[2022 Gib LR 120]

REPUBLIC OF KAZAKHSTAN v. A. STATI, G. STATI, ASCOM GROUP S.A. and TERRA RAF TRANS TRADING LIMITED

COURT OF APPEAL (Kay, P., Elias and Rimer, JJ.A.): May 25th, 2022

2022/GCA/07

Conflict of Laws—reciprocal enforcement of judgments—registration of foreign judgments—costs orders made by English High Court in proceedings concerning enforcement of foreign arbitral award excluded from registration in Gibraltar by Judgments (Reciprocal Enforcement) Act 1935, s.3(2A)(c)

The applicant/appellant applied pursuant to s.4 of the Judgments (Reciprocal Enforcement) Act 1935 to register three judgments of the English High Court.

The respondents had obtained an arbitration award against the applicant/appellant, the Republic of Kazakhstan ("the ROK"), in the sum of US$500m. following an arbitration that took place in Sweden. The respondents subsequently commenced proceedings in England to enforce the arbitration award. They obtained permission to enforce the award following a without notice hearing. The ROK then applied to set aside the order granting permission, claiming the arbitration award had been obtained by fraud. An English judge directed that the ROK's claim that the arbitration award had been obtained by fraud should proceed to trial. The respondents thereafter discontinued their enforcement proceedings. The English High Court made three separate costs orders against the respondents and in favour of the ROK totalling £1,435,000.

The ROK applied without notice to the respondents to register the costs orders in Gibraltar under s.4 of the Judgments (Reciprocal Enforcement) Act 1935.

Section 3(2) of the 1935 Act provided:

> "Subject to sub-section (2A), a judgment of a recognised court is within this sub-section if it satisfies the following conditions, namely—
>
> (a) it is either final and conclusive as between the judgment debtor and the judgment creditor or requires the former to make an interim payment of the latter; and

(b) there is payable under it a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and
(c) it is given after the coming into force of the order which made that court a recognised court."

Section 3(2A) provided:

"The following judgments of a recognised court are not within sub-section (2) of this section—
(a) a judgment given by that court on appeal from a court which is not a recognised court;
(b) a judgment or other instrument which is regarded for the purposes of its enforcement as a judgment of that court which was given or made in another country;
(c) a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of that judgment."

Section 11A provided:

"The provisions of this Act, except sections 3(5) and 8 shall apply as they apply to a judgment, in relation to an award in proceedings or an arbitration which 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."

The Supreme Court granted the application (that decision is reported at 2020 Gib LR 152). Yeats, J. considered there were two possible interpretations of s.3(2A)(c), namely a wider interpretation that the exclusion applied to any judgment given by the recognized court (in the course of enforcement proceedings of a judgment of a third country court), and a narrower interpretation that the exclusion applied to a judgment given by the recognized court (in the course of enforcement proceedings of a judgment of a third country court) only insofar as it related directly to the judgment of the court in the third country. The court determined that the narrower interpretation should be given to s.3(2A)(c), that the costs orders were therefore not excluded and proceeded to register them.

The registration order was served on the fourth respondent in Gibraltar. The fourth respondent applied to have the registration order set aside. The fourth respondent relied on two grounds: first, that the costs orders were judgments excluded from registration by s.3(2A)(c) and s.11A of the 1935 Act; and, secondly, that registering the costs orders was contrary to public policy in Gibraltar and therefore also excluded by s.6(1)(a)(v) of the 1935 Act. The Supreme Court accepted the submission that, contrary to the earlier decision, the orders were not registrable in Gibraltar and the earlier order was set aside (that judgment is reported at 2021 Gib LR 96). Yeats, J. concluded that he had been wrong in the earlier judgment to identify two possible meanings of s.3(2A)(c). He held that there was only one interpretation, namely the wider interpretation which he had earlier rejected, *i.e.* that the relevant exclusion applied to any judgment given by the recognized court in the course of proceedings in it to enforce the judgment

of a court of another country. Having so held, Yeats, J. had to consider the ROK's submission that s.3(2A)(c) did not apply because it applied only to a judgment of the recognized court "in proceedings founded on a judgment of a court in another country," whereas the respondents had been seeking to enforce in England an arbitration award, not a judgment of a court. Yeats, J. accepted the respondents' submission that the extension of the definition of "court" in s.2 to include a tribunal included an arbitration award. The judge found that the award was enforceable in Sweden and proceeded on the basis that the award was one to which s.11A applied. Yeats, J. concluded that the combined effect of the expanded definition of "court" and the provisions of s.11A was that s.3(2A)(c) required the words "founded on a judgment of a court in another country and having as their object the enforcement of that judgment" to be interpreted as also referring to an arbitration award in another country that had become enforceable as aforesaid. The effect was that s.3(2A)(c) was squarely in play and, on Yeats, J.'s interpretation of the meaning of its first reference to "a judgment", it had the effect of barring the English costs judgments from registration in Gibraltar.

The ROK appealed on the grounds that (1) the judge was wrong to find that the registration of the costs judgments was precluded by s.3(2A)(c); (2) the judge was wrong to hold that s.11A extended s.3(2A)(c)'s reference to "a judgment of a court in another country" to "an arbitration award by an arbitral tribunal in another country"; and (3) the judge wrongly failed to interpret s.3(2A)(c) in light of its purpose of preventing the laundering of judgments of a third country and, in consequence, wrongly failed to hold that the costs judgments were not such judgments but were original costs judgments of a recognized court, namely the English High Court.

The ROK submitted that (a) s.11A did not require s.3(2A)(c) to be interpreted as referring to the Swedish award; (b) the judge was wrong in holding that s.2's extended definition of "court" as including a "tribunal" meant that it included an arbitral tribunal; (c) s.11A therefore could not enable s.3(2A)(c) to be read as applying to the Swedish award because it was not "a judgment of a court in another country"; (d) as Sweden was not a country with which Gibraltar had a regime of reciprocal enforcement, the Swedish award could not fall within the scope of the 1935 Act at all; (e) s.11A was directed exclusively at enabling the registration of arbitral awards of reciprocating countries and went no further than that; it had no application to the exclusionary provisions of s.3(2A)(c); (f) "a judgment" in s.3(2A)(c) could not be interpreted as referring to the three costs judgments because they were not judgments the registration of which s.3(2A)(c) was directed at barring; (g) the court was invited to interpret "a judgment" purposively, as not excluding the costs judgments from registration; and (h) the court should have regard to the statutory purpose of s.3(2A)(c), namely to prevent the registration of "judgments on judgments" and, in light of that purpose, it would be wrong to interpret s.3(2A)(c)'s opening reference to "a judgment" otherwise than as referring

exclusively to a third country judgment whose registration in Gibraltar that subparagraph was directed at excluding.

Held, dismissing the appeal:

(1) The court agreed with the ROK that the extended definition of "court" in s.2 as including "tribunal" was confined to statutory or national tribunals exercising the judicial power of a state, and did not include arbitral tribunals, and that the extended definition of a "judgment" as a "judgment or order given or made by a court" did not include an arbitral award. However, the flaw in the ROK's approach was the assumption that, in order for an arbitration award to fall within the scope of the 1935 Act, it must be capable of amounting to a judgment of a court as defined in s.2. Section 11A of the 1935 Act was a deeming provision which required arbitration awards to be treated, in certain circumstances, as if they fell within the statutory definitions and were therefore subject to the provisions of the Act. Section 11A provided that (save for two irrelevant provisions) the provisions of the Act applied to a qualifying award as if such an award were a judgment of a court. There was therefore no need to show that an arbitral tribunal was a "court" or that a qualifying award was a "judgment" within the meaning of s.2, because s.11A treated it as such. Section 11A therefore enabled a qualifying award made in a reciprocating country to be registrable under s.3. The ROK's further proposition that s.11A was concerned only with registration and played no part in the application of s.3(2A)(c) so as to exclude certain registrations was wrong. First, s.11A, which was introduced into the 1935 Act at the same time as s.3(2A)(c), was precise as to the only provisions of the Act that did not apply to it. Had it been intended also to exclude any part of s.3(2A) it would have said so. Secondly, s.3(2A)(c) was directed at the important policy objective of avoiding any registration that would result in the laundering of (*inter alia*) a non-registrable third country judgment. It would be surprising if it were not also intended to prevent the laundering of (*inter alia*) non-registrable third country qualifying arbitration awards. There could therefore be no rational basis for interpreting s.3(2A)(c) as not also applying to s.11A. It was common ground that the three costs judgments were "judgments of a recognised court" for the purposes of the opening words of s.3(2A). Yeats, J. accepted that the Swedish award was a qualifying award and there was no suggestion before the court that it was not. Sweden was obviously "another country." The Swedish award was treated as "a judgment of a court in another country." It was irrelevant whether or not it was a country with which Gibraltar had reciprocal arrangements: s.3(2A)(c) invited no such inquiry. Therefore, for the purposes of this case, s.3(2A)(c) must be read as meaning "a judgment given by the recognised court [the English High Court of Justice] in proceedings founded on a qualifying Swedish arbitration award and having as their object the enforcement of that award" (paras. 32–37).

(2) Yeats, J., in his 2021 judgment, interpreted the relevant words of s.3(2A)(c) correctly. The question that s.3(2A)(c) and s.11A together posed for the court in relation to each of the three costs judgments was this: was

the judgment "given by the court in proceedings founded on a qualifying Swedish award and having as their object the enforcement of that award"? The answer could only be "yes," with the consequence that the judgment was excluded from registration. Therefore there was no scope for the adoption of a so-called purposive interpretation directed at attaching a different meaning to the opening words "a judgment" in s.3(2A)(c). There was no ambiguity in the statutory language. There was nothing to suggest that the legislature's chosen language was the result of a drafting mistake. Had the legislature been so minded, it could have made an express exception of costs judgments from its registration exclusions. It had not done so and it was not suggested to the court that its apparent policy choice in that respect was one it was not entitled to adopt. The court had therefore come to the conclusion that the statutory language of s.3(2A)(c) was unambiguously clear and that there was no legitimate basis upon which this court could accede to the ROK's invitation to rewrite it in some unexplained manner so as to enable the registration of the costs judgments. The ROK's appeal would be dismissed (paras. 46–49).

Cases cited:

(1) *Clarke* v. *Fennoscandia Ltd*., [2003] ScotCS 209; 2003 SCLR 894; [2004] SC 197, considered.

(2) *Inco Europe Ltd.* v. *First Choice Distribution*, [2000] UKHL 15; [2000] 1 W.L.R. 586; [2000] 2 All E.R. 109; [2000] BLR 259; [2000] CLC 1015; (2000), 74 Con LR 55, considered.

(3) *Metronet Rail BCV Ltd. (in PPP administration)*, *In re*, [2007] EWHC 2697 (Ch); [2008] 2 All E.R. 75; [2008] Bus. L.R. 823, considered.

(4) *R.* v. *A*, [2001] UKHL 25; [2002] 1 A.C. 45; [2001] 2 W.L.R. 1546; [2001] 3 All E.R. 1; [2001] HRLR 48; [2001] UKHRR 825, considered.

(5) *Shahid* v. *Scottish Mins*., [2015] UKSC 58; [2016] A.C. 429; [2015] 3 W.L.R. 1003; [2016] 4 All E.R. 363; 2015 SLT 707; 2016 SC (UKSC) 1, considered.

(6) *State Bank of India* v. *Mallya*, [2018] EWHC 1084 (Comm); [2018] 1 W.L.R. 3865, considered.

(7) *Strategic Technologies PTE Ltd.* v. *Procurement Bureau of the Republic of China National Defence*, [2020] EWCA Civ 1604; [2021] Q.B. 999; [2021] 2 W.L.R. 448; [2021] 4 All E.R. 189, referred to.

Legislation construed:

Judgments (Reciprocal Enforcement) Act 1935, s.3: The relevant terms of this section are set out at para. 11.

s.4(1): The relevant terms of this subsection are set out at para. 12.

s.8: The relevant terms of this section are set out at para. 13.

s.11A: The relevant terms of this section are set out at para. 13.

Foreign Judgments (Reciprocal Enforcement) Act 1933 (24 Geo. V, c.13), long title: The relevant terms of the long title are set out at para. 9.

s.2: The relevant terms of this section are set out at para. 10.

L. Baglietto, *Q.C.* and *M. Levy* (instructed by Hassans) for the applicant/ appellant, the Republic of Kazakhstan;
J. Ramsden, *Q.C.* and *P. Kuhn* (instructed by Triay Lawyers) for the fourth respondent.

1 **RIMER, J.A.:**

Introduction

By an order of April 29th, 2020, made upon a without notice application by the Republic of Kazakhstan ("the ROK"), Yeats, J. ordered that three judgments the ROK had obtained in the High Court of Justice of England and Wales be registered as judgments of the Supreme Court pursuant to the provisions of s.4 of the Judgments (Reciprocal Enforcement) Act 1935 ("the 1935 Act"). The judgments were costs orders obtained by the ROK in proceedings between (1) Anatolie Stati, Gabriel Stati, Ascom Group S.A. (a company incorporated in Moldova) and Terra Raf Trans Trading Ltd. ("Terra Raf," a company incorporated in Gibraltar) as claimants, and (2) the ROK as defendant (reported at 2020 Gib LR 152).

2 The registration order was served on Terra Raf in Gibraltar on September 1st, 2020. Whether it has also been served on the other three claimants in the English proceedings, I do not know. The order permitted all four claimants in those proceedings ("the Stati parties") to apply to set it aside and by an application notice dated October 20th, 2020 Terra Raf did so apply.

3 Yeats, J. heard that application in February 2021. By his reserved judgment of March 29th, 2021 (reported at 2021 Gib LR 96), reflected in an order of the same date, he accepted Terra Raf's submission that, contrary to his decision on the without notice application, the orders were *not* registrable in Gibraltar and he set aside his earlier order. This judgment is on the ROK's appeal against that decision. The ROK was represented before us, as below, by Mr. Baglietto, Q.C. and Mr. Levy. Terra Raf was represented by Mr. Ramsden, Q.C. and Mr. Kuhn.

The Swedish arbitration award

4 The underlying facts can be summarized briefly. Between 1999 and 2003, the Stati parties acquired two Kazakh companies that held oil and gas licences in various fields in Kazakhstan. They invested considerable sums of money in the companies, which became successful exploration and production businesses. In July 2010, the ROK expropriated the Stati parties' investments and other assets. The Stati parties asserted that this was unlawful and they commenced investor–state arbitration proceedings against the ROK under the Energy Charter Treaty ("ECT") regime. The

ECT arbitration was seated in Stockholm, Sweden and governed by the rules of the Stockholm Chamber of Commerce.

5 After contested proceedings, the ECT tribunal delivered its final award on December 19th, 2013. The Stati parties were successful and were awarded over US$500m. by way of compensation for the ROK's unlawful expropriations. The ROK was also made liable to pay their costs of the arbitration, assessed at over US$8.9m. The Stati parties have pursued the enforcement of the award in several jurisdictions, including Sweden. To date, the ROK has paid nothing towards either the award or the costs. The ROK has also incurred substantial further costs liabilities to the Stati parties in the Swedish courts as a result of the failure of its several challenges to the validity of the ECT award.

The proceedings in the High Court of Justice in England

6 On February 24th, 2014, the Stati parties commenced proceedings in the High Court of Justice in England under the Arbitration Act 1996 to enforce the Swedish award against the ROK. They obtained permission to do so on a without notice application, but the ROK then applied to set the permission aside, claiming amongst other things that the award had been obtained by fraud. On June 27th, 2017, Robin Knowles, J. directed that the ROK's fraud allegations should proceed to trial. By a notice of discontinuance dated February 26th, 2018, the Stati parties discontinued the enforcement proceedings. The ROK obtained a setting aside of that notice but the English Court of Appeal later ordered a discontinuance. There is no need to detail the course of the proceedings. Suffice it to say that in them the ROK obtained three costs orders against the Stati parties.

7 The first order was for the payment of £30,000. It was made by Robin Knowles, J. on May 21st, 2018, following the ROK's successful application for permission to use documents disclosed in the English proceedings in proceedings in other jurisdictions. The second order was for £25,000. It was made by Cockerill, J. on May 17th, 2019 on an application by the ROK requiring the Stati parties to disclose their funding arrangements. The third order was in respect of the ROK's costs of the Stati parties' discontinued proceedings. By his order of July 2nd, 2019, Jacobs, J. ordered the Stati parties to pay the ROK £1.3m. on account of its costs of the proceedings and £80,000 on account of its costs incurred in making the application. The total amount of the costs so ordered was £1,435,000.

8 It is those three orders that the ROK sought to have registered in Gibraltar. If they can be so registered, the ROK would hope to enforce them in Gibraltar. The ROK's registration application was made under s.4 of the 1935 Act, one modelled on the English Foreign Judgments (Reciprocal Enforcement) Act 1933.

Judgments (Reciprocal Enforcement) Act 1935

9 The 1935 Act's long title is as follows:

> "An Act to make provision for the enforcement in the United Kingdom of judgments given in foreign countries which accord reciprocal treatment to judgments given in the United Kingdom, for facilitating the enforcement in foreign countries of judgments given in the United Kingdom, and for other purposes in connection with the matters aforesaid."

10 Section 2 is the "Interpretation" section. The relevant definitions are, first, that of "Court" which "except in s.11 . . . includes a tribunal." Second, that of a "judgment," which:

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

11 Part 1 of the 1935 Act is headed "Registration of judgements given in other countries" and its s.3 is headed "Power to extend Part 1 to countries giving reciprocal treatment." The following provisions of s.3 are of direct relevance to the appeal:

> "3.(1) If, in the case of any foreign country, the Minister responsible for justice is satisfied that, in the event of the benefits conferred by this Part being extended to, or to any particular class of, judgments given in the courts of that country or in any particular class of those courts, substantial reciprocity of treatment will be assured as regards the enforcement in that country of similar judgments given in similar courts of Gibraltar, he may, by order in the Gazette, direct—
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> (a) that this Part shall extend to that country;
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> (b) that such courts of that country as are specified in the order shall be recognised courts of that country for the purposes of this Part; and
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> (c) that judgments of any such recognised court, or such judgments of any classes specified, shall, if within subsection (2), be judgments to which this Part applies.
>
> (2) Subject to sub-section (2A), a judgment of a recognised court is within this sub-section of it satisfies the following conditions, namely—
>
> (a) it is either final and conclusive as between the judgment debtor and the judgment creditor or requires the former to make an interim payment of the latter; and

(b) there is payable under it a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and

(c) it is given after the coming into force of the order which made that court a recognised court.

(2A) The following judgments of a recognised court are not within sub-section (2) of this section—

(a) a judgment given by that court on appeal from a court which is not a recognised court;

(b) a judgment or other instrument which is regarded for the purposes of its enforcement as a judgment of that court which was given or made in another country;

(c) a judgment given by that court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of that judgment.

. . .

(5) Any order made under this section before its amendment by the Civil Jurisdiction and Judgments Act 1993 which deems any court of a foreign country to be a superior court of that country for the purposes of this Part shall (without prejudice to sub-section (4)) have effect from the time of that amendment as if it provided for that court to be a recognised court of that country for those purposes, and for any final and conclusive judgment of that court, if within sub-section (2), to be a judgment to which this Part applies."

12 Section 4(1) provides materially:

"4.(1) A person, being a judgment creditor under a judgment to which this Part applies, may apply to the Supreme Court at any time within six years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the lat [*sic*] judgment given in those proceedings, to have the judgment registered in the Supreme Court, and on any such application the court shall, subject to proof to the prescribed matters and to other provisions of this Act, order the judgment to be registered . . ."

13 Finally, I must set out s.8, headed "Judgments which can be registered not to be enforceable otherwise"; and s.11A, headed "Arbitration awards." They provide:

"8. No proceedings for the recovery of a sum payable under a judgment given by a court of another country, being a judgment to which this

> Part applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in Gibraltar."
>
> "11A. The provisions of this Act, except sections 3(5) and 8 shall apply as they apply to a judgment, in relation to an award in proceedings or [*sic*: should be "on"] an arbitration which 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"

14 Of the provisions I have set out, those central to the argument are s.3(2A)(c) and s.11A. The 1933 English Act includes identical provisions.

Yeats, J.'s judgment of April 29th, 2020 (2020 Gib LR 152)

15 This is the judgment Yeats, J. delivered on the ROK's without notice application for the registration of the costs orders. The ROK had been represented by Mr. Baglietto, Q.C. and Mr. Levy. Yeats, J. rightly approached the application on the basis that a judgment of a recognized court (which the English High Court is) can be registered if it satisfies the conditions in s.3(2) of the 1935 Act and is not excluded from registration by s.3(2A). He held that all the s.3(2) conditions were satisfied and there is no dispute about that.

16 Yeats, J. turned to the s.3(2A) exclusions, and held that neither of those in s.3(2A)(a) and (b) applied, about which there is also no dispute. The critical question was whether the costs judgments were excluded by s.3(2A)(c). That was the central question before him, it was the main area of dispute in the later *inter partes* hearing also before him and was the only area of dispute in the appeal before us.

17 Yeats, J. explained that s.3(2A) was inserted into the 1935 Act by the Civil Jurisdiction and Judgments Act 1993. He referred to authorities supporting the proposition that the policy underlying s.3(2A)(c) was to prevent the "laundering" (2020 Gib LR 152, at para. 17) of judgments obtained in countries to which the 1935 Act did not apply, that is to prevent the registration in Gibraltar of the judgment of a foreign court that could not itself be registered in Gibraltar.

18 Approaching the interpretation of s.3(2A)(c) on that basis, Yeats, J. adjudged that its first reference to "a judgment" was capable of two possible interpretations. First, that it meant *any* judgment by the recognized court in the course of the enforcement proceedings. Second, that it meant only the judgment by that court in such course that related *directly* to the judgment of the court in the other country. The first interpretation would bar the registration in Gibraltar of the ROK's costs judgments. The second would not. Yeats, J. said (*ibid.*, at para. 22) that both interpretations were possible and concluded that, if the purpose of the sub-paragraph was "to prevent the 'laundering' of a judgment on a judgment," he should adopt the

second, narrower interpretation. He held, therefore, that the three English costs judgments were not excluded from registration in Gibraltar by s.3(2A)(c).

19 It was also argued before Yeats, J. that s.3(2A)(c) anyway had no application to the case because the English enforcement proceedings related to an arbitration award in another country, not to a "judgment of a court in another country," and s.11A did not extend the s.3(2A)(c) exclusion to a judgment of a recognized court in enforcement proceedings founded on such an arbitration award. As Yeats, J. had decided that the true interpretation of the extent of s.3(2A)(c) was the narrower of his two alternatives, so that the sub-paragraph had anyway had no exclusionary application to the registration of the costs judgments, he did not also need to decide whether s.11A had any relevant application and did not do so.

Yeats, J.'s judgment of March 29th, 2021 (2021 Gib LR 96)

20 This is Yeats, J.'s judgment on the *inter partes* application in which Terra Raf (one of the Stati parties), represented by Mr. Vasquez, Q.C. and Mr. Nagrani, applied to set aside his order of April 29th, 2020. It resulted in the decision now under appeal. The ROK was again represented by Mr. Baglietto and Mr. Levy. Terra Raf's case was that the registration of the costs orders in Gibraltar was precluded by (i) the combined effect of s.3(2A)(c) and s.11A, and (ii) public policy, although I need say nothing about the latter point, which failed before Yeats, J. and was not repeated before us. As to the former submission, the case was that the wider interpretation of s.3(2A)(c) that Yeats, J. had rejected in his earlier judgment was the correct one. The ROK's responsive submission was that (i) the Swedish award was not a judgment of a court and so s.3(2A)(c) was not in play; (ii) s.11A did not provide otherwise since it did no more than enable certain arbitration awards to be registered in Gibraltar; and (iii) that if s.3(2A)(c) *was* in play, Yeats, J. had been correct in his first judgment to favour its narrower interpretation.

21 Yeats, J. dealt first with the issue as to the correct interpretation of s.3(2A)(c). Counsel agreed he should start with the words of the sub-paragraph, and he referred to an observation by Lord Steyn in *R.* v. *A. (No. 2)* (4) ([2001] UKHL 25, at para. 44), that it was "a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it." He then referred to *Shahid* v. *Scottish Mins.* (5) in which Lord Reed said ([2015] UKSC 58, at para. 21) that—

> "21. The only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences . . ."

For the ROK, it was argued that a purposive approach to interpretation should be adopted where the strict legal meaning did not properly address the mischief the legislation sought to resolve.

22 Yeats, J. concluded he had been wrong in his earlier judgment to identify two possible meanings to s.3(2A)(c). He held (2021 Gib LR 96, at para. 23) there was "only one strict literal interpretation which can be arrived at," namely the wider interpretation he had earlier rejected. That was that the relevant exclusion applied to *any* judgment given by the recognized court in the course of proceedings in it to enforce the judgment of a court of another country. Yeats, J. said (*ibid.*, at para. 25), that he considered that to be the "plain and unambiguous meaning," having just explained his reasoning more fully (*ibid.*, at para. 24), as follows:

> "The only words [in s.3(2A)(c)] that I consider require particular analysis are the words 'proceedings founded on' and 'having as their object.' The former must simply mean that the action in which the judgment is given is concerned with and relates directly to a judgment of a third country court. As to the words 'having as their object,' these must refer to the *proceedings* in the recognized court and not to the recognized court's *judgment*. 'Their' is plural. 'Proceedings' are in the plural, and 'judgment' is in the singular. If the words 'having as their object' were intended to refer to the recognized court's judgment, then the drafter could simply have said 'having as *its* object.'" [Emphasis in original.]

23 Having so held, he also had to consider the ROK's argument that s.3(2A)(c) anyway did not apply because it applied only to a judgment of the recognized court "in proceedings founded on a judgment of a court in another country," whereas what the Stati parties had been seeking to enforce in England was not a judgment of a court, but an award under a Swedish arbitration.

24 In that context, Yeats, J. introduced (i) the expanded definition of "court" in s.2 of the 1935 Act, and (ii) s.11A. He noted that both those provisions, as well as s.3(2A), were introduced into the 1935 Act by the amending provisions in s.37 of the Civil Jurisdiction and Judgments Act 1993. He accepted the Stati parties' submission that the extension of the definition of "court" to include "a tribunal" included an arbitration award, and went on to say (*ibid.*, at para. 29):

> "Indeed, I observe that without extending the term 'court' to include arbitral tribunals, the jurisdiction conferred by s.11A would be of no effect. This is because s.11A only refers to the provisions of the Act applying to arbitration awards as they apply to judgments. However, to be able to register a judgment, it needs to be a judgment of a court. It was therefore necessary to amend the definition of 'court' to include all types of tribunals."

25 For s.11A to be applicable, it is also a condition that the arbitral award "has, in pursuance of the law in force in place where it was made, become enforceable in the same manner as a judgment given by a court in that place." As to that, Yeats, J. held (*ibid.*, at para. 33), that the Swedish award had, in accordance with the laws of Sweden, become so enforceable. He recorded that there was no evidence of Swedish law before him, but that Mr. Vasquez's instructions were that the award was enforceable in Sweden under the Swedish Enforcement Code (1981: 774). Yeats, J. also referred to the evidence of Mr. Carrington (a partner with Herbert Smith Freehills LLP, the ROK's solicitors) listing a number of enforcement actions in Sweden which, said Yeats, J. (*ibid.*), "clearly show that the award is being enforced in that country. I am therefore proceeding on the basis that the Swedish award is one to which s.11A applies."

26 The rival arguments as to the application or non-application of s.11A to s.3(2A)(c) were: (i) by Terra Raf, that a third country arbitration award locally enforceable as aforesaid is included in all aspects of s.3(2A)(c). Such an award would not be registrable in Gibraltar and so the s.3(2A) provisions against the "parasitic registration" of judgments of third countries must apply equally to third country awards; and (ii) by the ROK, that s.11A had only the limited effect of enabling an applicable arbitration award made in a reciprocating country to be also registrable in Gibraltar. It had no application to the exclusionary provision of s.3(2A)(c).

27 Yeats, J.'s conclusion was that the combined effect of the expanded definition of "court" and the provisions of s.11A was that s.3(2A)(c) required the words "founded on a judgment of a court in another country and having as their object the enforcement of that judgment" to be interpreted as also referring to an arbitration award in another country that had become enforceable as aforesaid. The effect of that was that s.3(2A)(c) was squarely in play and, on Yeats, J.'s interpretation of the meaning of its first reference to "a judgment," it had the effect of barring the English costs judgments from registration in Gibraltar.

The appeal

28 The ROK had three grounds of appeal. Ground 1 is the general one that the judge was wrong to find that the registration of the costs judgments was precluded by s.3(2A)(c). Ground 2 is that he was wrong to hold that s.11A extended s.3(2A)(c)'s reference to "a judgment of a court in another country" to "an arbitration award by an arbitral tribunal in another country." Ground 3, advanced on the premise that ground 2 might fail, was that the judge wrongly failed to interpret s.3(2A)(c) in light of its purpose of preventing the laundering of judgments of a third country and, in consequence, wrongly failed to hold that the costs judgments were not such judgments but were original costs judgments of a recognized court, namely the English High Court.

29 Mr. Baglietto, for the ROK, devoted no time to ground 1: its success depended on success on one or other of the other two grounds. Logically, ground 2 then came first, since success on it would knock out s.2A(3)(c) as presenting any exclusionary bar to registration and, with it, any argument about its interpretation. Illogically, Mr. Baglietto argued ground 3 first and ground 2 second. Advocates usually like to advance what they assess to be their better points first and I record that at the conclusion of his ground 2 argument, Mr. Baglietto acknowledged that this was not his primary point. I prefer a logical approach and so shall deal first with ground 2.

Does s.11A require s.3(2A)(c) to be interpreted as referring to the Swedish award?

30 Mr. Baglietto invited a negative answer to this question. The argument proceeded thus. The judge's view was that s.2's extended definition of "court" as including a "tribunal" meant that it included an "arbitral tribunal." It was submitted that he was wrong in so holding and that the sense of "tribunal" in the definition is confined to statutory or national tribunals exercising the judicial power of a state: the reason for extending the definition was to reflect the increased use of such tribunals in addition to a state's courts. The extended definition does not, however, include arbitral tribunals, which are not organs of the state but are private tribunals. This was supported by s.2's definition of a "judgment," which means "a judgment or order given or made by a court." Whereas courts give "judgments," arbitral tribunals do not: they give "awards." Section 11A itself draws the distinction between a "judgment" and an "award" and supports the view that s.2's definitions of "court" and "judgment" were not directed at including arbitral tribunals or their awards.

31 Mr. Baglietto said this meant that s.11A could not enable s.3(2A)(c) to be read as applying to the Swedish award because it was not "a judgment of a court in another country" within the meaning of s.2's definitions. His further submission to the like effect was based on a citation from Dicey, Morris and Collins on *The Conflict of Laws*, 15th ed., r.71 (2012), one concerned with the explanation of how, under provisions in England's 1933 Act equivalent to those in Gibraltar's 1935 Act, an arbitral award made in a reciprocating country can be registered in England. From that, Mr. Baglietto advanced the proposition that because Sweden is not a country with which Gibraltar has a regime of reciprocal enforcement, the Swedish award could not fall within the scope of the 1935 Act at all. His submission was that s.11A is directed exclusively at enabling the *registration* of arbitral awards of reciprocating countries and goes no further than that. It has no application to the exclusionary provisions of s.3(2A)(c).

32 I would agree with Mr. Baglietto, for the reasons he gave, that s.2's extended definition of "court"' does not include an arbitral tribunal; and

that the extended definition of a "judgment" as a "judgment or order given or made by a court" does not include an arbitral award. It appears to me, however, that if the logic of his argument is that the limits of these definitions preclude s.3(2A)(c) from having any application to s.11A—because the Swedish arbitration award was not "a judgment of a court in another country"—he must also accept that, contrary to his submission, an arbitration award in a reciprocating country cannot be registrable under s.3(2), because it is equally not a judgment of a recognized court for the purposes of that provision. The logic of Mr. Baglietto's submission was to reduce s.11A of the 1935 Act to a dead letter.

33 If so, there is obviously a flaw in it. In my judgment, the flaw in Mr. Baglietto's approach is the assumption that, in order for an arbitration award to fall within the scope of the 1935 Act, it must be capable of amounting to a judgment of a court as defined in s.2. He submitted (rightly, in my view) that since an arbitration tribunal does not fall within the definition of a court, the arbitral award cannot be a judgment of a court (even if it could otherwise be called a judgment). But that is not how s.11A works. It does not bring arbitration awards within the statutory definitions; rather it is a deeming provision which requires them to be treated, in certain circumstances, as if they do fall within the statutory definitions and are therefore subject to the provisions of the 1935 Act. Section 11A tells us that all but two (irrelevant) provisions of the Act "apply as they apply to a judgment in relation to [an arbitration award] which 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" (which I shall call a "'qualifying award"). The sense of s.11A is, therefore, that, save for the two excluded ones, all the provisions of the 1935 Act apply to a qualifying award *as if* such award were a judgment of a court in the place it was made. A qualifying award is thus equated with a judgment of a court. In the application of the provisions of the Act to s.11A, there is, therefore, no need to show that an arbitral tribunal is a "court" or that a qualifying award is a "judgment . . . given or made by a court" within the meaning of s.2. That is because s.11A treats it as such.

34 This being so, I would regard it as clear that s.11A enables a qualifying award made in a reciprocating country to be registrable under s.3, as Mr. Baglietto accepts and asserts, even though the logic of his analysis foreclosed it. His further proposition that s.11A is concerned only with registration and plays no part in the application of s.3(2A)(c) so as to *exclude* certain registrations is one I would respectfully reject as wrong.

35 First, s.11A, which was introduced into the 1935 Act at the same time as s.3(2A), is precise as to the only provisions in the Act that do not apply to it. Had it been intended also to exclude any part of s.3(2A) from such application it would have said so but did not. Second, s.3(2A)(c) is directed at the important policy objective of avoiding any registration that would

result in the laundering of (*inter alia*) a non-registrable third country judgment. It would be surprising if it were not also intended to prevent the laundering of (*inter alia*) non-registrable third country qualifying arbitration awards. There can therefore be no rational basis for interpreting s.3(2A)(c) as not also applying to s.11A, and Mr. Baglietto's citation from *Dicey, Morris and Collins* provides no support for a contrary view. The citation is exclusively about the *registration* of arbitral awards made in reciprocating countries; it is not about the provision *excluding* registration of awards in s.3(2A)(c), which is the relevant point before us. That point receives no help from the citation and its consideration requires no more than an engagement in the easy task of interpreting the combined effect of s.3(2A)(c) and s.11A.

36 As to that, first, it is common ground that the three costs judgments are "judgments of a recognised court" for the purposes of the opening words of s.3(2A). Second, Yeats, J. accepted that the Swedish award is a qualifying award and there was no suggestion before us that it was not. Third, Sweden is obviously "another country." Fourth, for reasons given, the Swedish award is treated as "a judgment of a court in another country." Fifth, it is irrelevant whether or not it is a country with which Gibraltar has reciprocal arrangements: s.3(2A)(c) invites no such inquiry. All this leads to the conclusion that, for the purposes of this case, s.3(2A)(c) must be read as meaning "a judgment given by the recognized court [the English High Court of Justice] in proceedings founded on a qualifying Swedish arbitration award and having as their object the enforcement of that award."

37 I would dismiss ground 2. I turn to ground 3.

What is the correct interpretation of the first reference to "a judgment" in s.3(2A)(c)?

38 Mr. Baglietto's submission is that Yeats, J.'s first instincts were right, namely those that moved him to make his original registration order. He submitted that the sense of the opening words "a judgment" in s.3(2A)(c) cannot correctly be interpreted as referring to the three costs judgments, because they are not judgments of the nature whose registration s.3(2A)(c) is directing at barring. As was explained in the decision of the Scottish Outer House in *Clarke* v. *Fennoscandia Ltd.* (1) ([2004] SC 197, at para, 31), the purpose of s.3(2A)(c) is to bar the laundering of *third country* judgments, whereas the costs judgments are not such judgments but are original judgments of the English High Court. Mr. Baglietto accordingly invited us to interpret "a judgment" purposively, that is as not excluding the costs judgments from registration. Those judgments were of course obtained by a defendant in an ultimately unsuccessful action by the claimants in the High Court. Mr. Baglietto made it clear, however, that identical considerations would apply to a bid by a successful *claimant* to

register its judgments for costs, even though s.3(2A)(c) would bar the registration of the third country judgment.

39 As to how we should approach the interpretation exercise, Mr. Baglietto referred us to several authorities. *State Bank of India* v. *Mallya* (6), a decision of Andrew Henshaw, Q.C. (as he then was), is fairly close to home in that it concerned the English Foreign Judgments (Reciprocal Enforcement) Act 1933, and Mr. Baglietto drew our attention in particular to the judge's observations ([2018] 1 W.L.R. 3865, at para. 64) that:

> "More broadly, the general aim of the legislation is of course the mutual recognition of judgments of the courts of reciprocating nations, and considerations of comity would suggest that it would be wrong to take an unduly narrow or technical approach to its interpretation."

40 Paragraph 61 (*ibid.*) included a rather fuller discussion about the approach to the interpretation of the 1933 Act:

> "61. The parties agreed that it is appropriate to give the 1933 Act and the 1958 Order in Council a purposive interpretation to the extent compatible with established principles. Those principles are that in interpreting a statute the aim is to establish objectively the intention of the legislature. The primary tool for that task is the text of the legislation. *Prima facie*, the meaning of that text is to be taken to be that which corresponds to the plain or literal meaning conveyed by the words used given their ordinary meaning as words and the grammar of the provision being construed. However, any provision, word or phrase is not to be construed in isolation but in the context of the surrounding provisions, words or phrases and in the light of any discernible legislative purpose where it is clear that the legislation has been enacted to remedy a particular mischief. These principles can be derived from the following authorities:
>
> i) *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 §§ 6–10 and 21;
>
> ii) *R v Z (AG for Northern Ireland's Reference)* [2005] UKHL 35 §§ 16–17;
>
> iii) Bennion, *Statutory Interpretation* (6th ed., 2013), Sections 9.1, 9.6–9.8, 10.1, and 11.1–11.2."

41 Mr. Baglietto referred us also to the helpful observations about statutory interpretation by Patte, J. (as he then was) in *Re Metronet Rail BCV Ltd (in PPP administration)* (3). I shall set out an extensive citation, because it includes valuable guidance ([2008] 2 All E.R. 75, at paras. 32–34):

> "[32] The court is asked to give effect to what is said to be the plain meaning of the words used. I was referred to a number of familiar

authorities in which the House of Lords has stressed that where Parliament has used clear and unambiguous language the court should not attempt to depart from it by seeking to find ambiguities where none exists. In such cases there is no alternative but to give effect to the Act as drafted. So in *Duport Steels Ltd v Sirs* [1980] 1 All ER 529, at 541, [1980] ICR 161 at 177 Lord Diplock said that:

> 'Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.'

[33] There has been no suggestion of any mistake having been made in the drafting of the legislation nor is this a case in which the literal meaning of the words used relied on by the respondents would produce such an absurd result that it should be rejected in favour of some other construction. But in every case the task of the court is to give effect to the intention of Parliament as recorded in the statute. Because the medium of communication is the written word this process is necessarily highly contextual. In one sense any construction of the words used can be described as literal and I have no difficulty with that term if it means no more than one should attempt to give meaning and effect to the words which the draftsman actually used rather than re-formulating the grammar or phraseology or even inserting additional words which are not there. But the words actually used cannot be construed in a vacuum. The product of the draftsman is the totality of the legislation and each part of it has to be read consistently with the other provisions to which it relates and from which it derives its meaning.

[34] This point has been explained very clearly by Lord Bingham of Cornhill in his speech in *R (on the application of Quintavalle) v. Secretary of State for Health* [2003] UKHL 13, [2003] 2 All ER 113, [2003] 2 AC 687, where he said this:

> '[7] Such is the skill of Parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the

> draftsman could not have foreseen and for which he has accordingly made no express provision.
>
> [8] The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provision should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'"

42 I record that Mr. Baglietto also referred us to the decision of the English Court of Appeal in *Strategic Technologies PTE Ltd.* v. *Procurement Bureau of the Republic of China Ministry of National Defence* (7). I do not, however, propose to refer further to it since although it raised a question arising in a similar field (relating to the Administration of Justice Act 1920), I derive no additional assistance from it as regards the approach to the correct interpretation of s.3(2A)(c). It certainly does not dictate the answer to the question before us.

43 Focusing on the particular question of interpretation with which we are faced, Mr. Baglietto therefore urged us to have regard to the statutory purpose of s.3(2A)(c), namely that of preventing the registration of "judgments on judgments," meaning (by reference to *Dicey, Morris and Collins*, *op. cit.*, para. 14–85, at fn 705), "judgments given by foreign courts enforcing the judgments of courts of third States." This, he said, is the manifest statutory purpose underlying the whole of s.3(2A) and, in light of that purpose, it would be wrong to interpret s.3(2A)(c)'s opening reference to "a judgment" otherwise than as referring exclusively to a third country judgment whose registration in Gibraltar that sub-paragraph is directed at excluding.

44 Of course Mr. Baglietto's submission rests on his recognition that he needs a judicial adoption of a purposive interpretational approach to the

meaning of "a judgment" in order to overcome the difficulty that its ordinary meaning is plainly *not* confined to a third country judgment. He submitted, however, that the correct interpretation of the whole scheme of the three sub-paragraphs of s.3(2A) is that they were all directed at preventing the registration of third country judgments and that none could be said to have in mind the barring of the registration of a costs order made by the recognized court. The clear purpose of s.3(2A) required the court to eschew an interpretation of s.3(2A)(c) that barred such a registration.

45 Mr. Ramsden, for Terra Raf, submitted otherwise. The language of the text of s.3(2A)(c) is unambiguously clear and, as the judge held (for the reasons he lucidly explained), it means that the costs judgments *are* excluded from registration. As Lord Steyn had said in *R.* v. *A (No. 2)* (4) ([2001] UKHL 25, at para. 44): "It is a general principle of interpretation that the text is the primary source of interpretation: other sources are subordinate to it." In his judgment in the *State Bank of India* case (6), referred to at para. 40 above, Andrew Henshaw, Q.C. said the same ([2018] 1 W.L.R. 3865, at para. 61). Further, as Lord Reed, J.S.C. said in *Shahid* v. *Scottish Mins.* (5) ([2015] UKSC 58, at para. 20): "No amount of purposive interpretation can however entitled the court to disregard the plain and unambiguous terms of the legislation." Lord Reed said further (*ibid.*, at para. 21): "The only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences . . ." In exceptional cases the court may legitimately omit or insert words to correct legislative drafting errors, but, as Lord Nicholls of Birkenhead said in *Inco Europe Ltd.* v. *First Choice Distribution* (2) ([2000] 1 W.L.R. at 592):

> "This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation . . ."

46 In my judgment, there is no doubt what the relevant words of s.3(2A)(c) mean, and I respectfully consider that Yeats, J., in his second judgment, interpreted them correctly. The question that s.3(2A)(c) and s.11A together pose for the court in relation to each of the three costs judgments is this: was the judgment "given by the court in proceedings founded on a qualifying Swedish award and having as their object the enforcement of that award"? The answer can only be "yes," with the consequence that the judgment is excluded from registration.

47 There is, therefore, no scope for the adoption of a so-called purposive interpretation directed at attaching a different meaning to the opening words "a judgment" in s.3(2A)(c). There is no ambiguity in the statutory language. There is nothing before us to suggest that the legislature's chosen language is the result of any sort of drafting mistake. The drafting of the provisions of the 1935 Act would have required a considerable understanding of litigation and of the type of orders that can be made in it and I would not be prepared to infer that the draftsmen were other than fully aware that, at any rate in the case of judgments of the type referred to in s.3(2A)(a) and (c), those judgments would (in the case of a failed application) be likely to be one for costs alone and (in the case of a successful application) would be likely to include a judgment for costs. In each case, however, the legislative policy is to exclude the registration of such judgments. Had the legislature been so minded, it could have made an express exception of costs judgments from its registration exclusions. It did not. It was not bound to do so, and it was not suggested to us that its apparent policy choice in that respect was one it was not entitled to adopt.

48 I have, therefore, come to the conclusion that the statutory language of s.3(2A)(c) is unambiguously clear and that there is no legitimate basis upon which this court can accede to the ROK's invitation to rewrite it in some unexplained manner so as to enable the registration of the costs judgments. To do so would be for the court to ignore the cautionary injunction so clearly and importantly expressed in Lord Nicholls's speech in the *Inco Europe* case (2). This court must refuse the invitation.

49 I consider that Yeats, J. came to the correct decision. I would dismiss the ROK's appeal.

50 **ELIAS, J.A.:** I agree.

51 **KAY, P.:** I also agree.

Appeal dismissed.