

EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2015/0714

BETWEEN:

CANISBY LIMITED

Claimant

and

FLATPOINT DEVELOPMENT LIMITED

Defendant

APPEARANCES:

Ms. Rika Bird for the Claimant

Ms. Jacqueline L. Walwyn for the Defendant

2021: June 21st

2023: February 2nd

JUDGMENT

- [1] **ROBERTSON, J:** This matter concerns the common law enforcement of a foreign judgment obtained against the Defendant in the Isle of Man.

Relevant Background

- [2] The Claimant is a company incorporated under the laws of the Isle of Man with a registered office at Portland House, Station Street P.O. Box 1, Ballasalla, Isle of Man IM99 6AB. The Claimant, pursuant to a contract dated 15th June 2007 loaned to the Defendant the sum of US\$1,150,000.00 which the

Defendant was required to repay on demand by the Claimant. Pursuant to Clause 14 of the loan agreement, the terms of the contract were to be construed in accordance with Manx Law and the parties thereby submitted to the non-exclusive jurisdiction of the Manx Courts.

- [3] The Claimant contends that by letters dated 19th October 2009 and 15th January 2010, the Claimant demanded repayment of the loan pursuant to the terms of the agreement. The Defendant did not comply with the demand for the repayment of the loan, and the Claimant initiated proceedings against the Defendant in the High Court of the Isle of Man on or around 1st July 2010. The Claimant filed an application for an order for service of the Claim Form outside the jurisdiction of the Isle of Man. The order was granted on 21st July 2010, and the Claimant was permitted by the said order to:
- (a) Serve the Claim Form together with the response pack, a plain copy of the order and a copy of the Claimant's Application dated 20th July 2010 on the Defendant by way of courier service with proof of delivery at the address of 26 Cross Street, St. John's Antigua.
 - (b) The Defendant had 21 days after service of the Claim Form to respond either by:
 - (i) Filing and serving an admission; or
 - (ii) Filing and serving an Acknowledgement of Service and, where an Acknowledgement of Service is filed and served, the Defendant had a further 28 days in which to file and serve its Defence.
- [4] It is the Claimant's case that an acknowledgement of service was filed by the Defendant in which the Defendant contended that it intended to defend the claim and the said acknowledgement was signed by Elisa Gamondi, and it indicated that the said Elisa Gamondi was a Director of the Defendant. However, the said acknowledgement failed to provide an address for service in the Isle of Man. The Claimant filed an application to set aside the acknowledgement of service, and for a default judgment to be entered against the Defendant.
- [5] The Claimant also contends that by way of a correspondence dated 24th September 2010 the Defendant was advised that the Claimant was seeking to have the acknowledgement of service struck out owing to the Defendant failing to provide an address for service in the Isle of Man. The Claimant filed an application to strike out the acknowledgement of service and by instructions from the High Court in the Isle of Man the Claimant was required to serve a copy of the application notice dated 15th September 2010, a copy of the witness statement in support of the application and a copy of the draft order. The application notice dated 15th September 2010 sought an order that the Defendant's acknowledgement of service be set aside, that there be judgment in default in accordance with the provisions of Rule 10.22 (a) of the Rules of the High Court in the Isle of Man as well as the costs associated with the application.

- [6] The Claimant asserts that the Defendant would have not only had the documents served on the Defendant at its registered office as instructed by the Court in the Isle of Man but that the Defendant would have been put on notice of the application by correspondence dated 1st September 2010. In that correspondence the Claimant informed the Defendant that if an address for service in the Isle of Man was not provided within seven days of that correspondence the Claimant intended to take steps to have the acknowledgement of service set aside and for judgment in default to be entered against the Defendant.
- [7] The Claimant's application was successful and the Claimant on 15th October 2010 obtained an order in the High Court of the Isle of Man against the Defendant which order set aside the acknowledgement of service and granted a judgment in default in the sum of USD\$1,150,000.00, court fees in the sum of £765.00 and advocate fees in the sum of £2,350.00. The Claimant initiated these proceedings seeking to enforce this default judgment granted in the Isle of Man against the Defendant for the sums stated or the Eastern Caribbean currency equivalent, interest, and costs.
- [8] The Defendant challenges the judgement obtained and contends that the Defendant has no record of receiving from the Claimant a letter dated 19th October 2009 which letter made a demand for payment of the loan; challenges that the Defendant received service of the application or the letter which was intended to notify the Defendant of the application to set aside the Defendant's acknowledgement of service and that the Claimant was applying for a default judgment to be entered; challenges that the acknowledgement of service bearing the signature of Elisa Gamondi dated 16th August 2010 was in fact signed by Elisa Gamondi and filed on behalf of the Defendant; challenges that the judgment of the High Bailiff of the Isle of Man dated 15th October 2010 was effectively served; and challenges that the Court of the Isle of Man was entitled to give the judgment which was made.
- [9] Additionally, the Defendant contends that since the entered judgment was not served upon the Defendant, the Defendant was therefore not provided with an opportunity to either apply to set the judgment aside or to have the judgment appealed. The Defendant's position is that the Defendant did not know of the default judgment until the proceedings in the Antigua Court were instituted to enforce the said judgment.
- [10] Summarized, the Defendant raises that the enforcement of the default judgment would be in breach of the rules of natural justice, contrary to public policy considerations and against the rule of law.

Relevant Principles of Law

[11] The principal issue before this Court is whether, the default judgment issued by the High Court in the Isle of Man can be recognized and should be enforced by the Court in Antigua and Barbuda. This principal issue gives rise to the following sub-issues:

- (a) Whether the default judgment is for a fixed sum and is final and conclusive; and
- (b) Whether the default judgment can be impeached on the grounds of public policy and/or breaches of natural justice.

[12] The matter of whether the Defendant submitted to the jurisdiction of the Isle of Man so that the Isle of Man was the appropriate jurisdiction for the foreign judgment has been affirmatively determined by our Court of Appeal¹.

[13] It is noted that there are two methods available to enforce a foreign judgment. These methods are through the application of statute or through a lawsuit at common law. The Claimant in these proceedings has adopted the latter approach. The matter of whether the judgment sought to be enforced was a fixed sum can easily be disposed as the judgement is for a stated sum not being a sum in the way of a tax or penalty².

[14] A Claimant's entitlement to enforce a foreign judgment at common law can be negated by a Defendant successfully establishing that the judgment sought to be enforced offends public policy or is in breach of the principles of natural justice. Breaches of natural justice and public policy considerations, are viewed in the context of the local laws. It is noted that these matters can affect the consideration of finality and the conclusive nature of the judgment obtained³.

Whether the Judgment was Final and Conclusive

[15] The test of finality and conclusiveness is the treatment of the judgment by the foreign tribunal as *res judicata*⁴. The test for finality and conclusiveness was stated in the case of **Nouvion v Freeman**⁵, a case of some vintage. In that case that Court noted that:

“In order to establish that [a final and conclusive] judgment has been pronounced, it must be shown that in the court by which it was pronounced, it conclusively, finally and forever

¹ ANUHCVP2016/0006 **Flat Point Development Limited v Canisby Limited**.

² The author of Caribbean Private International Law by Winston Anderson 2nd ed. Para. 10-004.

³ ANUHCVP2016/0006 **Flat Point Development Limited v Canisby Limited**.

⁴ Dicey & Morris on The Conflict of Laws 13th Edition.

⁵ [1889] 15 App. Cas. 1 and cited in Dicey & Morris Conflict of Laws 13th Edition para. 14-021.

established the existence of the debt of which it is sought to be made conclusive evidence in this country so as to make it res judicata between parties.”

- [16] The author of Caribbean Private International Law, The Honourable Mr. Justice Winston Anderson, PhD, eminent jurist, on the matter of the finality of default judgments referred to the case of **Menendez v Sawyer III**⁶ where it was noted that:

“A default judgment may be final and conclusive even though it may be set aside by the court which pronounced it. As Erle, CJ stated in Vanquelin v Bouard (1863) 15 CB NS 341 at 367:

‘The twelfth plea, to the first count, alleges that the judgment in the first count mentioned was a judgment by default for want of appearances by the defendant in the court of the Tribunal of Commerce, and by the law of France would become void as of course on an appearance being entered. I apprehend that every judgment of a foreign court of competent jurisdiction is valid and may be the foundation of an action in our courts, though subject to the contingency that, by adopting a certain course, the party against whom the judgment is obtained might cause it to be vacated or set aside. But until that course has been pursued, the judgment remains in full force and capable of being sued upon.’”

- [17] The recognition of a default judgment can be seen in the case of **Raffle America Inc. v Kingsboro International Holding Co. Ltd**⁷ emanating from the High Court of Barbados. In that case, the court applied the learning in **Russell v Smyth**⁸ which recognized that the requisites of the New York law had been complied with and that the judgment (albeit a default Judgment) was regular, final, and conclusive and had been regularly obtained. Thus, the fact that the judgment was granted in default is immaterial to the categorization of the judgment being final and conclusive. However, there are other considerations which may impact the final and conclusive nature of the judgment.

- [18] In the circumstances of this case the Claimant obtained a default judgment on 15th October 2010. There is no evidence before this Court that the judgment as obtained ought not, on its face, to stand as being final and conclusive in the jurisdiction of the Isle of Man. This Court will return to the matters of the public policy and natural justice considerations as they relate to the judgment obtained.

- [19] The Defendant has raised for the consideration of this Court the fact that the judgment obtained was not a judgment on the merits of the claim and that it is unknown whether the Claimant’s claim is valid.

⁶ Unreported December 21, 1990, Supreme Court of The Bahamas (1383/1987) See: The author of Caribbean Private International Law by Winston Anderson 2nd ed. pp. 251.

⁷ (1993) 52 W.I.R. 37.

⁸ (1842) 11 LJ Ex 308, 9 M & W 810.

In this Court's opinion the primary issue is the determination of the recognition of the default judgment. The determination of this primary issue will impact on the relevance of matter raised regarding the merits of the Claimant's case.

Whether the Enforcement of the Judgment should be Impeached on the Grounds of Breaches of Natural Justice, being Contrary to Public Policy and/or Contrary to the Rule of Law.

Public Policy Considerations.

[20] It is a settled principle in private international law that enforcement of a foreign judgment falls to be examined in accordance with the standards of justice and public policy of the *lex fori*- the local forum⁹.

[21] Public policy consideration was referred to in the case of Richardson v Mellish as being "...a very unruly horse and once you get astride it, you never know where it will carry you."¹⁰

[22] In the case of BCB Holdings Limited, The Belize Bank Limited v The Attorney General of Belize¹¹ the Caribbean Court of Justice (CCJ) considered the public policy exception in a dispute arising from an arbitral award and provided helpful guidance on the matter of public policy. In the **BCB Holdings** case, the CCJ referred to the case of Richardson v Mellish¹² and noted the admonition by Burrough J. was in the words of the CCJ "*especially prescient because the concept of public policy is fluid, open-textured, encompassing potentially a wide variety of acts. It is conditional by time and place. Religion and morality, as well as the fundamental economic, social, political, legal, or foreign affairs of the State in which enforcement is sought, may legitimately ground public policy concerns. Whether those concerns are of a substantive or procedural nature, if they are fundamental to the polity of the enforcing State, they may successfully be invoked*"¹³.

[23] In the **BCB Holdings Limited** case, the CCJ also indicated that "*Public policy ...in the first instance be assessed with reference to the values, aspirations, mores, institutions and conception of cardinal principles of law*". The CCJ in **BCB Holdings Limited** gave further guidance by noting that:

"[24] Where enforcement of a foreign or Convention award is being considered, courts should apply the public policy exception in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario. This is because, as a matter of international comity, the courts of one State should lean in favour of demonstrating faith in and respect for the judgments of foreign tribunals. In an increasingly globalized and

⁹ ANUHCVP2016/0006 **Flat Point Development Limited v Canisby Limited** [33].

¹⁰ 130 Eng. Rep. 294 at 303.

¹¹ CCJ Appeal CV 7 of 2012.

¹² (1824) 2 Bing 229, 252

¹³ CCJ Appeal CV 7 of 2012 at [21].

mutually inter-dependent world, it is in the interest of the promotion of international trade and commerce that courts should eschew a uniquely nationalistic approach to the recognition of foreign awards.

[25] The Courts must be alive to the fact that public policy is often invoked by a losing party in order to re-open the merits of a case already determined by the arbitrators. Courts must accordingly be vigilant not to be seen as frustrating enforcement of the Award or affording the losing party a second bite of the cherry. To encourage such conduct would cut straight across the benefits to be derived from the arbitral process and undermine the efficacy of the parties' agreement to pursue arbitration."

[24] Although in these proceedings the matter sought to be recognized is a default judgment the learning of the CCJ in the **BCB Holdings Limited** case remains applicable. In the circumstances of this case the Defendant pleads that they were not in receipt of the application to set aside the acknowledgement of service and to enter a default judgment as well as there was no service of the judgment entered. The Defendant in its pleadings puts the Claimant to strict proof that the judgment of the High Bailiff of the Isle of Man dated 15th October 2010 was effectively served. The counsel for the Defendant submits that these are violations of the fundamental principles of justice, more particularly natural justice and further contends that:

- (a) The default judgment obtained should not be recognized on the grounds of public policy since the Claimant provided no evidence as to whether the correct procedure in the jurisdiction of the Isle of Man was followed in order to obtain the judgment in default.
- (b) The Claimant has provided no evidence as to whether the Court in the Isle of Man correctly exercised its discretion to set aside the document purporting to be an acknowledgement of service.
- (c) The Claimant has not proven the cause of action which resulted in the judgment being obtained. Specifically, the Claimant had not proven that the Defendant breached the loan agreement pursuant to the terms and conditions of the said agreement.
- (d) The Claimant has not pleaded or proven foreign law in its claim to show that the default judgment was lawfully obtained.

[25] However, it is noted that the burden of proving foreign law is placed on the party who bases a claim or defence on that law¹⁴. In the circumstances of this case the Claimant has indicated that it has obtained a judgment and has satisfied the Court that the judgment was obtained in a court of competent jurisdiction, that the judgment was final and conclusive (subject to further public policy and natural justice considerations) and that the judgment was for a fixed sum. The Claimant having established these elements is *prima facie* entitled to having the judgment enforced. It is for the

¹⁴ Dicey & Morris Conflict of Laws 13th Edition, para. 5-003.

Defendant who raises the public policy concerns to satisfy the Court that in obtaining the judgment the Claimant fell short of the public policy considerations of *lex fori*. It is for the Defendant to show that the procedures adopted in the Isle of Man and/or the discretion exercised by the Isle of Man were so flawed that by enforcing the foreign judgment it would be contrary to local public policy considerations. The Defendant would have been expected to substantiate its position through, among other things, adducing expert evidence on the matters raised in its defence. This was not done by the Defendant.

Natural Justice Considerations.

[26] Natural justice relates to both procedural justice and substantive justice. Procedural infractions may give rise to the violation of substantive principles of natural justice. The operation of the *audi alteram partem* rule requires the Defendant to have notice of the application before the Court in the Isle of Man and have an adequate opportunity to be heard before an impartial tribunal. In the circumstances of this case, the matters raised by the Defendant are procedural justice/fairness infractions giving rise to substantive natural justice infractions.

[27] On the matter of natural justice, the Defendant contends that the Defendant has no record of:

- (a) receiving a letter from the Claimant in which the repayment of the loan was demanded pursuant to the agreement between the parties.
- (b) being served with an application to set aside the Defendant's acknowledgement of service and an application to enter judgment in default.
- (c) receiving the default judgment entered.

[28] The evidence of Michael Barry on behalf of the Claimant is that the proceedings were, on 1st July 2010, initiated. The Claimant on 1st July 2010 also made an application which application bears a file date of 20th July 2010 for permission to serve the Claim Form on the Defendant outside of the jurisdiction of the Isle of Man at the Defendant's registered address, 26 Cross Street, St. John's, Antigua and Barbuda. The Defendant does not dispute that this address was the registered address for the Defendant at the relevant time.

[29] On 21st July 2010, the court in the Isle of Man ordered that the Claim Form together with the response pack, a plain copy of the sealed order dated 21st July 2010 and a copy of the Claimant's application dated 20th July 2010 be served on the Defendant by courier service with proof of delivery at the address of 26 Cross Street, St. John's Antigua and Barbuda. The Defendant was served on 5th August 2010. The fact of service is not only evidenced by the witness statement filed by Giles Neil Jeremy Hill on 9th August 2010 in the High Court in the Isle of Man together with the courier proof of delivery, but the Defendant also filed an acknowledgement of service and a notice of intention to defend the claim dated 16th August 2010. These items, the witness statement of Giles Neil Jeremy Hill, the

exhibited proof of service and the Defendant's acknowledgment of service have been entered into evidence before this Court by the witness for the Claimant, Michael Barry.

- [30] It is noted that while the Defendant challenges the acknowledgement of service the Defendant has not disputed that at the relevant time Elisa Gamondi was a director of the Defendant Company. Additionally, the Defendant has not produced evidence to suggest that the signature on the acknowledgement of service was not that of Elisa Gamondi nor produced evidence to support the contention that Elisa Gamondi did not act on behalf of the Defendant when the acknowledgement of service was filed. In this Court's view there is no reason to go behind the acknowledgement of service as filed. Accordingly, the entry of an acknowledgement of service and the notice of an intention to defend the claim represents evidence that the Defendant was served with the claim. The suggestion by the Defendant that the signature in the acknowledgement of service cannot be verified is insufficient to rebut the weight of evidence of service.
- [31] The solicitors for the Claimant in the Isle of Man formed the view that the acknowledgement of service was defective because it failed to provide an address for service in the Isle of Man. The Claimant's evidence is that by correspondence dated 1st September 2010 the Claimant informed the Defendant that the acknowledgement of service was defective and that if the Defendant failed to address the matter within seven days the Claimant would apply to the court to set aside the Acknowledgement of Service and to seek judgment in default against the Defendant for the entire amount claimed. A second correspondence dated 24th September 2010 was issued to the Defendant at its registered address. The second correspondence stated that "In light of your failure to provide us and/or the Court with an Isle of Man address for service, we have made an Application to the Court for your company's Acknowledgment of Service to be set aside and for Judgment and Execution to be entered against Flat Point Development Limited in favour of our client. We have been informed by the Court that a hearing of our Application has been listed in the High Court of Justice of the Isle of Man on 15th October at 10.10 am. with 30 minutes allocation. We also enclose by way of service upon you a copy of the Application, Witness Statement of Giles Hill dated 9 August 2010 and the draft Order for your information."
- [32] Copies of both letters were entered into evidence through Mr. Michael Barry. The letters were purported to be authored by Dougherty Quinn. It is noted that the copies of the correspondence presented to the Court do not bear the signature of the author of the correspondence. However, in evidence before this Court are the courier receipts dated 24th September 2010 issued from Dougherty Quinn for documents sent to the Defendant at its registered address.

- [33] The application dated 15th September 2010 was the application by the Claimant to have the acknowledgement of service set aside and for entry of the default judgment. Proof of delivery of the said notice of application dated 15th September 2010 was exhibited to the witness statement of Giles Neil Jeremy Hill. The witness statement of Giles Neil Jeremy Hill supported the application to set aside the acknowledgement of service and to permit the entry of judgment. The said Giles Neil Jeremy Hill provided another witness statement dated 28th September 2010 which confirmed that a copy of the application of the 15th September 2010, the witness statement of 9th August 2010, a copy of the draft order were served on the Defendant. This witness statement exhibited proof of delivery on the Defendant at its registered address on 27th September 2010 at 2:00 p.m. The proof of delivery was signed by one, 'Abiola Henry' as having been received on behalf of the Defendant. The information as reflected on the proof of delivery document confirmed courier service having been initiated on 24th September 2010. The witness statements of Giles Neil Jeremy Hill and exhibits which were filed in the Isle of Man were tendered into evidence before this Court through Mr. Michael Barry.
- [34] This Court notes the contention of the Claimant that there is evidence that the Defendant would have had notice of the default judgment as the fact of the default judgment was noted in the 2010 Notes of the Consolidated Financial Statements of the parent company to the Defendant. The evidence of Michael Barry is that "I am aware that Emerald Cove Engineering N.V., the parent company of the Defendant acknowledged and confirmed in its 'Notes to Consolidated Financial Statements' dated December 31st, 2010 that Judgment for US\$1,150,000.00 plus costs was awarded to the Claimant on October 15th 2010 by the High Court of Justice of the Isle of Man and that interest was liable on the outstanding balance from the date of judgment.". A copy of the notes to Consolidated Financial Statements formed part of the Claimant's evidence.
- [35] The Notes of Consolidated Financial Statements, December 31, 2010, indicate in part that "Canisby filed a legal claim against Flat Point Development Limited, a subsidiary company, as a result of the default on the loan of \$1,150,000.00 Judgment for \$1,150,000 plus costs was awarded to Canisby on October 15, 2010, by the High Court of Justice of the Isle of Man. Interest is also liable on this outstanding balance from the date of judgment. No amounts have been accrued in the consolidated financial statements in respect of the interest."
- [36] In this Court's view it would be difficult to conceive that the parent company would have had the information as reflected in its 31st December 2010 Financial Statement and that the fact of the judgment would not have been known to the Defendant.
- [37] This Court is satisfied that the Defendant received notice of the claim issued in the Isle of Man, that the Defendant issued an acknowledgement of service and a notice of intention to defend but took no

further action. This Court is also satisfied that the Defendant was given notice of the application which sought to set aside the acknowledgement of service and sought for a judgment in default to be entered. These notices would have provided the Defendant with opportunities to participate in the proceedings before the court in the Isle of Man.

[38] In this Court's opinion the judgment obtained in the Isle of Man was final and conclusive. This Court has determined that there have been no breaches in natural justice, procedural or substantive, since the Defendant had an opportunity to be heard regarding the claim which was filed, and the actions taken thereafter by the Claimant in the Isle of Man. Additionally, it is noted that the Defendant has made no attempt to challenge the default judgment in the Isle of Man.

[39] As a consequence of the forgoing this Court has determined that the Defendant is unable to negate the judgment entered by the High Court in Isle of Man on the grounds of public policy or breaches of natural justice.

[40] Accordingly, this Court orders that:

- (a) The default judgment made on 15th October 2010 by the High Court of Isle of Man can be recognized and enforced in Antigua and Barbuda.
- (b) The sum of USD\$1,150,000.00, Court Fees in the sum of £765.00 and Advocates fees in the sum of £2,350.00 as ordered by the High Court in the Isle of Man or the Eastern Caribbean currency equivalent are due and owing plus interest thereon.
- (c) The Defendant is liable to pay the Prescribed Costs of this action.

Justice Marissa Robertson
High Court Judge

By the Court

Registrar