[2014] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 11/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**DYC FISHING LIMITED**	**APPELLANT**
AND	**PERLA DEL CARIBE INC**	**RESPONDENT**

Ransford Braham QC and Christopher Dunkley instructed by Phillipson Partners for the appellant

Abraham Dabdoub instructed by Dabdoub Dabdoub and Co for the respondent

17, 18, 19, 20, 26 July 2012 and 24 June 2014

HARRIS JA

[1] This appeal arises out of an action brought by the respondent for the enforcement of a judgment obtained against the appellant in the 11th Judicial Circuit Court for Miami-Dade County, in the state of Florida, which judgment was enforced by Anderson J on 17 December 2011. The appellant now challenges the judgment of Anderson J.

[2] The appellant, DYC Fishing Ltd ('DYC') is a limited liability company duly incorporated under the laws of Jamaica and the respondent, Perla Del Caribe ('Perla') is a corporation duly incorporated under the laws of Florida in the United States of America. Perla was incorporated in 1998, by two shareholders, Antonio Martinez-Malo and Ramon Placers. Prior to Perla's incorporation, DYC had entered into a joint venture agreement with Messrs Martinez-Malo and Placers for the sale and distribution of conchs and other seafood products. Subsequent to Perla's incorporation, its shares were transferred to Mr Placers' daughter, Mrs Clara Martinez, and to Mrs Liliana Martinez-Malo, Mr Martinez-Malo's wife. Each of these ladies held 50 percent of the shares. Despite the transfer of the shares, the joint venture agreement remained intact. The agreement continued up until 2001. Mr Martinez-Malo is the president and principal shareholder of Anchor Seafood Inc, a company in Miami, which DYC appointed as agent for conducting its business in Florida. On 14 June 2001, DYC entered into a brokerage agreement with Essex Exports Inc, "Essex", an American company, for the purchase and resale of conchs, to the European Union and its dominions. On each occasion on which Essex sold a container of conchs, it issued a purchase order to DYC which, in turn, released the product from its cold storage facility in Miami.

[3] A dispute arose between DYC and Perla, following which, on 25 February 2002, Perla and Mrs Martinez brought a claim against Anchor Seafood Inc, Mr Martinez-Malo and Mrs Martinez-Malo in the Circuit Court of the 11th Judicial Circuit for the Miami-Dade County in the state of Florida, the United States of America, for damages and breach of contract. DYC and Essex were subsequently joined as defendants, by way of

an amended verified complaint filed by Perla on 15 April 2002. On 3 May 2002, Anchor Seafood Inc and Mr and Mrs Martinez-Malo filed answers, defences and a counterclaim against Mrs Martinez and also filed a third party complaint against Placers and Sons, a corporation in Florida operated by Mr Martinez Malo. On 14 December 2004, DYC defended the claim by the filing of an answer and affirmative defences to the claim.

[4] On 27 June 2002, a second verified complaint was filed by Perla seeking judgment against DYC:

> "(a) Dissolving the partnership;
>
> (b) Ordering Defendant DYC to comply with this Court's previous Order by depositing all funds collected from October of 2001 to the present into the escrow account;
>
> (c) Restraining DYC from disposing of or drawing on any of the partnership funds so diverted to it to date;
>
> (d) Ordering the marshalling of the monies collected by DYC from sales to Essex, as well as for impending sales to Essex, for deposit into the escrow account;
>
> (e) Ordering DYC to account for and pay to Perla, share of the partnership funds misappropriated and diverted by DYC;
>
> (f) For attorneys [sic] fees and costs of this action; and
>
> (g) For such action and further relief as this Court seems [sic] appropriate."

[5] On 29 July 2002, a motion was filed by DYC to dismiss this complaint "for lack of jurisdiction and for failure to state a cause of action". Two years later, DYC withdrew the motion. On 17 February 2005, an evidentiary hearing as to jurisdiction was

conducted in which the pleadings and the evidence advanced by Perla and DYC were considered, subsequent to which the court held that the Floridian court exercised personal jurisdiction over DYC.

[6] DYC, thereafter, on 9 January 2006, filed a request for admissions which was served on Perla. The effect of this document was to obtain admissions on the merits of the claim.

[7] Perla filed a fourth amended verified complaint on 24 March 2006. In April 2006, DYC filed interrogatories and a request for the production of documents by Perla, on which it (Perla) intended to place reliance in proof of its claim. An order was made for the production of documents by DYC. DYC failed to comply as a consequence of which, an order for contempt of court was made against DYC on 6 November 2006. DYC's defence was struck out and a default judgment was entered against it. Subsequently, damages were assessed by a jury and an award was made to Perla.

[8] DYC, being unhappy with the judgment, filed an appeal. On 26 November 2008, the Third District Court of Appeal set aside the judgment in part. It upheld the striking out of the defence but remitted for trial, the question of damages, by the court below, as that court, in awarding damages, ordered unliquidated damages to Perla by placing reliance solely on Mrs Martinez's affidavit.

[9] At the retrial of the issue of damages, DYC was represented by an attorney, and on 24 November 2009, a verdict was given by a jury in favour of Perla for loss of profits

which was assessed at US$1,034,111.54. Following the verdict, on 14 January 2010, a final judgment was delivered in the undermentioned terms:

> "IT IS ADJUDGED that [sic] Plaintiff PERLA DEL CARIBE, INC. 750 West 20th Street, Hialeah, Florida 33010, recover from [sic] Defendant DYC FISHING, LTD., 23 Brentford Road, Kingston, Jamaica, W.I., compensatory damages in the sum of $1,034,111.54, and prejudgment interest from February 25, 2002 to January 14, 2010 at the statutory rates in the sum of $692,130.66, making a total of $1,726,242.20 that shall bear interest at the rate of 6% a year, for which let execution issue.
>
> The Court reserves jurisdiction to determine the amount of taxable costs and attorneys' fees."

[10] On 20 April 2010, the Floridian court awarded Perla the sum of US$129,867.07, as taxable costs and attorneys' fees. Interest was also awarded on that sum.

[11] On 8 February 2010, DYC filed a notice of appeal against the jury's verdict and the judgment. It reads:

> "NOTICE IS GIVEN that DYC FISHING, LTD., appeals to the Third District Court of Appeal, the Judgment of this court rendered January 14, 2010. The nature of the Judgment is a final order. A conformed copy of the order designated is attached in accordance with applicable Florida Rules of Appellate Procedure."

[12] On 21 April 2010, DYC withdrew the appeal and served, on the respondent, the following notice:

> **"APPELLANT'S NOTICE OF DISMISSAL OF CAUSE**
>
> Appellant, DYC FISHING LTD., through counsel, hereby gives notice of dismissal of the cause in this pending appeal, pursuant to Rule 9.350 (b), Fla. R. App. P.,

> WHEREFORE, Appellant prays that this Honourable Court accept [sic] this Notice of Dismissal and that the Clerk of the Court notify the Clerk of the lower tribunal, in accordance with Rule 9.350(c), Fla. R. App. R."

[13] DYC, having failed to honour the judgment of the Floridian Court, on 30 April 2010, Perla brought proceedings, under the Judgments (Foreign) (Reciprocal Enforcement) Act, in the Supreme Court of Jamaica by way of a fixed date claim form against DYC. Paragraphs 4, 5 and 6 read:

> " 4. The Claim was contested by the Defendant who, on the 10th day of April 2006 entered an Answer to the Complaint. That the contested claim was heard and a verdict rendered on the 24th day of November 2009.
>
> 5. That pursuant to the verdict of the Court, on the 14th day of January 2010, it was adjudged that the Claimant recover from the Defendant compensatory damages in the sum of $1,034,111.54 and prejudgement interest from February 25, 2002 to January 14, 2010 at the statutory rate in the sum of $ 692,130.66 making a total of $1,726,242.20 that shall bear interest at the rate of 6% per year for which execution may issue. A photocopy of the said judgment is attached hereto marked 'Perla 1'.
>
> 6. That the Court reserved jurisdiction to determine the amount of taxable costs and attorneys' fees and the 20th day of April 2010 the Court did award the sum of $129,87.07 [sic] as taxable costs and Attorney's fees. A photocopy of the order of the Court is attached hereto marked 'Perla 2.'

The following was sought:

> "1. Judgment to be entered for the Claimant against the Defendant in the sum of One Million Seven Hundred and Twenty-Six Thousand Two Hundred and Forty Two and Twenty Cents ($1,726,242.20) currency of the United States of America and Dollars together with interest thereon at the rate of 6% per year from the 14th day of January 2010 until payment pursuant to a Judgment handed down against the Defendant in favour of the Claimant in the CIRCUIT COURT OF THE 11TH DISTRICT IN AND FOR MIAMI-DADE COUNTY, FLORIDA, and

2. for recovery of the sum of One Hundred and Twenty-Nine Thousand Eight Hundred and Sixty-Seven Dollars and Seven Cents (129,867.07) currency of the United States of America plus interest at the rate of 6% per annum from the 20th day of April 2010 to the date of payment pursuant to an Order for taxable costs and Attorneys [sic] Fees made on Tuesday the 20th day of April 2010 by CIRCUIT COURT JUDGE MARC SCHUMACHER.

3. That the defendant be made to pay the Costs of this Claim."

[14] In its defence, DYC stated that the judgments of the Circuit Court of the 11th District should not be recognized as being enforceable, nor be enforced against it in Jamaica. Paragraphs 4 to 19 of the defence state:

> "4. The Defendant denies paragraph 4 of the Particulars of Claim and will say that at all material times it challenged the jurisdiction of the United States within which the Claimant brought its claim. The Defendant lost its jurisdictional challenge at first instance.
>
> 5. In answer to paragraph [sic] 5 and 6 of the Particulars of Claim the Defendant will say that the adjudication of the foreign court was in fact a judgment for non-compliance with court orders, and repeats paragraph 5 to 7 above [sic]. The Defendant will further say that in spite of its non compliance with Court orders which lead [sic] to the default judgment in the foreign jurisdiction, it did not breach any agreement with the Claimant.
>
> 6. The Defendant will further say that it refused to recognize and/or comply with the Court Orders for disclosure on the basis that it would have required disclosure of material which would otherwise have been confidential to the Defendant and its third party associates, in circumstances where the Court's jurisdiction was challenged in the first instance.
>
> 7. Save for any action brought against the Defendant within the jurisdiction of the Island of Jamaica, the Claimant ought not to have been entitled to discovery.
>
> 8. The Defendant will say that the Claimant misrepresented the true nature, terms and application of the Joint Venture agreement that it had with the Defendant.

9. The Defendant will say that contrary to its pleadings, the Claimant had no authority over its product and at [sic] material time was limited to a money claim for the recovery of a loan in the sum of US$410,000.00 inclusive of interest and the profits for the 2000-2001 Conchs fishing season.

10. The Defendant will say that the Claimant fraudulently pleaded:

a) That upon providing US$350,000.00 to the Defendant, the Defendant obligated itself to an exclusive contract knowing the same to be false;

b) In its Claim that the DYC-Perla joint venture entered into an exclusive agreement with a third party, Essex Exports Inc.;

c) In its Claim that a third party Defendant Anchor Seafood diverted shipments of seafood that were meant to belong to its [sic] and that such diversion required its consent;

d) In its claim that it's [sic] property or corporate assets, were seafood processed at the Defendant's facility;

e) In its claim that it had a contract with a third party, (Essex Exports Inc.) which contract it was unable to produce and subsequently withdrew its claim against said third party;

f) In its Claim that any invoicing for seafood products produced or procured by the Defendant required its authorization or consent;

g) In its Claim that it had authority over the seafood products produced or procured by the Defendant;

for the purposes of prejudicing the foreign Court's opinion of the Defendant in its interlocutory applications, for control of the Defendant's product, claiming:-

h) Tortious interference with business relations;

i) Conversion;

j) Breach of Joint Venture Agreement;

k) Civil Conspiracy.

Particulars of Fraudulent Misrepresentation

(a) Claiming to be in an exclusive relationship with the Defendant and another co-Defendant, Essex Limited, this was challenged by Essex and withdrawn.

(b) Claiming that other co-Defendants (names) interfered with its 'exclusive' contract with the Defendant in the absence of any evidence to that effect.

(c) Producing an 'agreement' in support of its claim for the first time in litigation, knowing it to be a contrived document, and entirely fraudulent in its nature.

(d) Claiming compensatory damages for tortuous [sic] interference with business relations conversion and breach of contract.

11. In answer to Paragraphs 7 and 8, the Defendant brought an Appeal against the ruling on jurisdiction, but withdrew same on the basis that in light of the Sarbanes oxley Acy [sic] of 2002 in the United States of America, there was no real likelihood of success before the Third District Court of Appeal on the question of the jurisdiction of the Eleventh Judicial Circuit [sic] for Miami-Dade County, Florida and was therefore a futile appeal.

12. All its court processes thereafter were consequent upon the ruling of competent jurisdiction by the Eleventh Judicial Circuit Court.

13. The Defendant will say that although the Claimant brought three prior complaints, it had no success against any of the then co-defendants to its Foreign Claim with whom it alleged that this Defendant:

a) Allowed a Tortious interference with the Claimant's agreement;
b) Converted the Claimant's product;
c) Civilly [sic] conspired;

14. The Claimant's breach of contract case against the co-defendants was all withdrawn, leaving a Fourth Amended Complaint against the Defendant alone.

15. The Defendant will further say that without basis the Claimant's principal officer filed an Affidavit alleging that the Defendant's principal notified the Claimant of the Joint Venture's expenses intended to mislead the foreign Court into a purported accounting in support of its Claim for its share of the profits.

16. In answer to Paragraph 9 of the Particulars of Claim, the Defendant will say the settlement of the Claimant's loan to the Defendant is a matter of record in that the parties settled a release on or about October 2003 in the amount of US$410,000.00 in full and final settlement of the Claimant's loan to the Defendant's [sic] inclusive of interest, which also disclosed that [sic] what was outstanding to the Claimant's share of the profits in the hands of the Defendant.

17. The above payment therefore narrowed the Claim to two thirds share of the net proceeds of sale of the 28 containers of Conchs products and for which the parties in support of their respective cases, filed their respective Proposal for Settlement; Demand/Offer for Judgment in the Foreign Court in July and August of 2004 in the sums of US$449,999.00 and US$325,000.00 for Claimant and Defendant respectively, being a difference of US$124,999.00.

18. On the striking out of the defence, the Claimant posited its Claim by a purported accounting through its Affidavit of Plaintiff's Damages filed by its principal officer on September 4th 2007 alleging that the Defendant's principal advised the Claimant of the Joint Venture's expenses intended to mislead the foreign Court into entering a judgement [sic] on the basis of the purported accounting for its share of the profits. The purported advice is completely at odds with the documents referred to at paragraph 17 above.

19. In answer to Paragraph 10, the Defendant repeats paragraph 1 to 18 of this Defence."

[15] Anderson J held that the court in Florida had jurisdiction to entertain the proceedings, which proceedings were conducted fairly and on the proven facts by the evidence presented, there was nothing from which he could conclude that the foreign

judgment had been obtained by fraud. He granted judgment in terms of the relief sought in the fixed date claim form.

[16] The following grounds of appeal were filed:

> "*Jurisdiction*
>
> 1. The Learned Trial Judge erred in failing to consider or at all whether Jamaica was the natural forum for the hearing of a dispute between the parties.
>
> 2. The Learned Trial Judge erred in finding that the foreign Court had jurisdiction to hear and determine a claim brought against the Appellant in the foreign jurisdiction, by artificially confining his consideration to the Respondent making its case that there was a sufficient basis to find that Florida had jurisdiction.
>
> 3. The Learned Trial Judge failed to recognize the inherent disadvantage to a local defendant of a foreign litigant seeking to take the benefit of the long arm of the foreign jurisdiction, for which the defendant is entitled to invoke the protection of the common law on a subsequent application to recognize the foreign judgment.
>
> *Voluntary Submission*
>
> 4. The Learned Trial Judge erred in failing to find that the Appellant's efforts to resist jurisdiction were conclusive on the question of voluntary submission.
>
> 5. The Learned Trial Judge erred in failing to appreciate that further appeal beyond the Third District Court of Appeal to the Florida Supreme Court was futile in the face of *res judicata viz* the foreign jurisdiction.
>
> 6. The Learned Trial Judge erred in making a negative finding on the Appellant's filing of Affirmative Defences as its submission to the foreign jurisdiction, where on the face of the record at page 1078 **Affirmative Defence #1 was a plea for lack of personal jurisdiction**, against which each subsequent plea must be read.

7. The Learned Trial Judge erred in failing to appreciate that the evidence of the Appellant's non-compliance with the orders of the foreign court was consistent with its Affirmative Defence #1.

Fraud

8. In addition to erring on the issues of jurisdiction, the Learned Trial Judge further erred in failing to recognize that an allegations [sic] of fraud raised against the Respondent in the Foreign Court ought to be considered by the local Court.

9. The Learned Trial Judge failed to give any weight or at all to the facts on the face of the defence and the record that this Claim was commenced against foreign defendants and was originally pleaded against the Appellant in interlocutory proceedings for control of its product, which was not the basis upon which the Respondent's judgment was obtained.

10. The Learned Trial Judge erred by failing to find that the allegation of fraud must be proven based on a thorough analysis at trial of the evidence presented.

11. The Learned Trial Judge erred by failing to find that the Appellant's assertions of fraud, were bore [sic] out by the Respondent's willful deceit in its several Claims and causes of Action.

12. The Learned Trial Judge erred by failing to find that the Respondent's [sic] used its willful deceit to ground its case in the foreign jurisdiction as well as for the purposes of prejudicing the foreign Court's opinion of the Appellant in its interlocutory applications, for control of the Appellant's product.

13. The Learned Trial Judge erred by failing to apply, in his examination of the issue of fraud in relation to foreign judgments, a different rule that [sic] than that applied to domestic judgments.

14. The Learned Trial Judge erred in failing to permit cross examination of the Respondent's witnesses in circumstances *inter alia*, where allegations of fraud were raised in both the foreign and local jurisdictions.

15. The Learned Trial Judge erred by failing to find that the Respondent's Second, Third and Fourth Verified Complaints

were at odds with the Limited Release signed by the directors and owners of the Respondent after an agreement with the Respondent executed on 29 October and 9 November 2003.

Judgment on its merits

16. The Learned Trial Judge failed to properly distinguish the ***Vasconcellos*** case as judgment obtained in the absence of a defendant per the ***Vasconcellos*** case is not analogous to this Appellant's robust efforts in the foreign court to dismiss for lack of personal jurisdiction, and subsequent default judgment for non-compliance in the foreign court.

    In those circumstances, in addition to its defence against jurisdiction, by virtue of its defence being struck out by the foreign court for non-submission to its orders, the Court erred in recognizing the Respondent's judgment as one obtained on its merits."

Submissions

Fraud

[17] Submissions were first made by Mr Braham QC, who presented arguments on the issue of fraud. Learned Queen's Counsel submitted that Anderson J recognized that, within the context of jurisdiction, there are two approaches where fraud is raised in respect of a foreign judgment, namely, the traditional and the modern approaches. The learned judge, however, erred by applying the modern approach which shows that fraud which goes to jurisdiction may be taken at any time but the allegations and evidence of fraud ought to be raised for the first time and that it was not raised in the foreign court, therefore, the defendant must show that he could not, with reasonable diligence, have raised the allegations in the foreign court, he submitted. The learned judge ought to have adopted and applied the traditional approach provided for by ***Abouloff v Oppenheimer*** [1882] 10 QB 295, in which it was held that a foreign

judgment may be impugned on the ground of fraud even if it had been raised and rejected in the foreign court, he argued.

[18] Anderson J, he contended, after reviewing the authorities which followed either ***Abouloff*** or ***Beals v Saldanha*** [2003] 3 SCR 416 found that in the case of ***Richard Vasconcellos v Jamaica Steel Works Ltd*** (***formerly Jamaica Steel and Plastic Limited***), ***Ishmael Gafoor and Amelia Gafoor***, SCCA No 1/2008, delivered on 18 December 2009**,** this court adopted the modern approach. The learned judge, he submitted, although placing reliance on ***Vasconcellos*** and adopting the decision of this court, it is clear that Harrison JA found that no evidence of fraud was before the court below. Learned Queen's Counsel went on to submit that in ***Vasconcellos***, the learned judge of appeal, having found that there was no evidence of fraud before the court below, any further pronouncement would have been obiter, and therefore, it is not obligatory on the part of this court to follow ***Vasconcellos***.

[19] Learned Queen's Counsel, after citing the case of ***Owens Bank Ltd v Etoile Commerciale S.A*** [1995] 1 WLR 44 in which their Lordships carried out a review of the cases which either supported the traditional or the modern approach, went on to submit that the Board having not overruled ***Abouloff***, it would have been inappropriate for this court to have abolished the traditional rule. He further made reference to a commentary by Dr Winston Anderson (now a judge of the Caribbean Court of Justice), in Elements of Private International Law, to show that ***Abouloff*** has been accepted by the English authorities as the law.

[20] Mr Braham also cited the case of ***AK Investment CJSC v Kyrgyz Mobil Tel Ltd & Ors*** [2011] UKPC 7 to support his argument that the Board declined to disturb the ***Abouloff*** principle and he later cited an extract from Civil Jurisdiction & Judgments 5th ed, in which Professor Briggs was highly critical of the acceptance of the modern approach in relation to the concept that fraud cannot be raised, if with due diligence it could have been raised in the foreign court. The learned author said at page 758:

> "Such doubts have led to the rejection of the English interpretation of the common law view in certain other jurisdictions, in which the law now claims to require a new discovery of material which would justify setting the judgment aside. Indeed, some courts have gone so far as to demand that the new discovery be of material which could not with reasonable diligence have been discovered for the original hearing. This last departure, it is thought, comes close to being unprincipled. In all sensible analyses of the matter, when it comes to taking sides between the negligent and the fraudulent, all the decent money is on the former."

[21] If this court finds that the modern approach represents the law of Jamaica, learned Queen's Counsel argued, then, the court should consider whether the legal evolutionary process has been completed by this approach, for example, whether there are any exceptions in applying the approach. Referring to the fact that in ***Beals*** the court held that if with reasonable diligence, the material could have been brought before the foreign court, such material would not be permitted to be presented before the local court, he went on to argue that in the present case, DYC's defence having been struck out by the Floridian Court, it was not allowed to defend the case on its merits, and it could not reasonably be said that DYC failed to exercise reasonable

diligence in respect of its defence. DYC had the right to raise fraud as an issue and this had not been appreciated by Anderson J, he contended.

[22] Referring to the Australian authorities of ***Keele v Findley*** [1990] 21 NSWLR 444 and ***Close & Anor v Arnot*** [1997] NSWSC 569, learned Queen's Counsel submitted that ***Keele v Findley*** was distinguished by Graham AJ in ***Close and Anor v Arnot*** when he stated as follows:

> "I would distinguish ***Keele v Findley*** and find that the English rule continued to apply to New South Wales in respect of actions to enforce judgments obtained in undefended proceedings in a foreign court where the defendant for good reason was unable to meet the Plaintiff's case in that court."

[23] Learned Queen's Counsel further cited ***Yoon v Song*** [2000] NSWSC 1147 to show that an exception to the modern approach may arise where the proceedings before the foreign court was undefended and the defendant had good reason to permit the matter to proceed undefended.

[24] The foreign court acted excessively in excluding DYC's defence, thereby undermining DYC's right to be heard, Mr Braham argued, and therefore, DYC having fallen within the exception to the modern approach, should not be excluded from the local court. Citing the Canadian case of ***Gambazzi v Daimler-Chrysler Canada Inc*** [2010] QB 388 to support this submission, learned Queen's Counsel further argued that a right to a fair hearing is fundamental.

[25] Learned Queen's Counsel further made reference to the following extract from Civil Jurisdiction and Judgment, in which Professor Briggs, speaking to the question of fraud within the context of the recognition of foreign judgments, said at page 757:

> "The only remaining question is what is comprehended by 'fraud'; and on this the common law on the recognition of judgments is open to greater objection. For in the context of the obtaining of foreign judgments, the meaning of fraud is neither narrow nor precise; it extends to encompass 'every variety of mala fides and mala praxis whereby one of the parties misleads and deceives the judicial tribunal'."

[26] It was also Mr Braham's submission that fraud is established in the defence and in the documents which were before the court below and he specifically drew to the court's attention several paragraphs of the defence, in particular, paragraphs 10, 15, 16 and 17, as well as certain areas in the evidence before the foreign court in which fraud was raised. Perla, he submitted, through Mrs Martinez, lied to the foreign court as to having a proprietary interest in the conchs and placed perjured evidence before it. The evidence upon which the profits were claimed by Perla was based on false estimated figures, counsel submitted. On the evidence in the affidavit of Mrs Martinez, he submitted, the following was before the jury: 28 containers were sold for the price of US$4,261,765.84 and the costs of producing the conchs was US$2,720,598.54, leaving a balance of US$1,551,167.30 to be distributed between Perla and DYC. In her testimony, the total sales were stated to be US$4,623,000.00 but the jury awarded US$4,261,765.00. However, an affidavit of Mr Frank Cox, sworn on behalf of DYC, shows that DYC would be paid all of its costs out of the proceeds of sale of the 28

containers and that all of DYC's indebtedness both to Perla and in Jamaica being, loans, taxes and other fees incurred during the period 1999 to 2001, would also be paid prior to any distribution to Perla or its shareholders. In a letter of 2 June 2003, from DYC to Perla, DYC informed Perla that its expenses for fishing and processing the product and the purchasing of the conchs and the containers amounted to approximately US$3,000,000.00 and this was not placed before the jury, he submitted. Perla produced a fraudulent letter dated 16 August 2000, in the foreign court, in which it was stated that DYC had an exclusive agreement with Perla and two other companies that the products would be sold through Perla. However, in evidence, Perla stated that the arrangement was that everything should go to Perla but DYC raised issues contradicting this and other statements made by Perla. The issue whether the evidence before the court in the United States of America was false, ought to have been tried and determined by our local court and the learned judge ought to have heard witnesses on cross-examination, and he was therefore wrong in refusing to do so, Mr Braham contended. He cited ***Chin v Chin***, PCA No 61 of 1999, delivered 12 February 2001 to show that where facts are disputed the parties ought to be made subject to cross examination.

[27] In dealing with the issue of fraud, Mr Dabdoub submitted that two competing schools of thought have emerged on the question of the enforcement of a foreign judgment on the ground of fraud. Traditionally, he argued, the principles laid down in ***Abouloff*** that fraud vitiates a judgment and discharges a defendant from liability have been approved and applied by the courts in the United Kingdom. However, he

submitted, that principle has been subject to criticisms by the courts of commonwealth countries and academia and by reason of the development of the law, there has been a departure from the ***Abouloff*** rule by the Canadian and Australian courts, the courts of Singapore and also our Court of Appeal. Counsel cited, among others, the following cases in support of this submission: ***Close & Anor v Arnot; Westacre Investments Inc v Jugoimport-SDRP Holding Company Ltd &*** **Ors** [1999] EWCA Civ 1401; ***Hong Pian Tee v Les Placements Germain Gauthier Inc*** [2002] 2 SLR 81, [2002] SGCA 17; ***Beals*** and ***Vasconcellos***. Counsel also made reference to ***Owens Bank v Etoile Commerciale SA,*** in which he submitted that their Lordships expressed disapproval of the ***Abouloff*** principle with respect to the defence of fraud**.** ***Vasconcellos***, he argued, shows that a foreign judgment is enforceable, provided the proceedings are fairly conducted.

[28] In the foreign court, counsel argued, DYC was the only defendant in the fourth amended verified complaint and the assessment of damages was heard and determined in respect of only one of several counts in that complaint, as all other counts were abandoned. That count, counsel argued, related to the issue of the profits made on the joint venture agreement to arrive at 2/3 share to which Perla is entitled, a fact which was admitted by DYC and Perla. The issues raised in the defence in the local court were the same which were raised in the court in Florida, which DYC had the opportunity to litigate through competent counsel who had vigorously done so, and further although pleading fraud, DYC failed to particularise the averments of fraud, counsel argued. Counsel, after examining the allegations pleaded by DYC in the foreign court,

submitted that the particulars of fraudulent misrepresentation were adjudicated on in that court, and further, the issues raised in the court in Florida did not amount to fraud.

Jurisdiction

[29] The submissions on the issue of jurisdiction were made by Mr Dunkley. DYC's main contention as to jurisdiction is that DYC is a Jamaican company having its principal place of business in this country and the informal joint venture agreement between the parties was founded in Jamaica; therefore this country is the proper forum for the determination of any dispute between the parties.

[30] It was submitted by Mr Dunkley that Anderson J erroneously accepted the strained interpretation of the facts presented by Perla, in failing to approach the issue of jurisdiction from the local court's perspective. It is clear, he argued, that Perla expressly elected the forum with the intention of acquiring an unfair advantage over DYC by exposing DYC to an expensive and complex legal system and also with the intention to gain control over DYC's assets. For the purpose of recognition, he argued, the primacy is in the local court's recognition of jurisdiction and the learned judge wrongly adopted the foreign jurisdiction. The learned judge's finding that DYC's withdrawal of its motion for want of jurisdiction was fatal to any further protection shows that he adopted Perla's submissions without taking into account paragraph one of DYC's first affirmative defence which shows a plea relating to the lack of jurisdiction, he argued. Where the foreign court was not seized of jurisdiction over DYC, by virtue of the common law, it must be shown that DYC submitted to that court, he contended.

[31] It was counsel's further submission that the learned judge wrongly approached submission by his application of the foreign court's test and was wrong in finding that the affirmative defences amounted to an act of submission. DYC having contested jurisdiction, he argued, it was for Perla to have shown that DYC had voluntarily submitted to the foreign court's jurisdiction.

[32] Although Perla's case is that DYC submitted to the foreign court's jurisdiction and that it participated in the appellate process, the appealing of the judgment of the Third District Court of Appeal would have been an exercise in futility and therefore, any further appeal would have been met by a challenge of res judicata, he argued.

[33] Mr Dabdoub submitted that DYC had a real and substantial connection with the state of Florida and was subject to the jurisdiction of the foreign court, it having established a place of business in that state, had for a long period carried on business through its agent, Anchor Seafood, and had engaged in a number of transactions in that state. He cited ***Adams v Cape Industries Plc*** [1996] 1 Ch 433 to show that where a company has established a fixed place of business for a period, or is represented by an agent carrying on business for a considerable period from a fixed place of business, this operates as a conferment of jurisdiction. It is common ground, he argued, that for a minimum period of at least two years, DYC's product was in storage in Florida and there is evidence from Mr Cox in his affidavit of 27 February 2002, showing that Anchor Seafood acted as DYC's agent and that Perla, Anchor Seafood and Place & Sons had no interest in the products as owners. Counsel made

reference to a letter, dated 14 June 2004, from Essex to DYC, in which Essex agreed to purchase conchs from DYC, and went on to submit that invoices from Perla and Anchor Seafood to Essex show that Perla and Anchor Seafood contracted to sell products to Essex. DYC was obviously the owner of the conchs, and on each occasion a container of conchs was sold by Essex, Essex issued a purchase order, following which, the container was released by DYC to the shippers, he argued. Anchor Seafood's agency, he contended, was limited to aiding DYC with the storage of the container and the invoicing and collection of the proceeds of sale. Mr Cox, in his deposition of 28 July 2002, stated that Anchor Seafood acted as DYC's agent between 2000 and 2004. Initially, a bank account was established by Anchor Seafood on behalf of DYC, but in or about 2000 that account was transferred to DYC's account and DYC, by letter of 26 February 2002, terminated Anchor Seafood's agency. This clearly confirms DYC's presence in Florida and importantly, after Anchor Seafood's agency was terminated, an invoice of 11 April 2002, showed a sale by DYC to Essex from its cold storage in Florida, counsel argued.

[34] Speaking to the issue of jurisdiction by submission, counsel submitted that a defendant may either voluntarily submit to a jurisdiction or take steps in contesting the merits of the claim. In bolstering this submission counsel relied on the extracts from pages 729-730 of Briggs' Civil Jurisdiction and Judgments where the learned author speaks to the issue of submission to a court's jurisdiction.

[35] It was counsel's further submission that DYC filed answers and defences to the claim, which did not only address the issue of jurisdiction but also the merits of the claim. DYC, counsel argued, actively participated in and engaged in the litigation of the issues which arose in the foreign court and offered to settle the claim and thereby submitted to its jurisdiction. Counsel outlined the following incidents to support his argument that DYC had submitted to the foreign court's jurisdiction: its filing of answers and affirmative defences to the second verified complaint; the filing and service, on Perla, of a request for admissions by asking Perla to admit matters relating to the merits of the claim, none of which was with reference to jurisdiction; its filing of interrogatories seeking to investigate the manner in which Perla intended to prove its claim and the evidence in support of such proof; its request for production of documents, which goes to the core of its defence of the claim; its proposal for settlement; its withdrawal of the motion to dismiss the claim for want of jurisdiction two years after filing it; its notice, filed on 14 July 2004, of an offer of judgment and proposal or settlement; its participation in the confidentiality agreement and the order of 30 May 2006; its agreement pursuant to the order for disclosure, in satisfaction of its objection to disclosing information relating to sales and expenses of conchs; subsequent to the court's ruling on jurisdiction, it neither contested Perla's request for discovery, nor the request for production of documents; its representation by counsel at the appeal; its agreement to a limited release in which Perla would accept US$440,893.22 in full and final settlement of the loan from Perla; it was a party to an agreement that the claim for profits for 2000 to 2001 was outstanding. The cases

of ***Harris v Taylor*** [1915) 2 KB 580 and ***Henry v Geopresco International Ltd*** [1915] 2 All ER 702 were cited to bolster a submission that DYC had submitted voluntarily to the jurisdiction of the foreign court.

[36] Therefore, in view of the foregoing circumstances, DYC ought not to be permitted to approbate and reprobate and the learned judge was correct in regarding the withdrawal of the motion as submission to the foreign court, counsel submitted.

Analysis

Jurisdiction

[37] The heart of the appellant's complaint on jurisdiction is that there is no valid exercise of jurisdiction by the foreign court and the learned judge failed to adequately address this issue. The gravamen of its contention is that, in founding jurisdiction, the learned judge directed his attention to a narrow area of the law instead of placing focus on the central issue, which is, whether the local court ought to have been the proper forum for the trial of the dispute between the parties.

[38] In dealing with the jurisdictional issue, the learned judge first considered whether DYC had a real and substantial connection to the state of Florida to have brought it within the jurisdiction of the foreign court and found that it did. He, thereafter, in an alternative finding, concluded that DYC voluntarily submitted to the foreign court. In giving consideration to the question as to whether DYC had a real

and substantial connection with Florida, he had this to say at paragraphs 10, 14 and 22 of his judgment:

> "[10] It was acknowledged that there had been no agreement between the parties as to jurisdiction. However, the Court was strongly urged to the view that the available evidence proved that either on the basis of a real and substantial connection with the jurisdiction (Florida) or by virtue of submission by the Defendant, the Florida Court had jurisdiction. In support for his proposition, the Claimant made the following submissions as being factual evidence of either or both bases, which evidence the court was being asked to accept.
>
> 1. It was said that the defendant fully litigated the question of jurisdiction in the Florida Court which ruled on the 22nd February 2005 that it was established that the Defendant had submitted itself to the jurisdiction of the State of Florida by engaging in a number of commercial transactions in the State of Florida.
>
> 2. Further, the Claimant argued that the defendant appealed the ruling to the Third District Court of Appeal which on August 31, 2005, upheld the ruling of the lower court in respect of jurisdiction.
>
> 3. The records of the Florida court indicate that thereafter the Defendant took active steps in litigating the issues before the Florida court thereby accepting the jurisdiction of the Florida court.
>
> 4. In an affidavit filed by Frank Cox of DYC Fishing Ltd. in the Circuit Court of the 11th Judicial District in and for the Miami-Dade County, Florida, on the 27th Florida [sic] 2002, the Defendant in effect admitted the jurisdiction of the Florida Court when at paragraph 7 he stated: 'Accordingly, each time Essex sells a container of conch, [sic] it issues a purchase order to DYC and DYC then has the product released from *its cold storage in Miami Florida* to the shipper of the product'. (My emphasis)
>
> 5. Again at paragraph 12 of the said affidavit Frank S. Cox states: *'Anchor* Seafood has *been acting as the agent of DYC Fishing Ltd to assist with the storage of the containers*

of conch [sic] *in Miami Florida, as well as to assist with the invoicing and collection of proceeds."* (My emphasis)

6. The question of jurisdiction was fully litigated by the Defendant in the Florida Courts including an appeal to the Third District Court of Appeal. The Defendant could have appealed further to the Florida Supreme Court but did not. Instead, it chose to take active steps in defending the claim and fully litigating the issues.

…

[14] It was argued that the facts of the instant case were distinguishable from the facts in **Adams** in that there was evidence before the Florida Court to establish jurisdiction in that Court. In fact, some of that evidence appears to come from the Defendant itself and its agent in Florida, Frank Cox. This evidence is contained in the various documents before the Court and according to the Claimant's submissions included, but was not limited to, the following evidence and facts;

1. It is a fact, asserted by both Plaintiff and Defendant, that the Defendant had product, [sic] in storage in Florida for a minimum period of two years.

2. At Paragraph 11 of the Affidavit of Frank S. Cox filed the 27 February 2002 it is stated that "As can be seen from all the legal documents attached hereto as Exhibits 'B' through 'F' neither Perla, Anchor Seafood nor Placeres, [sic] & Son have any ownership interest in the containers. As is evidenced by the bills of lading, commercial invoices, cited certificates and movement certificates, the shipper, exporter and owner of these containers of conch [sic] is DYC (See Defendant's Volume 1 at Page 519).

3. At paragraph 12 of the same Affidavit it is stated that "Anchor Seafood Inc. has been acting as the agent of DYC Fishing Ltd. to assist with storage of the containers of conch [sic] in Miami Florida as well as to assist with the invoicing and collection of proceeds (See Defendant's Volume 1 at Page 519).

4. Also in the said Affidavit at Paragraph 13 the Affiant states Accordingly, on February 26, 2002, I sent correspondence

to Tony Martinez, and Anchor Seafood Inc. advising them that they are to [sic] no longer to act as DYC's agent, store DYC [sic] product on behalf of DYC or Invoice Essex's customers for the product [sic] shipped. See attached Exhibit "G". Defendant's Volume 1 at Page [sic] 520 and 547-548.

5. In his Deposition of July 28, 2004 at Page[s] 65-66 Mr. Frank Cox in answer to a question stated that "That's not correct. Initially the account was set up by Anchor Seafood on behalf of DYC, but sometime around-- I think it was March of 2002 they were - on or around March of 2000 the products were transferred to the accounts of DYC.

6. Invoices from Anchor Seafood Inc. to Essex Exports Inc. indicating that at least from 24.10.01 Anchor Seafood has acted for DYC as agent in invoicing product [sic] to Essex Exports Inc. Pursuant to the agreement between DYC and Essex. (See Defendant's Volume 1 Pages 508 to 514).

7. There is an invoice from Anchor Seafood Inc. to DYC Fishing Limited indicating that DYC Fishing Limited paid customs duties on the shipments sent by DYC Fishing Limited to its Cold Storage facility at U.S. Cold Storage, clearly providing evidence that not all the product was [sic] 'in transit' or 'in bond' as customs duties were paid on some of the shipments. (See Defendant's Volume 2 Pages 910 to 914).

8. Invoices from U.S. Cold Storage to DYC Fishing Limited indicating that from March 2002 to at least December 2002 DYC stored product [sic] in Florida at that location and that said product was sold to Essex Exports Inc., a Florida Corporation, with offices at 550 SW 12th Avenue, Deerfield Beach, Florida 33442. (See Defendant's Volume 1 Pages 400 to 414).

9. Wire Transfer from Essex to DYC Fishing Limited's account held at Dehring Bunting and Golding Ltd. [sic] At 777 Brickell Avenue, Miami, Florida clearly establishing that DYC Fishing Limited maintained an account with Dehring Bunting and Golding Limited at that address. (See defendant's Volume 2 Pages 1261 to 1279).

[15]…[21]

[22] While the dicta of the English Court of Appeal does not seem conclusive as to whether a 'real and substantial connection' has been demonstrated in this case, it does seem that, on a balance of probabilities and on the evidence of the respective filings by each side as set out in paragraphs 10 and 14 above and which I accept as proven, that the Defendant had a real and substantial connection with Florida." [underlining as in original]

[39] In the alternative, Anderson J, in finding that DYC had voluntarily submitted to the jurisdiction of the foreign court, at paragraphs 23 and 27 to 30 of his judgment, stated as follows:

[23] "In the event that I am not correct in relation to this finding of real and substantial connection with the Florida jurisdiction, it is necessary to consider whether there has been a 'submission to the jurisdiction' so as to have conferred proper jurisdiction on the Florida Court. In **Adams**, Scott J had stated:

> *'Prima facie, a foreign court does not, in the eyes of the English law, have jurisdiction over an absent foreigner. But if the foreigner consents to the court exercising jurisdiction over him, the position is different. The element of consent is clearly present if the foreigner, as plaintiff commences proceedings in the foreign court. It is also present if the foreigner, as defendant, makes a voluntary appearance without protest in the foreign court' pg*. 679.
>
> …

[27] Whether a defendant has submitted by voluntary appearance or participation in the action is in the first place determined by the Common Law. The question to ask is whether the defendant took a step in the action to contest the merits. If he did, his act will be seen as submission. In a case in the

Supreme Court of Queensland, Australia, **de Santis v Russo** [2001] QCA 457 (26 October 2001) McPherson J.A. delivered the main judgment of the Court: This case was an appeal by Mirella de Santis against an order dismissing her application under section 7 of the **Foreign Judgments Act 1991 (Cth)** to set aside a foreign judgment registered in the Supreme Court of Queensland under section 6 of that Act. The terms of the sections of that Act are similar to sections of the Judgments (Foreign) (Reciprocal Enforcement) Act here in this jurisdiction and I believe that what the court said in that case may be helpful in the instant matter.

[28] In the Queensland statute, section 7(1) authorises a party against whom a registered judgment is enforceable to apply to the court of registration to have the judgment set aside. Our section 6(1) contemplates the making of such an application. I also proceed on the basis that any circumstance which would allow for setting aside a registration would provide a sufficient basis for denial of registration. Section 7(2) of the Queensland statute provides:

> '(2) Where a judgment debtor duly applies to have the registration of the judgment set aside, the court:
>
> (a) must set the registration aside if it is satisfied:
>
> (iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case'.

Section 7(3) proceeds to add:

> '(3) For the purposes of subparagraph (2) (a) (iv) and subject to subsection (4), the courts of the country of the original court are taken to have jurisdiction:
>
> (a) in the case of a judgment given in an action in *personam:*
> (i) if the judgment debtor voluntarily submitted to the jurisdiction of the original court.'

Section 7(5) provides:

> '(5) For the purposes of subparagraph (3) (a) (ii), a person does not voluntarily submit to the jurisdiction of a court by:
>
> (a) entering an appearance in proceedings in the court; or
>
> (b) participating in proceedings in the court only to such extent as is necessary for the purpose only of one or more of the following:
>
> (c) …
>
> (d) contesting the jurisdiction of the court'.

[29] The substance of the foregoing provisions in the Queensland statute is captured in section 6(1)(a) (i), (ii),(iii) and (iv) and section 6 (1) (b) of our Act. Voluntary submission is specifically dealt with in section 6 (2) which is in the following terms:

> (2) For the purposes of this section, the courts of the country of the original court shall, subject to the provisions of subsection (3) be deemed to have had jurisdiction –
>
> (a) in the case of a judgment given in an action in personam-
>
> (i) if the judgment debtor being a defendant in the original court submitted to the jurisdiction 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 the court.

McPherson J.A. said at paragraph 11 of the judgment:

> [11] If the judgment can be sustained at all, it must be in the character of one that was founded on a voluntary submission within s 7(3)(a)(i) to Italian jurisdiction. {See our Act section 6((2)(a)(i)(i)} The Act does not define what is meant by voluntary submission; but s 7(5) describes what does not constitute it. {See our Act section 6(2)(a)(i). Merely (a) entering an appearance in the proceedings in the

> foreign court is not; nor is (b) participating in those proceedings, provided in either of those cases that (so far as relevant here) the only purpose is: (d) to contest the jurisdiction of the court…. A conditional appearance limited to the purpose of contesting the jurisdiction or even participation in the proceedings only to the extent necessary for that purpose, does not now, even if it may at common law, involve a voluntary submission to the jurisdiction.

> [30] I adopt, with respect, the dicta of the learned judge of appeal as it appears to be parallel to the situation in the instant case. It seems to me that so long as the Defendant resisted the Second Amended Verified Complaint on the basis of want of jurisdiction, as it did when it filed its Motion to Dismiss for Lack of Personal Jurisdiction and failure to state a cause of action, it would have had the protection of the Act. However, when it filed its Notice to Withdraw Motion to Dismiss and filed an Answer and Affirmative Defences on December 14, 2004, it relinquished the protection which it would hitherto have enjoyed. I am satisfied and so hold, that the Defendant cannot now assert that it never submitted to the jurisdiction of the Florida Court. Its decision not to pursue the matter beyond the Third District Court of Appeals to the Florida Supreme Court is at best equivocal and cannot now be said to be on the basis of a denial of jurisdiction. I accordingly hold that the Claimant has satisfied its duty to show that jurisdiction did in fact, reside in the Florida Court."

[40] At common law, the cardinal principle in recognizing and enforcing a foreign judgment is that the foreign court had been seized of jurisdiction to hear and determine the case. In recognition of this principle, the English Court of Appeal, in ***Adams v Cape Industries Plc***, at page 517 - 518 said:

> "…in determining the jurisdiction of the foreign court … our court is directing its mind to the competence or otherwise of the foreign courts to summon the defendant before it and to decide such matters as it has decided."

[41] A foreign judgment, may be set aside for the want of jurisdiction, as prescribed by statute. By section 6 (1)(a) (ii) of the Judgments (Foreign) (Reciprocal Enforcement) Act, a person against whom a foreign judgment has been registered, may have it set aside if the registering court is satisfied that the court of the country of the original court lacked jurisdiction.

[42] In embarking on the question of jurisdiction, it would be helpful to first examine the principles governing the proper law of a contract. The law relating to the rules which afford guidance to the court on the question of the proper law of a contract is well established. It is the law to which the parties agreed, or which they intended to apply or presumed to have intended to be applicable. In ***R v International Trustee for the Protection of Bondholders*** [1937] 2All ER 164; [1937] AC 500, at page 166, Lord Atkin placed the rule in the following context:

> "The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed, the intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion, the court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply a particular law, e.g. the country where the contract is made, the country where the contract is to be performed. … But all these rules only serve to give *prima facie* indications of intention: they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such."

[43] Where there is no express choice of law, the court is obliged to decide what law they would have chosen. In determining the proper law, the court will look at the system of law by reference to which the contract was made or that which the transaction has the closest and most real connection -see ***Bonython v Commonwealth of Australia*** [1951] AC 201. Later authorities express the proper law to be that which the contract has the most real and substantial connection.

[44] The court, in deciding on the proper law of the contract, is required to examine the nature of the contract and all the surrounding circumstances and where the parties to a contract have not expressly agreed on a forum, there are presumptions from which the court may ascertain the appropriate forum for the hearing of an action arising from the contract. The primary presumption is that the law of the country in which the contract was made governs the nature of the contract and obligation under it. However, this presumption, being rebuttable, may be superseded by counter prevailing circumstances which exist to displace the *lex loci contractus* – see ***International Trustee for the Protection of Bondholders***.

[45] Although a discretion is conferred on the domestic court to order the registration of a foreign judgment, it is incumbent on the domestic court to satisfy itself that the foreign judgment has extra territorial validity. In order to establish that a foreign court has jurisdiction to hear and determine an action, one of the following conditions must be shown to exist, namely: that the defendant was a resident or had a presence in the foreign country, or voluntarily appeared in the proceedings, or

submitted to the jurisdiction, or before the commencement of the proceedings, consented to submit to the jurisdiction of the court.

[46] There is a line of older cases speaking to residence as a requirement as opposed to presence of a defendant in the foreign country at the time of the commencement of the proceedings as sufficient to ground jurisdiction. So far as a corporation is concerned, there are recent cases which speak to the "presence" of the corporation in ascertaining whether it is subject to the foreign court's jurisdiction. In some cases, in dealing with the question whether a foreign corporation is amenable to a domestic court, the words "reside" or "carrying on business" are used interchangeably. In ***South India Shipping Corporation Ltd v Export-Import Bank of Korea*** [1985] WLR 585 at 589 Ackner LJ referring to these words, said:

> "Those expressions were used as convenient tests to ascertain whether a corporation had sufficient presence within the jurisdiction since generally courts exercise jurisdiction over the persons who are within the territorial limits of their jurisdiction."

[47] In ***Adams v Cape Industries Plc***, the Court of Appeal, in addressing the question of jurisdiction of a foreign court, in respect of corporations, stated the test to be whether the corporation: is carrying on its own business at a definite and fixed place in the foreign country, or is conducting its own business through an agent who has been carrying on the corporation's business at or from some fixed place of business and the business has been in operation in excess of a minimum period of time. The

court further stated that if the representative of the corporation has the authority to bind its principal this is exceedingly strong evidence supporting the corporation's presence in the foreign country but if the representative does not possess that authority this fact is a very strong indicator to the converse**.**

[48] As earlier shown, initially, Anderson J concluded that DYC had a real and substantial connection with Florida. This conclusion, he essentially grounded on the finding that DYC had actively and substantially engaged in business at a fixed place in that state. Having found Florida to be the natural forum, in the alternative, he then took into consideration a series of events which unfolded in the proceedings and went on to conclude that jurisdiction had been established by DYC's voluntary submission to the foreign court. Was his approach correct?

[49] In applying the real and substantial connection test, within the context of jurisdiction, it is necessary to show a real and substantial connection with the cause of action and the foreign court - see ***Morguard Investments Ltd v De Savoye*** (1990) 3 SCR 1077 and ***Beals***. The learned judge, in his inquiry in relation to the test, directed his mind to DYC's connection with Florida, with reference to the following: DYC conducting business in Florida with Essex and through its agent Anchor Seafood; the sale of the products to Essex; Anchor Seafood invoicing and collecting the proceeds of sale; DYC's storage of the products in a warehouse in Florida for approximately two years and its maintaining a bank account in Miami through Anchor Seafood which was later transferred to DYC; and the payment of customs duties on some of the shipments.

These circumstances which were taken into account by the learned judge were inadequate to show that DYC had a real and substantial connection with Florida. Anchor Seafood was a mere conduit through which DYC conducted its trade from Jamaica. Significantly, there is nothing to show that Anchor Seafood could have entered into contracts to bind DYC. In considering the real and substantial connection test, the learned judge ought to have first taken into account the proper law of the contract. The contract was made in Jamaica, the products originated in Jamaica and DYC is a Jamaican company having its principal place of business here. This would lead to the conclusion that Jamaica would be the appropriate forum. The learned judge therefore erred in finding that DYC had a fixed place of business in Florida and a real and substantial connection to that state.

[50] I would pause here briefly to state that the conduct of DYC's business by its agent Anchor Seafood in Florida, its sale of products to Essex and the various acts complementary thereto would not be enough to amount to performance of the joint venture contract partly in Jamaica and partly in Florida. An inference could not be drawn that, implicit in the contract was a term or were terms that it should be performed partly in both countries. Consequently, it could not be concluded that the performance of the contract was to be carried out in Jamaica and in the state of Florida, to assign to the court in Florida the right to adjudicate on the matter.

[51] In this case, although, by applying the real and substantial connection test, Jamaica could be regarded the natural forum for the hearing of the action, the

further question is whether there are any circumstances giving rise to the court in Florida exercising jurisdiction over DYC. This requires an investigation as to the foreign court's competence to entertain the matter by reason of submission by DYC to that court's jurisdiction.

[52] The learned author in Brigg's Civil Jurisdiction and Judgments, treated with the question of submission to a court's jurisdiction, in the following context, at paragraph 7.49, in which he said:

> "If the defendant appears and defends the merits of the claim he will, in general, be held to have submitted to the jurisdiction of the court. Whether he has submitted by virtue of his voluntary appearance, or his participation in the action, is in the first place determined by recourse to the common law though, as will be seen, statute has intervened to establish or confirm the non-submissive nature of three particular kinds of act.
>
> As to whether the acts of the defendant constituted a submission, the usual approach is to ask whether the defendant took a step in the action to contest the merits: if he did, his act will be seen as a submission. It may not be necessary that the step be one which unequivocally demonstrates a submission to the merits jurisdiction of the court. Instead, the court is more likely to ask the question the other way round: were the acts of the defendant which are pointed to 'obviously and objectively inconsistent' with the defendant's submission to the jurisdiction of the foreign court; if they were, they will be not characterised as submission to the adjudicatory jurisdiction of the foreign court, but otherwise they will. In principle, at least, an act should not be interpreted as a submission if it would not be so regarded under the law of the foreign court; it would appear to be a little odd for an act to be regarded as submission to a court which does not consider itself to have been submitted to. …Submission is found or found to be absent by reference to English, not foreign, law.
>
> If the defendant elects to submit to the jurisdiction of the foreign court, but after he has done so the claimant succeeds in

> having a new cause of action added to the claim, or another party succeeds in being joined as claimant, it may be too late for the defendant to reconsider his position and withdraw his earlier submission. On the question whether the defendant is to be taken as having submitted to the enlarged claim, it appears that a pragmatic view is to be adopted; if the new claim arises out of the same subject matter as the original claim, or is related to it, the original submission will extend to it as well. If it is not, it will not and, to this extent, the defendant will be entitled to argue that he submitted to some, but not to all, of the claim against him. …
>
> A defendant who did not submit to begin with may, if he subsequently seeks to appeal against a judgment, be taken to submit to the adjudicatory jurisdiction of the court with retrospective effect, and in this sense to throw away his common law shield. It may be necessary to examine with care whether the part played by the defendant after the original judgment was entered was a submission, albeit late in the day, or was rather an assertion that the judgment which was entered was entered in circumstances in which the foreign court should have realized that it had no jurisdiction. In the latter case, the appearance should not be taken as a submission to the jurisdiction. But in the former case, there is no obvious reason why a defendant should not be found to have elected to submit to the adjudicatory jurisdiction of the foreign court after all, for if he is seen to mount an appeal against the merits of the judgment, he necessarily asks the court to adjudicate on those merits."

[53] At common law, a defendant may resist jurisdiction. In order to establish that a defendant has submitted to a foreign jurisdiction, it must be shown that he had done so by voluntary appearance or had taken steps to contest the merits of the claim. There is also statutory provision enabling a party to resist jurisdiction. Section 6 (2) (a) of the Judgments (Foreign) (Reciprocal Enforcement) Act provides as follows:

> "For the purposes of this section the courts of the country of the original court shall, subject to the provisions of subsection (3), be deemed to have had jurisdiction -
>
> (a) in the case of a judgment given in an 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…

[54] Ordinarily, a party who would not be subject to the jurisdiction of a foreign court, by failing to object to the court exercising authority over him, may give the court jurisdiction which it would not have possessed initially. However, where a party makes a voluntary appearance in the foreign court, he is taken to have submitted to that court (see ***Harris v Taylor*** and ***Henry v Geopresco International Ltd***), but where he resists jurisdiction, depending on the circumstances of the particular case, he may successfully challenge same.

[55] DYC opposed the foreign court's exercise of its jurisdiction. Anderson J regarded DYC's withdrawal of its motion of objection to jurisdiction as removing the protective shield inuring to DYC. Mr Dunkley, however, complained that the learned judge failed to have taken into consideration that DYC, in its first affirmative defence, posed a jurisdictional challenge. In light of the objection in the affirmative defence, did the challenge remain in effect and as a result provided a shield for DYC? In resolving this

issue it will be necessary to ascertain whether DYC was involved in pursuing the proceedings, despite its objection.

[56] In an action for the recovery of a debt, a foreign court has jurisdiction to enter a personam judgment where the judgment debtor submits to the court's jurisdiction. However, where a defendant objects to jurisdiction but at the same time participates in the proceedings, certain difficulties may be encountered in deciding on submission. Speaking to this issue, in ***Adams v Cape Industries Plc*** Scott J said at page 459:

> "Problems, obviously, still remain, particularly in cases where the steps taken by the defendant in the foreign proceedings were taken not only for the purpose of contesting the jurisdiction but also for the purpose of preparing for a trial on the merits. Some authority suggests that in such cases the defendant will be regarded as having submitted to the jurisdiction of the foreign court: see e.g **Boissiere & Co v Brockner** & Co (1889) 6TLR85 But in **Williams and Glyn's Bank Plc v Astro Dinamico Compania Naviera S.A** (1984) 1 W.L.R 438 th House of Lords approved a dictum of Cave J in **Rein v Stein** (1892) 66 LT 469, 471 that:
>
> > 'in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all'."

[57] Although DYC did not consent to the foreign jurisdiction nor did it make a voluntary appearance in the foreign court despite this, a further question is whether, in the circumstances of this case, evidence exists to show that DYC had taken steps in the

action to contest the merits of the claim so as to have drawn it through the jurisdictional gateway.

[58] On 15 April 2002, DYC and Essex were added as defendants to the proceedings by way of the second amended verified complaint. On 14 December 2004, DYC filed an answer and affirmative defenses to the complaint. In 2003, Perla and DYC settled a part of Perla's claim by way of a Limited Release relating to a loan by Perla to DYC. On 14 July 2003, DYC made an offer of judgment but on the same date withdrew same and in lieu thereof, proposed an offer for settlement in the sum of US $325,000.00 in full settlement of the claim with each party bearing its own costs and legal fees.

[59] On 5 January 2006, notices were served by DYC on Mrs Martinez, Mr Martinez-Malo and Anchor Seafood for the taking of depositions, for the purpose of discovery, for use at the trial.

[60] On 9 January 2006, DYC filed a request for admissions as to the merits of the claim. The tenor of the document was to secure information as to how Perla proposed to prove its claim.

[61] A fourth amended verified complaint was filed by Perla on 24 March 2006, to which DYC filed an answer and affirmative defences to that complaint on 10 April 2006. In April 2006, DYC filed interrogatories and a request for production of documents by

which it sought information on which Perla intended to rely at trial. This also points to DYC seeking to obtain matters which would go to the heart of the claim.

[62] Significantly, DYC appealed the order striking out its defence and the entry of judgment against it. It was represented by counsel at the hearing. The case was remitted for assessment of damages. The assessment was again contested by DYC. At the time of assessment, four counts were before the court but three were withdrawn and only one was placed before the jury. Mr Dunkley complained that five amendments of the verified complaint were made by the respondent initially, it claimed a share in DYC's assets and later submitted a claim for purported accounts for a share of the profits, thus rendering a new cause of action. Even if it could be said that by this act Perla created a new cause of action, it would have been too late for DYC to have registered its complaint, as it did not raise this issue in its answer and affirmative defences, it simply responded to the issues raised by Perla. In any event, the sharing of the profits was at the heart of the joint venture agreement. The fourth amended verified complaint which contained the pleadings before the court comprised the following counts against DYC: count one - tortious interference with business relationship; count two - conversion; count three - breach of joint venture contract; and count four - dissolution of partnership and accounting. Importantly, on the second occasion of the assessment of damages only the count relating to the joint venture agreement was adjudicated upon. DYC was represented by counsel in the court of first instance and the appellate court. It filed a notice of appeal on 8 April 2010, with

respect to the judgment on the rehearing of the assessment of damages, which it withdrew.

[63] From the foregoing, the conclusion is clear. DYC elected to participate in the proceedings despite its contest to jurisdiction. DYC actively engaged in the litigation process even after its defence was struck out. Its conduct portrays submission and accordingly the Floridian Court was not devoid of jurisdiction to determine the case. Anderson J, was correct in finding that DYC had taken several steps in the proceedings and had therefore submitted to the foreign court. The fact that the learned judge had sought assistance from the dicta of McPherson JA in the ***Santis v Russo*** to bolster his finding does not render his conclusion, as to submission to the foreign court's jurisdiction, wrong as there was sufficient evidence on which he could have so found. It cannot be said that the court could not have proceeded with the case for want of jurisdiction.

Fraud

[64] As a general rule, any judgment, domestic or foreign, obtained by fraud, is unenforceable. It is a settled rule that the English Court will entertain an action in which a judgment has been obtained by fraud, but the party who alleges fraud must show that since the trial, newly discovered evidence had come to his knowledge which, with reasonable diligence, could not have been produced at the trial and such evidence was material and would likely have affected the outcome of the proceedings. However, at common law and by statute, this rule does not prevail where a foreign

judgment is concerned. A foreign judgment obtained by fraud is impeachable and unenforceable even if no new evidence of fraud is produced. Even if the fraud could have been discovered or was alleged in the foreign court, the foreign judgment is open to challenge. This rule had been firmly implanted in ***Abouloff***.

[65] Prior to the advent of the ***Abouloff*** rule, there was a preponderance of authorities including, ***Bank of Australasia v Niass*** [1851] 16 QB & E 717 and ***Cammell v Sewell*** (1860) 5H&N 728, in which the courts recognised and enforced the proposition that the merits of a foreign judgment cannot be retried in an action on the foreign judgment. This proposition had to be balanced against two rules, which existed then, namely: (1) an English or a foreign judgment can be impeached for fraud and (2) in an action relating to a foreign judgment the merits cannot be investigated. The difficulty of integrating these rules as to how to proceed where an inquiry could not be made into an issue of fraud without reopening the merits of the case was considered and decided in ***Abouloff*** giving rise to the principle.

[66] In ***Abouloff***, the plaintiff obtained a judgment in Tiflis, Russia, in which it was ordered that the defendants return certain goods or pay charges to the claimant. Relying on the foreign judgment, the plaintiff brought an action in the English court for conversion of the goods. In their defence, the defendants pleaded that the foreign judgment had been obtained by fraud as the plaintiff had fraudulently concealed from the Russian court that the goods had been returned. The court held that, upon demurrer, the defence was good. At page 300 Coleridge CJ said:

> "…where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the courts of this country, when he seeks to enforce the judgment so obtained. The justice of that proposition is obvious: if it were not so, we should have to disregard a well - established rule of law that no man shall take advantage of his own wrong..."

Abouloff gives primacy to the rule laid down by DeGrey CJ in the case of the ***Duchess of Kingston*** (1776) 20 St Tr 355 when he said "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings".

[67] Later, ***Abouloff*** was adopted in ***Vadala v Lawes*** (1890) 25 QBD 310. In ***Vadala v Lawes***, the plaintiff brought an action against the defendant on bills of exchange falsely claiming that they were commercial but they had in fact been given for gambling debts. Lindley CJ, after reviewing ***Abouloff***, said at page 316:

> "…. if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court."

[68] For over a century, several English authorities have embraced ***Abouloff*** and ***Vadala v Lawes***. In ***Jets Holding Inc & Others v Patel*** [1990] 1 QB 335, an action was brought to enforce a judgment of a superior court. An allegation of fraud was raised in the defence. The defendant appealed from an order giving summary

judgment to the plaintiff for the amount in the foreign judgment. The order was set aside for fraud. Staughton LJ had this to say at page 344:

> "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 in road into the objective, which is generally desirable, of enforcing judgments where in the eyes of English law the foreign court had jurisdiction. The defendant may have been served in the foreign country, entered on 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."

He went on to say:

> 'The decisions in ***Abouloff***…and ***Vadala*** …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."

[69] In ***Owens Bank v Bracco and Another*** [1992] 2AC 443 the House of Lords carried out a comprehensive review of ***Abouloff*** and found that ***Abouloff*** was a binding authority which could only be overruled by statute. In ***Owens Bank v Bracco*** the bank made an application, under section 9(a) of the Administration of Justice Act to register a judgment, obtained in Saint Vincent, for the purpose of enforcing it in England. Following this, applications were made by the defendant to set aside or stay the English proceedings, contending that prior to, during and subsequent to the proceedings in Saint Vincent the parties had initiated criminal and civil proceedings in which fraud had been raised in Italy; or alternatively, for an order that the issues be

tried as to whether the registration of the Saint Vincent judgment was obtained by fraud. The judge refused to set aside the registration or stay the proceedings but ordered that an issue should be tried as to whether the judgment in Saint Vincent was obtained by fraud. On appeal, the decisions were upheld by the Court of Appeal. The bank's appeal to the House of Lords, solely on the trial of the issue of fraud, was dismissed. At page 465 their Lordships said:

> "The decisions in ***Abouloff's*** case and ***Vadala v Lawes***, 25 Q.B.D. 310 are, in our judgment, clearly binding on this court. In particular, it is clear to us that the rules for setting aside an English judgment on the ground that it was obtained by fraud are not the same as those applicable in registration proceedings or in a common law action to the raising of an issue of fraud with reference to a foreign judgment."

[70] In ***Owens Bank v Etoile Commerciale SA*** their Lordships considered ***Abouloff*** and ***Vadala v Lawes*** among others. Lord Templeman, after alluding to attacks made against the decision in ***Abouloff***, went on to say at page 48:

> "An English judgment is impeachable in an English court on the ground that the first judgment was obtained by fraud but only by the production and establishment of evidence newly discovered since the trial and not reasonably discoverable before the trial: see ***Boswell v Coaks*** (No) 2 (1894) 86 LT 365 n.
>
> The position with regard to foreign judgments is different. It is governed by the so called rule in ***Abouloff v Oppenheimer & Co*** (1882) 10 QBD 295…. Lord Coleridge CJ decided the case on the broad grounds stated in the ***Duchess of Kingston's*** case (1776) 20 St. Tr. 355."

[71] In ***Syal v Heywood*** [1948] 2 KB 443, the plaintiff obtained a default judgment in India against two defendants for money loaned to them. The defendants failed to defend the action by reason of an alleged promise by the plaintiff that no further action would have been taken for six months. The plaintiff obtained an order for the registration of the judgment under the English Foreign Judgments (Reciprocal Enforcement) Act 1933. The defendants applied to set aside the registration on the ground that the judgment was obtained by fraud, on the allegation that the plaiintiff had deceived the court by falsely asserting that he had lent them 20,000 rupees when in fact the loan was for 10,800 rupees. On appeal the judgment was set aside. At page 448, the court said:

> "…the question is not one of fraud on the plaintiff, but of fraud on the court, and it seems to us to be clearly established by authority binding on us, that if the defendant shows a prima facie case that the court was deceived, he is entitled to have that issue tried even though in trying it, the court may have to go into defences which could have been raised at the first trial."

[72] Dr Winston Anderson, in his book Elements of Private International Law, in support of the ***Abouloff*** principle, states at page 229:

> "The English authorities derived from the rule in ***Abouloff*** were accepted. This was without enthusiasm and with some regret because of the salutary principle that favoured finality in litigation. But those cases were thought too well entrenched to be overruled. There can therefore be no doubt that the mere fact that an allegation of fraud was raised and determined in a foreign country does not prevent it being raised and relitigated in the enforcement proceedings. Regrettably or not, the ***Abouloff*** rule continues as the general principle of Caribbean Law."

[73] Despite the foregoing, the principle in ***Abouloff***, has drawn severe criticisms from judges, scholars and academic writers. In Dicey, Morris and Collins, Conflict of Law, 14th Edition, at page 623, the learned authors said:

> "Thus, the rule that foreign judgments can be impeached for fraud stands in square opposition to the principle of conclusiveness and also to the principle that English judgments can only be impeached for fraud if new evidence of a decisive character has since been discovered."

[74] In ***Hong Pian Tee v Les Placements Germain Gauthier*** a case from Singapore, at paragraph 19 Chao Hick Tin JA said:

> "We must however, point out that the approach adopted in ***Abouloff*** (supra) is completely inconsistent with that adopted by the English court vis-a-vis its own domestic judgment."

[75] In ***Owens Bank v Etoile Commerciale SA***, the House of Lords expressed reservation about the ***Abouloff*** principle but although critical of that case, their Lordships accepted that it was binding on them. At page 50 Lord Templeman said:

> "Their Lordships do not regard the decision in ***Abouloff's*** case 10 Q.B.D 295, with enthusiasm, especially in its application to countries whose judgments the United Kingdom has agreed to register and enforce. In these cases the salutary rule which favours finality in litigation seems more appropriate."

[76] Although for years the rule in ***Abouloff*** *reigned* supreme in the United Kingdom and has been adopted in the courts of the Commonwealth, in recent times, the courts of several Commonwealth jurisdictions have refused to follow it. There has

been a perceptible contrast between the treatment of the ***Abouloff*** rule in the United Kingdom and in certain commonwealth jurisdictions. These jurisdictions, in adopting a new approach to the rule, expressly specify that where fraud is raised in relation to a foreign judgment, the domestic court will accommodate an action arising out of that judgment provided that with due diligence evidence of fraud was not discovered at the time of the trial of the action in the foreign court.

[77] The Canadian case of ***Beals*** is one of the well known cases in which the court has departed from ***Abouloff***. In that case, an action was brought in Florida over the sale of land. A default judgment was entered against the defendants who were Canadian residents. They failed to properly defend the action. An award of US$210,000.00 in compensatory damages and US$50,000.00 in punitive damages was made against them. They did not apply to set aside the judgment, nor did they appeal the award for damages in the court in Florida. On appeal, the questions arising, among others, were whether the issues of fraud or natural justice were established so as to vitiate the foreign judgment. The appeal was dismissed and the foreign judgment enforced. The court stated that:

> "While fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment. The defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of

> due diligence prior to the obtaining of the foreign judgment."

[78] In ***Vasconcellos***, this court implicitly followed the Canadian proposition. The appellant, Mr Vasconcellos, a resident of Florida, was the principal shareholder of a Floridian corporation. In 2001, a bank in Florida granted Jamaica Steel Works a loan of US$500,000.00 which was guaranteed by Mr Vasconcellos, his wife and Mr and Mrs Gafoor. Jamaica Steel Works defaulted on the loan and an action was commenced by the bank against the Mr and Mrs Vasconcellos, Jamaica Steel Works and the Gafoors.

[79] The bank obtained final summary judgment against Jamaica Steel Works and Mr Gafoor but the suit was adjourned for mediation in respect of Mr Vasconcellos, his wife and Mrs Gafoor. Mrs Gafoor did not attend the mediation despite the fact that she was notified. The outcome of the mediation was that Mr and Mrs Vasconcellos should pay US$400,000.00 to the bank in full and final settlement of the guarantees signed by them. The bank subsequently struck out a defence which had been filed by Mrs Gafoor and summary judgment was entered against her, following which Mr Vasconcellos obtained a default summary judgment against the Gafoors in the sum of US$402,838.27. The bank later assigned to Mr Vasconcellos all its rights and interest in the judgment entered. Subsequently, Mr Vasconcellos brought proceedings in our Supreme Court to recover, from Jamaica Steel Works and the Gafoors a sum of US$546,884.63 or its local equivalent. The Jamaica Steel Works and the Gafoors filed an affidavit objecting to Mr Vasconcellos' claim averring that the foreign judgment was

vitiated by fraud. The trial judge dismissed the claim, finding that where a foreign judgment has been impeached by fraud the local court will not enforce it. Mr Vasconcellos appealed and his appeal was allowed. Karl Harrison JA said, at paragraph 45 of the judgment:

> "In the instant case the 3rd Respondent has failed in my view to provide any evidence to substantiate her allegation of fraud. On a close examination of the documentary evidence contained in the Record of Appeal, the 3rd respondent has not alleged who has committed the fraud. Furthermore, where the circumstances are such that the defendant was aware of the action against her in the foreign court, aware of the allegations pertaining to jurisdiction, it is my view, that failure to prosecute her defence cannot now be re-litigated in these courts. A burden is placed upon her to demonstrate either that there was fraud that misled the foreign court into assuming jurisdiction or that there are new material facts suggesting fraud that were previously undetectable through the exercise of reasonable diligence. In my view, she failed to establish both limbs.
>
> It is therefore my judgment that the learned judge was plainly wrong when he held that once an allegation of fraud is made to impeach the foreign judgment, that judgment will not be enforced by our courts even if the issue was purportedly dealt with in the foreign proceedings. It is further my judgment that there must be evidence and not merely a bare allegation which discloses at least a prima facie case of fraud – see ***Owens Bank Ltd v Etoile*** (supra)."

[80] The case of ***Hong Pian Tee v Les Placements Germain Gauthier*** also shows a departure from ***Abouloff***. In that case, the Court of Appeal carried out a comprehensive review of a line of English cases in which the rule in ***Abouloff*** was followed, in contrast with Canadian and Australian cases, in relation to the enforcement of a foreign judgment, on the issue of fraud. The claimant, Les Placements, obtained a

summary judgment against Hong Pian in Canada and thereafter instituted proceedings in Singapore to enforce the foreign judgment. Summary judgment was granted. On appeal, Hong Pian sought to rely on fresh evidence to show that the foreign judgment had been obtained by fraud, that Les Placements was not entitled to summary judgment and the action should proceed to trial. The appeal was dismissed. Chao Hick Tin JA, delivering the judgment of the court, had this to say at paragraph 30:

> "In our judgment, the approach taken by the Canadian-Australian cases and ***Ralli v Angullia*** (supra) is more in line with principles of conflict of laws and treats foreign judgments in the same way as domestic judgments. It is consonant with the doctrine of comity of nations. It avoids any appearance that this court is sitting in an appellate capacity over a final decision of a foreign court. We, therefore, ruled that where an allegation of fraud had been considered and adjudicated upon by a competent foreign court, the foreign judgment may be challenged on the ground of fraud only where fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case."

[81] In the case of ***Close & Anor v Arnot***, the claimants brought proceedings against the defendant in New York and the service of the process was made while the defendant was on a visit to New York. The defendant failed to appear because of his inability to meet the cost of legal representation in New York. The claimant obtained a judgment in default and subsequently commenced enforcement proceedings in New South Wales. The defendant successfully resisted the action by claiming that the judgment was obtained by perjured evidence. In the domestic court, fresh evidence of

fraud was elicited from the 1st claimant's evidence. It was held that the proceedings in New York were tainted by fraud. Graham, AJ said:

> "It must be shown by, the party asserting that a judgment was been procured by fraud, that there has been a new discovery of something material…which, by themselves or in the combination with previously known facts, would provide a reason for setting aside the judgment."

[82] In ***Keele v Findley***, the court, in enforcing a foreign judgment, followed the approach taken by the Canadian authorities. In that case, an action was brought in New South Wales by the claimant for the enforcement of a judgment obtained in Arizona. In answer to the claim, the defendant pleaded that the foreign judgment was occasioned by fraud. It was held that:

> "The same principles governing applications to set aside a local judgment by reason of fraud are applicable to applications resisting the enforcement at common law of a foreign judgment obtained by fraud."

[83] In ***Beals, Close & Anor v Arnot*** and ***Hong Pian Tees v Les Placements Germain Gauthier*** the courts expressed the view that where the issue of fraud was unsuccessfully raised in the foreign court, seeking to raise it in the domestic court would amount to a re-litigation of the issues concluded in the foreign court. It is clear from the decisions in ***Beals***, ***Hong Pian Tees v Les Placements Germain Gauthier*** and ***Keele v Findley***, that the courts, by the modern approach, have clearly abandoned the traditional approach heralded by ***Abouloff***. The courts have demonstrated that the applicable test in challenging the foreign judgment, must

accord with the rule in the domestic courts relating to the setting aside of judgments obtained by fraud. It expressly shows, that where fraud is raised on a foreign judgment it will only be set aside where newly discovered evidence, which could have some material effect on the trial, which was not before the foreign court, had come to the attention of the party who seeks to set aside the judgment. This makes good sense jurisprudentially. ***Abouloff*** defies the principle of the finality of judgments. There cannot be one rule for the impeachment of a judgment entered in the domestic court and another for foreign judgments.

[84] In the recognition of good jurisprudence, the various commonwealth courts have refused to accept ***Abouloff*** as good law or a persuasive authority. ***Vasconcellos*** clearly shows that our local court is not necessarily bound by ***Abouloff***. The fact that Harrison JA found that in the court below, there was no evidence of fraud, does not mean that the judgment cannot be followed, in the case under review. The learned judge, expressly stated that the local court, in maintaining jurisdiction, will only do so if in assuming jurisdiction the foreign court was misled by fraud or that material facts of fraud raised by a party, had been newly discovered, which, with reasonable diligence, could not have come to that party's attention previously.

[85] Learned Queen's Counsel sought to persuade this court that, in light of the fact that DYC's defence had been struck out, it could not be said that it failed to use reasonable diligence with respect to its defence. Citing the cases of ***Keele v Findley*** and ***Close & Anor v Arnot***, he contended, that Graham AJ, in ***Close & Anor v***

Arnot, suggested that he would distinguish ***Keele v Findley*** by finding that "the English rule remains applicable to New South Wales where judgment is obtained in undefended proceedings in a foreign court where the Defendant has, for good reason been unable to meet the plaintiff's case in that court." This statement was not the *ratio decidendi* in ***Close & Anor v Arnot***.

[86] A pronouncement by Dunford J, in the case of ***Yoon v Song*** in which Dunford J said that there is a necessity for the imposition of a rule "which treats the deception of a foreign court more serious than" the domestic court, was brought to the court's attention by learned Queen's Counsel to support his contention that there are exceptions to the modern proposition. In ***Yoon v Song***, a judgment was obtained by the claimant against the defendant in Korea for a sum of money paid by the claimant to the defendant in respect of a joint venture. The claimant brought proceedings to enforce the judgment. The action was resisted by the defendant for the reasons that the judgment was obtained by fraud and that no action would lie under the Foreign Judgments Act and Foreign Judgments Regulations. The defendant was permitted to present before the domestic court evidence which showed that the claimant failed to divulge to the foreign court that the money claimed was owned by a third party. Judgment was awarded to the defendant. Dunford J said at page 310:

> "Notwithstanding the various criticisms that have been made of the ***Abouloff*** rule, I am satisfied that it correctly states the law in relation to foreign judgments and that if such law is to be changed it should be by parliament and not by the courts.

> Consequently I am not satisfied that ***Keele v Findley*** was correctly decided. Indeed the facts if this case demonstrate in my mind good reason for applying a different test of fraud in respect of foreign judgments to that applied in respect of domestic judgment, although for reasons which appear hereunder I am also satisfied that even if the domestic judgment test were applied, the defendant would satisfy that test in the present case."

[87] It is perfectly true, as urged by learned Queen's Counsel, that the authorities suggest that there are exceptions to the modern principle. For example, ***Yoon v Song*** speaks to such an exception. However, in our view, the exception as shown in ***Yoon v Song*** would not inure to DYC's benefit. Yong had good reason to allow the foreign judgment to be entered against him. DYC did not. The proceedings in the court in Florida were defended not only up to the time that the defence was struck out but the assessments of damages were also contested and appealed. The defence had been struck out by reason of DYC's fault for non-compliance with the orders of the court. The excuse for non compliance that it would run the risk of exposing its trade secrets to Perla is undoubtedly disingenuous or at best, very weak. There was a confidentiality agreement in place to which DYC was a party. This agreement was approved by an order of the court. Significantly, it was mandated, among other things, that all confidential material should be filed in sealed envelopes expressly marked confidential, with the specification that they should not be opened without an order of the court.

[88] Mr Braham submitted that Anderson J failed to make a distinction between ***Vasconcellos*** and the present case as, in ***Vasconcellos*** judgment had been awarded

by reason of the absence of the defendant while in this case, DYC had not been given an opportunity to defend its case, it being struck out by the foreign court. In my view, although there is a distinguishing feature between the present case and ***Vasconcellos*** as to the cause for the entry of the default judgments, this would not have, in itself, prevented Anderson J from adopting ***Vasconcellos***. The question is simply whether in the circumstances of both cases, the foreign court was justified in entering the judgments against them, and in my judgment there was very good reason for doing so. The default judgments were entered against the defendants by reason of their deliberate failure to pay due regard to the orders of the court.

[89] I now turn to the complaint of the breach of natural justice. This court will not enforce a foreign judgment if the proceedings in the foreign court are contrary to natural justice - see ***Pemberton v Hughes*** [1899] 1 Ch 781 and ***Salvesen (or von Lorang) v Administrator of Austrian Property*** [1927] AC 641. Where the question of the vitiation of a foreign judgment on the issue of breach of natural justice is raised, this must be in relation to the procedure adopted by the foreign court rather than the merits of the case - see ***Crawley v Issacs*** (1867) 16 LT 529. Even where an irregularity in procedure exists in the foreign court, this in itself is not recognised as vitiating the foreign proceedings see ***Pemberton v Hughes*** (supra). Substantial injustice must be proved.

[90] It cannot be denied that the right to a fair trial is a fundamental cornerstone of any adjudicatory process. In ***Gambazzi v Daimler Chrysler Canada Inc*** the

European Court of Justice gave consideration to this principle within the context of public policy in relation to the enforcement of a foreign judgment, in answer to questions raised by the Italian appellate court in Milan. In that case, the appellant's defence was struck out for disobedience of an order for discovery and judgment was entered against him. It was held that "the State in which the enforcement is sought may refuse to recognize a judgment delivered in another Member State if the judgment was delivered in manifest breach of the fundamental right to a fair trial".

[91] Speaking to the concept of fairness within the context of the rules of natural justice, in ***Regina v Secretary of State for the Home Department ex parte Doody*** [1993] 3 All ER 91LR 154 at 169, Lord Mustill said, among other things:

> "…(2) the standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demand is dependent on the context of the decision and this is to be taken into account in all its aspects…."

[92] Mr Braham's submission that the decision of the foreign court undermined DYC's right to be heard must be looked at against the developments in that court. DYC filed a defence to the verified complaint. It participated in the action by defending the claim and although it attempted to have the claim dismissed for want of jurisdiction and the lack of a cause of action, jurisdiction was vigorously contested in the foreign court. DYC took several important steps in participating in the proceedings. It is without doubt that DYC had an opportunity to answer the claim and could have

proceeded to trial of the action but for its failure to comply with court orders. It failed to produce documents which it was required to do and although it promised to do so, did not. This permitted the striking out of its defence and the entry of judgment against it. Clearly, it is the author of its misfortune. It has not advanced any evidence of unfairness in the conduct of the proceedings in the foreign court**.** It follows therefore that, its complaint of a breach of natural justice cannot be countenanced as justifiable.

[93] Consideration will now be given to the question as to whether the foreign judgment ought to be enforced. Until the contrary is shown, the presumption is that foreign law is similar to our local law. A foreign judgment of a court of competent jurisdiction is enforceable. A judgment in *personam* of foreign court of competent jurisdiction requiring one party to pay a sum of money constitutes a simple contract debt which may be enforced in our local courts. However, the authorities show that a foreign judgment which is sought to be enforced must be final and conclusive. The test as to the finality of a judgment is that it must be shown that "in the court by which it was pronounced, it conclusively, finally and for ever 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 the parties."- see ***Novuvion v Freeman*** (1889) 15 App Cas 1 at page 9.

[94] A judgment entered in default may be set aside by the court in which it was entered. However, in principle, the fact that it is open to reversal, the judgment ought

not to be divested of a right to finality. The requisite test is whether "it has been given the effect of finality unless subsequently altered". Where a defendant has appealed, the judgment to be enforced should be that of the court of appeal. In ***Guiard v De Clermont and Donner***, [1914] 3 KB 145 a default judgment was entered against the defendant. At first instance, the defendant succeeded in an application to set aside the judgment. It was held, among other things, that the definitive judgment which should be enforced is that of the Court of Appeal and not the judgment of the court which was restored. The default judgment against DYC had not been set aside by the court of appeal in Florida. That judgment of the Court of Appeal must be treated as being final and conclusive.

[95] Section 3(2) of the judgments (Foreign) (Reciprocal Enforcement) Act provides for the enforcement of a foreign judgment. It states that:

> "(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 order directing that this Part shall extend to that foreign country."

Under section 6(1) (a) (iv) of the Act, a judgment registered in accordance with the provisions of the Act may be set aside if the judgment was obtained by fraud.

[96] It is a well-established rule that the court will not make an inquiry into the merits of the case where the judgment of the foreign court is final and conclusive save and except where fraud is raised, and as shown by the modern approach, the merits are open to challenge only where the allegations of fraud are new. Where a foreign judgment is impeached by a party against whom the judgment is given, the burden of proof rests on that party who challenges the judgment.

[97] In raising the issue of fraud, it has not been shown that there is any new evidence which has been discovered which, with due diligence could not have been raised in the foreign court. The evidence put forward by DYC as showing fraud consisted of mainly matters which were before the foreign court and other matters of which DYC was fully aware at the material time which could have been placed before the foreign court. DYC has not demonstrated that the allegations of fraud raised could not have been, with reasonable diligence, placed before the foreign court. There are no circumstances arising in this case, which would have required Anderson J to have held an inquiry into the allegations of fraud, as contended for by DYC. It is obvious that DYC seeks to re-litigate the action.

Conclusion

[98] In my judgment, the court in Miami had jurisdiction over DYC. The issues of fraud complained of related to matters which were before the court or which could have been raised before the court. Perla is entitled to have its judgment registered and enforced, Anderson J was correct in so finding.

[99] The appeal is dismissed with costs to the respondent to be agreed or taxed.

DUKHARAN JA

[100] I have read in draft the judgment of my sister Harris JA and agree with her reasoning and conclusion. I have nothing to add.

PHILLIPS JA

[101] I too have read the draft judgment of Harris JA. I agree with her reasoning and conclusion.

HARRIS JA

ORDER

The appeal is dismissed. The order of the learned judge is affirmed. Costs are awarded to the respondent to be agreed or taxed.