SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 of 1991

BETWEEN:

ETOILE COMMERCIAL S.A.

Appellant

and

OWENS BANK LIMITED

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Honourable Mr. C.M.Dennis Byron - Justice of Appeal
The Honourable Dr. Nicholas J.O.Liverpool - Justice of Appeal

Appearances: Mr. Stuart Isaacs Q.C. and Mr. Bertram Commissiong for the Appellant
Mr. Karl Hudson-Phillips Q.C. and Miss Rene Baptiste for the Respondent

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1992: December 08;
1993: April 5.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

On the 10th May 1983, Etoile Commerciale S.A. (Etoile) instituted legal proceedings against Owens Bank Limited (Owens) in the Commercial Court of Paris with respect to a counter guarantee alleged to have been provided by Owens to Etoile. On the 11th May 1984, Etoile obtained from that court a judgment which was subsequently reviewed and affirmed by judgments of the Court of Appeal of Paris.

On the 29th March 1990, Etoile sought to enforce these foreign (French) judgments by instituting suit 159 of 1990 in the High Court of Justice of Saint Vincent and the Grenadines. There and by judgment dated 13th May 1991, Joseph J. ordered Etoile to produce the counter guarantee for inspection. Owens was dissatisfied with that judgment and appealed to this Court against it.

In the High Court and in this Court, the issues were whether the counter guarantee was falsified with the result that the foreign judgment was obtained by fraud and was therefore unenforceable here and whether the order for the production of the counter guarantee was necessary for the purpose of determining the issue of fraud. By judgment delivered on the 6th April 1992, this Court decided that the order was not necessary because the issue of fraud had already been determined by the French Courts and the said High Court, and Owens was therefore estopped (per *rem judicatam*) from raising or relitigating that issue. This Court also decided that in any case, it would be an abuse of the process of the Court to permit Owens to relitigate the issue of fraud in this jurisdiction.

Owens is dissatisfied with the judgment of this Court and has applied for leave to appeal to Her Majesty in Council from that judgment. The application is made under section 99(2)(a) of the Saint Vincent and the Grenadines Constitution Order 1979 which provides that -

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases -
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> (a) decisions in any civil proceedings where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council;......"

We are therefore required to form an opinion as to whether the questions involved in the proposed appeal ought to be submitted to Her Majesty in Council by reason of their "great general or public importance or otherwise". For this purpose, we were referred to the proposed grounds of appeal from which I would select grounds (2) and (3) which read as follows:

"2. The Honourable Court of Appeal erred in finding and/or in holding in effect that the circumstances of this matter under consideration were such as in effect to create an exception to the ancient rule laid down by Abouloff v Oppenheimer (1882) 10 QBD 295, Vadala v Lawes (1890) 25 QBD 310, recently confirmed in Jet Holdings Inc. v Patel (1989) 2 All.E.R.648.

3. That in the instant case, proceedings in a foreign jurisdiction, to wit, the Republic of France, being in the nature of review proceedings were sufficient to preclude the Defendant/Respondent from relying on the issue of fraud in enforcement proceedings in Saint Vincent and the Grenadines."

I would interpret these two grounds of appeal as involving the questions (1) whether and to what extent a local Court (considering the question whether an issue has been finally determined by a foreign court and is *res judicata*) should be concerned with the procedure adopted by the foreign court for determining that issue and (2) whether in local proceedings which have been instituted to enforce a foreign judgment and where the issue is whether the foreign judgment has been obtained by fraud, the fact that a foreign Court has determined that issue can preclude the judgment debtor from raising or relitigating that issue.

With regard to the first question, Counsel for Owens drew attention to the case of **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No. 2) (1967) 1 A.C. 855 where Lord Reid said (at 918):

"I can see no reason in principle why we should deny the possibility of issue estoppel based on a foreign judgment, but there appear to me to be at least three reasons for being cautious in any particular case. In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his full case in a trivial case: it might be most unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in that case went against him."

With regard to the second question, Counsel for Owens relies on the decision of the English Court of Appeal in **Jet Holdings Inc. v Patel** (1989) 2 A.E.R. 648. There, Straughton L.J. (delivering the judgment of the Court) said (at p 652):

" If the rule is that a foreign judgment obtained by fraud is not enforceable, it cannot matter that in the view of the foreign court there was no fraud. But this doctrine makes a great inroad into the objective, which is generally desirable, of enforcing foreign judgments where in the eyes of English law the foreign court had jurisdiction. The defendant may have been served in the foreign country, entered an appearance, given evidence, been disbelieved and had judgment entered against him. If he asserts that the plaintiff's claim and evidence were fraudulent that issue must be tried all over again in enforcement proceedings. The lesson for the plaintiff is that he should in the first place bring his action where he expects to be able to enforce a judgment.

That doctrine has encountered criticism from academic writers: see **Dicey and Morris p 469, footnote 66.** A possible view which is taken by some is that the fraud relied on must be extraneous or collateral to the dispute which the foreign court determines. But in my judgment it is a hundred years too late for this court to take that view. The decisions in **Abouloff v Oppenheimer & Co.** (1882) 10 QBD 295, (1881-5) All ER Rep. 307 and **Vadala v Lawes** (1890) 25 QBD 310, (1886-90) All ER Rep 853 show that a foreign judgment cannot be enforced if it was obtained by fraud, even though the allegation of fraud was investigated and rejected by the foreign court."

On the other hand, this Court was guided by the decision of the English Court of Appeal in **House of Spring Garden Ltd v Waite** (1990) 2 A.E.R. 991. There Stuart-smith L.J. said (at 998)

> " The question is whether it would be in the interests of justice and public policy to allow the issue of fraud to be litigated again in this court, it having been tried and determined by Egan J in Ireland. In my judgment it would not; indeed, I think it would be a travesty of justice. Not only would the plaintiffs be required to relitigate matters which have twice been extensively investigated and decided in their favour in the natural forum, but it would run the risk of inconsistent verdicts being reached, not only as between the English and Irish courts, but as between the defendants themselves. The Waites have not appealed Sir Peter Pain's judgment, and they were quite right not to do so. The plaintiffs will no doubt proceed to execute their judgment against them. What could be a greater source of injustice, if in years to come, when the issue is finally decided, a different decision is reached in Mr. Macleod's case? Public policy requires that there should be an end of litigation and that a litigant should not be vexed more than once in the same cause."

In **Owens Bank v Bracco** (1992) 2 W.L.R. 621, the House of Lords approved and applied the decisions in **Abouloff's** case and **Vadala's** case upon which the decision in **Jet Holdings'** case was based. The sole issue before the House was whether the resistance of the statutory enforcement of a foreign (Vincentian) judgment on the ground that the judgment was obtained by fraud was governed by the strict common law rule which applies to the resistance of the enforcement of a local (English) judgment on the same ground and whereunder the judgment debtor is required to prove fraud only by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered. Lord Bridge (delivering the judgment of the House) asserted that this was the sole issue before the House when he said (at p 627):

> " The question at issue in this appeal is whether a defendant who is seeking to resist the enforcement against him of a foreign judgment, either by an action on the foreign judgment at common law or under the statutory machinery for the enforcement of foreign judgments, is placed in the same position as if he were a plaintiff in an action seeking to set aside the judgment of an English court on the ground that it was obtained by fraud and can therefore only rely upon evidence which satisfies the English rule."

It is in answer to that question that Lord Bridge said (at p.632):

> " An English judgment, subject to any available appellate procedures, is final and conclusive between the parties as to the issues which it decides. It is in order to preserve this finality that any attempt to reopen litigation, once concluded, even on the ground that judgment was obtained by fraud, has to be confined within such very restrictive limits. In the decisions in **Abouloff v Oppenheimer & Co.** and **Vadala v Lawes** the common law courts declined to accord the same finality to foreign judgments, but preferred to give primacy to the principle that fraud unravels everything."

House of Spring Garden Ltd v Waite was cited in argument before the House where nothing was said in criticism of it. In

Owens Bank Ltd v Bracco (1991) 4 A.E.R. 883 Parker L.J. (delivering the judgment of the Court of Appeal) said (at p 857):

> " In our judgment, therefore, **House of Spring Gardens v Waite** does lay down a general principle, which is binding upon us, that a decision by a foreign court (whether or not a court of the country from which the judgment originates) that a foreign judgment was (or was not) obtained by fraud *can* create an estoppel in English proceedings to enforce that judgment, although it will always be necessary to be cautious in the particular case. We do not accept Mr. Mann's submission, unsupported by authority, that, as a matter of policy, no issue estoppel can arise in enforcement proceedings."

We are therefore left to wonder whether a judgment debtor who has repeatedly and unsuccessfully relitigated in foreign courts the issue that a foreign judgment against him was obtained by fraud is never estopped (per rem judicatam) from relitigating that issue for the first time in the local Court where the foreign judgment is sought to be enforced.

In this jurisdiction, where several international companies are domiciled and transact business, it is necessary to clarify the law governing the circumstances under which the enforcement of a foreign judgment may be resisted on the ground that it was obtained by fraud. I am therefore of the opinion that the question involved in the proposed appeal is "one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council."

Accordingly, I would grant Owens leave to appeal to Her Majesty in Council from our said judgment and would grant such leave subject to the terms and conditions prescribed by **rule 5** of the **West Indies Associated States (Appeals to Privy Council) Order 1967.** I would fix the amount of the security at the maximum sum prescribed and unless otherwise agreed between the parties, I would fix all times and periods mentioned in the rule at 90 days. The costs of the application shall be costs in the appeal.

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SIR VINCENT FLOISSAC
Chief Justice

I concur.

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C.M. DENNIS BYRON
Justice of Appeal

I concur.

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NICHOLAS J.O. LIVERPOOL
Justice of Appeal