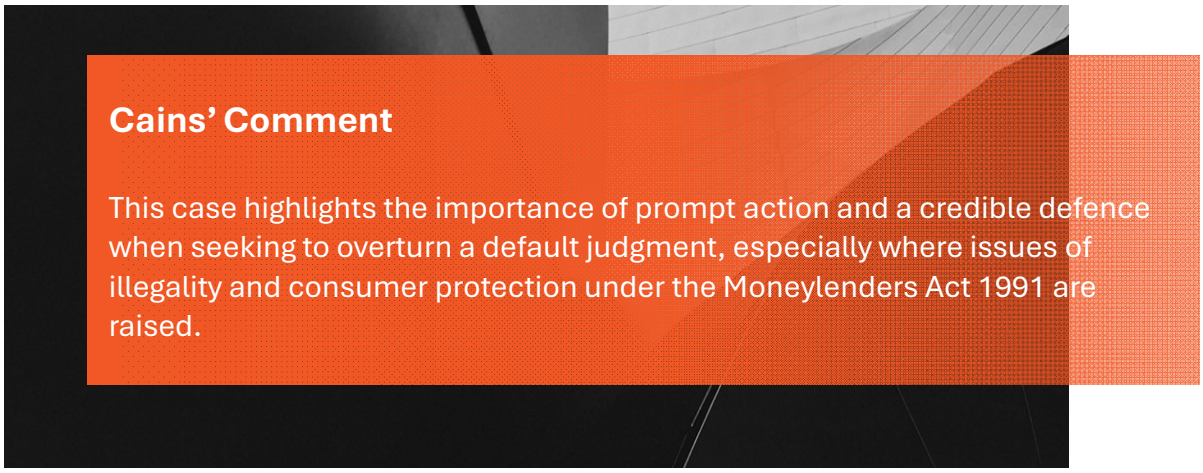
Cains' Judgment Journal: *Comment from Cains on Isle of Man Judgments*

Application to set aside Default Judgment



Cains' Comment

This case highlights the importance of prompt action and a credible defence when seeking to overturn a default judgment, especially where issues of illegality and consumer protection under the Moneylenders Act 1991 are raised.

Bellamy v Khan & Khan, Civil – Ordinary Procedure, 4 April 2025

This case involved a dispute over a series of loan agreements. The lender (Claimant) had obtained a default judgment against the borrowers (Defendants) when they failed to file an acknowledgment of service or defence to the claim in time. The Defendants later applied to have that judgment set aside pursuant to rule 10.35 of the Rules of the High Court of Justice 2009 ("the Rules").

The Court has a discretion to set aside a default judgment validly obtained where either:

(1) the Defendant has a real prospect of successfully defending the claim; or

(2) it appears to the Court that there is some other good reason why:

i. the judgment should be set aside or varied; or

ii. the defendant should be allowed to defend the claim.

In exercising its discretion, the Court must specifically consider whether the defendant has acted **promptly**.

The key issues in the case centred around:

1. **Promptness**. Whether the Defendants acted quickly enough in applying to set aside the judgment.

2. **Valid Defence.** Whether the Defendants had a realistic prospect of successfully defending the claim, particularly:

   - That the loans involved excessive interest rates (which were "extortionate" per the *Moneylenders Act 1991 and therefore the transactions could be re-opened by the Court*).

   - That the lender was not registered as a moneylender under Part 1 of the *Moneylenders Act 1991*, which could make the loans unenforceable due to illegality.

Decision

Deemster[i] Needham found that:

- The Defendants had acted promptly, especially given they were representing themselves and believed their defence had been filed but was lost in the post. He accepted that a delay of less than a month in putting forward a set aside application was "not outside the spectrum" of what could be classed as *prompt* in all the circumstances.

- The Defendants had a realistic, as opposed to a fanciful, prospect of invoking section 11 of the Moneylenders Act 1991 and successfully defending the claim on the grounds of illegality.

- Applying the Overriding Objective and balancing any prejudice to the parties arising from the question of set aside, there was *good reason* to set aside the default judgment, because it was fairer to both parties to "remove any artificiality or restriction" that the default judgment may have in respect of arguing their case fully.

- The Defendants have a realistic prospect of persuading a court at trial that the Claimant lent the money as part of a moneylending business (particularly considering the repetitive nature of the lending, the high and generally increasing interest rates, the significant business experience of the lender and the

vulnerabilities of the borrower) and the provisions in the Moneylenders Act regarding lending whilst unregistered were such as to imply that the illegality of any lending in such circumstances was an absolute bar to the lender recovering anything from the borrower.

- Applying the remarks by Deemster Corlett in *Holtby v McGovern*, 20th September 2016, as a "starting point" on the issue of illegality, their arguments about unlawful lending and excessive interest were serious enough to merit a full hearing. The default judgment was therefore set aside, allowing the case to proceed to trial.

The 'Denton Principles' and factors set out in Rule 2.59 of the Rules were applied to the set aside application and it was found to be fair and just to grant the relief from sanction and to set aside the default judgment.

By way of Postscript, Deemster Needham noted that he could not force mediation however he was sure that the experienced Counsel for both parties would advise them respectively that some other method of alternative dispute resolution may be more advantageous than the stress and cost of a fully contested trial.

The judgment can be found at: https://www.judgments.im/content/J3330.htm

Costs Appeal – Definition of "In-house Counsel"

Cains' Comment

The case concludes that government departments can recover legal costs at commercial rates when represented by salaried "in-house" counsel, clarifying a key principle in Isle of Man cost recovery law.

Baccarat Limited & Other v Cabinet Office, Civil – Chancery Procedure, 4 April 2025

This case concerned a dispute over legal costs following a failed challenge by Baccarat Limited and Morland Enterprises Limited to the Isle of Man's Area Plan for the East. The Cabinet Office, represented by the Attorney General's Chambers, sought to recover its legal costs at a rate of £300 per hour. However, the Costs Officer had limited recovery to

the statutory rate of £110 per hour under the Advocates (Prescribed Fees) Regulations 2005.

The key issue was whether the Attorney General's Chambers, which represented the Cabinet Office, could be classified as "in-house counsel" for the purposes of cost recovery or whether the Attorney General's Chambers, being a separate legal entity to the Cabinet Office, can only recover costs at the rate set out in the Advocates (Prescribed Fees) Regulations 2005.

The Cabinet Office relied on the Appeal Division's decision in *Gorry v Attorney General (No.4)* (2020 MLR 1), which in turn applied the English Court of Appeal's ruling in *Re Eastwood* [1975] Ch 112. In *Eastwood*, the Court of Appeal held that costs incurred by salaried in-house solicitors should be assessed as if they were charged by independent practitioners, provided the indemnity principle was not breached (i.e., the taxed costs should not be more than an indemnity to the party against the expense incurred in the litigation).

Deemster Corlett affirmed that *Gorry* was binding and that *Eastwood* offered a "convenient and practical" framework for assessing government legal costs and ensures that the taxpayer can claim costs when using in-house lawyers. He rejected the argument that the Attorney General's Chambers could not be considered "in-house counsel" simply because it was legally distinct from the Cabinet Office. He therefore also did not accept that as there was no letter of engagement or fees agreement between the Cabinet Office and the Attorney General's Chambers the rate of £110 per hour as set out in the Advocates (Prescribed Fees) Regulations 2005 must apply.

Deemster Corlett concluded that the Costs Officer had erred in doubting the "in-house" status of the Attorney General's Chambers. He ruled that the Chambers functioned as in-house counsel for the Cabinet Office in this litigation and in accordance with Gorry, the Eastwood principles must apply. The appeal was therefore allowed, and the claimants were ordered to pay costs at the higher hourly rate of £300.

The judgment also highlights the importance of using official law report versions in legal proceedings, when available (paragraph 13).

The full judgment can be found at: https://www.judgments.im/content/J3332.htm

Common Issues

Cains' Comment

In this case, the Court declined to designate binding common factual issues in a multi-party investment claim involving adviser-brokers, emphasising the risk of injustice without a Group Litigation Order.

Morrison, Parry, Pankovas & Otrs v Utmost International Isle of Man Limited & Otrs, Civil – Ordinary Procedure, 23 April 2025[ii]

This high-profile multi-party litigation, involving approximately 1,600 claimants, concerns allegations against Utmost International Isle of Man Ltd and others regarding investment advice and undisclosed commissions. The claimants allege that adviser-brokers, acting on their behalf, received secret or inadequately disclosed commissions from the defendants, leading to significant financial losses.

The central question addressed by Deemster Rosen was whether the Court should identify common factual issues that would bind all parties, particularly in light of a proposed test claimant trial. The claimants argued that findings from the test claimants' cases should apply to all clients of the same adviser-broker. However, the defendants opposed this, citing the absence of any general agreements of understandings or uniform conduct across all claimants.

Decision

Deemster Rosen declined to direct that any common factual issues be binding at this stage. He emphasised that:

- There was insufficient evidence to justify binding non-test claimants to findings based on test claimants' cases.
- The absence of a Group Litigation Order (GLO) did not preclude the Court from identifying common issues, referencing English authorities such as *McLean & Ors v Thornhill KC* [2023] EWCA Civ 446, *Lancaster & Ors v Peacock QC* [2020] EWHC 1231 (Ch), and *Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312.
- While common legal issues may be binding, factual differences between claimants such as evidence, timing and context (including those advised by the

same broker) posed a risk of injustice to a party who was not the subject of the test trial, if treated uniformly.

- The Court may still be able to give strong indications or directions as to the other claims following the outcome of the test trial, which might involve limiting evidence or summary judgment.

The Deemster concluded that other procedural matters, including disclosure by non-test claimants and foreign law issues, would be addressed following the selection of 20 test claimants. Costs were ordered to be costs in the case.

The full judgment can be found at: https://www.judgments.im/content/J3337.htm

Removal of an Executor

Cains' Comment

In this case, a sister's bid to challenge her late mother's asset transfers and replace her brother as executor failed, as the Court upheld testamentary freedom and found no evidence of undue influence or mistake.

Devereau v Gorman, Civil – Ordinary Procedure, 24 April 2025

The Claimant, Mrs Devereau, brought a claim against her brother, Mr Gorman, seeking to be appointed administrator of their late mother's estate. She questioned whether their mother truly understood that jointly held assets would pass (by operation of law) solely to her brother so that they fell outside of her estate and would not be dealt with in accordance with the terms her Will.

The key issues in the case were:

- **Removal of Executor**: The Court applied the test from *Re Folkes* [2017] EWHC 2559, which requires a claim to have reasonable prospects of success and to enhance the estate's value relative to the cost of litigation. The Court did not exercise its discretion to appoint an administrator of the estate.
- **Whether the Claimant could set aside the transfers made by the deceased:**

- **Presumption of Undue Influence**: Referencing *Jolly v Watson* (2012) MLR N-3 and Enonchong's *Duress, Undue Influence and Unconscionable Dealing*, the Court found no suspicious circumstances or detriment to the deceased on the facts that would create a presumption of undue influence. There was no evidence to satisfy the allegation.

- **Mistake in Voluntary Disposition**: Mrs Devereau invoked *Pitt v Holt* [2013] 2 AC 108, but the Court found no evidence of a grave causative mistake that would make it unconscionable not to grant relief.

Decision

The claim was dismissed. Deemster Corlett held that the deceased's actions were consistent with her testamentary intentions evidenced in her Will, namely that the residuary beneficiaries would only benefit from the deceased's assets if the joint owner (Mr Gorman) died before the deceased. Despite Mrs Devereau's submissions that the Will was "pointless", Deemster Corlett confirmed that the Will was "necessary" in the event Mr Gorman predeceased the deceased leaving the deceased's estate holding substantial assets.

Deemster Corlett held that both sets of transfers of funds into the joint names of the deceased and her son and later into the sole name of her son are perfectly explicable by reference to the facts.

The delay in bringing proceedings (over five years) and the lack of live evidence further weakened Mrs Devereau's case. The Court upheld the principle of testamentary freedom, finding no legal basis to set aside the asset transfers or to appoint Mrs Devereau as administrator.

Further points to take away from the judgment:

1. The absence of estate assets within the jurisdiction does not prevent a grant of probate being made (per section 6 of the Administration of Estates Act 1990).

2. A late attempt to admit witness evidence in breach of a Court Order is "*unfair, disruptive and contrary to the overriding objective*". The application by Mrs Devereau to admit evidence at the beginning of the hearing was rejected on the grounds of *lack of relevance* and *lateness*.

The full judgment can be found at: https://www.judgments.im/content/J3333.htm

References

[i] The term used to refer to judges in the Isle of Man judiciary.
[ii] Jonathan Nash KC (TAL) with Robert Long for Cains represented Friends Provident International Limited (Defendants, party six).

Leanne Hinds, Associate