FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 42
P147/17

Lord President
Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD BRODIE

in the Reclaiming Motion

in the petition

(FIRST) DRIKA BVBA; (SECOND) ROGER VAN CRAEN; and (THIRD) NV MALU

Petitioners and Reclaimers

against

CLARE RAMSAY GILES

Respondent

Petitioners and Reclaimers: Dewar QC, Bell; Russel & Aitken LLP (for Yuill & Kyle, Solicitors, Glasgow)
Respondent: Reid; Brodies LLP

2 May 2018

Introduction

[1] It was the opinion of Lord Justice Clerk Braxfield that "there can be no *conflictus legum* among civilized nations", and accordingly,

> "[if] I have a *res judicata* in England, freeing me from a demand; I come to Scotland, can I be taken up there on an action on the same ground? No. A *res judicata* is good all the world over … A man cannot be forced to go through every country in Europe with his defence."

The then Lord President (Sir Ilay Campbell, Lord Succoth) was more circumspect. In the same case (*Watson* v *Renton* (1791) Bell 8vo Cas 92 at 108) he observed: "If a foreign court should give a decree ought you to give effect to it? Justice perhaps requires it, but this Court never does so."

[2] Much has happened in the law since 1791 and, in particular, much has happened in the last fifty years to bring Scots law as to the recognition and enforcement of the judgments of European courts closer to Lord Braxfield's conception of what it should be. Nevertheless, remarkable as it may seem, the respective contentions in the present reclaiming motion, which relates to the attempt to register for enforcement in Scotland a money judgment of the 9B Division of the Court of First Instance of the judicial district of Antwerp dated 24 December 2013, retain at least an echo of Lord Succoth's competing notions of what, on one hand the court should do, and, on the other, what the court can do.

Registration of foreign judgments

[3] At common law, recognition and authority for the enforcement of a foreign money decree could be obtained by raising in the Court of Session an action for "decree conform" to the decree of the foreign court. This was (and where competent still is) a mechanism whereby the foreign decree may become indirectly enforceable in Scotland by virtue of the pronouncement of a decree of the Court of Session in the same terms as the foreign decree. Armed with the Court of Session decree conform, the party in whose favour the foreign decree was pronounced may then proceed to do diligence in Scotland.

[4] However, from the nineteenth century onwards a series of statutory measures were enacted which were aimed at providing a more straightforward and essentially administrative process for giving direct effect to external judgments where it was

appropriate to do so. An early example of such a measure is the Judgments Extension Act 1868 (now repealed by the Civil Jurisdiction and Judgments Act 1982) which provided for the recognition in Scotland of decrees pronounced in other parts of the United Kingdom as having the same effect as decrees of the Court of Session with a view to their enforcement. The mechanism by which this was to be achieved was registration in the Books of Council and Session of a certificate in relation to the relevant external decree in terms of section 2 of the Act, with power being conferred on the Court of Session by section 7 "to make such Acts of Sederunt to regulate the practice to be observed in the execution of this Act or in any matter relating thereto."

[5] Other provisions followed. They included the Foreign Judgments (Reciprocal Enforcement) Act 1933. Like the 1868 Act and other analogous statutes the 1933 Act employed the mechanism of registering the foreign judgment for enforcement. Section 1 of the 1933 Act provides for extension of the benefit of its terms on a jurisdiction by jurisdiction basis by Order in Council. It was extended to Belgium in 1936 (S.R & O 1936/1169).

[6] It would appear that registration of any external judgment which is to be enforced within the jurisdiction is a feature particular to the United Kingdom. This is to be contrasted with what is described at para 9.127 of Anton *Private International Law* (3rd edit) as the procedure more typical of other European states: the issue of an *exequatur* ("let it be followed") or order for execution being attached to the external decree. What Anton describes as an *exequatur* may also be referred to as a declaration of enforceability.

The Brussels regime

[7] On 27 September 1968 in Brussels the then six member states of the European Economic Community entered into the Convention on Jurisdiction and the Enforcement of

Judgments in Civil and Commercial Matters (the "Brussels Convention"). As the full title suggests, the Brussels Convention provided for common rules as to jurisdiction in the domestic courts of the contracting states and common rules for the enforcement in a contracting state of judgments pronounced by the courts of other contracting states. The United Kingdom has acceded to the Brussels Convention. Article 54 of the Brussels Convention provides that it shall apply only to legal proceedings instituted after its coming into force in both the state of origin and the state of destination. As far as the United Kingdom and Belgium are concerned the critical date was 1 January 1987.

[8] The Brussels Convention has been subject to amendment by virtue of a Protocol of 1971 and the various Accession Conventions. It recognises the role of registration in the enforcement of external judgments in the United Kingdom. Article 31 of the Brussels Convention, as amended, provides:

> "A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.
>
> However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom."

[9] Article 37 of the Brussels Convention provides for the possibility of appeal against the decision authorising enforcement "in accordance with the rules governing procedure in contentious matters - … in Scotland, with the Court of Session".

[10] In terms of section 2 of the Civil Jurisdiction and Judgments Act 1982, as amended by the Civil Jurisdiction and Judgments Act 1991, the 1968 Convention has the force of law in the United Kingdom.

[11] In 2000 the provisions for common rules on jurisdiction and the mutual recognition of judgments within the European Union were refined by the adoption of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I"). Recital (6) explains its purpose as:

> "In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable."

[12] The United Kingdom has negotiated special treatment in the form of what may be referred to as "opt-outs" in certain areas of European Union competence. One of these is the area of freedom, security and justice. However, as is the case with Ireland, the United Kingdom may opt into any given initiative if it so wishes. As appears from recital (20) of Brussels I, that is what it did in relation to that measure:

> "The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation."

[13] Article 38 of Brussels I is in the following terms (which again acknowledge the significance of registration in the United Kingdom's domestic arrangements for enforcement):

> "Article 38
>
> 1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.
>
> 2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of

> any interested party, it has been registered for enforcement in that part of the United Kingdom."

[14] Article 39 of Brussels I provides that an application under article 39 shall be submitted to the court or competent authority indicated in the list in Annex II to the Regulation. For Scotland that is the Court of Session. Article 40 provides that the procedure for making the application shall be governed by the law of the Member State in which enforcement is sought. Article 43 provides that the decision on an application for a declaration of enforceability may be appealed against by either party, on an appeal lodged within one month of service. Annex III provides that in Scotland the court in which an Article 43 appeal may be lodged is the Court of Session.

[15] Article 68 of Brussels I provides:

> "This Regulation shall, as between Member States, supersede the Brussels Convention except as regards [certain external territories]"

[16] On 30 October 2007 there was signed at Lugano on behalf of the European Community the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, between the European Community and the Republic of Iceland, the Kingdom of Norway, the Swiss Confederation and the Kingdom of Denmark (the "Lugano Convention"). This superseded the Convention signed on 16 September 1988 by the then twelve members of the European Community and the then six members of the European Free Trade Association with a view to extending the provisions of the 1968 Convention to the EFTA member states. The provisions of the Lugano II Convention are closely aligned to those of Brussels I. They came into force for the European Union on 1 January 2010. In terms of article 66 they do not prejudice the application by the Member States of the European Community of Brussels I.

[17] Brussels I has however now been superseded by Parliament and Council Regulation (EU) 2015/2012 ("Brussels I Recast"). As with Brussels I, the United Kingdom and Ireland have opted in.

[18] As with its predecessors, Brussels I Recast provides for the recognition of judgments but with the important difference that it does away with the requirement for an *exequatur* or its United Kingdom equivalent, registration.

[19] Brussels I Recast came into force on 10 January 2015. In terms of Article 80 it repeals Brussels I. Brussels I Recast is however subject to transitional provisions. Article 66 provides that Brussels I Recast shall only apply to legal proceedings instituted after 10 January 2015 and that Brussels I shall continue to apply to judgments given in legal proceedings instituted before 10 January 2015.

Giving effect to the Brussels regime in Scotland

Prior to 7 February 2015

[20] In Scotland, prior to 7 February 2015, the procedure whereby a judgment subject to the Brussels regime was registered for enforcement was provided by part V of chapter 62 of the Rules of the Court of Session (headed "Recognition and Enforcement of Judgments under the Civil Jurisdiction and Judgments Act 1982, or under Council Regulation (EC) NO 44/2001 of 22 December 2001 or under the Lugano Convention of 30 October 2007"). Reflecting the heading of part V, RCS 62.26 (1) was in these terms:

> "(1) This Part applies to the recognition and enforcement of a judgment under the Civil Jurisdiction and Judgments Act 1982, the Lugano Convention or the Council Regulation."

RCS 62.26 (2) provided definitions of the various instruments referred to in RCS 62.26 (1). The expression "the Council Regulation" meant Brussels I.

[21] RCS 62.28 provided:

> **Enforcement of judgments, authentic instruments or court settlements from another Contracting State or State bound by the Lugano Convention**
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> 62.28.- (1) An application under-
>
> (a) section 4 of, and Article 31 (enforcement of judgment from another Contracting State) or Article 50 (enforcement of authentic instrument or court settlement from another Contracting State) of the Convention in Schedule 1 to, the Act of 1982; or
>
> (b) Article 38 (enforcement of judgment from Member State), Article 57 (enforcement of authentic instrument from another Member State) or Article 58 (enforcement of court settlement from another Member State) of the Council Regulation; or
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> (c) Article 38 (enforcement of judgment from another State bound by the Lugano Convention), Article 57 (enforcement of authentic instrument from another State bound by the Lugano Convention) or Article 58 (enforcement of court settlement from another State bound by the Lugano Convention.
>
> shall be made by petition in Form 62.28."

Form 62.28 provided for an abbreviated style of petition. The essentially administrative nature of the application for recognition and enforcement of a decree to which one of the three measures listed in RCS 62 (the 1982 Act, Brussels I and the Lugano Convention) applied, was underlined by the disapplication (by RCS 62.1 and RCS 62.27) of certain Rules relating to petition procedure: RCS 4.1(1), 14.4, 14.5, 14.6, 14.7 and 14.9. RCS 62.30 provided that on being satisfied that the petition complied with the relevant measure listed in RCS 62, the court should grant warrant for registration, warrant for the execution of protective measures and, where necessary, granting decree in accordance with Scots law. Registration of the external judgment was to be in the register kept for that purpose in the Petition Department and in the register of judgments of the Books of Council and Session (RCS 62.32).

[22] It will be recollected that article 37 of the Brussels Convention and article 43 of Brussels I (and also article 43 of the Lugano Convention) require that there should be an

appeal available against a declaration of enforceability within one month of service. Provision for that was made by RCS 62.34 through the mechanism of an appeal to the Lord Ordinary by way of motion.

Subsequent to 7 February 2015

[23] What one sees in the text of part V of chapter 62 of the Rules of the Court of Session as it was prior to 7 February 2015 is provision for a very simple procedure for the enforcement of the external judgments to which the 1982 Act, Brussels I and the Lugano Convention respectively applied. The Rules accurately reflected what these three measures require: a mechanism for securing the immediate declaration of enforceability, or in the United Kingdom the registration, of an external judgment, with the availability of appeal within a month. This symmetry was disrupted by the amendment of the Rules of Court by the Act of Sederunt (Rules of the Court of Session Amendment) (Regulation (EU) SI 1215/2012) 2015 which came into effect on 7 February 2015.

[24] As the title to the Act of Sederunt would suggest, its purpose was to bring the Rules of Court into conformity with the Brussels regime as it had been altered by the coming into force on 10 January 2015 of Brussels I Recast. In this it was not wholly successful.

[25] Recital (1) to Brussels I Recast narrates that whereas the operation of the Brussels I had in general been found to be satisfactory, it was desirable in order to further facilitate the free circulation of judgments and to further enhance access to justice, that its provisions be improved. Accordingly, since a number of amendments were to be made to Brussels I it should, in the interests of clarity be recast. As we have already mentioned above, among the amendments was the abolition of the *exequatur* and its United Kingdom equivalent, registration. Article 36 of Brussels I Recast provides that a judgment given in a Member

State shall be recognised in the other Member States without any special procedure being required (albeit that Article 36.2 allows an interested party to apply for a decision that there are no grounds of refusal of recognition). Article 39 provides that a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required, and Article 40 provides that an enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the Member State addressed. Thus, the party wishing to enforce an external judgment in a Member State can go ahead and do so with nothing by way of preliminary. Enforcement remains within the control of the court but rather than the party wishing to enforce an external judgment requiring to make an application for a declaration of enforceability or for registration, as under Brussels I, under Brussels I Recast it is the party who wishes recognition or enforcement to be refused who must take the initiative by making an application (Articles 45 to 51).

[26] A further amendment to the Brussels regime is that effected by Article 54 of Brussels I Recast, which includes:

> "If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests."

The remedy whereby a measure or order may be adapted in this way may be referred to as an "adaption order".

[27] When one turns to the Act of Sederunt one can see provision being made to amend the Rules of Court in order to accommodate the changes brought in by Brussels I Recast. A new part VA is inserted into chapter 62 of the Rules (RCS 62.42A to 62.42C). Part VA is headed: "Recognition and Enforcement of Judgments under Regulation (EU) No. 1215/2012

of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil Matters (Recast)". Part VA makes provision for the various new sorts of application required under Brussels I Recast including those required by Article 36.2 (no grounds of refusal of recognition); Article 45.1 (refusal of recognition of judgment); Article 46 (refusal of enforcement of judgment); and Article 54 (adaption orders). The Act of Sederunt also amends the provisions of part V of chapter 62. Among these amendments is a change to the heading of the part. It now reads: "Recognition and Enforcement of Judgments under the Civil Jurisdiction and Judgments Act 1982, or under the Lugano Convention of 30 October 2007". What is foreshadowed in the heading is reflected in the other amendments to part V: the references to Brussels I which had appeared in the previous text are excised. Thus, RCS 62.28(1) now reads:

> "62.28 (1) An application under-
>
> (a) section 4 of, and Article 31 (enforcement of judgment from another Contracting State) or Article 50 (enforcement of authentic instrument or court settlement from another Contracting State) of the Convention in Schedule 1 to, the Act of 1982; or
>
> (c) Article 38 (enforcement of judgment from another State bound by the Lugano Convention), Article 57 (enforcement of authentic instrument from another State bound by the Lugano Convention) or Article 58 (enforcement of court settlement from another State bound by the Lugano Convention;
>
> shall be made by petition in Form 62.28."

[28] Why we say that the Act of Sederunt was not wholly successful in bringing chapter 62 into conformity with the Brussels regime as it has been altered, is that it addresses only judgments to which 1982 Act, or the Lugano Convention or Brussels I Recast apply. There is another category of external judgments falling under the Brussels regime for which it makes no provision. As already mentioned, article 66 of Brussels I Recast is a transitional provision which provides that Brussels I Recast shall apply only to legal proceedings

instituted on or after 10 January 2015. Notwithstanding the repeal of Brussels I by Brussels I Recast, Brussels I shall continue to apply to judgments given in legal proceedings instituted before 10 January 2015. The draftsman of the Act of Sederunt of 2015 does not appear to have noticed this and its consequence: that there will be transitional cases, that is instances of external judgments which are enforceable in Scotland by virtue of Article 38 of Brussels I and which fall to be enforced by the mechanism of registration subsequent to 10 January 2015. If the draftsman did notice the possibility of transitional cases, he did not make provision for that possibility in his reformulation of chapter 62 of the Rules. Parties accepted that this was an error.

[29] The judgment of the 9B Division of the Court of First Instance of the judicial district of Antwerp dated 24 December 2013 ("the Judgment") which the now reclaimers are seeking to enforce is a transitional case.

Procedure in the Outer House in the present case

[30] The reclaimers presented a petition for registration of the Judgment which, although typed on a printed *pro forma* headed "Rules of the Court of Session 1994 Rule 14.4(1)", followed Form 62.28, that is the "form of petition for registration of a judgment under section 4 of the Civil Jurisdiction and Judgments Act 1982, or under Article 38, Article 57 or Article 58 of the Council Regulation". The petition was presented to Lord Boyd of Duncansby who pronounced an interlocutor dated 16 February 2017 in, *inter alia*, the following terms:

> "The Lord Ordinary having considered the petition and proceedings, and being satisfied that the petition complies with the requirements of Article 38 of [Brussels I] in terms of Rule of Court 62.28, Grants warrant to the Keeper of Registers of Scotland to register [a] certified copy of [the Judgment] under the Civil Jurisdiction and Judgments Act 1982; Appoints the petitioners to serve a copy of this notice of this

> interlocutor and form 62.33 on Claire Ramsay Giles residing at [the respondent's address] and allows her if so advised to apply to the Court of Session …within one month after such service to appeal against the grant of warrant of said registration: meantime Orders that the petitioners may not proceed to execution of the said judgment when registered until the expiry of lodging such an appeal or its disposal. Finds the said Claire Ramsay Giles liable to the petitioners in the expenses of the petition together with interest at the rate of eight per cent a year from the date of decree in accordance with the Civil Jurisdiction and Judgements Order 2001 Schedule 1 paragraph 5 (2)."

[31] The respondent appealed, as she was entitled to do in terms of Article 43 of Brussels I (albeit that while RCS 62.34 had made provision for an appeal under article 43 prior to 7 February 2015, on amendment by the Act of Sederunt, the reference in the text of RCS 62.34 to Article 43 of the Brussels I Regulation was excised). On 27 April 2017 the Lord Ordinary (Lord Woolman), having heard counsel "at the Procedural Hearing in terms of Rule of Court 62.28" appointed the appeal to a substantive hearing. On 16 June 2017, on the unopposed motion of the petitioners, "in terms of Rule of Court 62.29(1)" Lord Woolman granted warrant for protective measures.

[32] The substantive hearing called before Lord Brailsford on 29 September 2017. Having heard counsel, he made *avizandum*. On 20 October 2017 Lord Brailsford pronounced the following interlocutor:

> "The Lord Ordinary, having resumed consideration of the appeal of the respondent made in terms of the Rule of Court 62.34, and there now being no mechanism within the Rules of Court of Session for the registration of [the Judgement], grants the appeal, and in terms of Rule of Court 62.39, recalls the warrant granted in the Court of Session on 16 February 2017 for registration of the said judgment; orders cancellation of the registration of said judgement; authorises the Deputy Principal Clerk of Session to issue to the Keeper of the Registers a certificate of this order, and decerns."

[33] In his Opinion of 20 October 2017 Lord Brailsford explains that without suggesting that there had been any intention to prevent decrees from other Member States being

registered there was a consensus between counsel that the Act of Sederunt of 2015 had created a lacuna in the law. Counsel for the petitioners had submitted that there were two means whereby the obvious intention of Brussels I could be implemented: first, by recognising that the Regulation by virtue of its direct effect conferred a jurisdiction on the court; second, by resorting to the court's inherent power to "discharge its responsibilities", as recognised in *Hepburn* v *Royal Alexandra Hospital NHS Trust* 2011 SC 20. Counsel for the respondent, on the other hand, had submitted that the Act of Sederunt had expressly repealed the application of Brussels I. The present application was therefore incompetent. It did not follow that the Judgment could not be enforced. The common law remedy of decree conform could still be relied on, as perhaps could a petition to the *nobile officium*. The doctrine of direct effect did not extend to interference with Member States' procedural provisions for implementation: *Azienda Agricola Monte Arcosu Srl* v *Regione Autonoma Della Sardegna* [2002] 2 CMLR 14 (in the Opinion of the Advocate General at paragraphs A6 and A7, and in the judgment of the court at paragraphs 26-28), and *ÖBB-Personenverkehr AG* v *Schienen-Control Kommission and others* [2014] 1 CMLR 51 (Opinion of the Court paragraphs 54-60). The inherent jurisdiction of the court had to be exercised sparingly and with care: cf *Taylor Clark Leisure plc* v *Commissioners for HM Revenue and Customs* 2015 SC 595, the Lord Justice Clerk (Carloway) at paragraph [30].

[34] Lord Brailsford considered that the circumstances in which the petition was presented to the court were highly unusual. While he could think of no plausible reason why the Rule of Court had been amended in this way and while the position was unsatisfactory, he did not feel able to conclude that there had been an error. The implication of this was that there was no mechanism in the Rules of Court for registration of a decree such as the one in the present petition. Lord Brailsford accepted that Brussels I had direct

effect but one had to have regard to Article 40 which provided that the procedure for making the application shall be governed by the law of the Member State in which enforcement is sought. While the court had some inherent power to regulate matters of practice, the scope to interfere or innovate in relation to procedure controlled by the Rules of Court was more limited. He therefore did not feel able to rely on the inherent power in the way that had been suggested by counsel. In the result it may be that the petitioners would have no option but to seek decree conform.

Submissions

[35] Before this court Mr Dewar QC, on behalf the petitioners and reclaimers and Mr Reid, on behalf of the respondent, reiterated the arguments which had been made to Lord Brailsford. As we have already noted, counsel were agreed that there appeared to have been an error in the drafting of the Act of Sederunt which had had the result that there was no specific provision in the Rules of Court for applications for the registration of judgments in transitional cases. They differed as to what was the consequence of this. For the reclaimers Mr Dewar submitted that Lord Brailsford had erred in holding that Brussels I did not have direct effect. The only issue was whether the procedural rules of Scots law were apt to provide for the registration of the Judgment. That should be determined in favour of the reclaimers. Mr Dewar referred to what had been said by Lord President Emslie in *Hall* v *Associated Newspapers* 1979 SC 1 at 9. The court had an inherent power to entertain an application (such as the present) where (i) an exigency has arisen as a result of a lacuna in the procedural rules caused by an apparent drafting error, and (ii) to decline to do so would amount to a breach of the United Kingdom's international obligations. Such

exercise of the court's inherent jurisdiction would involve no significant innovation on established procedure.

[36] Mr Reid reminded the court of the terms of the petition. It purported to proceed under RCS 62.28, whereas parties were agreed that as at the date of presentation of the petition RCS 62.28 did not provide for an application to register a decree such as the Judgment; the petitioners had chosen to use a procedure which is no longer available. The dispute between the parties was not as to whether there was a procedure which could be used but whether this particular procedure could be used. Lord Brailsford had been correct to find that the relevant provisions of Brussels I did not have direct effect but a submission based on direct effect passed over the question of whether the procedure which the petitioners had adopted was the appropriate procedure. As far as the argument based on the inherent power of the court was concerned, the purpose of the inherent power was to deal with an incidental question arising in what were competent proceedings. The view expressed by Lord Carloway at para [54] of *Hepburn* v *Royal Alexandra Hospital NHS Trust* had been endorsed by the court in *Macleod's Legal Representatives* v *Highland Health Board* 2016 SC 647 at para [160]. Mr Reid submitted that the reclaiming motion should be refused.

Decision

[37] There is no dispute that the decree of a Belgian court of competent jurisdiction, of which the Judgment is an example, is enforceable in Scotland. Since 1936 the basis of such enforceability has been found in legislation: initially the 1933 Act, then the 1982 Act, more recently Brussels I and now Brussels I Recast. Given that the Judgment is a transitional case, as that expression is to be understood by reference to Brussels I Recast, what makes it enforceable in Scotland is Brussels I.

[38] Mr Reid argued, rather faintly, that Brussels I did not have direct effect and therefore, of itself, could not provide for the enforcement of the decree of a Member State in Scotland. We cannot agree. Mr Reid did not discuss the potentially extensive ramifications of his argument were it to be accepted but in fairness to him he was not pressed to do so by the court. For present purposes it suffices to say that, in our opinion, the authorities to which Mr Reid referred (*Monte Arcosu* and *ÖBB*) do not support his argument. Subject to exceptions which arise from the structure of a particular regulation, regulations generally have immediate and direct effect; consistent with that, as can be seen from its recital (6), quoted above, Brussels I purports to have direct effect. Both the general rule and the exception on which Mr Reid relied are not controversial. They appear in para 26 of the Opinion of the European Court of Justice in *Monte Arcosu*:

> "26 …although, by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may nonetheless necessitate, for their implementation, the adoption of measures of application by the Member States."

[39] Thus, in *Monte Arcosu* the regulation under consideration provided for investment aid to "farmers practising farming as their main occupation". The regulation specifically provided that "Member States shall define what is meant by this …expression". A law applicable to Sardinia provided for the creation of a register of farmers practising farming as their main occupation but, at the relevant date, the criteria for the management of the register had not been laid down and there was no legislation defining the conditions under which a company could be granted the status of a farmer practising farming as its main occupation. A limited company, Monte Arcosu, brought proceedings in order to be entered

in the register. The court in Cagliari made a reference to the ECJ for a preliminary ruling on two questions:

> "(1) Despite the silence of the Italian legislature, is it in any event possible to apply the Community provisions in question to persons other than natural persons, and in particular to companies having legal personality?
>
> (2) If an affirmative answer is given to the first question, what are the necessary and sufficient conditions for conferring the status of farmers practising farming as their main occupation on persons other than natural persons and, in particular, on companies with legal personality?"

By way of answer the CJEU explained that the relevant provisions of the regulation could not be relied on before the national court given that in terms of the regulation it was for the Member States to define what, in the particular Member State, was meant by "farmers practising farming as their main occupation". The Member States had been given a discretion in respect of the implementation of the relevant provisions and therefore it could not be held that individuals derived rights from the provisions in the absence of measures of application having been adopted by the Member State in question.

[40] *ÖBB* concerned Article 17 of Regulation 1371/2007 which sets out the minimum compensation, determined by reference to ticket prices, which railway passengers are entitled to claim in the event of delay. The Austrian railway regulator formed the view that the terms of ticket price compensation applied by a railway undertaking did not comply with Article 17 and ordered the undertaking to amend them, in particular by removing certain exclusion provisions. The undertaking brought proceedings in the local administrative court which referred two questions to the CJEU, the second of which asked whether a national body responsible for the enforcement of the regulation might, in the absence of any national provision to that effect, impose upon a railway undertaking whose compensation terms did not meet the Article 17 criteria the specific content of these terms.

The CJEU reiterated the general rule that the provisions of a regulation have immediate effect in national systems without the necessity for national authorities to adopt measures of application. Nevertheless some of the provisions of a regulation may necessitate for their implementation the adoption of measures of application. In the present case Article 30(1) of the regulation did provide that the national body responsible for the enforcement of the regulation must see that "the necessary passengers' rights …be respected" but it was nevertheless clear that the specific measures which the national body must be able to adopt had not been identified by the EU legislature. It followed from that that Article 30(1) required Member States to adopt measures defining the powers available to bodies such as the Austrian railway regulator with a view to them doing what was necessary to implement the regulation. Therefore, in the absence of such measures having been adopted by Austria, Article 30(1) could not be interpreted as constituting a legal basis authorising national bodies to impose on railway undertakings the specific content of their contractual terms relating to the circumstances in which they are to pay compensation.

[41] The relevant provisions of Brussels I are not similar to the provisions in the regulations under consideration in *Monte Arcosu* and *ÖBB*. In *Monte Arcosu* and *ÖBB* it was necessary for Member States to take action in order to give necessary content to what was provided for by the regulation. That is not the case with Brussels I and, in particular, with what is the relevant provision for present purposes, that is Article 38. Article 38 declares that a judgment given in a Member State "shall be enforced in another Member State". True, Article 38(1) goes on to state: "when, on the application of any interested party, it has been declared enforceable there". That means that while the judgment is, as a matter of EU law, enforceable, it can only be enforced within a particular Member State after an application has been made to obtain the appropriate domestic stamp of approval: an *exequatur* being

attached to the judgment or, in the United Kingdom, registration of the judgment. In terms of Article 39 that application must be to a court or other competent authority indicated in the list in Annex II to the Regulation. Other than in the case of a maintenance judgment, where the place of domicile of the party against whom enforcement is sought is Scotland, the court to which application must be made is the Court of Session. In contrast to the positions in *Monte Arcosu* and *ÖBB*, nowhere in the Brussels I scheme is there provision for the enforceability of a judgment being dependent on a measure implemented by the Member State in which enforcement is sought. Rather, in terms of Article 41, once the formalities specified in Article 53 have been completed, the relevant court or other competent authority shall declare the judgment enforceable. It is competent to appeal a declaration that the judgment is enforceable, with the possibility of a single further appeal on a point of law, but, significantly, provision for that and what otherwise follows from a declaration of enforceability are to be found in the Regulation. The role for domestic law is limited. In terms of Article 40, the procedure for making the application for an *exequatur* or registration shall be governed by the law of the Member State but that is it; it is a matter of procedure only. Putting it slightly differently, Member States have a choice as to precisely how an application to the identified court or other authority is made, but they do not have a choice as to whether an application can be made. Article 40 does not in any way trench on the provision in Article 38(1) that a judgment shall be enforced. Thus, it is not the case that by neglecting to have a procedure or by inadvertently abolishing what had been the procedure a Member State can thwart the Brussels regime. Of course, that consideration only comes into play in the present case if a situation has arisen where the Court of Session, in exercise of its rule-making function, has indeed neglected to have or has abolished the only possible procedure for the making of an Article 39 application in transitional cases.

[42] At paragraph [9] of his Opinion the Lord Ordinary records his conclusion that, although he could not think of any plausible reason as to why this should be so, there was no mechanism in the Rules of Court for registration of a decree in a transitional case. Before this court, both parties agreed with this "unsatisfactory position", as the Lord Ordinary had described it. Where parties differed was where, outside of the Rules of Court, a solution was to be found. For the petitioners it lay in an exercise of the court's inherent jurisdiction. For the respondent there was no alternative but to raise an action for decree conform. With great respect we cannot agree with any of this.

[43] What can be disposed of immediately is the respondent's suggestion that it would be open to the petitioners to bring an action for decree conform. As far as judgments of Belgian courts of competent jurisdiction are concerned, that remedy has been superseded since 1936, first by the 1933 Act and latterly by the Brussels regime. It is not a competent means of proceeding. However, while entirely satisfied that the draftsman of the 2015 Act of Sederunt made an error which in due course perhaps should be corrected, we do not see it as having given rise to quite the problem identified by the Lord Ordinary.

[44] Chapter 14 of the Rules of Court is concerned with petitions. As is explained in the annotations to RCS 14.1, a petition is an *ex parte* application addressed to the Lords of Council and Session and seeks their aid for some purpose or other, by exercising some statutory jurisdiction or the *nobile officium* in a variety of matters: *Tomkins* v *Cohen* 1951 SC 22 at 23. Quoting from the Report of the Royal Commission on the Court of Session 1927 (Cmd. 2801) pp 49-50, the authors of the annotation continue:

> "… the object of a petition … is to obtain from the administrative jurisdiction of the court power to do something or to require something to be done, which it is right and proper should be done, but which the petitioner has no legal right to do or to require apart from judicial authority."

Consistent with its administrative function petition procedure is summary, that is relatively informal, flexible and (intended to be) swift. It can be resorted to whenever the authority of the court is required "to do something or to require something to be done" to use the language of the Royal Commission. RCS 14.2 lists certain specific sorts of application that can be made by petition in the Outer House but it includes, at paragraph (h), "a petition or other application under these Rules or any other enactment or rule of law". Thus, a petition is exactly the vehicle for the sort of requests of which an application as is provided for by Article 39 of Brussels I is an example.

[45] Chapter 14 goes on to set out a procedure which can apply to any petition. However, having made provision for the generality of petitions in chapter 14, the Rules, in their later chapters, make special provision for some, but not all, sorts of application which can be made by petition. Chapter 57, for example, is concerned with the admission of advocates, chapter 58 with judicial review, chapter 60 with suspension and interdict, and chapter 61 with judicial factors. Other chapters are concerned with other matters. Chapter 62 is headed "Recognition, Registration and Enforcement of Foreign Judgments, etc." In common with the other chapters of the Rules which make special provision for certain sorts of application, chapter 62 is structured as an exception to the generality of chapter 14; some rules are disapplied and particularly apposite requirements are added. As has already been noticed, prior to 7 February 2015 chapter 62 made special provision for applications to register judgments to which Brussels I applied. However, while special provision for applications for registration of judgments to which the 1982 Act and the Lugano Convention continued to be made under part V of chapter 62 and special provision was made under part VA for the various applications required by Brussels I Recast, the effect of the amendments to the Rules of Court effected by the Act of Sederunt of 2015 is that there is no longer any special

provision made for the transitional cases regulated by Brussels I. Given the structure of the Rules, that means that an application of which the present case is an example falls to be made by reference to the general provisions as to applications by way of petition which are largely to be found in chapter 14; if an exception no longer applies then one reverts to the generality.

[46] Now, the precise terms of the petition and the interlocutors in the petition process do not explicitly recognise the basis upon which this application can still competently be made. We consider that this does not matter. The purpose of the petition is plain. It is a competent purpose. Given the flexibility of the petition process it may be appropriate to borrow or mirror procedural steps from elsewhere than chapter 14. Essentially that is what the respondent did in making her appeal "in terms of Rule of Court 62.34" and the Lord Ordinary did in granting that appeal and, "in terms of Rule of Court 62.39", cancelling registration of the Judgment.

[47] The respondent has no substantive objection to the registration of the Judgment for enforcement in Scotland. Her objection was limited to the procedure adopted in making the necessary application for registration. We consider that objection to be unsound for the reasons we have given. We shall accordingly allow the reclaiming motion. We shall recall the interlocutor of the Lord Ordinary of 20 October 2017. We shall refuse the respondent's appeal against registration of the Judgment.