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# REVIEW



## Human Rights between Friendly States



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# REVIEW

## Introduction

Welcome to the 1st edition of our new electronic news review published by Mann & Partners. We hope that the publication is of interest to recipients. Please contact any of the individuals listed on the contact us page with comments for future articles.



### Advocate Chris Murphy reviews .....

how far, if at all, will the Manx court seek to pass judgment on the laws of another friendly state when the parties before it cry them foul of human rights?

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## Human Rights between Friendly States

How far, if at all, will the Manx court seek to pass judgment on the laws of another friendly state when the parties before it cry them foul of human rights? With human rights laws playing an ever increasing part in litigation, Advocate Christopher J. Murphy reflects on the recently decided case of **Re: Brunning** (in which he appeared successfully as counsel), an example of a case where human rights arguments were raised in a perhaps unexpected context; to question the laws and legal process of a 'friendly' foreign state.

The case involved the recognition under relevant principles of private international law of a foreign (US) appointed trustee in bankruptcy. The submission of human rights arguments placed the court in the somewhat delicate position of being invited to examine the foreign state's laws and legal process. The case is perhaps most important as an authoritative and detailed analysis of the legal principles concerning the recognition of a foreign trustee in bankruptcy. However, of particular interest is the court's approach to the human rights arguments that were placed before it and it is on that aspect that this article will focus.

Proceedings were brought before the High Court of Justice of the Isle of Man by an

American trustee in bankruptcy appointed under the jurisdiction of the United States Bankruptcy Court Southern District of California seeking firstly the recognition by the Isle of Man court of the trustee in bankruptcy's appointment and secondly the court's assistance with regard to the vesting in the trustee in bankruptcy of certain assets which were located in the Isle of Man.

The bankrupts ('the Brunnings') opposed the trustee in bankruptcy's requests averring that the court should neither recognise nor assist the foreign trustee in bankruptcy. The court noted that the whole thrust of the submissions on behalf of the Brunnings was that they were not able to obtain justice in the United States of America. The Brunnings alleged in effect that the US legal system and the applicable US laws failed to provide them with effective remedies and/or operated in such a way as to infringe their human rights. The Brunnings compared their situation to those of detainees at Guantanamo Bay and brought into question the fitness for purpose of the laws and legal system of the US.

The facts of the case are complicated and unusual in many respects. The Brunnings it was alleged had filed for Chapter 7 voluntary bankruptcy but they had then

deliberately failed to declare substantial assets including cash deposits of approximately US\$1,000,000 held on bank accounts in the Isle of Man.

The trustee in bankruptcy uncovered evidence of the existence of such assets and criminal proceedings were instituted in the US against the Brunnings who in the meantime had left the US for Mexico. Following the Brunnings' arrest and detention in Mexico and then lengthy but ultimately unsuccessful resistance to extradition proceedings, the Brunnings were eventually returned to custody in the US.

By the time the trustee in bankruptcy's application came to be heard before the Isle of Man court, the US criminal proceedings had still yet to be determined. The Brunnings vehemently contested the validity of the US bankruptcy proceedings before the Manx court but significantly had made no civil challenge before the US courts in relation to the trustee in bankruptcy's appointment, arguing that to do so would prejudice their defence of the criminal charges facing them and/or that they were in any event practically barred from doing so because of the way in which such laws operated. The Brunnings further contended that the determination of the criminal charges would impact directly on the issue of the validity of the trustee in bankruptcy's appointment and so to that extent, there was an unresolved challenge extant before the US criminal courts.

The court accepted that it had jurisdiction to recognise a foreign trustee in bankruptcy's appointment and to provide assistance if the interests of justice required it and the requirements of the well established principles of private international law, as applied by Manx common law were satisfied<sup>1</sup>. The court also held that it had a discretion to refuse such recognition and assistance and that such discretion was wide ranging and not confined merely to considerations of public policy, natural justice, fraud or the enforcement of foreign penal or revenue law. Other relevant matters could include human rights and, as in this case, whether there was pending any challenge to the validity of the trustee in bankruptcy's appointment in the home jurisdiction.

On the issue of the Brunnings' human rights, the court found that there was insufficient evidence before it to conclude that such rights had been breached. It found in particular that any appointment of the trustee in bankruptcy and the enforcement orders made ancillary thereto by the US Bankruptcy Courts were not contrary to the requirements of substantial justice in Manx law.

<sup>1</sup>See Dicey & Morris *The Conflicts of Laws* (13th Edition) (Dicey & Morris) Rule 165(2) "*English Courts will recognise that the Courts of any other foreign country have jurisdiction over a debtor if –*

(a) *he was domiciled in that country at the time of the presentation of the Petition; or*  
 (b) *he submitted to the jurisdiction of its Courts, whether by himself presenting the Petition or by appearing in the proceedings."*

The court further observed that if there had been breaches of natural justice or a right to a fair hearing then no doubt such issues could be raised before the courts of the United States for determination and that if the US bankruptcy proceedings were to be challenged it should be through *“The front door of the Civil Courts of the United States rather than... through the back door of the Isle of Man Courts”*. The court was unimpressed with the allegation that there had been a breach of Article 1 of the First Protocol 1 to the European Convention for the Protection of Human Rights and Substantial Freedoms. The court recognised that it appeared lawful under the relevant foreign law for a trustee in bankruptcy to be appointed and that the relevant law provided a mechanism for such appointment. The court therefore did not hesitate in its rejection of the submission that the US bankruptcy proceedings had been in breach of Article 1 of Protocol 1.

In considering complaints of breaches of human rights the court referred to the need to always remember that with human rights come human responsibilities. Citing Benjamin Cardozo (an Associate Justice of the United States Supreme Court 1932 – 1938) who recognised the need to balance the rights of individuals and responsibilities to society as a whole long before the European Human Rights Convention was signed on behalf of the UK, the court emphasised the importance of balancing human rights with human

responsibilities, the principle of proportionality and the wider interests of society as a whole. The court also drew a clear distinction between the political and legal spheres stating in its judgment *“..it may well be that the United States of America’s international reputation for compliance with human rights has been adversely affected by what the Brunnings refer to as “Guantanamo”. Such criticism, however if valid would be against the government rather than the judiciary and the legal system of the United States. I am far from persuaded... that the United States of America could properly be regarded as an unfriendly or unsophisticated jurisdiction whose judiciary and legal systems disrespect the rule of law on human rights so that recognition and enforcement of orders of their Bankruptcy Courts should be declined on that basis alone.”*

In closing on this issue the court found that whilst in general terms the Manx court should be entitled to assume that an order made in the US is valid until successfully challenged, a situation might also be envisaged where an order which is not challenged in the home jurisdiction but is so clearly repugnant to basic principles of fairness or public policy, a Manx court would be justified in refusing to recognise and enforce it. Such cases would however be exceptional.

*NB Seek specific legal advice on the facts of each case.  
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