[2018] JMCC Comm 46

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018 CD 00235

BETWEEN	**ERROL PANTON**	**CLAIMANT**
AND	**DONALD PANTON**	**1ST DEFENDANT**
AND	**DESMOND PANTON**	**2ND DEFENDANT**

IN CHAMBERS

Mr Stephen Shelton QC and Ms Stephanie Ewbank instructed by Myers Fletcher and Gordon Attorneys-at-Law for the Claimant

Mr William Panton instructed by DunnCox for the Defendants

HEARD: 2, 3 and 4 July and 20 December 2018

CIVIL PRACTICE AND PROCEDURE – APPLICATION TO ENFORCE A FOREIGN JUDGMENT – APPLICATION MADE AT COMMON LAW – DEFENCE OF FRAUD, PUBLIC POLICY AND NATURAL JUSTICE RAISED TO IMPEACH JUDGMENT – WHETHER JUDGMENT SUCCESSFULLY IMPEACHED

EDWARDS, J

Introduction

[1] Mr Errol Panton (the claimant), by way of a fixed date claim form filed 6 July 2016, seeks the enforcement, in this jurisdiction, of the judgment and orders of the Superior Court of Ontario, Canada, made on the 6 April 2016, by the Honourable Mr Justice Stinson (Stinson J). There are no reciprocal arrangements for the

recognition, registration and enforcement of judgments from the superior courts of Canada, therefore, the claimant must rely on any common law principles which might be applicable.

[2] The judgment delivered by Stinson J in the Superior Court of Ontario on 6 April 2016, is a confirmation of the orders made in arbitration proceedings by the Honourable Susan Greer, delivered on 10 November 2015. This application to enforce those orders, in this jurisdiction, follows almost eight years of litigation.

[3] The orders sought to be enforced in this jurisdiction are as follows:

1. "The net proceeds of sale of the Ocho Rios Condominium, known as the Santa Maria property, be delivered by Donald Panton and Desmond Panton to Shael Eisen Professional Corporation in Ontario, Canada in trust for the Estates of Lascelles Panton, deceased and Ivy Panton, deceased, upon the closing of the said sale, in accordance with the terms of the Mediation Settlement Agreement dated July 29, 2010;

2. The following payments be made personally by Donald Panton and Desmond Panton jointly and severally to Errol Panton:

a. $9,488.88 CAD (equivalent to JMD$906,406.28 as at June 7, 2016);
b. $34,013.18 CAD (equivalent to JMD$3,249,040.99 as at June 7, 2016);
c. $35,000.00 CAD (equivalent to JMD$3,343,305.00as at June 7, 2016);
d. $20,695.00 CAD (equivalent to JMD$1,976,870.45 as at June 7, 2016);
e. $27, 526.69 CAD (equivalent to JMD$2,629,432.00 as at June 7, 2016); and
f. $9,537.16 USD (equivalent to JMD$1,980,508.03 as at June 7, 2016).

(Source of foreign exchange rate- Bank of Jamaica)

3. Costs to be costs in the claim;
4. Such further and other relief as this Honourable Court deems fit.

The grounds on which the Claimants are seeking the orders are as follows:

1. These orders are being sought pursuant to a judgement made by the Superior Court of Justice in Ontario, Canada April 6, 2016;

2. The said Judgement is final and conclusive of the dispute between the parties to the instant claim;

3. The said judgement allows for the payment orders sought herein to be enforced personally against the 1st and 2nd Defendants herein.

4. The 1st and 2nd Defendants are within the jurisdiction of this Court, as they are ordinarily resident in Jamaica, and the relevant property (Ocho Rios Condominium) is located in Jamaica".

The claimant asserts that the sums claimed are judgment sums and do not relate to any penalties.

[4] The claimant and Donald Panton and Desmond Panton (the defendants) are brothers and they are also the three surviving heirs, co-executors and trustees in the estate of their father Lascelles Samuel Panton (hereinafter referred to as "Lascelles Estate") who died on 3 October 2003 and in the estate of their mother Ivy Monica Panton (hereinafter referred to as "Ivy's Estate") who died on 28 June 2006. Both died testate with Wills dated 17 April 1998.

[5] As co-executors, the claimant and the defendants failed to corporate in obtaining probate and administration of the estates. The defendants started proceedings against the claimant in the Superior Court of Ontario, Canada and the claimant counterclaimed. In 2009, the claimant hired Mr Shael Eisen. Mr Shael Eisen is a duly licensed lawyer in Ontario, Canada. The claimant also had representation from Mr Andrew Bryne, an attorney-at-Law in Florida. The defendants were represented by attorney-at-Law Mr Ian Hull, then subsequently by Ms Kimberley Whaley of Whaley Estate Litigation Partners, both being Canadian attorneys. Ms Whaley acted for the defendants in or about September 2012 until March 2013. As a result of the 2009 proceedings in Ontario, Canada, the parties were ordered to attend mediation. At mediation, the claimant and the defendants entered into a Mediation Settlement Agreement and Mutual Release (the Settlement Agreement), dated 29 July 2010.

[6] The portion of the Settlement Agreement which is relevant to the claims made in this court, are as follows:

> *"In order to facilitate the orderly liquidation of assets of Lascelles Panton, the Surviving Heirs appoint as agents (who in turn have the right to appoint their own agents) of the estate, Shael Eisen, Esq., and Ian Hull, Esq., to act jointly to locate, liquidate, and turn over to the Probate Proceedings for administration any and all assets of the estate of Lascelles Panton. Such duties shall not include the institution of collateral litigation proceedings without the consent of the Surviving Heirs, but shall include the issuance of Such Court orders and letters of administration that are necessary to gain access to and collect the estate assets. The Surviving Heirs agree to cooperate fully to aid the agents in their efforts, such as in the provision of information that the agents deem necessary to accomplish their duties. Any fees incurred by the agents shall be paid by the estate. The agents shall make periodic reports to the Surviving Heirs of their progress. Any disputes that arise between the agents or the Surviving Heirs as to any issues of administration of the Probate Proceedings or the actions of the agents that cannot be resolved by agreement of the Surviving Heirs shall be submitted to binding arbitration to the mediator John B Webber Q.C., or another agreed upon Arbitrator, by Shael Eisen and Ian Hull, from the ADR Chambers, whose determination of such disputes, if any, shall be final and binding, without right of Appeal, on the Surviving Heirs. It is understood and agreed that the litigation in Jamaica, regarding the Goldenvale matter is a disputed asset and shall proceed only by way of binding arbitration before John Webber Q.C., without right of appeal. For greater certainty, the litigation regarding Goldenvale shall be dismissed without costs in the Jamaican court."*

[7] Mr Shael Eisen and Mr Ian Hull were appointed to act as agents because the claimant and the defendants could not agree on anything to do with the administration of the estates, including control and distribution of the monies in the estate. On 12 July 2012, Mr Ian Hull's retainer was terminated by the defendants, and he vacated his position as agent. Mr Shael Eisen remained sole agent for the estate and the defendants did not request or seek to appoint a replacement agent for Mr Ian Hull. At the time of the departure of Mr Ian Hull approximately 98% of the estate was complete. There were three arbitrations with the Honourable John

B Webber QC (Mr Webber QC) after Mr Ian Hull's' departure as agent, in which the defendants participated.

[8] There were disputes amongst the claimant and the defendants over property at Goldenvale, the condominium in Ocho Rios referred to as Santa Maria and other properties, all of which ended in arbitration. The issue of Goldenvale went to arbitration before Mr Webber QC in July of 2011, and he ruled against the defendants in August of 2011, holding that the property belonged to a company of which the claimant was the principal.

[9] Despite several attempts to settle the estates, the disagreements between the brothers made it impossible and has led to much of the funds in the estate being frittered away on fees and costs and the accumulation of the judgement debts claimed herein. For example, after the decision on Goldenvale, the defendants "deliberately and improperly" refused to release a caveat they had lodged against the title, on behalf of the estate. The parties went back to the arbitrator, on motion, in February of 2012, to deal with the removal of liens, caveats, cautions and encumbrances on the title to Goldenvale and for an order for Santa Maria to be sold to the highest willing buyer. Mr Webber QC was also asked to make an order that, if the defendants were not willing to file for probate of the estate by a certain period then the claimant be allowed to do so. Mr Webber QC having heard the motion, ordered that the caveat lodged on the title to Goldenvale, (which was not estate property), for the benefit of the estate and which was unauthorized by the estate, be removed, at the expense of the defendants.

[10] With regard to Santa Maria, the defendants refused to accept an offer for sale, the property was falling into disrepair and they also refused to have it listed for sale or to have it rented. As a result, Mr Webber QC found that the defendants' actions were a deliberate obstruction to the finalization of the asset and ordered that the property be sold. Either of the parties were given the right to purchase, on the condition that a 50% deposit is made at the time of signing the offer. Mr Webber

QC also found the defendants solely liable to pay the costs of this proceeding as they were the source of the difficulty.

[11] On 12 July 2012, Mr Ian Hull wrote to Mr Webber QC to indicate his retainer was terminated and to formally remove himself as agent. He also indicated that the defendants wanted the money in the estate held by Mr Shael Eisen to be distributed to them, forthwith. Whaley Estate Litigation came on the record 11 October 2012. By August 2012 the defendants were still refusing to cooperate in the probate of Ivy's Estate and the sale and repair of Santa Maria. On 6 September 2012, another motion, on behalf of the claimant, was made to Mr Webber QC for permission for the claimant to; complete probate; take possession of Santa Maria and for attendant costs. On 12 December 2012, Mr Webber QC held arbitration proceedings and in January 2013, made an arbitral award.

[12] In making the award Mr Webber QC considered the wishes of the claimant to reseal probate in Ivy's Estate, in order to conclude the sale of Santa Maria. He granted the claimant the permission to reseal probate in Jamaica. He granted the defendant's permission to reseal Estate Lascelles in Jamaica. He ordered the sale procedure for the sale of Santa Maria, as he had outlined in previous awards, to proceed. Costs was awarded to both the defendants and the claimant with a set off in costs to the claimant of $25,000. That order was made April 2013. On 3 January 2014 the award made by Mr Webber QC on 17 January 2013, was enforced as a judgment of the court of Ontario with costs of $17, 653, against the defendants.

[13] By the time of the death of Mr Webber QC, the claimant was no longer interested in purchasing the Santa Maria condominium because of the delays and the obstructive behaviour of the defendants with regard to the property and wished to have his deposit back. He also wished to be refunded the cost resulting from the defendants' delays in carrying out the orders made in arbitration. A substitute arbitrator was necessary to adjudicate on these issues.

[14] I have sought to give a brief background on the genesis of the debts sought in the claim, below. The outstanding judgement debt sums were awarded by the arbitrator, Susan Greer in her judgement handed down on 10 November 2015, which was subsequently confirmed by Stinson J in the Superior Court of Ontario, Canada. The orders were in relation to the following matters which I have summarised as follows:

The Ocho Rios Condominium (Santa Maria)

[15] On 27 and 28 July 2011, there was an arbitration hearing before Mr Webber QC in which he ordered the parties to make provisions for the sale of the Ocho Rios Condominium, known as Santa Maria. Due to the brothers' failure to comply with the orders, in or about March 2012 an order was made requiring the Ocho Rios Condominium to be sold to the highest bidder at or above the price of United States Dollars Five Hundred Thousand $500,000. The claimant was the highest bidder and he deposited United States Two Hundred and Fifty Thousand Dollars (USD$250,000.00) in trust with Mr Shael Eisen representing fifty percent of the purchase price, in compliance with the March 2012 order. The defendants demanded the payment of certain amounts from the claimant and threatened not to go through with the sale, if the payments were not made. This lead to a subsequent order being made, in December 2012, which to date has not been complied with.

[16] In April 2014, the claimant was notified by the property managers of the developments at Santa Maria, that there was severe damage to the property, (this after he was barred from entering the property by the defendants and or their agents in Jamaica) as a result the claimant decided that he was no longer desirous of purchasing the unit and requested the return of his USD$250,000 deposit. The outcome of this, is the order made by Susan Greer (the substitute arbitrator) in arbitration, which is now being sought to be enforced in this court as the judgment of Stinson J, that, the Ocho Rios Condominium must be sold and the net proceeds of the sale must be delivered to Mr Shael Eisen in trust.

Costs from the Whaley Law Firm's Motions

i. Costs to Errol Panton in Motion brought by Kimberley Whaley instructed by the Whaley Estate Litigation Partners in the sum of $9, 488.88 CA.

[17] On 19 November 2014, a Motion was commenced by Whaley Law firm for payment to it, of the defendants' outstanding legal fees of $30,654.98. The claimant's attorneys had no choice but to respond to the claim, as the only funds that remained in trust, were from the deposit made by the claimant for the purchase of the Ocho Rios Condominium. The defendants were then ordered to pay the claimants cost in the sum of $9,488.88 CA, for having to attend this motion. That is the antecedence of order 2(a) of the orders sought to be enforced in this jurisdiction.

The appointment of a Substitute Arbitrator

ii. *Errol Panton shall be paid his costs of $34,013.13 from Donald Panton's and Desmond Panton's shares in the Estates held in trust. These costs arise from the need for the appointment of a substitute Arbitrator and subsequent necessary steps in the Estates administration and are otherwise enforceable as an amount owing to Errol Panton by Donald Panton*.

[18] Due to the death of Mr Webber QC, a new arbitrator had to be appointed to resolve disputes between the parties which continued to arise under the Settlement Agreement. Counsel Andrew Byrne took charge of this aspect of the matter and wrote to ADR Chambers seeking the appointment of a substitute arbitrator, in accordance with the Settlement Agreement.

[19] The ADR Chambers then appointed the Honourable David M Steinberg (Mr Steinburg) but he questioned his authority to take the appointment, in light of the absence of a second agent following the departure of Mr Ian Hull. Mr Steinberg then made an order on 31 July 2014, directing Mr Byrne to send the Order to the defendants and their Jamaican Counsel Mr William Panton. The defendants' attorneys, however, objected to the appointment of a substitute arbitrator. The

defendants also refused to participate in a conference call with Mr Steinberg, neither did they make submissions regarding the ability of Mr Steinberg to preside over the matter. Mr Steinberg eventually gave a written ruling in which he opined that, in the circumstances of the terms of the Settlement Agreement and in the absence of the appointment of a new agent after the departure of Mr Ian Hull, a Court Order would be necessary to appoint an arbitrator to replace Mr Webber QC.

[20] Mr Shael Eisen commenced a motion in Ontario for the appointment of a substitute arbitrator. The defendants opposed the motion for a substitute and refused to hire new legal representation to act on their behalf. The motion was decided by the order of the Honourable Justice McEwan, which led to the appointment of Susan Greer, as substitute arbitrator in place of Mr Webber QC.

That is the antecedence of the order at 2(b) sought to be enforced in these courts.

The Jamaican Litigation

iii. *Errol Panton shall be paid the sum of $35,000.00 from Donald Panton's and Desmond Panton's shares in the Estates held by the Eisen Firm in trust for his Costs associated with the Jamaican litigation*.

[21] Mr Webber QC, in his July 2011 Order, ordered the parties "to cooperate fully and reseal probate of the Estates of Lascelles and Ivy Panton, if necessary, at their own expense but with the full cooperation of all other surviving heirs in… Jamaica." These costs are associated with a series of litigation which the claimant became engaged in due to the refusal of the defendants to comply with the Mediation Agreement and the orders of Mr Webber QC. The claimant, through his counsel, brought a motion to Mr Webber QC, heard on 24 October 2012 and in that motion he sought the authority to execute the necessary documentation for obtaining probate of his mother's Will. The hearing was held on 19 December 2012 and was confirmed in Mr Webber QC's January 2013 Order, giving the claimant the authority to unilaterally act on behalf of the Ivy's Estate, without his brother's participation.

[22] On 27 January 2013, Mr Webber QC ordered that the defendants were permitted to reseal the Certificate of Appointment of Estate Trustee for Lascelles Estate at their own cost and independent of the claimant. Part of the order of Webber J stated that:

> *"This order is granted solely on the basis that any cost or disbursement involved in the resealing of the Certificate of Appointment in the Estate of Lascelles' Samuel Panton in any of these jurisdictions shall be paid by the Defendants. Errol shall not be required to contribute to the cost or disbursement nor shall the Estates of Lascelles' Samuel Panton or Ivy Monica Panton be responsible for any of the disbursements."*

[23] Due to the defendants' continued refusal to comply with the January 2013 order, Mr Byrne wrote to Mr Webber QC, requesting an arbitral hearing. Jamaican Counsel for the defendant responded to Mr Byrne's letter by writing to Mr Webber QC, challenging his authority to decide the issue of the payment of costs and attorney's fees.

[24] **T**he claimant was then forced to file his own action in Jamaica to honour Mr Webber QC's decisions with respect to the resealing of the Will in Ivy's Estate and the purchase of the condominium Santa Maria. The claimant had to have the arbitration decision incorporated into an order of the Superior Court of Ontario, in order to ensure that the decisions were enforceable in Jamaica. As a result, the claimant was required to bring a motion in Ontario which resulted in the judgement of the Honourable Justice Morawetz, dated 3 January 2014. The claimant was awarded $17,653.20 in costs payable out of the defendants' shares in the Estates.

[25] On 21 March 2013, the defendants served on the claimant, papers in The Matter of the Estate of Lascelles Panton, 2012 HCV 06036, seeking an order from the Supreme Court of Jamaica, requiring the claimant to cooperate in the resealing of Lascelles' and Ivy's Will in Jamaica. On 8 August 2013, while the matter of the resealing of Lascelles Estate was pending before the Jamaican Supreme Court, the defendants gave notice to the claimant that they would be filing a similar action

in regarding the resealing of probate for Ivy's Estate. The defendants thereby, made an attempt to consolidate the resealing action of both their parents' estates but abandoned that effort by not showing up for court.

[26] The claimant's Jamaican counsel attempted to arrive at a Consent Order in the Jamaican litigation while the defendants still refused to honour Mr Webber QC's January 2013 Order. On 9 December 2013, counsel for the claimant appeared in the Jamaican Supreme Court before the Honourable Justice V Harris (Ag) (as she then was) in relation to a fixed date claim form claim No 2012 HCV 06036. On 9 December 2013, Harris J (Ag) ruled that any disputes about the probate should be submitted to the Arbitrator and cannot be dealt with by the Jamaican Supreme Court. She also directed the parties to prepare a Consent Order consistent with her ruling with the costs to be borne by the defendants. Eventually, the defendants consented to the terms of the December 9 ruling by Harris J, consolidated in the Consent Order of February 5. On 9 March 2015, The Jamaican Supreme Court made Consent Judgement with respect to Ivy's Estate, which was similar to the orders of the court resealing Lascelles' Will, except that costs were to come out of that Estate.

[27] However, the defendants refused to pay the associated costs to the claimant as a result of or honour the awards made in, the arbitrations in Ontario. The claimant therefore, sought further arbitration proceedings in Ontario, Canada.

The Greer J Arbitration

> *iv. Errol Panton shall be paid $20,695. 23 for his legal costs for Arbitration for today's Arbitration Hearing, with such Costs to be paid put of Donald Panton and Desmond Panton's shares in the Estates and held by the Eisen Firm in trust and is otherwise enforceable as an amount owing to Errol Panton by Donald Panton and Desmond Panton.*

[28] These costs are associated with the arbitration that was held before Susan Greer on 29 September 2015 on which reasons and orders were released on the 10 November 2015. Counsel for the claimant was present at the arbitration hearing,

however, the defendants chose not to attend and did not have counsel appear for them. They, however, made submissions by way of letters to Susan Greer. Present at the hearing was also Whaley's Litigation, making submissions for the payment of costs owed to them out of the estate. One of the concerns raised at this hearing by the claimant and Whaley's Litigation is that upon the sale of the Condominium, the defendants would dissipate the proceeds of sale of the Condominium, without making payments to either of the parties.

Costs for arbitration hearings and maintenance of the Ocho Rios Condominium

v. *Donald Panton and Desmond Panton jointly and severally to Errol Panton the amounts of $27,526.69 CA and $9,537.15 … These shall be paid jointly and severally out of the sale of the Ocho Rios Condominium , and it is otherwise enforceable personally against Donald and Desmond.*

[29] The sum of $27, 536.69 represents two thirds of the Arbitration fee. The claimant paid the full amount of the costs, and the outstanding debt represents two thirds of the total costs, being both the defendants' costs debt owed to the claimant. All three were to contribute equally to the costs. The claimant had also paid the insurance on the condominium and was entitled to a refund of 2/3rd the costs from the defendants. The sum of $9,537.15 represents the 2/3rd costs for repairs and maintaining the Ocho Rios Condominium which had been paid by the claimant, when he had intended to buy and take possession of it.

[30] On 23 February 2016, Counsel for the claimant brought an application in the Ontario Superior Court of Justice for a judgement incorporating these orders given by Susan Greer. On 6 April 2016, a default judgement was obtained from the Honourable Justice Stinson of the Ontario Superior Court, confirming and incorporating the Orders of Susan Greer, making it of the same effect as an Order of the Superior Court in Ontario. The order of Stinson J is to the effect inter alia that:

1. *"The Arbitration Order of the Honourable Susan Greer, be and is hereby enforced and shall have the same effect as a judgment of the Superior Court of Ontario.*

2. *No longer a requirement for Errol Panton to purchase the condominium at Ocho Rios.*

3. *The deposit be returned to Errol Panton …*

4. *…*

[31] On 23 February 2016, the defendants simultaneously made their application to have the Arbitral Award given by Greer J set aside. However, on 12 April 2016, by notice of abandonment, the defendants withdrew their application.

The submissions

1. The claimants submissions

[32] The submissions made by Mr Shelton QC and Ms Ewbank on behalf of the claimant, in summary, is that:

1) There being no legislative framework relevant to judgments from the superior courts of Ontario Canada, the common law principles are applicable. This judgment is enforceable in the Jamaican Supreme Courts on the principles enunciated in the case of Sylvester Dennis v Lana Dennis [2016] JMCA Civ 56.

2) The only three grounds on which a challenge to the enforcement of this judgment may be launched in this jurisdiction on the basis of; fraud; public policy and breach of natural justice.

3) That although the opposition to this claim being enforced in this jurisdiction was said to be on the basis of misrepresentation or fraud; bias of the arbitrator; breach of natural justice and breach of public policy, the cross examination of the witnesses failed to elicit any evidence which supported those claims.

4) That there is no evidence of any new fraud or any fraud at all raised on the evidence before this court. In the case of **Beals v Saldanha** [2003] 3 SCR 416, it was stated that:

"While fraud going to jurisdiction can always be raised before a domestic court to challenge the judgement, the merits of a foreign

judgment can be challenged for fraud only where the allegations are new and not the subject of prior jurisdiction."

5) In the case of case of ***Richard Vasconcellos v Jamaica Steel Works Ltd (Formerly Jamaica Steel & Plastic Ltd) SCCA No 1****/ 2008,* the decision in **Beals** was confirmed in the judgment given by Harrison JA where he held that:

"Where allegations of fraud are new and not the subject of any prior adjudication … 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 judgement."

6) Based on those authorities, a foreign judgment could only be challenged on the basis of fraud where fresh evidence has come to light which reasonable diligence on the part of the defendant would not have been discovered and the fresh evidence would have been likely to make a difference in the eventual result of the case.

7) In the Privy Council decision of **Owens Bank Limited v Etolie Commerciale SA** [1994] 3 LRC 96, Lord Templeman noted that:

"No strict rule can be laid down in every case the court must decide whether justice requires that further investigation of alleged fraud or requires that the plaintiff having obtained a foreign judgment shall no longer be frustrated on enforcing that judgement."

8) The allegations could hardly amount to fraud in the obtaining of the Award and or the judgment as the defendants were served with the applications and made submissions through their attorneys in Canada in the first instance and laterally by their Jamaican attorneys-at-law. Arbitrator Greer considered their positions and made the award which was served on the defendants and which they applied to set aside and then filed a notice of abandonment of this application. The subsequent application made by the claimant to enforce the award as a Judgment was served on the defendants who chose not to appear or to be represented. The Judgment was also served on them and they chose not to appeal.

9) There is no new evidence of any breaches of natural justice and that all of these allegations were within the knowledge of the defendants and included in their application to set aside the award in Canada prior to the instant claim.

10) **Beals v Saldanha, Close & Anor v Arnot** [1997] NSWSC and **Hong Pian Tee v Les Placements Germain Gauthier** [2002] 2 SLR 81 are all authority

for the principle that where the issue of fraud was unsuccessfully raised in the foreign court it cannot be raised in the local courts because it would amount to a re-litigation of the issues concluded in the foreign court.

11) It is clear from the decisions in **Beals, Hong Pian Tee** case and **Keele v Findley** that the courts by this modern approach have clearly abandoned the traditional approach heralded by **Abouloff**. The cases demonstrate that the applicable test in challenging the foreign judgment, must accord with the rule in the domestic courts relating to the setting aside of judgements obtained by fraud. They expressly show that where fraud is raised to challenge a foreign judgement 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 judgement.

12) The defendants had previously raised allegations of fraudulent misrepresentations, fraud, deceit, collusion and breaches of fiduciary duty in their application to set aside the arbitral award in Canada, which they willingly chose to withdraw. Those allegations included claims that the arbitrator misrepresented and or misinterpreted sections of the Mediation Settlement Agreement; that the Arbitrator displayed bias against then, that the Arbitrator erred in assuming jurisdiction over the issue; that the arbitral award has decisions on matters outside of the scope of the Mediation Settlement Agreement, among other issues. The defendants now seek to raise these allegations again, notwithstanding that they had already had the opportunity to raise them and did in fact raise them but chose to withdraw the allegations. Therefore, their allegations cannot reasonably be viewed as "newly discovered evidence". Therefore, it is not a sufficient basis on which to impeach the foreign judgment in this case.

13) The Defendant's affidavit which was filed on the 9th day of January 2017, had many incorrect allegations which were substantially controverted by the affidavit evidence filed on behalf of the claimant and the cross examination of the claimant and his witnesses.

14) There was no evidence from the defendants from which the court should conclude that they, who were properly served and represented in all the arbitration which were conducted by Justice Webber, should not be bound by his awards.

15) The parties voluntarily entered into the Mediation Settlement Agreement which provided for the settlement of all disputes by arbitration. There was no genuine evidence from the defendants to challenge the appointment of Justice Greer as a substitute arbitrator by the Canadian Court after Justice

Webbers death, neither is there evidence of bias as she was court appointed.

16) There was no evidence to show that the arbitrator, Greer J, misconducted herself in the hearing of the arbitration of which the defendants had full notice and had made representations through their attorneys-at-Law. Neither is there any evidence to impeach her Award so that it should not have been enforced by the Superior Court of Justice of Ontario, Canada. There was no evidence of bias as the arbitrator was court appointed and had accepted the appointment, heard the evidence and made the Award.

17) The defence of natural justice is restricted to the form of foreign procedure and to due process and does not relate to the merits of the case. If the procedure is not in accordance with the local public policy in the jurisdiction where enforcement is being sought, then the foreign judgment will be rejected and the defendant has the burden of proof (see **Beals v Saldanha** which was accepted as good law and applied by the Jamaican Court of Appeal in **Richard Vasconcellos)**.

18) The defendants had not raised any issues in the instant claim regarding the procedure of the Canadian court or any allegation of being denied due process of the Canadian court. In fact, the undisputed evidence establishes that they were afforded due process in the form of their application to set aside the arbitral award, which they chose not to pursue. Their decision to not pursue these issues in the Canadian court when they had an opportunity to do so cannot now form the basis of an argument that the principles of natural justice have been contravened.

19) The defendants challenge to the arbitrator's jurisdiction on the issue of costs in relation to the Jamaican litigation does not satisfy the threshold for being an issue contrary to the public policy of Jamaica. The Arbitrator was not awarding costs in the Jamaican litigation, what she awarded was a portion of the fees the claimant paid to his attorneys for representation in the Jamaican litigation which she found to have been unnecessarily incurred due to the defendants non co-operation.

20) The judgement being sought to be enforced is the judgement of the Superior Court of Ontario not the arbitral award. It is undisputed between the parties that the Canadian court in which the judgement being sought to be enforced herein was obtained in a court of competent jurisdiction. The defendants actively participated in proceedings in the same Court when it filed its notice of application to set aside the arbitral award and then intentionally withdrew it.

21) The defendants having submitted to the jurisdiction of the Canadian court in relation to the proceedings, cannot now challenge the jurisdiction of the same court to enforce the arbitral award (see the case of **DYC Fishing**).

22) The instant claim does not in any way contravene or contradict any term of the Consent Orders regarding the resealing applications for the Lascelles Estate. The Consent Orders do not indicate that the parties are each entitled to one third of the residuary estates and the wording of the consent order does not invalidate the fact that Shael Eisen was authorised to act as an Agent for the Estates as agreed by the parties in the Mediation Settlement Agreement and to continue as sole agent after the departure of Mr. Hull in a limited capacity and managing the funds of the Estates on behalf of the beneficiaries.

23) The cross-examination of the claimant and his witnesses on the question of agency provided further demonstrated that Mr Shael Eisen was not a trustee, he had authority to act as sole agent (after Mr Hull was fired) in a limited capacity, and he did so pursuant to the Mediation Settlement Agreement. There was no conflict of interest or breach of fiduciary duties by virtue of him acting as sole agent and the attorney for the claimant at the same time. He performed his role as agent in conformity with the standards required of him including providing proper and accurate accounts when they were requested by the defendants, through their various attorneys.

24) The defendants cannot seek to raise issues relating to the order for costs in the context of these enforcement proceedings, as this is not the proper forum and in any event, the defendants have now lost their opportunity to raise these issues in Canada, as the judgement is final and not appealable. The claimant cannot be said to be reneging on the Consent Orders obtained in the Jamaican Courts as there is no obligation, in either of them, that prevents the claimant from seeking to enforce the separate and unrelated judgement of the Canadian Court.

25) The only relevant issue that arises from the defendants' current challenge to the jurisdiction of an arbitration regarding the issue of costs in the Jamaican litigation is whether the recognition or enforcement of the foreign judgement would be either contrary to public policy or to the principles of natural justice.

2. The defendants submissions

[33] Mr Panton's submissions on behalf of the defendant may be summarised as follows:

1) Any dispute regarding the resealing of the Canadian Grant and distribution of the residuary estate to the beneficiaries, in respect of both Lascelles Estate and Ivy's Estate, were settled by the Consent Order and the Consent judgement in the Jamaican Supreme Court, as the Consent Order and the Consent Judgement in the Jamaican Supreme Court predated the appointment of Greer J as Arbitrator and the judgment of the Superior Court of Ontario.

2) The claimant, in the two applications by the defendants and in his own application of 28 March 2014 submitted to the jurisdiction of this Honourable Court. The claimant in each case voluntarily appeared by his attorney to argue the merits and consented to the Order and judgment and the discontinuance of his own claim.

3) The Claimant has failed to mention the fact that he consented to judgments in these courts and is bound by the decisions. The Consent Order and the Consent Judgment of 5 February 2014 and 9 March 2015, respectively, were made in this court when the claimant was represented by his Jamaican attorney, Mr Shelton QC, with the knowledge and consent of his Canadian and American attorneys, Mr Shael Eisen and Mr Andrew Byrne. The suggestion that the claimant played no part in the decision is not credible.

4) The claimant, in evidence during cross examination, has confirmed that he willingly agreed to the Consent order and judgment and meant it when he did so. The registration of the Canadian judgment would be contrary to the policy of reciprocity and was obtained in a manner which contravenes the principles of natural justice, bearing in mind that the Greer Arbitration and the Superior Court Order were made after the Consent Order and Consent judgment. The claimants are saying to this court that their consent to the Orders and Judgements of this court and Mr Shelton QC agreeing and signing off on those consent orders in this court, is of no consequence.

5) The Arbitrators award of costs of $35,000.00 to the claimant for his costs in relation to his Jamaican litigation is impermissible. The claimant submitted to the Jamaican jurisdiction in both matters. If Counsel believed the claimant was entitled to seek to recover costs of litigation in Jamaica, the Court having made orders, it was for the claimant to apply to recover the cost of that litigation in Jamaica.

6) The Arbitrators decision to award litigation costs in a foreign jurisdiction, that is Jamaica, is ultra vires. The Arbitrator has no power to award costs in a matter involving a foreign court of competent jurisdiction, where a Consent Order and a Consent Judgement, respectively, is made and no application for costs by either party was made and none granted. The decision of the arbitrator undermines the principle and process whereby parties freely enter into agreements endorsed by the courts.

7) Based on the three presumptions in the case of **Dennis v Dennis** recognition and enforcement in relation to this application, would be contrary to Public Policy. The judgment that is being sought to be enforced, contravenes the principles of natural justice. The claimant is seeking to renege on the Consent Order in Estate Lascelles' and the Consent Judgment agreed to by his counsel in the face of the court, in Estate Ivy Panton and confirmed in the statement made before the court that he was only interested in getting his one- third share.

8) Greer J showed clear bias in her decision about the objections to her appointment by Mr Shael Eisen who had no power to appoint another such arbitrator under the terms of the Mediation Settlement Agreement. Greer J was judge in her own cause and wrongly accused the defendants of refusing to participate in the arbitration held by her, despite the fact that she knew of the irregular manner of her selection and the defendant's reasons for not participating.

9) A foreign judgment may be impeached at common law whether it be on the part of the court or the successful party. This provides exception to the general rule that a foreign judgement cannot be attacked on its merits. A foreign judgement will not be enforced at common law, if it has been obtained by fraud, although the allegation of fraud has been investigated and rejected by the foreign court; since the foreign court's decision on whether there was fraud is neither conclusive nor determinative.

10) **Halsbury Laws of England 4th Ed 2003 paragraphs 742 and 757 & 758** states:

> *"Representation is deemed to have been false and therefore a misrepresentation, if it was at the material time false in substance and in fact. Not only is a representation fraudulent if it is known or believed by the represented to be false when made, but mere none belief in the truth is also indicative of fraud…"*

11) In determining whether a representation was made fraudulently, the standard of proof applicable is the civil standard of a balance of probability and not the criminal standard of proof beyond reasonable doubt as the degree of probability required for establishing proof may vary according to the gravity of the allegation to be proved.

12) The Mediation Settlement Agreement signed by the parties makes no provision for Mr Shael Eisen, either as a corporation or individually to act as sole agent or trustee. The statement that he has acted "as sole agent without objection by any of the parties" is untrue. The Mediation Settlement Agreement

signed by the parties makes provision for the agents to act jointly. The defendants have never agreed to Mr Shael Eisen being their agent.

13) At the time of the Mediation Settlement Agreement, Mr Shael Eisen was the claimant's attorney and agent and has remained so. Mr Ian Hull was the defendants' attorney and agent at the time up to his resignation in July 2012.The defendants did not object to Mr Shael Eisen's appointment along with Mr Ian Hull, as agents because Mr Shael Eisen was the claimants' attorney. The statement in Mr Shael Eisen's affidavit demonstrates, that in claiming to be the defendants' agent, which was not provided for under the Mediation Settlement Agreement, Mr Shael Eisen breached every fiduciary duty owed to the defendants.

14) There is email evidence which shows that Mr Shael Eisen failed to consider the defendants' request for funds, and instead withheld same. Despite the Superior Court of Ontario rejecting his application to act as sole agent 20 November 2014, Mr Shael Eisen still continued to act as same. Correspondence shows that the defendants were displeased with the actions of the claimant and Mr Shael Eisen and that they found him disrespectful and wholly disingenuous in his claim that he continued to act as sole agent for the parties, without objection.

15) The existence of a fiduciary obligation ultimately depends on a finding of trust and confidence imposed on the agent by the principal (**Halsbury Laws of Canada 1st Edition Page 168 Hay-50 Fiduciary Principles).** The accepted tests that have been referred to in a number of cases in the Superior Court of Canada are as follows:

1. *First the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary.*

2. *Second the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has discretionary power over them.*

3. *Third and finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciaries power may affect the legal or substantial interests of the beneficiary.*

16) **Dennis v Dennis** is distinguishable. Although the defendants did not participate in the Greer J Arbitration, the issues of concern to the defendants were before her.

17) The present case can also be distinguished from **Beals v Saldanha** and **Richard Vasconcellos** on the grounds that although the challenge to Mr Shael Eisens' lack of authority to act as "sole agent "was a live issue and gave rise to

the allegations of misrepresentation and fraud raised in documents on behalf of the defendants before Susan Greer and the Superior Court of Ontario, neither adjudicated upon the issues. Although the allegations are not new they were before the arbitrator and the Superior Court who did not adjudicate on the issues as they arose in circumstances where there were affidavits by Mr Shael Eisen confirming that he did, indeed, for a number of years act as sole agent, ostensibly without authority.

18) In the case of **Richard Vasconcellos** the court stated at paragraph 44 & 45 that:

> *"It is patently clear from the authorities that fraud which misleads a court into taking jurisdiction may be raised at any point in time and may bar enforcement of a foreign judgment as in **Beals v Saldhana**. However, in my judgement there must be a basis for the allegation of fraud. … A burden is placed upon her to demonstrate 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."*

19) At paragraph 42 the court said:

> *"The Privy Council found it unnecessary however, to decide whether the fraud exception to the recognition of foreign judgment permitted the Defendant to raise an issue of fraud which has also been determined by the foreign court. Lord Templeman said at para 51:*
>
> *No strict rule can be laid down; in every case the court must decide whether justice requires the further investigation of alleged fraud or requires the plaintiff, having obtained a foreign judgment shall no longer be frustrate in enforcing that judgment."*

20) There were also breaches of natural justice and public policy (see the case of **Adams v Cape Industries Plc and another (1991)** All ER 929 in the English Court of Appeal held at page 391 where it was said, inter alia that;

> *"The defence of branch of procedural natural justice preventing a judgement of a foreign court being enforced in England was not restricted to the requirements of due notice and opportunity to put a case but depended on whether the proceedings in the foreign court offended the English Courts views of substantial justice. It was*

therefore open to the court to consider whether the lack of judicial assessment was contrary to natural justice."

21) The resignation of Mr Ian Hull brought to an end the joint agency and it was never replaced or recognised by Judge Steinberg. Each time Mr Shael Eisen issued proceeding on behalf of the claimant, he was in breach of the supposed agency, as his actions were hostile to the concept of agency and fiduciary duty.

22) The claimant having consented to the order and judgment agreeing to the sale and distribution of the proceeds of sale of the Condo by the executors, there is no for the claimant to attempt now, before this court, to treat his consent, freely given and affirmed in his evidence, as not valid and enforceable. This court has no jurisdiction to act as an appellate court in relation to the consent order and judgement.

23) Despite what is now being claimed on behalf of the claimant, he at no time challenged the jurisdiction of the Jamaican court to deal with the matter. The Mediation Agreement provides for the parties to agree issues rather than take them to the arbitrator. The parties resolved their issues by agreement in relation to the two matters filed by the defendants in this court.

24) Mr Shael Eisen continues to claim that he is an agent of the parties and has acted since the resignation of Mr Ian Hull as the attorney for the claimant. He cannot point to a single act when it could be said he consulted or acted upon the instructions of his two principals and beneficiaries. Mr Shael Eisen's every action since the resignation of Mr Ian Hull, has shown complete disloyalty and was disadvantageous to the interests of the defendants. He has breached every fiduciary duty owed by an agent to his principal and the duties of a fiduciary to the beneficiaries. He has constantly ignored the requests and instructions of the defendants.

25) The application ought to be dismissed as an abuse of process.

The Jurisdiction of the court to enforce foreign judgments

[34] Foreign judgments are recognised and enforced in this jurisdiction, under three regimes; The Judgments and Awards (Reciprocal Enforcement) Act 1923; The Judgments (Foreign) (Reciprocal Enforcement) Act 1936 and the common law. The 1923 Act recognises, for the purposes of registration and enforcement, judgments from Commonwealth countries for which orders have been made by the Governor General in Council. Similarly the 1936 Act extends to any country for

which the Governor general as made orders in Council, for extension of the Act to that country. Section 3 of the 1936 Act states that:

> *"The Governor-General in Council, if he is satisfied that in the event of the benefits given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the in the supreme court of Jamaica, may by order direct-*
>
> *(a) That this Part shall extend to that foreign country:"*

The Governor General also has the power to make orders in Council for this Act to extend to Commonwealth countries.

[35] No orders have been made by the Governor General in Council with respect to Canada under either Acts, which means that the enforcement of this monetary foreign judgment is governed by the common law. In the case of **Sylvester Dennis v Lana Dennis** [2016] JMCA Civ 56, the claimant sought to enforce a judgment from a Canadian court. At paragraph 35 of the judgment the court observed that:

> *"The respondent is seeking to enforce an order that was made in a Canadian court. The respondent may seek to enforce a foreign judgment under common law or statute. However, since there is no statutory framework existing between Jamaica and Canada, governing the enforcement of judgments, I am in agreement with both counsel that the appropriate channel for seeking enforcement of the judgment in this case is the common law."*

[36] In **Richard Vasconcellos v Jamaica Steel Works Ltd**. SCCA No 1/2008 unreported (judgment delivered 18 December 2009, where there was an application to enforce a judgment from the superior courts in the state of Florida USA, Harrison JA observed that:

> *"There is no statutory provision in Jamaican law for the reciprocal enforcement of foreign judgments between the State of Florida, (USA) and Jamaica. These judgments have to be considered as simple contract debts between the parties and it is open to the Claimant to sue either on the foreign judgment or on the original cause of action on which it is based."*

[37] In **Sylvester Dennis v Lana Dennis** the recognised conditions under which this court will assent to the enforcement of a foreign judgment in Jamaica, at common Law, were enumerated as follows:

a) Where the judgment was handed down by a Court of competent jurisdiction;
b) If it is final and conclusive;
c) It must be enforceable by or under Jamaican Law;
d) It must be for a money debt;
e) It must not be in respect of immovable property; and
f) It must be for a definite sum of money and should not contain a penalty.

[38] At common law there are only three recognised grounds on which a foreign judgement may be impeached, in this jurisdiction. These are as follows:

a) If the judgment was obtained by fraud;
b) if its enforcement would be contrary to public policy;
c) If it was obtained in a manner which contravened the principles of Natural Justice.

Outside of those recognised grounds, a final and conclusive judgment of a foreign court of competent jurisdiction is unimpeachable on the merits, whether for error of fact or law (**Sylvester Dennis v Lana Dennis paragraph 34**)

[39] In the case at bar, the defence to the claim is that the judgment should not be enforced on the grounds of misrepresentation and fraud, bias of the arbitrator, breach of natural justice and public policy.

The issues

[40] The issues raised by this application, as I see it, are as follows:

1. Whether the judgement is enforceable at common law?
    a) Was the judgement obtained by fraudulent misrepresentation?

b) Would the recognition and enforcement of the judgement be contrary to public policy?

c) Was the judgement obtained in a manner that contravenes the principles of natural justice?

2. Whether the Consent Orders and Judgements obtained in Jamaica superseded the Mediation Settlement Agreement and Mutual Release and rendered any further arbitration unnecessary and unlawful.

Issue 1 – Is the judgment enforceable at common law?

a) Was the judgement obtained by fraudulent misrepresentation?

[41] There is no dispute that the judgment sought to be enforced in this claim is from a court of competent jurisdiction. There is also no dispute that the judgment is final and conclusive between the parties and relates to a money debt. It is a default judgment, for which there was no application to set it aside and on the authority of **Richard Vasconcellos v Jamaica Steel Works Ltd**, in those circumstances, a default judgment is final and conclusive between the parties. There is no pending appeal of this judgment in the courts of Ontario Canada, and the time for appealing having long expired there is no option of appealing this judgment. I accept the evidence of the claimant and that of Mr Shael Eisen, an attorney, who practices law in that jurisdiction, with regard to that position.

[42] It is no longer the case, if it ever were, that by simply raising the allegation of fraud, it frustrates the attempt by the claimant to enforce his foreign judgment. I am bound by the views expressed in the decisions of the Court of Appeal in the case of **Richard Vasconcellos v Jamaica Steel Works Ltd** and **DYC Fishing Limited v Perla Del Caribe Inc** [2014] JMCA Civ 26**,** which follow the case of **Beals v Saldanha** [2003] 3 SCR 416**,** and will approach my discussion of this issue on that footing.

[43] The law has moved from a position where a mere allegation of fraud renders a foreign judgement unenforceable, to a position where there must exist evidence of

the alleged fraud which could not have been previously detected with reasonable diligence, and it must not have been the subject of prior adjudication. The appellate court in **Beals v Saldanha** outlined the following, with respect to the defence of fraud in the recognition and enforcement of foreign judgements:

1. *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.*

2. *Once material facts, not previously discoverable, arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition.*

3. *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 judgement.*

4. *There must be evidence of fraud.*

Harrison JA in **Richard Vasconcellos v Jamaica Steel Works Ltd** adopted this position taken in **Beals v Saldhana**.

[44] Although this application seeks to enforce the judgement of the Superior Court of Ontario, the challenge to the judgment is not in respect to those orders, but in fact raises the issue of the validity of the actions of the attorney for the claimant and the substitute arbitrator Susan Greer, which resulted in those orders being made. In **Owens Bank Limited v Etolie Commerciale SA** [1994] 3 LRC 696 the Privy Council held that there can be no strict rule, and every case must be examined to determine whether the allegation of fraud requires further investigation or whether the judgment should be enforced. All the parties involved, who gave affidavit evidence, were cross examined.

[45] Applying the principles in the various authorities cited by both counsel, the defendants have not established a prima facie case of fraud in the claimant in obtaining the judgment or any fraud going to the jurisdiction of the court to make the orders it did. Firstly, the defendants submitted themselves to the jurisdiction of

the superior court of Ontario Canada. The application to confirm the arbitration award was made on notice to the defendants. The defendants applied, then voluntarily abandoned the application opposing the confirmation of the award. They had, therefore, placed the issue of the alleged fraudulent misrepresentation by Mr Shael Eisen and the alleged bias and ultra vires actions of Susan Greer before the court, then abandoned their complaint. These allegations are therefore, nothing new, and they were not adjudicated on by the court because they were abandoned. Secondly, although the defendants did not participate in Susan Greer's Arbitration, they had every opportunity to do so and they chose not to. The issues of concern to the defendants were before her. However, they have argued that Susan Greer did not adjudicate on matters relating to Mr Shael Eisen acting on behalf of the defendants without authority. But in my view by ruling against them, she in fact did so. Thirdly, the issue of Mr Shael Eisen acting as the sole agent was not a secret to anyone, including Susan Greer, the Superior Court of Ontario, Canada and the defendants. Mr Ian Hull was the attorney for the defendants and the second agent appointed under the Settlement Agreement. After he left, the defendants were well aware that only one agent remained. Mr Shael Eisen had to go to court, as the sole agent to seek directions. The fact of Mr Shael Eisen being the only agent remaining, did not vitiate the Settlement Agreement. The agreement called for the parties to arbitrate and for the agents to agree an arbitrator. There being only one agent contrary to the requirement under the Settlement Agreement, under the laws of Ontario, as pointed out by Mr Steinberg, the substitute arbitrator had to be appointed by the court.

[46] The appointment of Mr Shael Eisen was by virtue of the Settlement Agreement. The Settlement Agreement called for Arbitrator to be agreed by both appointed agents or by agreement of the parties but it also called for disputes regarding the agents to go to arbitration. The defendants' complaints regarding Mr Shael Eisen could have been taken to arbitration, they, however, chose not to do so.

[47] Despite the claims by counsel for the defendant that Susan Greer was appointed by Mr Shael Eisen, this is in fact not true. Susan Greer was appointed by the court in Ontario to arbitrate. The defendants did not nominate a new agent or go to court themselves with regard to the agent but were content to refuse to cooperate with the arbitration. No alleged misrepresentation by Mr Shale Eisen that he acted as sole agent with the cooperation of the defendants, could affect what Susan Greer was appointed to do. Susan Greer was not misled by any alleged conflict between Mr Shael Eisen and the defendants. Neither did it affect the jurisdiction of Susan Greer to do what she was appointed by the court to do. The defendants, through their attorneys raised the issue through letters to Susan Greer, and although counsel claims it was not adjudicated on by her, the fact that she conducted the arbitration and made the orders she did, is a clear indication that she did not think that the allegations being raised by the defendants against Mr Shael Eisen, was relevant to the issues she was appointed by the court to arbitrate on.

[48] There is no issue of fraud which goes to the jurisdiction of the arbitrator. That being so, there can be no issue of fraud raised against the jurisdiction of the Ontario court to confirm the orders of Susan Greer. The defendants willingly withdrew their objection to the orders of the arbitrator being confirmed, where they had every opportunity to raise the issues, now being raised before this court, and declined to do so. In **DYC Fishing Limited** the Court of Appeal said that:

> *"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 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."*

[49] The fact is that, these allegations of fraudulent misrepresentation are not new. Neither are they based on any facts not previously discoverable. Nothing said about the actions of Mr Shael Eisen or the claimant or any of his other attorney's, conflicts with the evidence before Susan Greer or the Superior Court of Ontario. There is nothing which would cause this court to take the view that Susan Greer was misled into assuming jurisdiction. The Settlement Agreement called for disputes to go to an arbitrator agreed by the parties. When the agreed arbitrator died it was clear no arbitrator was going to be agreed by the defendant, albeit one was necessary. The court appointed Susan Greer on the application of Mr Shael Eisen and she accepted the appointment. That was the root of her jurisdiction, not some alleged misrepresentation or fraud. The arbitration was not about the actions of Mr Shael Eisen acting as sole agent but was about the actions or inactions of the claimant and the defendants in the administration of their parents' estates. I see no difference between being unsuccessful in raising the issue of fraud in the foreign jurisdiction and abandoning the issue after having raised it, as far as attempting to re-litigate in the domestic court is concerned.

[50] Nothing new has been presented to this court that was not raised with Susan Greer and in the application before the Ontario Court, which the defendants abandoned. It is plain as plain can be, that on the facts outlined by the defendants, there is no evidence of fraud. The agent for the estate fulfilled the duties that he owed to each party as agent of the estate. He was not the trustee of the estate. The defendants had an option to elect or appoint a second agent which they failed to do. They had the option, under clause 3 of the Mediation settlement Agreement, to take the issue of the actions of the agent to arbitration and they failed to do so. They had the

option to agree an arbitrator which they also failed to do. Their inertia amounted to an implied authorisation of Mr Shael Eisen to continue to act alone until they decided to agree a second agent or agree another arbitrator. An early appointment of a new agent would have evidenced their complete disapproval of Mr Shael Eisen acting alone, instead they wrote requesting funds and accounting. Not once did they take Mr Shael Eisen to court or arbitration in regard to his alleged illegal actions. Not once did they take the initiative to take the issue of the absence of an arbitrator to court or enter into an agreement with the claimant in that regard. They continue to dispute the costs associated with the appointment of the arbitrator, even though there was no effort on their part to have one appointed. They knew that an arbitrator was absolutely necessary to the conduct of the Settlement Agreement and that the arbitrator Mr Webber QC, had died. Lastly, although the defendants did not attend before Susan Greer for the arbitration and wrote to her objecting to her appointment, they did not go to court to have her removed and did not appeal her ruling. The defendants cannot now claim that Mr Shael Eisel breached his fiduciary duty or acted fraudulently or that Susan Greer was biased amongst other things, as a basis for preventing the enforcement of a judgment, properly made by a court of competent jurisdiction.

b) Would the recognition and enforcement of the judgement be contrary to public policy?

[51] Counsel for the defendants argued that Susan Greer and the Ontario Court were in breach of the principles of comity and reciprocity because they both were aware of the consent orders and judgments in Jamaica, but ignored them. Counsel also claimed that Susan Greer showed utter disrespect for the Jamaican Court when she awarded costs of the Jamaican proceedings when there was no application for costs on behalf of the claimant, in the Jamaican proceedings and none was awarded. Counsel also complained that Susan Greer went further when she determined that the Jamaican Consent orders were irrelevant and disregarded the agreement the parties made to sell and distribute the proceeds of sale themselves. He pointed out the consent orders predated the arbitration award. Counsel also

complained that the order for costs made by Susan Greer, in the Jamaican litigation, was ultra vires, since she had no power to order costs in litigation in a foreign jurisdiction. Further, that Susan Greer ignored the breaches by Mr Shael Eisen and made orders sought by him, and in doing so, she was complicit in the breaches of duty by Mr Shael Eisen.

[52] Based on the above, counsel argued that the recognition and enforcement of this judgment would be contrary to public policy.

[53] In the Settlement Agreement the parties agreed that "for greater certainty, the litigation regarding Goldenvale shall be dismissed without costs in the Jamaican court." It is, therefore, not unusual or unknown to the parties for orders referencing cross border jurisdictions to be made in respect of them. It is clear, to me at least, that the order made by Susan Greer was not an order for costs in the Jamaican proceedings, as this would be an impossible jurisdictional feat. What the order was meant to do was to compensate the claimant for his costs incurred in bringing proceedings in the Jamaican Court, as a result of the failure of the defendants to comply with the arbitration orders made by Mr Webber QC. Part of the orders of Mr Webber QC was that the claimant was not to be visited with any costs in the resealing of the Will in the Estate of Lascelles. However, due to the defendants neglect, the claimant was forced to bring proceedings and incur costs. The order of Susan Greer was, therefore, a compensation order for the refund of the costs incurred and not an order for costs made in the Jamaican proceedings, as submitted by counsel. It is therefore, not against public policy.

[54] I have already dealt with the lack of effect of the alleged breaches of Mr Shael Eisen on the jurisdiction of Susan Greer and ultimately on the Ontario Court. For reasons discussed below at issue two, the treat by Susan Greer of the consent judgments made in this jurisdiction, is also not in breach of public policy.

Issue 1c – Was the judgement obtained in a manner that contravenes the principle of natural justice?

[55] Authorities such a **Beals v Saldanha** outline that the defence is restricted to the form of the foreign procedure and to the due process. There is no evidence to show that the parties were not afforded a fair hearing, neither have they, at any point, contested the jurisdiction of the Canadian Court but if anything have shown their approval of it by submitting to the courts' jurisdiction. The appointment of the arbitrator Susan Greer, also could not be seen as a breach of natural justice or public policy. Mr Shael Eisen acted in accordance with Section 16 (3) (a) of the Arbitration Act of Canada which allows the court, upon the application by a party, to appoint a substitute arbitrator. This application was made on notice to the defendants, who had every opportunity to participate in the process and be heard. It is this application under the Arbitration Act of Canada, which led to the appointment of Susan Greer. This cannot have been said to interfere with due process or constitute a breach of natural justice. The actions of Mr Shael Eisen in attempting to have an arbitrator appointed, without a court order, is irrelevant to the subsequent appointment by the court.

[56] The defendants also claim that Susan Greer was biased. There is no evidence of bias, and the only evidence presented by the defendants, is the unmeritorious claim that Susan Greer ruled against them in their objection to her appointment and awarded costs against them.

[57] The defendants also complained that Susan Greer ordered the proceeds of sale to go to Mr Shael Eisen Professional Corporation which was not a trustee for the estates and were not entitled under the Settlement Agreement to receive estate funds. But the evidence showed that Mr Shael Eisen was always the agent who dealt with the monetary aspect of the distribution of the estate funds and several orders were made by Mr Webber QC relating to Mr Shael Eisen receiving funds in relation to the estate.

[58] It follows, therefore, that there was no breach of natural justice, or evidence of fraud or bias in this case which offends this courts view of substantial justice. (**See Adams v Cape Industries Plc and another** [1991] 1 All ER 929 at page 931 and pages 1042 to 1043 and 1046 to 1047). The defendants had the right to participate in the arbitration, which was conducted on notice, instead they refused to do so. They had the right to challenge the arbitration award in court proceedings, which were on notice and they gave up that right (see Lord Atkin in **Jacobson v Frachom** on the principles of natural justice). It is difficult therefore, for this court to see the basis upon which they can now successfully claim a breach of natural justice.

Issue 2 – Whether the Consent Orders and Judgements obtained in Jamaica superseded the mediation Settlement Agreement and Mutual Release and rendered further arbitration unnecessary and unlawful

[59] The relevant parts of the consent order made between the parties on the 5 February 2014 are as follows:

1. "The Applicants and the Respondent are to sign:

i. All documents necessary to ground the application to reseal the Certificate of Appointment of the Estate Trustee with a Will in Jamaica

ii. All subsequent documents required to collect, realise, administer and distribute the assets in Jamaica of the Estate of Lascelles Samuel Panton including but not limited to the revenue Affidavit, Application for Transmission, and Assent or Devise.

3. In the event that the Respondent fails to sign any of the documents related to the resealing the Certificate of Appointment of Estate Trustee with a Will in Jamaica and the administration of the assets of the estate of Lascelles Samuel Panton, and the Administration thereof as contained in paragraph 2 of this order the Registrar of the Supreme Court shall be empowered to sign the said documents.

5. The applicants Attorney-at-Law, Messrs DunnCox are to have conduct of the application for resealing of the Probate in Estate Lascelles Samuel Panton

(b) If any properties under the Estate of Lascelles Samuel Panton are being sold, DunnCox shall have carriage of sale in respect of the same.

6. After the payment of all debts and testamentary expenses the executors (being the Applicants and respondents) will distribute the residuary estate thereto."

[60] It is important to consider the facts of the case in relation to this issue. The period in which the Consent Order was made is of significance. At the time when the Consent Order was agreed by the parties, the defendants still had not complied with some of the Orders of Mr Webber QC, as it relates to the Santa Maria property, which played a fundamental role in the urgency to reseal the Will in Jamaica. The claimant had not been repaid his deposit on the condominium or the sums expended by him on the property at the time when he was intending to purchase. Neither had any of the costs orders made against the defendants personally in any of the arbitration proceedings been paid by them. The only remaining asset of value in the Estates was Santa Maria in Ivy's Estate. The only funds remaining in the estate was the claimant's deposit, which had been ordered returned to the claimant. Whaley litigation had a claim for funds due to it from the estate. It was clear from correspondence by the defendants' attorneys in Jamaica, that there was an objection to the return of the deposit being met from the sale of Santa Maria. They would only agree to it being repaid by "whosoever received it". The deposit however, or what remained of it could not pay all the debts of the estate and refund the claimant. This was a burgeoning dispute which had to be determined by arbitration.

[61] As part of the Mediation Settlement Agreement and Mutual release paragraph 4f, it stated that:

> *"Certain Estate Real property. The Surviving heirs are aware of the existence of three real property assets of the estate, namely, a condominium in Santa Maria, a parcel of property at Prospect Beach, and a parcel of property at Riverton City. These real property assets shall remain estate assets and shall be liquidated by the estate agents, with the proceeds delivered to the estate, or as directed for equal distribution and administration in the Probate Proceedings."*

[62] Paragraph 6 states:

> *"Dismissal of all Pending Claims. The Surviving heirs agree, that (subject to paragraph 3 above, in respect of the Goldenvale litigation, such litigation shall be dismissed in Jamaica and shall proceed by way of a new hearing and by way of binding arbitration, as set out herein)all current claims that are pending by and between them in whatever jurisdiction shall be dismissed with prejudice with all parties to bear their own cots and attorney's fees and Surviving Heirs further agree to fully release and hold harmless any and all claims and demands of whatever type or kind that presently exist among them. Provided, however, this release does not extend to extinguish the obligations of the Surviving Heirs that arise from the terms of this Mediation Settlement Agreement and Mutual Release, and any future disputes that arise between the parties to this agreement arising from the administration of the estate of Ivy Panton Lascelles Panton or the performance of this Mediation Settlement Agreement and Mutual Release shall be submitted to binding arbitration, before John B. Webber Q.C in accordance with paragraph 3 of this agreement."*

[63] The first observation I would make is that the Settlement Agreement was a much more comprehensive agreement than the consent orders. In paragraph 6 it made clear the position of prior litigation following the entry into the agreement. They were all expressly made irrelevant. In the case of the consent orders, they dealt specifically with the resealing of the Wills and made no mention of the years of ongoing litigation in Canada, with all the attending orders and costs associated with it. Paragraph 6 of the Settlement Agreement expressly stated that although the prior litigations would be dismissed, the release did not extend to extinguish the obligations of the Surviving Heirs arising from the terms of the agreement. The consent order makes no reference to the obligations under the Settlement Agreement and the various arbitrations and contains no release of those obligations. Therefore, it is clear, that the consent orders and judgments made in the Jamaican Court could not serve to extinguish the existing obligations of the defendants under the Mediation Agreement, which included the obligation to submit to and be bound by arbitration of disputes, involving the administration of the estate.

[64] In any event the co-operation of the parties in the resealing of probate in Jamaica formed part of the arbitration consent order made by Mr Webber QC, 28 July 2011, in which it was said that:

> *"I make the following Orders by Consent of the parties:*
>
> *…*
>
> *3. The Surviving Heirs shall cooperate fully and completely to reseal probate of Lascelles and Ivy Panton, if necessary, at their own expense but with the full cooperation of all other Surviving Heirs in the United Kingdom, Jamaica, the Cayman Islands or the United States of America (the equivalent of a resealing in the United States.)The Surviving Heirs will cooperate fully and completely in any process required to obtain probate (or equivalent in the United States) in any of the above noted jurisdictions."*

[65] Paragraph 10 and 11 of that consent order also carried an agreement of the parties that Mr Shael Eisen and Mr Ian Hull shall attend to the distribution of assets and also shall attend to the sale and transfer of three properties, Santa Maria (which is the Ocho Rios Condominium), Prospect Beach and the Riverton Property. The proceeds of sale to be distributed equally amongst the surviving heirs upon completion of the sale transaction. Prospect Beach and Riverton City were dealt with, leaving only Santa Maria.

[66] In the case of **Siebe Gorman & Co Ltd v Pneupac Ltd** [1982] 1 WLR 185 it is seen where a Consent Order may be treated as a contract between parties. To my mind, it was necessary for the parties to resolve their contentious litigation issues in Canada, in order to give efficacy to the Consent Order made between the parties in Jamaica and in order to determine what the residuary estate was, after the debts, which the estate racked up in Canada, was paid out.

[67] The defendants were, according to the evidence, notoriously uncooperative. At the time of the consent order they had not complied with any of the orders agreed to in Canada. Even though they entered into the consent order in Jamaica, there were still outstanding matters under the Settlement Agreement which had to be settled

before the residuary estate could be distributed. The only way in the terms of the Consent Order could be fulfilled and be given its efficacy, was for the defendants failure to comply with the Mediation Agreement to go to Arbitration in Canada. It is simplistic to think years of obstructionism could be suddenly and completely resolved by a simple consent judgment to reseal probate in Jamaica.

[68] There is nothing in the consent judgments and orders in this jurisdiction which refers to the Settlement Agreement in Canada being replaced. There were several arbitration orders and costs orders which were ignored by the defendants. There is nothing in the consent orders which says the claimant was consenting to abandoning his rights under the Settlement Agreement and the orders made by Mr Webber QC. I am surprised that counsel for the defendants take the view that a statement in court allegedly spoken by the claimant that he only wants his one third share, could be interpreted that he was abandoning his claim to be repaid his deposit, his out of pocket expenses spent on the condominium and his right to the payments ordered to be made to him by Mr Webber QC.

[69] In my view, the arbitration order of Susan Greer and the court order of Stinson J does not prevent the property being sold under the consent order. It simply means that after the property is sold by the mechanism agreed in the consent order, the proceeds of sale must be sent to Canada so the debts of the estate ordered paid under the various arbitral awards, can be paid. After that, the remaining funds can be sent to the executors of the estate to be distributed as part of the residuary estate.

Conclusion

[70] This matter was not dealt with summarily. There was a full hearing with cross examination of witnesses. A full and comprehensive picture emerged. No evidence has been produced by the defendants which suggests that there was any fraud which led to the court assuming jurisdiction and making the order it did. There is no fraud suggested in the making of the orders by the Superior Court of Ontario

Canada. There was no breach of natural justice leading up to the judgment of the court, neither is the arbitral award confirmed in the judgment of the foreign court contrary to public policy.

Disposition

[71] Order is granted in terms of the fixed date claim form filed 6 July 2016.