ownership of the Collection on the basis that it had been given to Christo by his parents.

16 In October 2004, the trustees in bankruptcy gave notice of appeal against the Greek court's judgment. Only after that, in June 2005, was Calyon first told of the Greek proceedings and judgment. The following month it was told about the appeal. When correspondence between the parties in the Gibraltar proceedings about the proof of ownership of the Collection did not lead to agreement, on May 22nd, 2006, Dudley, A.J. granted the claimants' application for a stay pending the Greek court's determination of the question of ownership "without prejudice to the defendant's contention that the decision of the Court of Appeal in Athens is not binding on it in Gibraltar . . ."

17 The appeal in the Greek proceedings was formally withdrawn on February 1st, 2007 in the context of a settlement between the trustees in bankruptcy and the counter-claimants, which covered a wide range of matters and actually involved a net payment by the Michailidis interests to the trustees of some $2m.

18 With the Greek proceedings at an end and with the judgment of the Greek court standing in their favour, the respondents in the present proceedings, Mrs. Michailidis and the administrators, returned to the charge. On May 31st, 2007, they gave notice of an application under CPR, r.24 for an order that summary judgment be given for the claimants on the issue—

> ". . . that it be declared (for the purposes of these proceedings only) that at all material times, the claimants owned the Collection . . . on the ground that ownership of the said Collection has been conclusively determined by the courts of Greece . . ."

On October 25th, 2007, Dudley, Ag. C.J. refused the application for summary judgment. The claimants appealed to the Court of Appeal and, on April 18th, 2008, in accordance with the judgment of Otton, J.A., with which Stuart Smith, P. and Aldous, J.A. agreed, the Court of Appeal allowed the appeal and granted summary judgment declaring that, at all material times, the claimants owned the Collection. On December 10th, 2008, Her Majesty granted Calyon's petition for special leave to appeal to the Board.

19 After that long introduction, their Lordships start their consideration of the issues by emphasizing (as Mr. Mowschenson, Q.C. rightly emphasized on behalf of the appellants) the single, narrow and specific basis on which the claimants made their application for summary judgment "that ownership of the said Collection has been conclusively determined by the courts of Greece." In other words, although ownership is critical to their case, the claimants have put forward no evidence of any kind in these

proceedings to support their claim to have been the owners of the Collection at the time it was sold. They contend that no such evidence is required because they are simply entitled to rely on the conclusive determination of the Greek court that the Collection belonged to Christo and so, on his death, ownership passed to his heirs. It follows, of course that if the decision of the Greek court is not in fact a sufficient basis for granting summary judgment as to their ownership of the Collection, the application must fail.

20 So far as can be discovered from the papers in this case, the Collection was last seen as it was flown from London to Switzerland in April 2001 to be delivered to its purchaser. There is therefore no reason to suppose that the Collection was ever "so situated as to be within the lawful control of the State [Greece] under the authority of which" the court which determined its ownership sat. So, the Greek judgment does not satisfy the first test for a judgment *in rem* laid down by Blackburn, J., giving the opinion of most of the consulted judges, and approved by Lord Chelmsford in *Castrique* v. *Imri*e (4). The Court of Appeal duly held that the Greek judgment was not a judgment *in rem*. Counsel for the claimants and respondents, Mr. Steinfeld, Q.C., did not challenge that conclusion. The Board agrees with it and therefore proceeds on the basis that the Greek judgment was *in personam*.

21 Equally clearly, the appellant, Calyon, was not a party to the counter-claim in the Greek proceedings. Indeed, the counter-claimants did not find out about Calyon's involvement to the matter until some three years after they began their counter-claim. And not only was Calyon not then added as a defendant in the counter-claim, but it was not even told about the Greek proceedings until after the judgment had been given and had been appealed. Nor does Calyon in any sense stand in the shoes of Mr. Symes or RSL. In these circumstances, since Calyon was not itself a party to the proceedings, the judgment of the Greek court could not give rise to any estoppel *per rem judicata* against Calyon in the present proceedings—even if it would have given rise to such an estoppel against Mr. Symes and RSL. The Court of Appeal rightly so held and the respondents did not cross-appeal against that decision.

22 Counsel for the claimants made some reference to art. 33(1) of Council Regulation (EC) No. 44/2001 of December 22nd, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters which stated that "a judgment given in a Member State shall be recognised in the other Member States without any special procedures being required." In their written case, counsel referred to Layton & Mercer, *European Civil Practice*, 2nd ed., para. 24.006, at 845 (2004), where it is said that "recognition involves equating the authoritative nature of a foreign judgment with a judgment delivered in the state addressed . . ." Basing himself on this comment, Mr. Steinfeld, Q.C.

submitted that the effect of recognition of the Athens judgment is that it enjoys no less a status in Gibraltar than an equivalent judgment of the Gibraltar court itself.

23 Suppose, then, that a judge of the Gibraltar Supreme Court had held, in proceedings between Christo's heirs, Mr. Symes and RSL, that Christo had been the owner of the Collection and that the title to the Collection had passed to his heirs on his death. What effect would such a judgment have as evidence in the present proceedings in which Mrs. Michailidis and the administrators sue Calyon? The answer to be derived from the approach of the law, as exemplified by the decision in *Hollington* v. *F. Hewthorn & Co. Ltd*. (8) is: None.

24 In *Hollington*, the defendant's car, when being driven by an employee, collided with the plaintiff's car driven by his son. The son was injured and the car was damaged. The driver of the defendant's car was convicted of careless driving. The owner of the other car and his son sued the defendant for damages on the basis of the defendant's driver's negligent driving. The son then died and the father continued the action on his behalf as the administrator of his estate. Due to his son's death, the plaintiff was forced to try to rely on the driver's conviction to provide *prima facie* evidence of his negligent driving. The Court of Appeal held that, both on principle and on authority, evidence of the conviction was inadmissible for that purpose, and the action failed.

25 Giving the judgment of the Court of Appeal, Goddard, L.J. pointed out ([1943] K.B. at 594) that—

> "the court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision."

Even assuming that the plaintiff could show that the conviction referred to the particular incident giving rise to the claim, Goddard, L.J. continued (*ibid.*, at 595):

> "It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result. It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his

> opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."

Goddard, L.J. went on to refer to the statement of Sir William Grey, Lord Chief Justice of the Common Pleas, giving the view of the consulted judges in *Re Duchess of Kingston's Case* (6). The passage is worth quoting in full (2 Sm. L.C. at 644):

> "What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them."

26 Having referred to the last part of this passage, Goddard, L.J. went on ([1943] K.B. at 596):

> "This is true, not only of convictions, but also of judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case."

27 The Court of Appeal in *Hollington* (8) may have chosen the analogy with the opinion of a bystander because they were dealing with a conviction by lay magistrates. Admittedly, that analogy may seem rather unsatisfactory where the previous decision is by a professional judge. Nevertheless, the essential reasoning is compelling—unless the second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous decision which means that the previous decision itself cannot be relied upon.

28 The actual decision in *Hollington* has, of course, been criticized, for example, by Lord Diplock in *Hunter* v. *Chief Const. (W. Midlands Police)* (9) and by Lord Hoffmann in *Hall & Co.* v. *Simons* (7). There is a well-established exception to the rule in the case of the facts found in the

reports of company inspectors acting under statute (see the authorities analysed by Thomas, L.J. in *Business, Enterprise & Regulatory Reform Secy.* v. *Aaron* (3)). But *Hollington* continues to embody the common law as to the effect of previous decisions. In *Land Securities Plc.* v. *Westminster City Council (No. 1)* (10), Hoffmann, J. stated ([1993] 1 W.L.R. at 288) that: "In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties." In *Three Rivers District Council* v. *Bank of England (No. 3)* (13), Lord Steyn held that, in proceedings against the Bank for misfeasance in public office, reliance by the court on the conclusions and findings of the Bingham Report on the collapse of BCCI was ruled out ([2003] 2 A.C. 1, at para. 5) "by settled principles of law" even though the report was (*ibid.*) "self-evidently an outstanding one produced by an eminent judge."

29 These "settled principles," which can be seen as fully established by the time of *Re Duchess of Kingston's Case* (6), were scrutinized in the 15th Report of the Law Reform Committee (*The Rule in Hollington* v. *Hewthorn* (1967, Cmnd. 3391)). The result of the Committee's Report was Part II of the Civil Evidence Act 1968. Section 11 reversed the actual decision in *Hollington* (8) and made previous convictions admissible so that the defendant is to be taken to have been guilty of the conduct in question, except in so far as the contrary is proved. Two other particular changes recommended by the Committee were also enacted. The Committee recommended no other changes in the law and Parliament made no other changes.

30 Having dealt with the particular situations where they recommended reform, the Committee went on to consider the status of previous decisions by civil courts on matters of fact. At para. 38 of the Report, the Committee said that (1967, Cmnd. 3391, at para. 38):

> "With the exceptions with which we have already dealt, an issue of fact in one civil action is seldom the same as an issue of fact in another civil action between different parties. In practice it is only likely to arise where a number of different persons are injured in the same accident by the same acts of negligence. Such cases are most conveniently dealt with by all the injured parties joining in the same action, by consolidation, or by agreeing to treat one action as a test action. It is, however, theoretically possible (and has occasionally happened) that separate actions brought by different passengers in the same vehicle have been tried at different times by different courts with different results. This is undesirable and should be avoided by one or other of the means referred to above. But we do not think that, where there are two civil actions between different plaintiffs against the same defendant or by the same plaintiff against different defendants which do raise the same issue of fact, the finding of the court

> should be admissible in the second action. As we have already pointed out, in civil proceedings the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court. The thoroughness with which their case is prepared may depend upon the amount at stake in the action. We do not think it just that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action, should not be allowed to avail himself of the opportunity to improve upon it in the second."

31 The Committee's reasoning develops the reasoning in the first of the passages which the Board has quoted from Lord Goddard's judgment in *Hollington* (8). Their Lordships find that reasoning compelling. What is more significant, perhaps, is that Parliament must have found the reasoning convincing since the Civil Evidence Act and its Scottish counterpart made no change to this aspect of the law. The Parliament of Gibraltar has not yet had occasion to consider the matter.

32 Their Lordships are accordingly satisfied that, even if it were open to them to do so, they would not accede to Mr. Steinfeld's submission that they should depart from the established underlying principles in *Hollington*. In particular, he argued that even if the Greek judgment could not be regarded as conclusive, it should still be admitted in evidence and given such weight as seemed appropriate. But there could be no better illustration of the difficulties of that superficially attractive solution. The simple fact is that the Greek judgment does not indicate the substance of the evidence on which the court relied in holding that the counter-plaintiffs had proved their ownership of the Collection. So a judge in the Gibraltar Supreme Court would be in no position to determine what weight it was appropriate to give to the Greek judgment on the point.

33 For all these reasons the Board sees no basis for admitting evidence of the Greek judgment, far less for holding that it should be regarded as furnishing *prima facie* evidence that for the purposes of these proceedings, Mrs. Michailidis and Mrs. Papadimitriou were the owners of the Collection at the time when it was sold.

34 Mr. Steinfeld's final contention was that if by not accepting the claimants' title to the Collection, Calyon could force them to establish in these proceedings what they had already proved in the Greek proceedings, this would be an abuse of process. There were, after all, only two possibilities: either the Collection belonged to the claimants or it belonged to Mr. Symes and RSL. Mr. Symes and RSL had not even attempted to establish their supposed title or to challenge the claimants' title in the Greek proceedings. Moreover, in the course of the various litigations Mr.

Symes had been shown to be a liar, had been imprisoned and had been completely discredited. Since there was, accordingly, no realistic possibility that anyone other than the claimants owned the Collection, the Court of Appeal had been right to conclude that Calyon's tactic would amount to an abuse of process.

35 In *Hunter* (9), Lord Diplock referred ([1982] A.C. at 536) to—

> "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

The authorities show that re-litigating an issue can indeed amount to an abuse of process even where the parties to the proceedings are different from those in the earlier proceedings (see Auld, L.J. in *Bradford & Bingley Bldg. Socy.* v. *Seddon* (1)). But in such a case the onus is on the person who alleges that it is an abuse of process to establish what makes the further litigation an abuse. In *Bragg* v. *Oceanus Mutual Underwriting Assn. (Bermuda) Ltd.* (2), Sir David Cairns said ([1982] 2 Lloyd's Rep. at 138):

> "I do not accept the proposition . . . that when an issue has already been decided in proceedings between A and B it is prima facie an abuse of the process of the court for B to seek to have the issue decided afresh in proceedings between himself and C and that in such circumstances there is an onus on B to show some special reason why he should be allowed to raise the issue against C. On the contrary, I consider that it is for him who contends that the retrial of the issue is an abuse of process to show some special reason why it is so."

36 It is accordingly for the claimants in these proceedings to show some special reason why it would be an abuse of process for them to have to prove their title to the Collection. The test to be applied is exacting: the claimants must show that it would be manifestly unfair to them that the same issues should be re-litigated or that to permit such re-litigation would bring the administration of justice into disrepute (see Morritt, V.-C. in *Trade & Indus. Secy.* v. *Bairstow* (14) ([2004] Ch. 1, at para. 38)). That test is appropriate since, if re-litigating the point would amount to an abuse of process, Calyon would in effect be estopped from contesting the point. So they would be in a worse position than if the Greek judgment were admissible as *prima facie* evidence of ownership, which Calyon might nevertheless challenge by leading any available evidence to the contrary (see Parker, L.J. in *Conlon* v. *Simms* (5) ([2008] 1 W.L.R. 484, at para. 147)).

37 In their Lordships' view, the claimants have not satisfied the exacting test for abuse of process. A number of factors are relevant. Since the claimants have chosen to rely simply on the Greek judgment, which does not set out the evidence on which the court relied, they are in no position to show how strong the evidence supporting the Greek court's judgment was, and hence how inappropriate it would be for them to have to re-litigate the point. Very strikingly, for reasons which the Board finds hard to fathom, the claimants have never given any indication in these proceedings of the evidence which they have, for example, of the purchase of the Collection by Alexander Michailidis and his wife or, indeed, of the gift from his parents to Christo. Yet, in a world where provenance is not infrequently disputed, one might expect there to be documents vouching legitimate transactions of these kinds involving such a valuable collection. Moreover, as already pointed out, although the claimants have now fixed on one particular basis for their claim to ownership, members of the family have previously put forward other inconsistent versions. Next, since the claimants chose to rely simply on the Greek judgment and to seek summary judgment based on it, not only does the Gibraltar court not know what their evidence at trial might be, but it equally does not know what evidence about ownership Calyon might be able to bring forward from persons other than Mr. Symes. Finally, and perhaps most importantly, Calyon is the defendant in these proceedings. Mrs. Michailidis and the administrators have chosen to come after the bank in an action which they can only win if they prove that they were owners of the Collection when Mr. Symes sold it. As the Board has mentioned more than once, Calyon played no part in the Greek action which the claimants rely on—it was not joined as a defendant; indeed the Michailidis family and their representatives chose not to tell the bank about it until a late stage. In these circumstances their Lordships can see no hint of an abuse of process in Calyon insisting that Mrs. Michailidis and the administrators should prove this essential element in their claim against it. Re-litigating the point would neither be manifestly unfair to them, nor bring the administration of justice into disrepute. That would remain the position even if the Gibraltar court reached a different conclusion as to the ownership of the Collection at the relevant time. The interests of justice would be served, provided that the court's judgment was correct, having regard to the evidence adduced before it.

38 One final comment: The Board cannot know the thinking that may have led the claimants to seek to resolve the issue of the ownership of the Collection by the mechanism of a summary judgment based on the Greek judgment. The failure of that tactic means that roughly two years have been wasted. If the point had not been taken and pursued with such determination, on the face of it at least, the matter could by now have reached trial, or have been well on the way to trial.

39 For these reasons their Lordships are satisfied that the application for summary judgment should be dismissed. They will, accordingly, humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal should be set aside and the order of Dudley, Ag. C.J. restored. The parties should make written submissions on costs within 21 days.

Appeal allowed.