

Judgment 64/2003

**Williams v Williams
Royal Court
(Civil Action file 779)
22nd December, 2003**

Award of money by Superior Court of the State of California – monies held in Guernsey – application for summary judgment – principles applicable to application to enforce a foreign judgment

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 22nd day of December, 2003 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E.,
Lieutenant Bailiff; sitting alone.

In the matter of

Between

JEANETTE IRENE WILLIAMS

Plaintiff/Applicant

and

DAVID JOHN WILLIAMS

Defendant/Respondent

Whereas on the 21st day of October, 2003, the Lieutenant Bailiff considered an application for Summary Judgment in respect of the proceedings attached hereto and heard thereon Advocates J.E. Roland and S.L. Brehaut, Counsel for the Plaintiff and Defendant respectively, the Lieutenant Bailiff this day handed down judgment in the terms attached hereto and GRANTED the application as prayed.

S.M.D. ROSS
Her Majesty's Deputy Greffier.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
ORDINARY DIVISION

Between:

JEANETTE IRENE WILLIAMS

Plaintiff/Applicant

and

DAVID JOHN WILLIAMS

Defendant/Respondent

Ruling on Application for Summary Judgment.

1. The parties to this action were formerly husband and wife residing in the State of California, U.S.A. Their marriage was dissolved on an undefended Petition on 22nd December, 1999. By the Order of the Superior Court of California, Orange County dated August 30th, 1999, the Wife was awarded, *inter alia*, all the funds standing to the parties' credit in joint account No 089060 25185560 the Guernsey Branch of the Co-operative Bank. There was an Attachment to the Order, signed by Commissioner David. S. Weinberg, paragraph 1 of which recited the respective earnings of the parties' and ordered the Husband to pay the Wife \$1,450 per month, on the 1st and 15th days of each month with effect from 1st August, 1999, by way of that which is termed spousal support.

2. Paragraph 4 of the Attachment awarded to the Husband, *inter alia*, a second joint account with the Manchester Branch of the Co-operative Bank, namely Account No. 0544158300, which at the material time showed a credit balance of the equivalent of U.S \$ 14,813.51. In order to secure the due performance of Mr. Williams' obligation to provide spousal support the operation of this part of the Order was stayed for one year, and, for her part, pursuant to the equalization policy, Mrs. Williams was ordered to deposit U.S.\$ 16,248.34 in an interest bearing account in trust for the Husband. This part of the Order was also stayed for one year, but, in the event of the Husband's failure to pay the support the Wife was entitled to withdraw an amount equal thereto (it is not precisely clear from which account) on the 2nd and 16th days of each month.

3. Mr. Williams failed to pay anything to his former Wife, and Advocate Roland, appearing for her as Plaintiff in this Cause, filed on 27th September, 2002, informed the Court that the Bank, possibly because of the matrimonial proceedings, had frozen both the Co-operative Bank accounts. Accordingly, as she had received nothing from him, and could not gain access to either Account, Mrs. Williams applied to the Court to commit him for Contempt in May, 2001, and he was due to appear to show cause why he should not be so committed on the 11th July, 2001. However, on the preceding day, the 10th July, the Wife appeared and tendered to the Court a joint Consent letter signed by both the parties, (Exhibit DJW 1 to the Husband's Affidavit of 3rd October, 2003) to which was attached a joint authorisation, annexing formal documentary acknowledgments by each party, dividing both Bank accounts so that each party would receive half the proceeds thereof.

4. The Consent letter is of prime significance in this case because the thrust of the Husband's Defence is that the subsequent Court Order of 6th September, 2002, (which is the basis of the present proceedings) was obtained by fraud, or further or alternatively was contrary to public policy. The parties are, however, at variance as to the circumstances surrounding the coming into existence of the letter and its production. In paragraph 5 of her Affidavit of 29th July, 2002, the Wife stated that she agreed to sign it because of her financial situation and under pressure from the Husband. This seems to be contrary to Clause 5 of the letter, which certifies that the Agreement therein had been entered into by each party of its own free will 'absent any coercion or other duress'. The Husband's version is that the Wife was preparing to return to South Africa, wished to settle their dispute and needed money prior to her

departure. He accordingly caused the Agreement to be drawn up with the provisions set out in paragraph 7 of his Affidavit of 3rd October 2003.

5. When Mrs. Williams attended the Court on 10th July, in the company of one, Pat Ruvulo (who was either an employee of or the employer of the Husband) armed with the letter, the clerk of the Court refused to admit it and Pat Ruvulo so informed the Husband by telephone. So far the parties agree. However the Wife's version of the reason for the rejection is that the letter was not properly drawn up in the required format, while the Husband says that it was not produced because of an objection taken (presumably on a later date) by her lawyer. Whatever the reason for the non-production of the Consent letter, the Husband now maintains that he was never informed that the document was not before the Court when the second Order was made. Accordingly, in the erroneous belief that it had been lodged (and had thus varied the August, 1999, Order by consent) he did not attend Court either on the 11th July or when the case was listed on the 22nd August, 2001. Thus he claims that the second Order was vitiated by fraud and that it would be contrary to public policy to enforce it.

6. However, the Wife's Attorney, Mr. Thomas E. Anthony, who was instructed in the post dissolution of marriage proceedings, did attend Court to represent her on the 22nd August, and obtained an Order from the same Judge awarding her the totality of the funds standing to the parties' credit in both branches of the Co-operative Bank. The condition of depositing the money which had previously attached to the Wife was relaxed. She has now sued in the Royal Court for the sum comprised in the Guernsey Account which, at the date of filing suit was £65,328.38, with continuing interest. On 12th September, 2003, she applied for summary judgment to be entered against the Husband, now the Defendant, for the sum claimed in the Cause.

7. I observe that in Mr. Anthony's Affidavit of 29th April, 2003, which exhibits the second Order of the U.S. Court, he does not say that he attended the Court on either the 10th or 11th July, and neither does he refer to the Consent letter. Consequently the implication from Mrs. Williams' statement in paragraph 7 of her Affidavit that she was advised by him not to accept the offer (meaning the Agreement constituted by the Consent letter) is that this advice was given after the 10th July. It follows that it is reasonable to infer that it was not brought to the Judge's attention, which, as I indicated during Miss Roland's submissions, would in my view, have been both ethical and desirable. Therefore there is merit in Mr. Williams' complaint to this effect in paragraph 7 (vii) of his Defence. A further factor to be borne in mind in is the Defendant's handwritten note of 12th September, 2001, seemingly sent from London, which repeated the previous offer. If that document is genuine it lends support to his case that he genuinely and reasonably believed he did not need to attend Court on the 22nd August, 2001.

8. In her opening submission Miss Roland referred to the passage in Halsbury's Laws Fourth Edition Reissue, Volume 8(3) at paragraph 150, which states that a foreign judgment *in personam* is generally conclusive as between the parties on the issue adjudicated unless there is evidence that it was obtained by fraud. In this connexion she said it is not sufficient simply to allege fraud and that there must be some definite, tangible, evidence thereof on the part of the person seeking to enforce the judgment. She pointed out that service of the Court process had never been disputed, and she asked this Court to draw an inference from paragraph 13 of the Husband's Affidavit that he was well aware that he was required to appear before the Court both on the 11th July and the 22nd August, and that he deliberately absented himself, not because he thought the Agreement absolved him from doing so, but because he feared committal to prison for disobedience to the 1999 Order.

9. Furthermore, Miss Roland said, the Defendant never raised the issue of fraud, in the sense of concealment of the Consent letter, in the California Court; neither did he make any effort to set the judgment aside. It was not for this Court to strive to reach a finding that Mr. Commissioner Weinberg would have made a different order had he known of the 10th July letter. She cited House of Spring Gardens Ltd. v. Waite & Others [1991] 1 QB 241. There one Mr. Sacks had invented a bullet proof vest. He and the first two defendants entered into a joint venture regarding the vests, but the plaintiff discovered that the first defendant, Mr. Waite, had been deceiving him on two main aspects of the venture relating to the sale of the bullet proof vests to the Libyan Army. He commenced actions in

England and Ireland for damages for misuse of confidential information and breach of copyright. The action was settled on the basis of the payment of royalties by Waite and an undertaking to notify Sacks of any future contracts with the Libyans.

10. There was then further alleged deception by Waite, which led to two further principal actions in England and in Ireland, the latter of which was tried by Costello J. who gave judgment for Sacks for damages to be assessed. The defendants appealed and a new trial was ordered on terms, with which Waite and his co-defendants had failed to comply. So there was no new trial. The defendants then sued in Ireland to set aside the judgment of Costello J, on the ground that it had been procured by fraud. The subsequent Judge, Egan, J, rejected the allegation of fraud and refused to set aside the earlier judgment. Finally the original plaintiffs sued in England to enforce Costello J's original judgment, and then sought summary judgment under the former Order XIV. Once again the defendants pleaded that the earlier judgment had been obtained as a result of fraud.

11. At first instance Sir Peter Pain held that the defendants were estopped from alleging fraud by the judgment of Egan J. The Court of Appeal upheld Sir Peter Pain. In the course of delivering the leading judgment Stuart-Smith L.J said:

“It is common ground that in proceedings in this country to enforce a foreign judgment as a debt at common law, the defendant can set up as a defence that the judgment was obtained by fraud. If, on a summons under Order 14, the evidence of the defendant discloses a triable issue that the foreign judgment has been so obtained, leave to defend should be given. But a foreign judgment that is final and conclusive on its merits and is not impeachable on the ground of fraud (or other grounds that are not material) is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error of fact or law: see Dicey & Morris, *The Conflict of Laws*, 11th ed., p 460, rule 42. *But for the judgment of Egan J, Costello J.'s judgment could have been impeached on the ground of fraud.*” (My italics).

Unfortunately the Edition of Dicey and Morris referred to was the Eleventh Edition, and not the Thirteenth (as has been reproduced at Divider 4 of the Bundle of Authorities) which led to some difficulty in matching the citation exactly. I am however satisfied that that statement of the law by Stuart Smith L.J is authoritative and that the present case falls to be determined in accordance with the principles he stated, subject to the refinements contained in the Etoile decision (*infra*).

12. The Spring Gardens case was considered at some length in the subsequent Privy Council case of Owens Bank Ltd v. Etoile Commerciale S.A [1994] 6th July, to which both Advocate Roland and Advocate Brehaut (who appears for the Husband) referred. This was a second appeal from the Court of Appeal of St. Vincent and the Grenadines, which had allowed an appeal from the High Court of St. Vincent. The particular fraud relied on was that the Court had acted on a guarantee of which the date had been fraudulently altered to read the 1st March, 1983, instead of the 7th March, 1983. In the Etoile case the supposed rule differentiating between the impeachment of a foreign and of an English judgment on the ground of fraud was criticised by Lord Templeman, in delivering their Lordships' unanimous opinion that the appeal by Owens Bank, which had sought to rely on the fraud as vitiating earlier decisions by the French Courts, should be dismissed.

13. Lord Templeman said that the submissions addressed to the Privy Council as to whether the supposed rule still applied, or whether, the words of Lord Bridge in Owens Bank v. Bracco [1992] 2 AC 443,

“.....there might be a strong case to be made in the 1990's in favour of according to overseas judgments the same finality as is accorded to English judgments.”

should prevail were ‘interesting and important arguments. However, he said, there was a much shorter answer to the appeal under consideration, namely:

“Every court of justice has an inherent power to prevent misuse of its process, whether by a plaintiff or by a defendant: See Hunter v. Chief Constable of the West Midlands Police [1982] A.C 529 per Lord Diplock at page 536. This was the alternative ground on which the Court of Appeal decided in the plaintiff’s favour in House of Spring Gardens.

There is nothing in the authorities which precludes a party from obtaining summary judgment or an order striking out a pleading on the grounds of abuse of process where a fraud is alleged. It is axiomatic that where fraud is alleged full particulars should be given. Where allegations of fraud have been made and determined abroad summary judgment or striking out in subsequent proceedings are appropriate remedies in the absence of plausible evidence disclosing at least a *prima facie* case of fraud.”

Accordingly Lord Templeman concluded:

“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.”

14. In firmly resisting the present application Miss Brehaut submitted that all her client needs to do is to show that there is a triable issue, in this instance that there was a fraud on the Court in California in the sense that there was a concealment of material evidence, namely the Consent letter which in the annexed acknowledgments is said to have been made on 10th July, but which is otherwise itself undated, save for Mr. Williams’ signature which shows ‘7/10/01’. She said, as Miss Roland had said in a different context, that this Court should not speculate upon the course Mr. Commissioner Weinberg would have adopted had he known of it. Miss Brehaut referred in detail to paragraphs 8 to 13 of her client’s Affidavit, and submitted it was clear that, while the Husband knew the Court clerk had rejected the document, he obviously thought that it was only a matter of reprinting it in acceptable form on ‘legal sized paper’. The Husband was entitled to rely on, and had in fact relied on, the Wife re-presenting it for registration in its correct form. In this *bona fide* expectation he genuinely believed he was not obliged to attend on 22nd August.

15. Miss Brehaut went on to refer to the case of Parsons & Parsons v. Provincial Insurance PLC [1998] 20th February in which insurers repudiated a claim arising from a gas cylinder explosion resulting in the plaintiff’s house being burned down. The different types of fraud which can occur were reviewed by the Court of Appeal, although the classification did not cover every type of crime which involved dishonesty: for instance, as Diplock L.J. had said in an earlier case it would be wholly inappropriate to regard robbery as a species of fraud so that a jury trial could be ordered in proceedings for recovery of the proceeds of a bank robbery from one of the convicted robbers. This case, Miss Brehaut said, is closer to that which is generally known as Derry v. Peek fraud, which, broadly speaking, covers any type of deceit. The definition speaks of a trick, misrepresentation or stratagem. It is broad enough, Miss Brehaut submitted, to include concealment of a material fact or document, as had occurred in the instant case when the California Court made the second Order.

16. The authority on which Miss Brehaut placed particular reliance, which was cited by both Counsel, is Commercial Innovation Bank Alfa Bank v. Victor Kozeny [2002] 11th December, another Privy Council decision, at Divider 9 of the Bundle. In that case the Alfa Bank claimed U.S.\$ 6,779,154.83 due under a credit facility in the agreed forum, namely the Moscow Court. Mr. Kozeny failed to turn up, having been duly notified to do so, and a default judgment was entered against him. The Bank sought to enforce that judgment in the parallel to the Order XIV procedure in the Bahamas,

where Mr. Kozeny resided. He alleged that there existed a Letter of Understanding, under which a company called Audia would ‘take over the position of the borrower’ had been concealed from the Court which awarded summary judgment against him.

17. In delivering their Lordships’ opinion Lord Steyn analysed the Letter of Understanding, and concluded that Audia had not in fact replaced the Borrower, and indeed that a subsequent letter affirming the change of debtor had not been written by or on behalf of Audia. It followed that the Bank had not misled the Court by stating that the Letter of Understanding was irrelevant. Here the position is different, said Miss Brehaut. The U.S. Court was obviously misled because the Consent letter was never even mentioned to the Court, whereas it was of course known to the Plaintiff and, by implication, to her Attorney.

18. In these circumstances, Miss Brehaut submitted that it is at least arguable that it would be unjust to enforce the California Court’s decision and the case should accordingly go for trial in the ordinary way. As I understood Miss Brehaut the aspect of her client’s case that the enforcement of the U.S. Court’s decision would be contrary to public policy is linked to the aspect of fraud by concealment, because it would manifestly be against public policy to enforce a claim based on a Court Order, which was itself based on a case where full and frank disclosure had not been made by the Applicant.

19. Finally, Miss Brehaut drew my attention to the local case of Monument Trust Company v. Gaudion & Gaudion [1996] Guernsey Civil Appeal No 226, in which it was held that the English principles relating to summary judgment laid down in European Asian Bank Ltd v. Punjab & Sind Bank Ltd (No. 2) [1983] 1 WLR 642 do apply to Guernsey. In that case Robert Goff L.J said at page 654:

“The policy of Order 14 is to prevent delay in cases where there is no defence.”

Thus if the defendant fails to satisfy the Court that there is an issue or question in dispute that ought to be tried, or that for some other reason there ought to be a trial, then the Judge should give judgment for the plaintiff.

20. The other side of the coin is that if there is shown, on the documentary or other evidence before the Court that there are serious questions of fact on which the defendant ought at least to be heard then leave to defend must be given. In summary, the contrasting situations may be expressed to be that Order XIV was intended to enable a plaintiff with a liquidated claim, to which there is clearly no defence, or an obviously sham defence has been filed, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. If the judge to whom the application is made considers that there is any reasonable ground of defence to the claim then he should give leave to defend. To deny a party the right to be heard is not a course which the Court will lightly adopt.

21. As I indicated earlier, the maximum disclosure to the Court, even of material which is against the interest of the party in question, is highly desirable, especially if the matter is being heard *ex parte*. I have therefore considered the issue of the non-disclosure, and the contents, of the Consent letter in this case with anxious care. But in applying the words of Lord Templeman in the Etoile case which I here repeat:

“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.”

I have reached the conclusion that the pattern of the Husband’s conduct is such that he was obviously bent on avoiding coming to the Court and upon a policy of delay. Only when his committal became imminent was the Letter of consent produced. In my view he intended to bounce the Wife into agreeing to proposals which were clearly not in her interest, and which removed much of the benefit of the order she had obtained in August, 1999, when, again, the Defendant did not appear.

22. Furthermore, I find it hard to believe the Husband when he says that he was unaware of his right to appeal. While I accept that it might have been ethically desirable that the Attorney should have brought the Agreement to the attention of the Commissioner, I cannot think, as in Kozeny's case, that, had he known of it, it would have made any difference to his decision. As was said in the early case of Nouvion v. Freeman [1889] 15 App. Cas. 1 at pages 9 to 10:

“The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter be disputed, and can only be questioned in an appeal to a higher tribunal.”

23. For the reasons I have endeavoured to give and having carefully considered all the circumstances of this case I am satisfied the prayer for summary judgment is well-founded. Applying the principles stated by Lord Templeman, and having borne in mind the words I have italicised in the citation from the Spring Gardens case, I find that the justice of the case requires that the Plaintiff should be entitled to enforce the U.S. judgment. I therefore grant the application as prayed. I am minded to award costs to the Plaintiff/Applicant, but I will hear Counsel if they so wish.

A.R.W.Hancox
Lieutenant Bailiff
22nd December 2003.