HBZ FINANCE LIMITED

v.

SHANTILAL BROTHERS

[HIGH COURT, 1989 (Palmer J) 27 October]

Civil Jurisdiction

Foreign Judgments- reciprocal enforcement- whether judgment of Supreme Court of Hong Kong registrable- whether Fiji's departure from the Commonwealth relevant- application to set aside- principles applicable- Foreign Judgments (Reciprocal Enforcement) Act (Cap 40) Sections 3, 6, 9.

Summary Judgment was entered against the Defendant in the Supreme Court of Hong Kong. On application being made to set aside the registration of the Judgment in the High Court of Fiji the High Court confirmed that Judgments of the Supreme Court of Hong Kong were registrable in Fiji and that this position was unaffected by Fiji's departure from the Commonwealth. The Court also examined and explained the practice and procedure of registration and the onus on a party applying to set registration aside. It HELD: that for the purposes of the Act a Judgment capable of being set aside was nevertheless registrable.

No case was cited:

H.M. Patel for the Plaintiff
H. Lateef for the Defendant.

Interlocutory application in the High Court.

Palmer J:

This is an application to set aside the registration in Fiji of a judgment obtained in the Supreme Court of Hong Kong. The parties have filed affidavits and written submissions. From these the following facts may be gathered: The Plaintiff is a Financial Institution carrying on business in Hong Kong. On 28th March 1985 it issued a Writ against the Defendants claiming a sum of some HK$535,630 plus interest thereon in respect of moneys advanced by it to the Defendants.

The 2nd Defendant filed a Defence by his Solicitors in Hong Kong. These present proceedings are concerned only with the 2nd Defendant. In May, 1985 the Plaintiff applied for summary judgment under Order 14 and on the 10th June 1985 the Supreme Court of Hong Kong gave judgment pursuant to Order 14 for the Plaintiff in the sum of HK$535,627.90 together with interest from the 27th March, 1985 at the rate of 3% above the Plaintiff's prime interest rate and also costs. Costs were subsequently taxed in the sum of $35,425.50.

On the 15th April, 1988 the Plaintiff filed a Summons in this Court seeking the registration of the Hong Kong judgment. The application was ex-parte and on

the 24thJune, 1988 Mr. Justice Fatiaki made an Order that the judgment be registered as a judgment in the High Court of Fiji pursuant to the Reciprocal Enforcement of Judgments Act Cap 40 (sic), and that the judgment debtor shall have 14 days to apply to set aside the registration of the said judgment. That Order was served on the Defendant on the 16th September, 1988 and on the 30th September, 1988 the Defendant made the present application to set aside that registration on a number of grounds.

Some of these grounds may be disposed of fairly briefly. The Foreign Judgments (Reciprocal Enforcement) Act Cap 40 makes provision, inter alia, "for the enforcement in Fiji of judgments given in foreign countries which accord reciprocal treatment to judgments given in Fiji." I shall refer to it hereafter as "the Act". Section 3 of the Act which is to be found in Part (II) reads as follows: -

"3-(1) The Governor General, if he is satisfied that, in the event of the benefits conferred by this Part being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country judgments given in the Supreme Court, may by proclamation direct-

(a) that this Part shall extend to that foreign country; and

(b) that such courts of that foreign country as are specified in the proclamation shall be deemed superior courts of that country for the purposes of this Part.

(2) Any judgment of a superior court of a foreign country to which this Part extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part applies if-

(a) it is final and conclusive as between the parties thereto; and

(b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and

(c) it is given after the coming into operation of the proclamation directing that this shall extend to that foreign country.

(3) For the purposes of this section a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it or that it may still be subject to appeal in the courts of the country of the original court."

Section 9 (1) of the Act provides as follows:-

A

> "The Governor-General may by proclamation direct that this Part shall apply to any country or territory of the Commonwealth outside Fiji and to judgments obtained in the courts of such countries or territories as it applies to foreign countries and judgments obtained in the courts of foreign countries, and, in the event of the Governor-General so directing, this Act shall have effect accordingly ....."

B On the 30th June, 1950, the then Governor directed by proclamation pursuant to the above provisions "that Part II shall apply to His 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." This proclamation was No. 8 of 1950 as noted in the schedule to the Act.

C

There is a submission by the Defendant that the Act does not apply to the Colony of Hong Kong. It is clear that Hong Kong at the material time was and for that matter still is a Colony. See 6 *Halsbury* (4th Ed) para 1163. Paragraph 803 ibid makes it clear that the term "Her Majesty's dominions" signifies the territories under the sovereignty of the Crown. And further that the term "Her Majesty's D dominions" is not to be confused with the obsolete term "Dominion" which was in official and statutory use during the first 50 years of the century to denote self governing members of the Empire or Commonwealth. Accordingly I hold that the term "His Majesty's dominions" in the Proclamation mentioned above includes the colony of Hong Kong and that according the Act has been made applicable to Hong Kong in accordance with its provisions. The Defendant has also submitted E that the cessation of Fiji's membership in the Commonwealth has had the effect of revoking the reciprocal arrangement upon which registration under the Act rests. I reject this. The fact that Fiji is not now a member of the Commonwealth has nothing to do with the matter in hand. The Governor made the proclamation which makes Part II of the Act operative in respect of Hong Kong. Under Section 11 he has power by proclamation to make foreign judgments unenforceable in F Fiji in the case of less favourable receiprocation. No such proclamation has been made I hold that the judgment of the Hong Kong Supreme Court is capable of registration in Fiji providing that the other criteria which are precedent thereto have been met. One of the essential criteria to registration is that the court giving the judgment had jurisdiction to do so, and it is that issue of jurisdiction which forms the principal challenge raised to the registration by the Defendant. He G puts this on a number of different grounds and I will now turn to these.

He says basically that he was not at any time a resident of Hong Kong, that he did not carry on business there. That he had no property there. He also denies that he was in partnership with the other Defendant and therefore says that the Court had no jurisdiction to make an order against him. He was in fact present in Hong Kong in the early part of 1985. He says that his presence was in an attempt to rectify, as he puts it, the problems created by his brother, the other

Defendant's business dealing in Hong Kong and there were a number of meetings with creditors in an attempt to resolve the situation that had arisen. He claims that there was some fraud or trickery involved in the Plaintiffs taking the opportunity of his presence in Hong Kong to take these proceedings against him and pursue them to judgment. He says a part of these activities of the Plaintiffs was the taking out of a Prohibition Order against him. The evidence furnished on Affidavit in pursuit of this application is quite incomplete, but some essential facts may be pieced together from what evidence there is. Neither the Prohibition Order nor the application for it have been placed before me in evidence nor has the relevant legislation. I therefore have no evidence of its force or effect. It may be some Order which a Plaintiff may apply for to prevent a Defendant or perhaps a prospective Defendant, from leaving the Colony pending the institutions of proceedings against him. Perhaps some species of the ancient Writ *ne exeat regno*. I do not know. I do however have in evidence a copy of a judgment given by the Hon. Mr. Justice Penlington on the 8th May, 1985 which sheds some light on this aspect of the matter. That was an application by the present Defendant to discharge the Prohibition Order. In the end the learned judge did discharge it on that day. I will return to that matter later.

Other complaints of the Defendant are that he was not liable for this debt and that he had not been served with the appropriate process. In an Affidavit he deposes that the "default judgment" against him was the result of his not filing any Defence nor defending the Order 14 application. This is quite contrary to other evidence before me.

It is to be noted that the Order 14 judgment was never appealed against in Hong Kong. In this application I am not of course concerned to go behind the judgment and investigate the merits or otherwise of the Plaintiff's claim which have been concluded by the judgment, except in so far as this is relevant to the considerations mentioned in Section 6 of the Act to which I will return. The Defendant cannot use this application to challenge the Hong Kong judgment. He must do that in Hong Kong by the appropriate procedure.

On the evidence I am satisfied that the Defendant was in partnership with his brother, the 1st Defendant and was liable jointly with him and severally to the Plaintiff for advances made to the partnership. There is ample evidence of this. There is a Letter of Guarantee given by the Defendants to the Plaintiffs and signed by both, there is a Promissory Note given by both Defendants to the Plaintiff and signed by both; there is a document headed "Letter of Hypothecation/ Letter of Charge/Undertaking for Credit Facilities" in which the name of the borrower is shown as "Shantilal Brothers (Hong Kong) importers, exporters and commission agents." The borrower is described as a Partnership Company. There appears on the document the number of the firm's commercial registration and the address where the business is carried on in Hong Kong, and the document is again signed by both Defendants who are described as applicants. There is further a specimen signature document in which both Defendants appear as authorized

signatories, each of them having signed under a stamp reading "Shantilal Brothers (Hong Kong)" and above the description "partner." The judgment of Mr. Justice Penlington recites at paragraph 1:-

> "It was not disputed that Defendant was a partner in the firm in Hong Kong which was registered in 1964."

His Lordship makes a finding that the Defendant and his brother were guarantors evidenced by a Letter of Guarantee and a Promissory Note. In paragraph 8 the judgment says:-

> "The Defendant does not dispute liability but disputes quantum."

In paragraph 11 the judgment says:-

> "When Order 44A was introduced last year, it was not intended to apply to anyone who was neither resident in Hong Kong nor doing business here. The Defendant is not resident here and was under no obligation to come to Hong Kong. However he is clearly doing business here and the Order does apply."

It is nothing to the point, if it be the fact as the Defendant claims that his brother incurred these debts and he had nothing to do with it and also that the Plaintiff should have exhausted its remedy against the brother who, incidentally, is said to have absconded and disappeared. It is trite law that in partnerships, each partner is severally as well as jointly liable for the whole of the debt, and the creditor may choose which debtor to pursue, according no doubt to which one he thinks offers the better prospect of recovery. The other joint debtor is left to assert his rights of contribution against his joint debtor. I therefore hold that the Hong Kong Court had jurisdiction to give judgment against one of the two joint debtors.

It is not entirely clear how long the Defendant was in Hong Kong but the judgment of Justice Penlington recites that "the Defendant came to Hong Kong on the 4th January 1985 to try and resolve the problem and that he saw the creditors and held a number of meetings with creditors in January, March, April, and at least to the 9th of May, 1985." The Prohibition Order was discharged on the 8th May, 1985. The Defendant has not shown the basis for the Plaintiff's application for that Order nor has he embarked on any evidence as to how the taking out of that Order has affected his own position, except presumably, though this is not known in any evidence, preventing him from leaving the colony. In his submission the Defendant talks about being arrested. But there is his own evidence that he attended creditors meetings on 9.4. and 3.5.85, and the Order was discharged on 8.5.85, more than a month before the Order 14 judgment.

With regard to the Defendant's complaints that he was not served with the necessary documents and was not represented in the proceedings leading up to and including the default judgment, he specifically in his affidavit sworn on the

19.10.88 says: "I am precluded from filing a defence because I have never been served with a copy of the re-amended Statement of Claim."

A

In an affidavit sworn the 4.10.88 he says:

> "that the judgment, entered is a default judgment as I did not file any defence to the claim and neither did I defend the application Order 14. The re-amended Statement of Claim was also not served on me and neither did I instruct Solicitors to appear for me on the hearing of Order 14 Summons."

B

The Plaintiff's affidavit and submission claim that the Defendant was represented at the hearing of the Order 14 summons. This is not challenged in the Defendant's submission in reply. There is evidence that the Writ was issued on the 28th March, 1985 to which an acknowledgement of service was filed on the 11th April, 1985 by the Defendant's Solicitors, Messrs. So and Karbhari. Incidentally the evidence C shows that those Solicitors attended some of those meetings of creditors already referred to. The Statement of Claim was amended in quite minor particulars, and contrary to the Defendant's allegation there is evidence that the re-amended Statement of Claim was served on his Solicitors on the 22nd April, 1985. Again contrary to his Affidavit his Solicitors filed a Defence to the claim on the 25th April, 1985. The first paragraph of that Defence reads as follows:-

D

> "The second named Defendant herein was at all material times and is a non resident partner in the firm of Shantilal Brothers (HK) hereinafter referred to as the firm".

The second paragraph of the Defence denies the indebtedness and puts the Plaintiff to strict proof and the remaining paragraphs recite the fact that he has received a E number of letters of demand from the Plaintiff on different dates which show different amounts as owing to them. On the 23rd May, 1985, the Plaintiffs filed a Summons for Summary Judgment under Order 14 returnable on the 10th June, 1985. That Summons was served on the Defendant's Solicitor on the 25th May, 1985. A supporting affirmation by the Plaintiff's Manager was also served on the Defendant's Solicitors. On the 10th June, 1985 Master Betts of the Supreme F Court gave judgment pursuant to O 14. Contrary to the Defendant's allegation in his Affidavit that judgment, in addition to interest, also awarded the Plaintiff costs. The judgment was served on the Defendant's Solicitors on the 4th July 1985. The Plaintiff filed its bill of costs for taxation. There is no evidence that that was served on the Defendant's Solicitors but it contains the usual items for service, and the allocatur which was issued by the Taxing Master on the 9th G December 1985 was served on the Defendant's Solicitors on the 12th December 1985. The bill of costs of the Plaintiff which runs to some 150 or so items contains numerous items of dealings with the Defendant's Solicitors in the course of the action. I reject the evidence of the Defendant on this point and accept that of the Plaintiff.

The Defendant apparently proved elusive to the Plaintiff's effort to enforce that judgment. But the Defendant himself deposes that in April, 1988 he received a letter demanding payment of the judgment, interest and taxed costs from Australian Solicitors addressed to him, "c/-' Shantilal Brothers (Australia)" in Sydney and a letter in similar terms from Fiji Solicitors addressed to him in Suva. The Defendant having failed to challenge the jurisdiction of the Hong Kong Court by entering a conditional appearance or otherwise and being represented by Solicitors certainly became aware of the judgment and the taxation of costs. He has taken no steps at any time to challenge that judgment by seeking to have it set aside under Order 14 or appealing against it.

The application for registration was made *exparte* in accordance with the rules. Order 71 of the High Court Rules 1988 makes the rules prescribed under the Reciprocal Enforcement of Judgments Act (Cap 39) applicable to proceedings under the Act (Cap 40).

I now turn to a consideration of Section 6 of the Act and an examination of the criteria there set out in relation to the present application.

The Section is headed as follows:-

> "Cases in which registered judgments must or may be set aside"
>
> 6.-(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of judgment -
>
> (a) shall be set aside if the registering court is satisfied -
>
> (i) that the judgment is not a judgment to which this Part applies (or) was registered in contravention of foregoing provisions of this Act; or
>
> (ii) that the courts of the country of original court had no jurisdiction the circumstances of the case; or
>
> (iii) that the judgment debtor being defendant in the proceedings in original court did not (notwithstanding that process may have been duly served on him in accordance with the law 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; or
>
> (iv) that the judgment was obtained by fraud; or
>
> (v) that the enforcement of the judgment would be contrary to public policy in the country of the

registering court; or

(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made;

(b) .....

As to Section 6 (1)(a)(i) I have already dealt with both limbs of this.

As to (ii) this is the jurisdiction question.

Section 6 (2) provides:

"(2) For the purposes of this section the courts of the country of the original court shall ....be deemed to have had jurisdiction-

(a) in the case of a judgment given in action in personam;

(i) if the judgment debtor, being a Defendant in the original Court, submitted to the jurisdiction of that Court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting or obtaining the release of property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of that Court; or ....

(iii) if the judgment debtor, being a Defendant in the original Court, had, before the commencement of the proceedings, agreed in respect of the subject matter of the proceedings to submit to the jurisdiction of that Court or of the Courts of the country of that Court; or .....

(iv) if the judgment debtor, being a Defendant in the original Court, had an office or place of business in the country of that Court, and the proceedings in that Court were in respect of a transaction effected through or at that office or place."

With regard to (i) I note that the Defendant submitted to the jurisdiction of the Hong Kong court by voluntarily appearing in the proceedings. As stated above the Defendant has endeavoured to make a case that he was somehow tricked into being available to be served with the process by virtue of the Protection Order and that it is some sort of a dirty trick on the part of the Plaintiffs to have instituted proceedings against him in those circumstances. I have already referred to the findings and considerations relating to that aspect of the matter evidenced by the fact that he has not followed that complaint of duress, as it were, by taking

any steps to challenge the judgment in the original Court. Nor has he appeared conditionally. With regard to (ii) I have already referred to contractual documents underlying the Plaintiff's claim. In the Letter of Hypothecation etc. there appears the following paragraph 22(b):-

> "I/We recognize and affirm that the local courts shall be competent to adjudicate on any disagreement, dispute, or claim arising from this undertaking……"

This of course is in addition to the fact that the debt was incurred in Hong Kong and the underlying documents were executed in Hong Kong where the Defendant and his partner declared themselves to be conducting business in partnership. This also applies to paragraph (v).

Returning to Section 6 (1) (a) (ii) I therefore hold that the original court had jurisdiction in the circumstances of the case. As to (6) (1) (a) (iii) for reasons I have already stated I hold that the Defendant did receive notice of the proceedings in sufficient time to enable him to defend the same. Also that he did appear by Solicitors. As to 6 (1) (a) (iv) the defendant raises a general allegation that there has been fraud. However, it is well established that fraud must be pleaded on every occasion on which it is alleged with the greatest particularity. This has not been done here. The Defendant has not pleaded, let alone established, in what way or by what actions the Plaintiff is said to have committed what particular fraud upon him and how this has led to the giving of the judgment in question. If his allegation is based on the proposition that the Plaintiff took out a Protection Order, and of course, I am only guessing as to this, then I have already dealt with it. *Inter alia* the Order 14 judgment was given over a month after the Protection Order was discharged. The defendant, who is the applicant here carries the onus of proof and Section 6 of the Act provides that the registration "shall be set aside if the registering Court is satisfied" of the matters there stated. The defendant has failed to satisfy me that the judgment was obtained by fraud. As to 6 (1)(a)(v) nothing has been put to satisfy me that the enforcement of the judgment would be contrary to public policy in Fiji.

I should mention one other matter raised by the Defendant. Section 3 of the Act provides that a judgment of a superior Court of a foreign country shall be a judgment to which this part applies "if it is final and conclusive as between the parties thereto". The Defendant claims that this being an Order 14 Judgment it is not a final judgment. It is true that in one sense and for some purposes an Order 14 Judgment is not final in that it is open to being set aside in certain circumstances and of course, like all judgments, open to appeal, but of course a judgment is final even though it is subject to appeal.

I reject the proposition that because a judgment is capable of being set aside, it can never be enforced, be it by registration or otherwise.

Moreover, Section 3(3) of the Act provides:-

"For he purposes of this section a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it or that it may still be subject to appeal in the courts of the courts of the original court."

For the foregoing reasons I hold that the judgment was validly registered in accordance with the Act and the Rules and no cause has been shown for setting such registration aside. Accordingly the application to do so is dismissed with costs to be taxed if not agreed.

(Application dismissed.)