SIMON NARAYAN & PADMA NARAYAN

v.

DARRELL THEODORE WONG

[HIGH COURT, 1996 (Fatiaki J) 27 June]

Civil Jurisdiction

Courts- foreign judgment- whether Canada a Commonwealth country- Foreign Judgments (Reciprocal Enforcement) Act- Cap 40 Sections 6 (1) (a) (iii); 9 (1).

Unsuccessful Plaintiffs in an action in Canada applied to set aside an order for costs made against them by the Supreme Court of British Columbia. The High Court HELD: (1) that Canada is a part of the Commonwealth and accordingly the order was properly registered (2) that the Act does not give a right to an unsuccessful plaintiff to apply to set aside a costs order against him and (3) that the Plaintiffs had not shown that the normal rule that costs follow the event did not apply.

Cases cited:

Barnett v. Eccles Corporation (1900) 2 Q.B. 104
Carson v. Pickersgill & Sons (1885) 14 Q.B.D.
Emanuel v. Symon [1908] 1 K.B. 302
Ritter v. Godfrey [1920] 2 K.B.47
Russell v. Smyth (1842) 60 R.R.904
Schibsby v. Westenholz (1870) 6 L.R. Q.B. 155

Interlocutory application in the High Court.

V. Maharaj for Applicants
P. Sharma for Defendant

Fatiaki J:

On the 20th of January 1995 pursuant to an ex-parte application under Order 71 of the High Court Rules and invoking the provisions of Rule 2 of the Reciprocal Enforcement of Judgments Rules (Cap.39), this Court ordered that a judgment of the Supreme Court of British Columbia, Canada be registered as a judgment of this Court for the purposes of enforcing it against the applicants in Fiji.

Thereafter Notices of Registration were duly served on the applicants on the 7th of February 1995, and within the time given them, the applicants issued a summons pursuant to Rule 13 seeking to set aside the registration.

It is convenient to deal briefly with the background to this matter. The original case concerns a motor-accident claim instituted by the applicants (as plaintiffs) against the defendant in the Supreme Court of British Columbia, Canada. The

action was tried before a judge and jury over 5 days in late March 1994 and was dismissed with costs and disbursements being awarded to the successful defendant. The relevant judgment entered on the 19th of April 1994 and which was approved as to form by the applicants Canadian counsel, reads : (as relevant)

> "This Court Orders that the Plaintiff's action against the defendant be and the same is hereby dismissed.
>
> And this Court further orders that the Defendant recovers against the Plaintiffs costs on Scale 3 and disbursement to be assessed."

Pursuant to the latter Order, the defendant's solicitors prepared and sent a detailed Bill of Costs in the sum of $17,985.16 to the applicant's Canadian solicitor seeking his approval or contrary advice. No reply was forthcoming and the defendant's Canadian solicitors obtained on the 14th of June 1994 an appointment for assessment of the defendant's Bill of Costs by an officer of the Supreme Court of British Columbia and fixed to take place on the 12th July 1994.

The Appointment Notice was sent under cover of a letter dated 14th June 1994 to the applicant's Canadian solicitor, and was duly acknowledged by the applicant's Canadian solicitor who also advised that he had no instructions to oppose the Bill of Costs. Exception was taken however to the attendance fees claimed for Baker Material Engineering which amount accounted for just under a third of the total costs claimed by the defendant.

Then on 30th June 1994 the defendant's solicitors prepared an amended Bill of Costs for $18,258.76 which included two items relating to Discovery which had been erroneously omitted from its earlier Bill of Costs. Costs were duly assessed by a Registrar of the Supreme Court of British Columbia on the 12th of July 1994 and allowed at $16,834.96 (i.e. a reduction of approximately $1,400).

On 14th July 1994 judgment for the assessed costs was sealed against the applicants in the Supreme Court of British Columbia. So much then for the background.

In opposing the registration the first applicant raises two grounds in his affidavit in support, as follows:

> "(a) The said judgment is not a judgment to which the Foreign Judgment Reciprocal Enforcement Act Cap.40 applies, in that, ... there is no treaty between the Government of Fiji and Canada by virtue of which such judgment could be enforced in Fiji
>
> (the jurisdictional ground)
>
> (b) Furthermore, even if the Judgment is enforceable ... then the said judgment ought to be set aside, on the grounds that I did not receive any notice of the proceedings in which said

judgment of $16,834.96 was purported to be given in sufficient time or at all to enable me to defend the said proceedings and although I appeared as a Plaintiff at the substantive hearing of Action No. B924798 in the Supreme Court of British Columbia, Vancouver I am not aware how and on what basis the judgment in the sum of CAN$16,834.96 was entered against me and the Co-plaintiff."

(the Section 6 ground)

Dealing firstly with the jurisdictional ground. In this regard counsel for the applicant's simple submission is that Canada is not a scheduled country to which the Foreign Judgments (Reciprocal Enforcement) Act (Cap.40), applies, nor is there any specific proclamation extending the Act's provisions to Canada (as has been done for the Republic of India); or, to any of the Canadian provinces, as has occurred in the case of the Australian states.

The answer to this submission may be found in a brief survey of the relevant legislation dealing with the registration of foreign judgments in this country of which there are two, namely, the Reciprocal Enforcement of Judgments Act (Cap.39) and the Foreign Judgments (Reciprocal Enforcement) Act (Cap.40).

The Reciprocal Enforcement of Judgments Act (Cap.39) deals specifically with arbitration awards and the judgments of Superior Courts in the United Kingdom and Fiji (see : Section 3(1)) and such other Superior Courts of the Commonwealth outside the United Kingdom in respect of which there is in existence an Order of the Governor in Council. Quite plainly, this Act does not and cannot be extended to the judgments of foreign countries outside the Commonwealth.

Equally clearly, the Foreign Judgments (Reciprocal Enforcement) Act (Cap.40) primarily deals with the judgments of Superior Courts of foreign countries. (see : Section 3(1)). However, in addition and pursuant to Section 9(1), the Governor-General may by proclamation extend the provisions of the Act "... to any country or territory of the Commonwealth outside Fiji."

In this latter regard there undoubtedly exists the potential for some duplicity or conflict between the two Acts and recognising that, the legislature has specifically provided that in the event of any conflict, the Reciprocal Enforcement of Judgments Act (Cap.39) shall cease to have effect in relation to such country or territory of the Commonwealth in respect of which a proclamation has been made under Section 9 of (Cap.40).

More specifically however, the Reciprocal Enforcement of Judgments Act (Cap.39) has not been extended to Canada by any Order of the Governor in Council and accordingly, no possible conflict arises between the Acts in regard to that country.

The Foreign Judgments (Reciprocal Enforcement) Act (Cap.40) ('the Act') on

the other hand, although not specifically extended to Canada, was however extended by Proclamation 8 of 1950:

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> "to Her Majesty's dominions outside the Colony and to judgments obtained in the Courts of the said dominions as it applies to foreign countries and judgments obtained in the courts of foreign countries."
>
> (my underlining)

The critical question therefore is whether Canada is a part of "Her Majesty's
B dominions" outside Fiji ? or in terms of the empowering Section 9(i), "... (a) country ... of the Commonwealth outside Fiji ..." ?

I must confess that the answer to this seemingly simple question is deceptively complex and is aggravated by the absence of any definition in the Act of either of the phrases referred to in the question.

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The expression "Her Majesty's dominions" is explained in Vol.6 Halsburys of Laws of England (4th edn.) at para.803 as "... (signifying) the territory under the sovereignty of the Crown", and para.817 entitled `The Queen in Her Majesty's dominions' provides (that) :

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> "By virtue of her Majesty's sovereignty in the United Kingdom, ... the Queen is Sovereign, head of state and invested with the executive power in each Member (of the Commonwealth) remaining within Her Majesty's dominions."

In this latter regard Section 9 of the British North America Act 1867 (U.K.) which enacted a Constitution for Canada provides :

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> "The executive government and authority of and over Canada is hereby declared to continue and be vested in the Queen."

As for the phrase the Commonwealth, para.801 (ibid) provides :

> "The term "the Commonwealth" ordinarily signifies, first, the
F voluntary association of independent sovereign states which are recognised by each other as associated for purposes of consultation and co-operation, and which recognise the Queen as the symbol of their free association and as such Head of the Commonwealth ;"

G Then amongst the list of fully self-governing and independent members of `the Commonwealth` set out in para.810 (ibid), is listed :

> "(6) Canada, comprising the provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland; the Northwest Territories and the Yukon Territory."
>
> (my underlining)

Then there is the definition of the Commonwealth to be found in Section 127 of the 1970 Constitution which states :

> "the Commonwealth' means Fiji and any country to which Section 24 of this Constitution for the time being applies and includes the dependencies of any such country;"

and subsection (3) of Section 24 applies the term to the following countries :

> "United Kingdom and Colonies, Canada, Australia, New Zealand, India, Pakistan, Ceylon, Ghana, Malaysia, Nigeria, Cyprus, Sierra Leone, Tanzania, Jamaica, Trinidad and Tobago, Uganda, Kenya, Malawi, Malta, Zambia, The Gambia, Singapore, Guyana, Lesotho, Botswana, Barbados, Mauritius, Swaziland, Tonga and Southern Rhodesia."
>
> (my underlining)

Finally, the Shorter Oxford Dictionary defines Canada as "The name of a British Dominion in North America usually attributed in names of plants, animal products etc."

From the foregoing I have no hesitation in holding that Canada is included within the collective phrase "Her Majesty's dominions" as expressed in Proclamation 8 of 1950 and also, that the Supreme Court of British Columbia is a court of "... a country or territory of the Commonwealth" within the terms of Section 9(1) of the Foreign Judgments (Reciprocal Enforcement) Act (Cap.40). So much then for the jurisdictional objection.

I turn next to consider the applicants second and more substantial ground of objection which is purportedly based upon the provisions of Section 6(1)(a)(iii) of the Foreign Judgments (Reciprocal Enforcement) Act (Cap.40) which provides

> "(6) - (1) On an application in that behalf made by any party against whom a registered judgment may be enforced, the registration of the judgment -
>
> (a) shall be set aside if the registering court is satisfied -
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> (iii) that the judgment debtor being the defendant in the proceedings in the original court did not (not withstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear."

In considering the factual background to this ground of objection it may be noted for a start, that the judgment in this case having been granted in an action *in*

personam instituted by the applicants, the Supreme Court of British Columbia was, in terms of Section 6(2)(a)(ii) of the Act, deemed to have had jurisdiction since the applicant's who are now judgment debtors, were "(the) plaintiffs ... in the proceedings in the original court", albeit unsuccessful. [see also : the five categories of cases enumerated by Buckley L.J. in Emanuel v. Symon (1908) 1 K.B. 302 at 309.]

As for the primary facts relating to this ground it is common ground that the applicants (as opposed to their Canadian solicitor), were never personally served with any correspondence, Bill of Costs or notice of the proceedings leading up to the assessment and/or taxation of costs by the Registrar of the Supreme Court of British Columbia nor did they attend at the appointed hearing date or venue either in person or by counsel.

Indeed the second applicant deposes in her affidavit of 20th September 1995 :

> "... that shortly after the judgment was handed down by the judge in the Supreme Court of British Columbia both my said Husband and I left Canada for Fiji (date undisclosed). It was always our understanding that after the completion of the hearing and delivery of judgment our instructions to our solicitors was terminated."

From the foregoing I am satisfied that the applicants would have been and were aware not only that they were unsuccessful in their claim against the defendant, but also, that the judge trying their case had, in the exercise of his discretion, awarded the defendant his costs in successfully defending the claim, to be assessed according to a fixed scale for matters of ordinary difficulty or importance.

Quite plainly in my view the Order for costs was part and parcel of the final judgment of the Supreme Court of British Columbia in the applicant's action, and, if I may say so, was a necessary incident of the dismissal of the applicant's claim.

Indeed in Vol.37 of Halsbury's Laws of England (4th edn.) the learned authors state at para.717 :

> "On the principle that costs follow the event there is such a settled practice that a successful party should receive his costs that it is necessary for the unsuccessful party to show some ground for the court to exercise its discretion to refuse an order which would give them to him, and if he has exercised his discretion on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the trial the Court of Appeal may not intervene even if it deems his reasons insufficient."

In similar vein Atkin L.J. said in Ritter v. Godfrey [1920] 2 K.B.47 at p.60 :

> "In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence

> that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

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Needless to say in the exercise of his unfettered discretion to award costs to a successful defendant, a judge is entitled to draw a distinction between a plaintiff and a defendant insofar as the former initiates the litigation, while the latter is brought into it against his will, and therefore would require more substantial grounds to justify a refusal of costs than might be the case for an unsuccessful plaintiff.

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I accept that this is not a review or an appeal against an award of costs which, in this jurisdiction at least, could only be undertaken with leave [see : Section 12(2)(e) of the Court of Appeal Act (Cap.12)], but it would have greatly assisted this Court had the applicants deposed to some evidence or conduct of the defendant connected with or leading up to the litigation which might have disentitled the defendant from an award of costs despite his success in defending the action.

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Moreso in a judgment awarding costs to a successful party to litigation which is based upon the exercise of an unfettered judicial discretion and which is consistent with a settled practice, that costs follow the event, and where costs have been taxed, a process undoubtedly to the unsuccessful party's benefit insofar as extra costs are disallowed by the taxing official.

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In this latter regard Brett M.R. said in Carson v. Pickersgill & Sons (1885) 14 Q.B.D. 809 at 868 :

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> "Now the rule of taxation in actions which are not pauper actions is that the unsuccessful party is bound to pay his opponent those costs which the opponent was reasonably entitled to incur, and has either paid, or rendered himself liable to pay."

As to what those costs are, para.745 of Vol.37 of Halsbury's Laws of England (4th edn.) provides :

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> "The costs which are allowed on taxation on the party and party basis include the costs reasonably incurred in obtaining the assistance of solicitors and counsel, and experts, the expenses of various steps in the action, of interlocutory proceedings, of the trial or hearing and of the proceedings upto the signing of judgment."

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From the foregoing there can be little doubt that the defendant's solicitor's Bill of Costs contains no unusual, exaggerated or extraordinary claims or items.

That is not to say however that a successful party will receive the actual expenses incurred. On the contrary, since "... the law does not recognise the difference

between the sum which it gives as costs, that is, costs taxed as between party and party, and the larger sum which in practice a litigant has to pay" (per Bigham J. in Barnett v. Eccles Corporation (1900) 2 Q.B. 104, 109).

In Russell v. Smyth (1842) 60 R.R.904 where the plaintiffs sought to recover in England costs awarded in Scotland upon a default judgment, Lord Abinger C.B. in upholding the claim said at p.910 :

> "The action may be sustained on the ground of morality and justice. The maxim of the English law is to amplify its remedies, and, without usurping jurisdiction to apply its rules to the advancement of substantial justice. Foreign judgments are enforced in these Courts, because the parties liable are bound in duty to satisfy them."

In similar vein Blackburn J. in Schibsby v. Westenholz (1870) 6 L.R. Q.B. 155 said at p.159 :

> "... the true principle on which the judgments of foreign tribunals are enforced in England is ..., that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce ; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

Then at p.161 in discussing the question whether the defendant in a particular suit was bound by the judgment which it is sought to enforce against him, his lordship said :

> "... if the defendants had been at the time when the suit was commenced residents in the country, so as to have the benefit of its laws protecting them, ... we think that its laws would have bound them ...
>
> Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of the foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him."

In the circumstances I am not only satisfied that the applicants do not strictly come within the confines of Section 6(2)(a)(iii) of the Act insofar as they were plaintiffs and not the defendants in the proceedings in the original court but also, having regard to the very nature of the judgment sought to be de-registered.

The application is accordingly dismissed with costs to the defendants to be taxed if not agreed.

(Application dismissed.)