PROVING FOREIGN LAW

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It often happens that the courts of one jurisdiction are asked to apply the law of a different jurisdiction, especially in contentious trust cases, where there can be a divergence of proper law, centre of administration and location of assets. In England, foreign law must be proved to the English court as a matter of fact. A recent Supreme Court case and the latest edition of the Chancery Guide now offer some flexibility in how foreign law is proved and, hopefully, will inject some realism into cases applying the law of offshore jurisdictions.

In the Sussex Peerage (1844) 11 C. & F. 85, Lord Brougham said: "… the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it. If the Code Napoleon was before a French Court, that Court would know how to deal with and construe its provisions; but in England we have no such knowledge, and the English Judges must therefore have the assistance of foreign lawyers."

If the relevant foreign law is truly unfamiliar, the rule makes good sense. Foreign legal systems may operate in different ways and apply different concepts in otherwise-familiar situations. For example, some legal systems recognise constructs that look like trusts, but which consist only of fiduciary obligations, or which involve creating a new legal entity. Another example might be a usufruct, which bears an uncomfortable resemblance to a life interest (which is how HMRC treats it: IHTM27054), but which is something different, as the editors of Lewin on Trusts explain at 1-027. Lord Brougham's example of the Code Napoleon may be an apt one.

In the offshore world, particularly when dealing with trusts, the law is often not so different from that of England. Even where trusts law is codified by statute, the underlying principles may be the same as in England. Any differences are only departures from the basic body of English law.

As the Royal Court of Jersey put it in Re Esteem Settlement [2002 JLR 53]: "Trusts were recognized and enforced by the Jersey courts well before the passing of the 1984 Law and, in doing so, they looked to English law for guidance on trust matters and, by and large, adopted English principles save where it was appropriate to differ. A Jersey trust is essentially the same animal as is found in English law, subject to certain local modifications."

The rigid traditional application of the requirement of proof of foreign law can lead to a costly and cumbersome process. Points of foreign law must be pleaded at the beginning of the case, at a time when the factual picture is still murky. Evidence of foreign law has to be given by expert report. Reports produced early can assist with the pleadings but may not focus on the fuller facts as they emerge through disclosure and exchange of witness evidence. At trial, if points of foreign law are in dispute, the experts have to be cross-examined, not an ideal process for testing propositions of law. Experts give their evidence before the lay witnesses of fact, and the reports are not normally permitted to evolve to meet developments at trial.

The Evidence (Colonial Statutes) Act 1907 provides a limited exception for statutes of "British possessions", which may be admitted in evidence without proof. But the exception does not extend to foreign case law, and in R. v. Governor of Brixton Prison ex p. Shuter [1960] Q.B. 89, Lord Parker C.J. noted that "no one except an expert can be sure that the statute or other document of which the printer's copy is tendered is the latest version of the local law."

More recently, though, the Supreme Court took a softer line in Brownlie v. FS Cairo (Nile Plaza) [2022] A.C. 995. The consequence of not proving foreign law is that the court will presume that foreign law is the same as English law. Lord Leggatt, with whom the other justices agreed on this issue, suggested that the requirement for an expert witness in all cases was outdated.

He proposed a more nuanced approach: "In an age when so much information is readily available through the internet, there may be no need to consult a foreign lawyer in order to find the text of a relevant foreign law. On some occasions the text may require skilled exegesis of a kind which only a lawyer expert in the foreign system of law can provide. But in other cases it may be sufficient to know what the text says."

The Supreme Court has thus given apparent licence to prove foreign law by any appropriate means. The lower courts have largely adopted that open-textured approach. The latest Chancery Guide restates the rule that "foreign law is a matter of fact to be proved by evidence" at 9.46. It then gives examples of approaches that parties might take. At the top end, there is the familiar spectacle of treating a foreign legal expert as any other expert. But the Guide also suggests the more interesting prospect of the parties identifying the sources of foreign law by expert evidence but leaving the trial advocates to make submissions based on those materials. Thus, when the source materials are readily available and verifiable, foreign law can be treated in a way much closer to English law.

Happily, none of this means that our friends around the world are obsolete. As the Supreme Court recognises, foreign lawyers will be essential in explaining local nuances. Even if trial advocates are English, our offshore colleagues can be central to the trial team when formulating submissions, and we can all look forward to our more flexible future.