IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 75/94

BETWEEN: D. GOKAL & COMPANY LIMITED, a duly incorporated company having its registered office in Suva, Fiji:

Plaintiff

A N D: JOSEPH P. FRUEAN and TAGAILIMA FRUEAN, both of Lotopa, Business Persons:

Defendants

Counsel: P. Meredith for defendants in support of motion
P.A. Fepuleai for plaintiff to oppose

Hearing: 4th May 1994

Decision: 30th May 1994

DECISION OF SAPOLU, CJ

This is a motion by the defendants to strike out the plaintiff's statement of claim. Even though there are three separate grounds expressly advanced in support the motion, I think the first two grounds are inter-related and can be dealt with together. The grounds stated are these :

(a) That the plaintiff has already obtained judgment in the High Court of American Samoa for the debt on which it is now suing the defendants in Western Samoa. Therefore the proper procedure for the plaintiff to follow is to apply for registration of their American Samoan judgment in Western Samoa under the provisions of the Western Samoa

Reciprocal Enforcement of Judgments Act 1970. In that way the plaintiff may obtain enforcement of its American Samoan judgment in Western Samoa. As the American Samoan judgment cannot be registered in Western Samoa because there is no reciprocity afforded to American Samoan judgments under the Western Samoan Reciprocal Enforcement of Judgments Act 1970, that should be the end of the plaintiff's claim.

(b) For this Court to enter another judgment in Western Samoa against the defendants would effectively mean that two judgments have been entered against the defendants in respect of one claim.

(c) The plaintiff's claim is time barred as it has been filed outside of the limitation period of six years provided under section 6 of the Limitation Act 1975.

I will deal now with the first two grounds of the motion to strike out the statement of claim. In doing so, it must be made clear that what the plaintiff has done is to bring fresh proceedings in Western Samoa based on the original cause of action for which it had obtained a consent judgment in the High Court of American Samoa on 22 February 1990 for US$19,506.52. Under the common law doctrine of non-merger, the original cause of action does not merge in the foreign judgment and therefore extinguished by the foreign judgment. The original cause of action in a foreigh judgment may still be re-litigated in the Courts of Western Samoa unless the foreign judgment has been satisfied. This is different from a domestic judgment which is a judgment of a domestic Court where the cause of action is merged in the judgment and

the successful plaintiff cannot sue again in Western Samoa on the same cause of action. I will refer now to some of the relevant English authorities on this question.

In Cheshire and North Private International Law, 10th edn 631 (which is the latest edition of that work available to the Court) it is provided :

> "It is a rule of domestic English law that a plaintiff who
> "has obtained judgment in England against a defendant is
> "barred from suing again on the original cause of action.
> "The original cause of action is merged in the judgment -
> "transit in rem judicatum - and therefore extinguished.
> "It has been held, however, in a series of authorities,
> "that this is not so in the case of foreign judgments.
> "Such a judgment does not, in the view of English law,
> "occasion a merger of the original cause of action, and
> "therefore the plaintiff has his option, either to resort
> "to the original ground of action or to sue on the judgment
> "recovered".

In the chapter on conflict of laws in 8 Halsburys Laws of England, 4th edn para 716 it is provided :

> "As a foreign judgment constitutes a simple contract debt
> "only, there is no merger of the original cause of action,
> "and it is therefore open to the plaintiff to sue either
> "on the foreign judgment or on the original cause of
> "action on which it is based, unless the judgment has
> "been satisfied".

The doctrine of non-merger was also the subject of opinions expressed in the judgments of the House of Lords in the case of Carl-Zeiss Stiftung v Rayner [1966] 2 All E.R 536. Even though Lord Wilberforce did not appear to favour the continued existence of the common law doctrine of non-merger three other Law Lords in the same case agreed that the doctrine is still part of English common law. Lord Reid at page 535 says :

"At one time foreign judgments were regarded as being only "evidence and not conclusive; but at least since the decision "in **Godard v Gray (1970) L.R 6 Q.B 139** they have been regarded "as equally conclusive with English judgments (subject to any "difference there may be resulting from there being no merger "of a cause of action in a foreign judgment)".

At page 561 Lord Hodson says :

"Another argument against the estopple was put forward by the "appellant which I do not find it possible to accept. It was "based on the rule which still subsists in English law..... "that the cause of action in a foreign case does not merge in "the judgment but remains available to be sued on, the foreign "judgment being duly evidence of the cause of action not, as "in this country, that in which the cause of action has merged".

And at page 567 Lord Guest says :

"The first matter to be observed is that a foreign judgment "does not have the same finality and conclusiveness as an "English judgment. In the case of the latter the cause of "action is merged with the judgment, so that action can only "be brought to enforce the judgment. Not so in the case of "foreign judgments. Sub-rule 183 of **Dicey**, page 996 states : "'A foreign judgment does not of itself extinguish the "'cause of action in respect of which judgment is given'. "The plaintiff, therefore, has the option either of suing on "the judgment or on the original cause of action. The doctrine of "non-merger stated in **Nouvion v Freeman (1889) 15 App. Cas 1** "is still good law".

And in the case of **Flynn v Flynn [1969] 2 Ch 403 at 412**, Buckley J says :

"Where a judgment is obtained in a foreign court the cause of "action does not merge in the judgment. Thereafter the "successful party can either re-ligitate his original cause of "action in this jurisdiction, or he can bring an action in this "jurisdiction on the foreign judgment, those being, as I under- "stand the law, two distinct causes of action available to him "in this country".

It is therefore clear that under English common law the original cause of action does not merge in the foreign judgment and thereby extinguished. The original cause of action is still alive and may be re-litigated in England. The other option of bringing an action on the foreign judgment does not arise in this case and so I say nothing about it.

The next question is whether the Reciprocal Enforcement of Judgments Act 1970 has altered or abrogated the common law doctrine of non-merger. The point here is that the application of the Act has not been extended to judgments of any American Samoan Court so that American Samoan judgments are not registrable and enforceable under the Act. In other words the Act does not apply to American Samoan judgments. Counsel for the defendants has therefore submitted that the American Samoan judgment in this case would either be registrable under the provisions of the Act and thereby become enforceable under the Act, or else the present claim cannot be entertained by the Western Samoan Courts and must therefore be struck out. I have examined the provisions of the Reciprocal Enforcement of Judgments Act 1970 and I have found no expressed words or clear implication in the Act to show that the doctrine of non-merger of a cause of action in a foreign judgment (to which the Act does not apply) has been altered or abrogated. I leave open the question whether the doctrine of non-merger has been abrogated by the Act in respect of a foreign judgment to which the Act applies as that question does not arise in this case.

In construing this Act I have borne in mind two interrelated presumptions of statutory interpretation. These are, a statute is presumed not to alter the common law or abrogate common law rights unless it is clearly shown that the legislature intended such a result. I have found no expressed

words or clear implication in the provisions of the Reciprocal Enforcement of Judgments Act 1970 to suggest that the legislature intended to alter or abrogate the common law doctrine of non-merger in respect of foreign judgments to which the registration and enforcement provisions of the Act do not apply. If such a result was intended, I would have expected the legislature to express its intention in the Act in unmistakably clear language. The legislature has not done so in this case. Furthermore, the doctrine of non-merger confers rights at common law on the individual to bring fresh proceedings on the original cause of action on which a foreign judgment is founded. The abrogation of such common law rights by statute is not something to be lightly entertained unless the legislature has expressed itself in the statute in no uncertain terms and with irresistable clarity. And that should not have been difficult for the legislature to do in this case if its intention was to abrogate the common law doctrine of non-merger in respect of foreign judgments to which the Act does not apply and thereby override the common law rights used to be enjoyed under that doctrine. I find no such intention in this case. I also reject any suggestion that the Act is an exhaustive codification of the common law which existed at the time it came into effect. I refer in this connection to **8 Halsburys Laws of England, 4th edn paras 715, 716, 761** which refer to the English Foreign Judgments (Reciprocal Enforcement) Act 1933.

In all then, I have come to the view that the first two grounds of the motion to strike out the statement of claim cannot succeed.

As to the third ground of the motion, it is not precisely clear on the information before the Court whether the action in this case is now time barred under the Limitation Act 1975. The statement of claim simply

alleges that the transaction between the plaintiff and the defendants took place in 1988 and the present action was filed in the Court registry here in Apia on 25 February 1994. It is therefore not clear when in 1988 this transaction was concluded and whether the limitation period of six years had expired before the present action was commenced. This issue should become clear at the substantive hearing when evidence is called.

Therefore the third ground of the motion to strike out the statement of claim also cannot succeed.

There is one more question which, though not stated in the grounds of the motion, was raised by counsel for the defendants in the course of his argument. He says that the action in this case arose out of a transaction between the plaintiff which is a Fijian company and the defendants while carrying on business under the style of Daily Shoppers in American Samoa. What happened was that the plaintiff supplied goods from Fiji to the defendants while carrying on business in American Samoa. Thus counsel for the defendants contends that the plaintiff's cause of action did not arise in Western Samoa and therefore the Courts of this country have no jurisdiction to entertain and hear the claim. In order to deal fully with this contention, it must be stated that it is clear from the documentation before the Court that the defendants are now resident at Lotopa in Western Samoa having returned from American Samoa to Western Samoa in 1988. The plaintiff's claim and summons were served on the defendants at Moamoa-tai in Western Samoa. There is no complaint about the service of the claim and summons on the defendants. There is also no complaint that the hearing of the plaintiff's claim in this country would work an injustice because it would be oppresive or vexatious to the defendants or would be an abuse of the Court's process.

It is clear to me that the presence of the defendants in this country, being now resident here, when the claim and summons were served on them confers jurisdiction on this Court to hear the claim even though the cause of action did arise outside of Western Samoa. This is the true position unless the defendants can satisfy the Court, which they have not done, that these proceedings ought to be stayed as the continuance of the claim in Western Samoa would work an injustice to the defendants because it would be oppressive or vexatious to the defendants, or that the proceedings would be an abuse of the Court process. It is also for the defendants to satisfy the Court, which again they have not done, that a stay of proceedings would not work an injustice to the plaintiff. I will refer now to two English cases.

The first is Colt Industries Inv v Sarlie [1966] 1 All E.R 673. The cause of action in that case appears to have arisen in the United States of America. The plaintiff was an American company incorporated in the State of Pennsylvania and the defendant was a Swedish and a naturalised American citizen. The plaintiff brought an action for damages against the defendant in the Supreme Court of the State of New York and obtained judgment against the defendant. Then the defendant went to England on a temporary visit when the plaintiff served him in London with a writ claiming the amount for which the plaintiff had obtained judgment against the defendnat in the Supreme Court of the State of New York. It was argued on behalf of the defendant that as the defendant was merely a temporary visitor and not a resident of England and has not otherwise submitted to the jurisdiction of the English Courts, therefore the English Court in that case had nc jurisdiction to decide the plaintiff's claim merely because a writ had been served on the defendant.

In reply to what was argued by counsel for the defendant, Lyell J held :

> "The first authority to which I was referred was Dicey's "Conflict of Laws (7th edn), r.25, p.175, which reads as "follows : 'When a defendant in an action in personam is, "'at the time for the service of the writ, in England, "'the court has jurisdiction in respect of any cause of "'action, in whatever country such cause of action arises', "subject, however, to two exceptions which have no relevance "to this case. That same rule is stated by Mr Cheshire in "his work, though he does in fact criticise it, and it is, "perhaps, on that criticism that counsel for the defendant "to some extent founds his argument. I have obtained a "copy of the last edition of Professor Dicey's Conflict of "Laws which was edited by him; and that edition was "published in 1922 and r.29 reads as follows (3rd edn) "p.241 : 'When a defendant in an action in personam is, "'at the time for the service of that writ, in England, the "'court has jurisdiction in respect of any cause of action, "'in whatever country such cause of action arises'; that is "in fact, identical with the rule as stated in the 7th "edition.... That rule, as far as my own experience goes, "has always been acted on by practitioners".

The second case was Maharanee of Baroda v Wildenstein [1972] 2 All E.R 689. In that case both the plaintiff and the defendant lived in Paris where the plaintiff purchased a painting from the defendant on the understanding that the painting was a work by one Boucher. On a visit to England where she kept a stud farm in Ireland, the plaintiff was told by an English expert in paintings that her painting was not a Boucher. A writ was then taken out against the defendant by the plaintiff's solicitors in England. And when the defendant came to England to watch the Ascot horse races, the plaintiff's solicitors served the writ on him at the Ascot race course. It is clear from this case that the transaction which was the subject matter of the writ took place in Paris where the plaintiff and the defendant lived but the writ was taken out and served against the defendant in England where both the

plaintiff and defendant were on temporary visits. The case went up to the English Court of Appeal.

In dealing with the case Lord Denning MR at page 693 has this to say :

> "If a defendant is properly served with a writ whilst he is "in this country, albeit on a short visit, the plaintiff is "prima facie entitled to continue the proceedings to the "end. He has validly invoked the jurisdiction of the Queens "Courts; and he is entitled to require those courts to "proceed to adjudicate on his claim. The courts should not "strike it out unless it comes within one of the acknowledged "grounds such as that it is vexatious or oppressive, or "otherwise an abuse of the process of the court; see RSC "Ord. 18, r.19. It does not become within those grounds "simply because the writ is served on the defendant whilst "he is on a visit to this country. If his statement of claim "discloses a reasonable cause of action, he is entitled to "pursue it here, even though it did arise in a foreign country. "It is not to be stayed unless it would plainly be unjust to "the defendant to require him to come here to fight it, and "that injustice is so great as to outweigh the right of the "plaintiff to continue it here".

Lord Denning MR then goes on to refer to the essential nature of the issue in the case which was whether the painting was a genuine Boucher or not as an issue of fact which can be dealt with under French law as well as English law and therefore not solely a French issue. His Lordship also referred to the international character of the art world and the fact that the plaintiff and the defendant were both citizens of the world and both had some association with England as well as to the difficulties, if not injustice, in requiring the plaintiff to seek redress in the French Courts. In the end, it was decided that the plaintiff's case should continue in England. Edmund Davies and Stephenson L.JJ agreed with Lord Denning MR.

I would also refer to 8 Halsburys Laws of England, para 406 which contains this statement :

> "In general, the English court has jurisdiction in actions "in personam against any person who is present in England "when the writ of summons or other originating process is "served upon him. As a general rule the domicile, residence "and nationality of the parties are all immaterial. In "certain cases the court may make an order for substituted "service or for service outside the jurisdiction".

It is clear from the English authorities referred to that under English common law the presence of a defendant in England and service of a writ upon him confers jurisdiction on the English Courts. That is so even though the cause of action against the defendant did arise in a foreign country unless the English Courts upon being satisfied by the defendant on one of the acknowledged grounds, decides to order a stay of proceedings.

In this case, the presence of the defendants in this country is neither temporary, casual, nor merely fleeting. They are now resident in this country and I see no injustice in continuing the plaintiff's action in this country. The plaintiff's claim and summons have been served on them. They also have no complaint except to say that the plaintiff's cause of action did not arise in Western Samoa but in a foreign country. The issue in this case is also one of sale of goods which can be dealt with by this Court without undue inconvenience to the parties.

In all then the argument by counsel for the defendant's that this Court has no jurisdiction because the cause of action did not arise in Western Samoa but in a foreign country must also fail.

The motion to strike out the statement of claim is therefore dismissed and the defendants are ordered to pay $150 costs to the plaintiff for these proceedings.

I.F.
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CHIEF JUSTICE