JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 01 OF 2008

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.

BETWEEN	RICHARD VASCONCELLOS	APPELLANT
AND	JAMAICA STEEL WORKS LTD. (Formerly Jamaica Steel & Plastic Ltd.)	1ST RESPONDENT
AND	ISHMAEL GAFOOR	2ND RESPONDENT
AND	AMELITA GAFOOR	3RD RESPONDENT

Miss Hilary Phillips Q.C., Lawrence Haynes and Miss Lauren Sadler for the Appellant.

Anthony Pearson instructed by Pearson & Company for the 1st and 2nd Respondents.

Wentworth Charles and Floyd Green instructed by Wentworth Charles & Company for the 3rd Respondent.

January 15, 16 and December 18, 2009

PANTON, P.

I have read the judgment of my brother Harrison, J.A. I agree with his reasoning and conclusion and have nothing to add.

HARRISON, J.A.

Introduction

1. This is an appeal from the judgment of Donald McIntosh J., delivered on December 19, 2007 whereby the learned judge ordered that the appellant's application

for the enforcement of a foreign judgment against the respondents, be dismissed with costs to the respondents to be agreed or taxed.

The Background to the Application

2. The appellant is a businessman who resides in the United States of America and is the principal shareholder of ANK Enterprises, a corporation duly registered in accordance with the Laws of the State of Florida in the United States of America.

3. Sometime in the year 2001, Commerce Bank of Coral Gables, Florida, granted credit facility to the first respondent (a company duly registered in accordance with the Laws of Jamaica) in the sum of Five Hundred Thousand United States Dollars (US$500,000.00). The second and third respondents are husband and wife and are the principals of the first respondent. The second and third respondents, together with the appellant and his wife, were guarantors of the loan facility granted to the first respondent.

4. The first respondent defaulted in payments to the bank and in April, 2003 the Bank filed suit in Miami Dade County Court, Florida against the respondents, appellant and his wife.

5. In April, 2005 the bank was granted a Final Summary judgment against the first and second respondents. The action against the third respondent, appellant and his wife was adjourned for mediation. In October, 2005 mediation proceedings were held but the third respondent did not participate (notwithstanding that she had obtained

permission to participate by telephone). The appellant reached a settlement with the bank to pay the sum of US$400,000 in full and final settlement of the guarantees signed by him and his wife.

6. On 30 November, 2005 the bank obtained an order striking out the defence of the 3rd respondent and entered a default judgment against her. The 3rd respondent did not appeal or challenge that decision.

7. The appellant obtained a default summary judgment against the respondents in the sum of US$402,838.27 inclusive of costs and interest, in December 2005.

8. On 24th January, 2006 in consideration of the settlement arrived at between the appellant and the bank, the bank assigned to the appellant, all its rights, titles and interest in the judgments entered against the respondents.

9. The appellant initiated a claim against the respondents by way of Fixed Date Claim Form in the Supreme Court of Judicature of Jamaica pursuant to the assigned judgment, on May 11, 2006. He sought an order for judgment to be entered against the respondents jointly and severally in the sum of US$546,884.63 or the Jamaican equivalent together with interest at 7% per annum from 5th April, 2005 until payment.

10. The respondents objected to the appellant's application and on October 1, 2007 the 3rd respondent filed an Affidavit alleging that:

i. The documents supporting the loan granted by the bank, that is, a Credit Agreement dated June 27, 2001, a Promissory Note dated

June 27, 2002 and a Guaranty agreement, contained a forgery of her signature;

ii. She had never given the Appellant any authority to negotiate a loan neither on her behalf nor on behalf of the 1st Respondent;

iii. She was never contacted by the bank when the loans were being negotiated;

iv. When she learned that the bank was demanding repayment of the said loan, she retained the services of Sandler, Travis & Rosenberg, P.A., attorneys-at-law who filed an Answer, Defences and a Counterclaim on the 3rd Respondent's behalf placing her case before the Court;

v. She could not attend the mediation of the matter as a result of circumstances beyond her control and that her request for a postponement was refused;

vi. She believed she had a good defence as the judgment was vitiated by fraud;

vii. The summary judgment obtained against her was obtained in breach of Natural Justice and was pronounced in the absence of a fair trial.

11. On December 19, 2007 McIntosh, J. ordered as follows:

i. That there was no breach of Natural Justice.

ii. 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.

iii. The claim must be dismissed with costs to the Defendant.

iv. Leave to appeal.

12. In his written reasons for judgment, the learned judge stated inter alia:

> "There was no breach of Natural Justice in respect of the third defendant. She was given every opportunity to be heard and at all times had legal representation. It is she who deliberately placed herself in contempt of court.

> However, as repugnant as it is to me this court finds itself constrained to dismiss this application based on the authorities which maintain that once there is an allegation of fraud made to impeach a foreign judgment, that judgment will not be enforced by our courts even if the foreign court purportedly dealt with the issue of fraud."

13. The appellant was dissatisfied with the learned judge's order and filed Notice of Appeal in the Registry of the Court of Appeal on January 8, 2008.

The Grounds of Appeal

14. The appellant bases his appeal on the following grounds:

Ground 1

- The Learned Trial Judge failed to consider at all or to give adequate consideration to the fact that the issue of fraud was raised by the Third Defendant in the Court in Florida and was extensively enquired into at the Deposition stage of the proceedings and her failure to have a full trial was on account of her removing herself from that Jurisdiction and refusing to take any further part in the proceedings. That the Third Defendant failed to offer any explanation for absenting herself from those proceedings. The Learned Trial ought properly to have factored this in considering the BONA FIDES of the allegation of fraud raised by the Third Defendant.

Ground 2

- That notwithstanding the above the Learned Trial Judge still expressed his personal misgivings about the bona fides of the allegation of fraud made by the Third Defendant but nevertheless erroneously felt that he was constrained by the authorities to dismiss the Claim upon the barest allegation of fraud by the Third Respondent.

Ground 3

- The Learned Trial Judge failed to consider or to properly consider that the Third Defendant in her allegation of fraud did not indicate:

- Who the fraudster was
- What loss if any she had suffered through the fraud

Ground 4

- That the substance of the allegation of fraud made by the 3rd respondent was that the signature purporting to be hers on the Guarantee document requested by the bank was forged by someone.

- That in all the circumstances the only persons who were in a position to forge her signature were the employees or officers of the First Defendant and Second Defendant, her husband and co-director.

- That the failure of the Third Respondent to institute any Third Party proceedings both in Florida and in this Jurisdiction seriously undermines the validity of the allegation of fraud. The Learned Trial Judge failed to take this into consideration and as a consequence misdirected himself.

15. Notwithstanding the wide ranging grounds of appeal, the issues for determination in this appeal have been summarized quite succinctly by Miss Phillips Q.C, for the appellant, in her written submissions. She states inter alia:

> "...in the instant case, in light of the documentary evidence before the learned trial Judge, the authorities on the issue of enforcement of foreign judgments and the lack of credible evidence offered by the Respondents in defence, the learned trial judge was plainly wrong in refusing the Appellant's application for an order enforcing the foreign judgments against the Respondents ... the learned trial Judge misdirected himself on the applicable law and his findings were against the weight of the credible evidence adduced before him. More particularly, it is submitted that the learned Judge erred in concluding that a bare allegation of fraud, made only by one of the Respondents in circumstances where the allegation had been made before the foreign court, vitiated the Judgment as against all the Respondents and rendered the Judgment unenforceable in Jamaica. "

16. It is against this background that the order of McIntosh J. will be examined. Of course, one will have to bear in mind that the Court of Appeal only interferes with a decision of the court below where it is satisfied that the decision was plainly wrong. See **Watt v Thomas** [1947] AC 484.

The Submissions

17. 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. See Halsbury's Laws of England, 4th Edition, Vol. 8 paragraphs 715 and 716.

18. There are several cases in Jamaica with regard to the registration and enforcement of foreign judgments but my research has not unearthed any authorities which deal specifically with the impeachment of such judgments due to fraud. It is therefore necessary to examine the common law position in the United Kingdom and Commonwealth jurisdictions in order to see what assistance can be derived from them.

19. Miss Phillips, Q.C. has set out in her written submissions, the competing schools of thought in relation to the basis for challenging the enforcement of a foreign judgment. She stated that traditionally the courts of the United Kingdom have followed the ruling in **Abouloff v Oppenheimer & Co** (1882) 10 QBD 295 and **Vadala v Lawes** [1890] 25 QBD 310.

20. Learned Queen's Counsel has also referred to certain criticisms leveled at the **Abouloff** decision by academic writers (Dicey and Morris, The Conflict of Laws, 9th Edition, page 1028), and the Courts of Canada, Australia and Singapore. She also referred to and relied on certain dicta by Lord Templeman in the Privy Council decision of **Owens Bank Ltd v Etoile Commerciale SA** [1995] 1 WLR 44 (a case from the Caribbean Island of St. Vincent and the Grenadines). Counsel submitted that the judgments from these Courts have demonstrated that:

> "...they have elected to maintain the long established principle that a foreign judgment is conclusive as to any matter adjudicated upon and they have included the issue of fraud if the same had already been raised and dealt with in the foreign court unless the allegation relates to a new discovery of a material fraud. It has been held that to determine otherwise would 'practically abrogate the whole doctrine of res judicata both as to native and foreign judgments', per Garrow, J.A of the Ontario Court of Appeal in Jacobs v. Beaver Silver Cobalt Mining Co. (1908) 17 OLR 496 (which is relied upon at page 4 of the judgment of the Singapore Court of Appeal in Hong Pian Tee v. Les Placements Germain Gauthier Inc [2002] 2 SIR 81; [2002] SGCA 17)."

21. Miss Phillips also referred to and relied on the Canadian Supreme Court decision of **Beals v. Saldanha** [2003] 3 S.C.R. 416. She submitted that this case explained the general principle that neither foreign nor domestic judgments will be enforced if obtained by fraud but the principle is and should be construed narrowly as it relates to proceedings for the enforcement of foreign judgments where the issue of fraud was already raised unsuccessfully in the foreign proceedings.

22. Learned Queen's Counsel submitted that in the instant case the learned judge failed to give adequate consideration to the fact that the issue of fraud was raised by the 3rd respondent in the Florida Court and was extensively enquired into at the deposition stage of those proceedings in Florida. She also submitted that even in circumstances where the foreign judgment was delivered in default, the principle enunciated in **Beals** (supra) should apply.

23. Miss Phillips also stated at paragraphs 36-39 of her written submissions as follows:

> "36. It is submitted that based on **Abouloff** and **Vadala**, a bare allegation of fraud cannot suffice and that what is required is an investigation of the allegation on the evidence presented to the Court. The Learned Trial Judge failed to enquire into the details of the 3rd Respondent's allegation including the person(s) she alleges are responsible for the fraud committed. The Learned Trial Judge also erred in not taking into consideration that the 3rd Respondent in fact provided very little detail in relation to her allegation and that her omission clearly brought into doubt, the genuineness of her allegation.
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> 37. It is submitted further that the evidence which was in fact given in support of the allegation of fraud, scant as it was, was not credible and that the bare allegation was therefore given undue weight by the learned trial Judge ...
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> 38. It is submitted that the Learned Trial Judge, if he had conducted an enquiry into the 3rd Respondent's allegation, he would have concluded that the allegation was not proven on the evidence that existed. The Learned Trial Judge ought to have considered or given greater consideration to the evidence showing that the 3rd Respondent raised the issue of fraud in the foreign proceedings at the Deposition stage of the proceedings and the fact that she failed to pursue her defence in those proceedings without providing any credible reason or any reason at all, for ceasing to participate in the

> proceedings. In her Affidavit of 1st October, 2007, the 3rd Respondent simply states that she was unavailable for the scheduled mediation as a result of "circumstances beyond (her) control" (see paragraph 19, page 46 of the Record). The Affidavit did not speak to the details of those circumstances. At trial, her Attorney attempted to elaborate by stating that the 3rd Respondent and her Attorneys in Florida "parted company". However, it is submitted that the excuse offered by the 3rd Respondent's Attorney is evidently weak. Even the Learned Trial Judge indicated in his Reasons that the 3rd Respondent was given every opportunity to be heard. It is submitted therefore that the 3rd Respondent's failure to pursue her defence indicated a lack of sincerity and veracity in pursuing the same and strongly indicated the male fides of that defence. In the circumstances, it is submitted that the Learned Trial Judge ought to have dismissed the 3rd Respondent's allegation as unmeritorious.
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> 39. It is submitted that the bona fides of the 3rd Respondent's defence is further undermined and is rendered less credible by her failure and also the failure of the 1st and 2nd Respondents to take any steps in Florida to set aside the foreign Judgments or to appeal the said Judgments. It is submitted that it is even more instructive that the 1st and 2nd Respondents did not raise the defence of fraud in these proceedings."

24. Learned Queen's Counsel finally submitted that this Court ought to accept that the issue of fraud having been raised in the foreign court, and the 3rd respondent having refused to continue the pursuit of that defence in the proceedings, ought not to be permitted to successfully raise that defence in these proceedings. However, Miss Phillips, Q.C. submitted that if the Court were minded to give due consideration to the decision in **Abouloff**, the appeal should nevertheless be allowed since the learned judge did not conduct the requisite enquiry into the 3rd respondent's defence. She expressed the view that this Court may examine the evidence that was before the learned judge as the evidence was entirely documentaryin nature and is contained in

the Record of Appeal herein. She submitted that for the 3rd respondent's defence of fraud to succeed, it must meet the standard required by the Privy Council in Owens **Bank Ltd v. Etoile** (supra) where it was held that it is necessary for the evidence to disclose at least a prima facie case of fraud.

25. Mr. Wentworth Charles, for the 3rd respondent (supported by Mr. Anthony Pearson for the 1st and 2nd respondents) relies on the principle laid down in **Abouloff and Vadala** (supra). He argued that these cases have decided that at common law, a foreign judgment can be impeached for fraud even if no newly discovered evidence is produced and even though the fraud might have been, and was, alleged in the foreign proceedings. He argued that **Abouloff** was still good law.

26. Mr. Charles referred to certain dicta by Lindley LJ in the **Vadala** case where the learned judge said at p. 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."

27. He has also placed strong emphasis on the dicta by Straughton LJ in **Jet Holdings Inc. and Others v Patel** [1990] 1 QB 335 at 344 where he stated inter alia:

> "...That doctrine has encountered criticism from academic writers ... A possible view which is taken by some is that the fraud relied on must be extraneous or collateral to the dispute which the foreign court determines. But, in my judgment, it is 100 years too late for this court to take that view. 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."

28. Learned Counsel also referred to and relied on the House of Lords decision in **Owens Bank Ltd. v Bracco and others** [1992] 2 All ER 193. He submitted that the learned judge had properly directed himself in law and applied the appropriate legal principles to the instant case when he ruled 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. Mr. Charles submitted that the 3rd respondent's affidavit in support of the objection to have the foreign judgment entered, had raised a triable issue of fraud and that in those circumstances the learned judge would be obliged to grant leave to the 3rd respondent to defend the action. Furthermore, he submitted that the Order of McIntosh J. should not be overturned because judgment in the foreign court was obtained by way of default and not upon a trial of the issues.

The Discussion

29. What is abundantly clear from a reading of the decision of the Court of Appeal in **Abouloff v Oppenheimer & Co** (Supra) is that a foreign judgment obtained by fraud of the party who subsequently seeks to enforce it by an English action, will not be enforced by the English Court. Lord Coleridge CJ, states as the justice for the proposition of the rule, that "no man shall take advantage of his own wrong". At the time when that case was decided, there was a long line of authorities including **Bank of Australasia v. Niass** 16 Q. B. 717 which held that in an action on a foreign

judgment, you could not re-try the merits. However, in **Vadala v Lawes** [1890] 25 QBD 310, the Court of Appeal held that where an action is brought in England to enforce a foreign judgment, the defendant may raise the defence that the judgment was obtained by fraud of the plaintiff even though the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign court.

30. In **Syal v Heyward** [1948] 2 All ER 576; [1948] 2 KB 443, it was held that the English Court will investigate an allegation of fraud even though the same facts were investigated and the same issues debated in the foreign courts. The case seems to decide that the court will even allow what is effectively a retrial in England, notwithstanding that the plaintiffs deliberately refrained from adducing at the original trial, the facts upon which the allegation of fraud is based.

31. **Jet Holdings Inc. and Others v Patel** (supra), another English authority, held inter alia, that a foreign judgment obtained by fraud was not enforceable in the English Courts and the foreign court's view as to the fraud was neither conclusive nor relevant whether the fraud was said to be fraud going directly to the cause of the action or was collateral fraud. Staughton LJ, at page 344 said:

> "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. The defendant may have been served in the foreign country, entered an appearance, give 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 enforce a judgment."

32. Interestingly, however, the English Court of Appeal in House of Spring Gardens Ltd v Waite [1990] 2 All ER 990 held inter alia:

> "(1) Where proceedings were brought in the English courts to enforce a foreign judgment as a debt at common law, a defendant would be estopped from pleading that the judgment had been obtained by fraud and was therefore unenforceable if that issue had already been decided against him in a separate and second action in the foreign jurisdiction, since the decision in the foreign action, unless it was itself impeachable for fraud, was conclusive on the matters thereby adjudicated on, namely whether the prior judgment was obtained by fraud. Even if the judgment in the second action did not create an estoppel, it would be an abuse of process for the defendant to relitigate the very same issue in the English courts on which he had failed in the foreign jurisdiction, particularly in circumstances where he had chosen that forum and it was the natural forum in which to challenge the judgment. Accordingly, since the decision in the second Irish action was final and conclusive on the issue of whether the prior judgment had been obtained by fraud and was not itself impeachable for fraud, the defendants were estopped from raising the allegation of fraud in the English action (see p 997 c d g to p 998 b, p 10001 g, p 1002 e and p 1004 e, post); Abouloff v Oppenheimer & Co [1881—5] All ER Rep 307 and Vadala v Lawes [1886—90] All ER Rep 853 distinguished."

33. In **Owens Bank Ltd v Bracco and Others** (supra) the House of Lords had the opportunity to reconsider the rule in **Abouloff's** case. The issues for determination were inter alia, whether it was sufficient for a judgment debtor to show a prima facie case of fraud and whether fresh evidence to support an allegation of fraud was necessary. The headnote reads inter alia:

> "....the bank applied under s 9a of the Administration of Justice Act 1920 to register the judgment in the United Kingdom with a view to enforcing it there. The defendants

> then sought orders to set aside the English enforcement proceedings, contending that before, during and after the St. Vincent proceedings both parties had commenced criminal and civil proceedings in Italy in which the issue of fraud was squarely raised and therefore the court should either (1) set aside the registration or stay the proceedings under the lis pendens provisions in arts 21 and 22 of Sch. 1 to the Civil Jurisdiction and Judgments Act 1982 or, alternatively, (2) order issues to be tried as to whether registration of the St Vincent judgment was precluded by s 9(2)(d) of the 1920 Act, which prohibited the registration of a judgment obtained in a British dominion or territory if it had been obtained by fraud. The judge gave judgment for the bank on the first issue and refused to set aside the registration or stay the proceedings but gave judgment for the defendants on the second issue, ordering an issue to be tried whether the St Vincent judgment had been obtained by fraud. The Court of Appeal affirmed both decisions and the parties appealed further to the House of Lords, which only determined the bank's appeal on the trial of the fraud issue."

34. The House of Lords held:

> "A judgment debtor resisting statutory enforcement in reliance on s 9(2) (d) of the 1920 Act was not required to prove that the judgment had been obtained by fraud within the strict limits of the common law rule applicable to English judgments because s 9(2) had adopted the common law approach to foreign judgments specifically denying finality to such a judgment if it could be shown that it had been obtained by fraud. Accordingly, the defendants were entitled to show that the St Vincent judgment had been obtained by fraud irrespective of whether they could produce fresh evidence not available to them or reasonably discoverable by them before the judgment was delivered. The bank's appeal would therefore be dismissed (see p 195 f and p 202 h to p 204 b, post).
> Abouloff v Oppenheimer & Co [1881-5] All ER Rep 307 and Vadala v Lawes [1886-90] All ER Rep 853 applied."

35. The English authorities thus show that the Courts have consistently been prepared to go behind fraudulent foreign judgments where reliance is sought to be placed on them in the English courts.

36. In more recent times the law in relation to the recognition of foreign judgments has developed and departed from the **Abouloff** principle and has been the subject of discussion in the Courts of Canada, Australia, Singapore and the Judicial Committee of the Privy Council.

37. In **Beals v. Saldanha** (supra), the Supreme Court of Canada held that fraud that misled a Court into taking jurisdiction may be raised at any point in time and may bar enforcement of a foreign judgment. The Court also held 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. Their Lordships also opined that 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 Supreme Court of Canada has laid down that 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.

38. **Beals** has been followed in a number of Canadian decisions such as **Minnesota Valley Alfalfa Producers Co-operative v. Baloun**, 2008 ABCA 131 (CanLII);

Cabaniss v. Cabaniss, 2006 BCSC 1076 (CanLII) and **State Bank of India v. Navaratna**, 2006 CanLII 8887 (ON S.C.).

39. In **Hong Pian Tee v. Les Placements Germain Gauthier Inc** (supra), the Court of Appeal in Singapore had to examine the issue of fraud as a defence to the enforcement of a foreign judgment. This was an appeal by the defendant (Hong) against a decision of the High Court granting summary judgment to the plaintiffs (Les Placements) on the latter's claim based on a judgment obtained in Canada. Hong had argued that, having raised the point that the Canadian judgment was obtained by fraud, that should suffice to preclude the judgment from being enforced in Singapore, and that the action should be allowed to go on for trial to enable Hong to establish fraud. The Court of Appeal was not persuaded by Hong's contention and dismissed the appeal. The Court chose to follow the approach taken by Canadian and Australian cases. Chao Hick Tin, J.A. delivering the judgment of the Court stated:

> "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."

40. In **Owens Bank Ltd v Etoile Commerciale SA** (supra), Lord Templeman delivering the judgment of the Judicial Committee of the Privy Council (the Privy

Council) examined the criticisms leveled at the **Abouloff** approach and had this to say about the enforcement of foreign judgments:

> "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 L.T. 365n.
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> The position with regard to foreign judgments is different. It is governed by the so-called rule in Abouloff v. Oppenheimer & Co. (1882) 10 Q.B.D. 295 ... Lord Coleridge C.J. decided the case on the broad grounds stated in the Duchess of Kingston's Case (1776) 20 St. Tr. 355. He said, 10 Q.B.D. 295, 300:
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> > "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 ..."

41. His Lordship then looked at what Lindley, L.J said in **Vadala** (supra) and continued:

> "Thus fresh evidence is necessary in order to mount an attack on an English judgment on the ground of fraud. But according to the rule in Abouloff's case this is not so in the case of a foreign judgment.
>
> The rule has been subject to widespread and long standing academic criticism, summarised by Mr. Isaacs in his helpful argument on behalf of the respondents. In House of Spring Gardens Ltd. v. Waite [1991] 1 Q.B. 241, 251C Stuart-Smith L.J. observed that both Abouloff's case and Vadala v. Lawes "were decided at a time when our courts paid scant regard to the jurisprudence of other countries;" and it is to be

> noticed that they were both decided a few years before Boswell v. Coaks (No. 2), 86 L.T. 365n., in which the House of Lords laid down the more restricted rule for attacking English judgments. In Owens Bank Ltd. v. Bracco [1992] 2 A.C. 443, 489 Lord Bridge of Harwich recognised that, as a matter of policy, there might be a very strong case to be made in the 1990s in favour of according to overseas judgments the same finality as is accorded to English judgments."

42. The Privy Council found it un-necessary however, to decide whether the fraud exception to the recognition of foreign judgments permitted the defendant to raise an issue of fraud which had also been determined by the foreign Court. Lord Templeman said (at 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 that the plaintiff, having obtained a foreign judgment, shall no longer be frustrated in enforcing that judgment."

43. In **Close and Anor. v. Arnot Matter** No 10107/96 [1997] NSWSC 569 the Australian Supreme Court emphasized the importance of finality in litigation. Justice Graham, in that case said:

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

44. 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: **Beals v. Saldanha** (supra). However, in my judgment, there must be a basis for the allegation of fraud.

45. 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.

46. 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).

47. Finally, I turn to the issue concerning the default judgment and that there was no trial of the issues, including the allegation of fraud. The learned judge found that there was no breach of natural justice because the 3rd respondent was given every

opportunity to be heard and at all times had legal representation. He also stated that it was she who deliberately placed "herself in contempt of court".

48. In Beal's case, Major J. (delivering the majority judgment) said:

> "53. Although Jacobs, supra, was a contested foreign action, the test used is equally applicable to default judgments. Where the foreign default proceedings are not inherently unfair, failing to defend the action, by itself, should prohibit the defendant from claiming that any of the evidence adduced or steps taken in the foreign proceedings was evidence of fraud just discovered. But if there is evidence of fraud before the foreign court that could not have been discovered by reasonable diligence, that will justify a domestic court's refusal to enforce the judgment."

49. I therefore agree with Miss Phillips, Q.C. when she submitted that it matters not that the foreign judgment was obtained by default provided that the proceedings were conducted in a fair manner.

50. In the circumstances, I would allow the appeal with costs to the appellant to be taxed if not agreed.

DUKHARAN, J.A.

I agree.

PANTON, P.

ORDER:

Appeal allowed. Judgment of the Court below set aside. Judgment entered in favour of the appellant with costs to be agreed or taxed.