Hong Pian Tee v Les Placements Germain Gauthier Inc
[2002] SGCA 17

Case Number : CA 600101/2001

Decision Date : 21 March 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; Yong Pung How CJ

Counsel Name(s) : Manjit Singh and Sree Govind Menon (Manjit & Partners) for the Appellant; Siva Murugaiyan and Parveen Kaur Nagpal (Colin Ng & Partners) for the Respondents

Parties : Hong Pian Tee — Les Placements Germain Gauthier Inc

Conflict of Laws – Foreign judgments – Enforcement – Allegation that foreign judgment obtained by fraud – Principles governing foreign judgments – Approach of local court – Whether foreign judgment challengeable on ground of fraud where allegation of fraud already adjudicated upon by foreign court – Whether fresh evidence of fraud required – Whether fresh evidence of fraud exists – Whether evidence makes a difference to verdict admitted in foreign court

(delivering the grounds of judgment of the court): 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 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 the alleged fraud. We were not persuaded by Hong`s contention and dismissed the appeal. We now give our reasons.

Background

The facts giving rise to the action were largely as follows. Les Placements was a company incorporated in Canada. On or about 25 April 1995, it entered into a loan agreement (`the loan agreement`) with Wiraco Trading Pte Ltd (`Wiraco`), a company incorporated in Singapore, whereby Les Placements agreed to lend Wiraco a sum of C$350,000. At the time of the loan, the President of Les Placements was one Mr Germain Gauthier (`Germain`) and his son, Pierre Gauthier (`Pierre`), was a shareholder and the managing director of Wiraco. Hong`s wife was also a director of Wiraco. As a part of the loan arrangement, Hong gave a guarantee to Les Placements to ensure the repayment of the loan extended by Les Placements to Wiraco.

Under cl 12.1 of the loan agreement it was provided that the courts of the province of Quebec as well as the Supreme Court of Canada shall have the exclusive jurisdiction with respect to all disputes relating thereto.

On the due date, Wiraco defaulted in repaying the loan. Despite demands, both Wiraco and Hong failed to fulfil their repayment obligations. Thus, Les Placements commenced proceedings against Wiraco and Hong in the Superior Court of the District of Montreal, Quebec, Canada pursuant to the exclusive jurisdiction clause.

Hong disputed the jurisdiction of the Canadian court and sought a stay on the ground of forum non conveniens. That challenge was rejected. The action went on for trial and Hong alleged that he never guaranteed a loan from Les Placements to Wiraco. Instead, he claimed that the guarantee he

executed related to a personal loan from Germain to Wiraco which was never effected. In the alternative, Hong contended that the arrangement was that Germain was to extend a personal loan to him and that the guarantee was for Germain`s benefit and not Les Placements. These defences were raised with a view to having the claim dismissed on the ground that there was no privity of contract between Hong and Les Placements.

The Canadian court held that in relation to the loan transaction Germain was not acting for himself but on behalf of his company, Les Placements, and that the guarantee was addressed to him as the head of Les Placements. The defences raised were therefore rejected and both Hong and Wiraco were held to be jointly and severally liable to Les Placements for C$360,645, plus interest and costs. Dissatisfied with this decision, Hong and Wiraco appealed to the Court of Appeal in Quebec but the appeal was disallowed.

As Canada was not a country gazetted under either the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) (`RECJA`) or the Reciprocal Enforcement of Foreign Judgments Act (Cap 295) ("REFJA"), Les Placements had to commence a writ action in Singapore to enforce the Canadian judgment against Hong under common law. Thus, the present proceeding. No enforcement action was taken by Les Placements against Wiraco because the latter was in liquidation.

Following the institution of the action in Singapore, an application was made to obtain summary judgment, which led to the statement of claim being amended and re-amended and a fresh application for summary judgment made. On 4 May 2001 the senior assistant registrar granted unconditional leave to defend to Hong. On further appeal to the High Court, Les Placements successfully obtained a summary judgment from Choo Han Teck JC (see [2001] 3 SLR 418). Being dissatisfied, Hong appealed to this court.

Before Choo JC, counsel for Hong made the following arguments in so far as they were germane to this appeal. First, Les Placements was not entitled to summary judgment on the strength of the Canadian judgment unless the `underlying basis` of the foreign judgment is pleaded and tried in the Singapore courts. Second, the Canadian judgment was improperly obtained because Les Placements had fraudulently failed to disclose to the Canadian court that the guarantee of 20 March 1995 was addressed to Germain and not Les Placements. On both points, Hong failed. The court held that it was an established principle that a judgment obtained from a competent foreign jurisdiction, which was final and conclusive on the merits, was also generally conclusive in Singapore between the same parties.

Appeal

Before us, Hong reiterated the point about the Canadian judgment being obtained by fraud. He submitted that, where fraud was raised, the foreign judgment could no longer be conclusive and this was so even if the defence of fraud had been investigated into by the foreign court and rejected. Furthermore, he was entitled to have the issue of fraud re-litigated in Singapore even if there was no new material. However, he conceded that leave to defend would be refused, if it was obvious that the allegation of fraud was frivolous, citing **Codd v Delap** [1905] 92 LT 510. He argued that the court below should not have followed the decision in **Ralli v Angullia** [1917] 15 SSLR 33 .

Hong further asserted that there were fresh materials to support the allegation of fraud: the sworn statements of two witnesses (Chew Kia Lee and Yeo Seok Lee) which were prepared by Les

Placements in the Canadian proceedings but were never produced before the Canadian court.

Principles governing foreign judgments

Quite apart from the arrangements under the RECJA or the REFJA, it is settled law that a foreign judgment in personam given by a foreign court of competent jurisdiction may be enforced by an action for the amount due under it so long as the foreign judgment is final and conclusive as between the same parties. The foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error, whether of fact or of law: **Godard v Gray** [1870] LR 6 QB 139. In respect of such an action, an application for summary judgment may be made on the ground that the defendant has no defence to the claim: **Grant v Easton** [1883] 13 QBD 302. The local court will only refrain from enforcing a foreign judgment if it is shown that the plaintiff procured it by fraud, or if its enforcement would be contrary to public policy or if the proceedings in which the judgment was obtained were opposed to natural justice: see 8(1) ***Halsbury`s Laws of England*** (4th Ed) (1996 Reissue) paras 1008-1010.

In a much earlier case, **Vanquelin v Bouard** [1863] 15 CBNS 341(Unreported) which was an action in England on a French judgment, Erle CJ, said:

> *It has been well settled that defences which might have been raised in the foreign court cannot be brought forward here for the purpose of setting aside the judgment.*

The rule established in ***Godard v Gray*** (supra) was followed in the local case, ***Ralli v Angullia*** (supra), a 1917 decision of the Court of Appeal of the Straits Settlements (the predecessor of this court). One of the issues determined by the court there was that a foreign judgment was conclusive as to any matter adjudicated upon and could not be impeached for any error of fact or law in an action based on it, apart from special grounds. A defence which might have been raised in the foreign court and was not raised could not be raised in the forum of enforcement. Woodward J, who delivered the leading judgment, even suggested that the foreign judgment created a new and independent obligation distinct from the original cause of action. But he recognised that the exact nature of the obligation still remained unsettled and, in his words, `it may be there is no merger, because the original cause of action still subsists, but the obligation created by the judgment is nevertheless a new one` (at p 76).

However, there is a line of authorities starting with **Abouloff v Oppenheimer & Co** [1882] 10 QBD 295 which seemed to say that so long as fraud is alleged the defendant is thereby entitled to reopen the issue of fraud. This decision considerably extended the fraud exception to the conclusive rule enunciated in ***Godard v Gray*** . In ***Abouloff*** , the Court of Appeal held that a foreign judgment could be impeached for fraud even though no new evidence was produced and even though the fraud might have been, and was, alleged in the foreign proceedings. The court sought to justify its approach allowing re-opening of the fraud issue by stating that the foreign court would not have itself approved of being misled and permit a judgment so obtained to remain.

In the later case **Vadala v Lawes** [1890] 25 QBD 310, while the Court of Appeal recognised the problems posed as a result of the decision in ***Abouloff*** (supra), it nevertheless refused to depart from it. Lindley LJ observed (at pp 316-317): `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 though you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court`.

It was again reaffirmed in the recent case **Jet Holdings Inc v Patel** [1990] 1 QB 335[1989] 2 All ER 648 at 652, where Staughton LJ stated:

> *[I]t is to my mind plain that the foreign court`s decision on its own jurisdiction is neither conclusive nor relevant. If the foreign court had no jurisdiction in the eyes of English law, any conclusion it may have reached as to its own jurisdiction is of no value. To put it bluntly, if not vulgarly, the foreign court cannot haul itself up by its own bootstraps. Logically, the same reasoning must apply where enforcement is resisted on the ground of fraud ... If the rule is that a foreign judgment obtained by fraud is not enforceable, it cannot matter that in the view of the foreign court there was no fraud. But this doctrine makes a great inroad into the objective, which is generally desirable, of enforcing foreign judgments where in the eyes of English law the foreign court had jurisdiction. The defendant may have been served in the foreign country, entered an appearance, given evidence, been disbelieved and had judgment entered against him. If he asserts that the plaintiff`s claim and evidence were fraudulent that issue must be tried all over again in enforcement proceedings. The lesson for the plaintiff is that he should in the first place bring his action where he expects to be able to enforce a judgment.*
>
> *The doctrine has encountered criticism from academic writers: see Dicey and Morris* ***The Conflict of Laws*** *p 469, footnote 66. 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 a hundred years too late for this court to take that view****. The decisions in* ***Abouloff v Oppenheimer & Co*** *[1882] 10 QBD 295[1881-5] All ER Rep 307 and* ***Vadala v Lawes*** *[1890] 25 QBD 310[1886-90] All ER Rep 853 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. [Emphasis is added.]*

In **Syal v Heyward** [1948] 2 KB 443[1948] 2 All ER 576 the Court of Appeal, applying ***Abouloff*** (supra), held it to be immaterial that the facts relied upon to establish a prima facie case of fraud were known to the party relying on them at all material times and could thus have been raised by way of defence in the foreign proceedings.

We must, however, point out that the approach adopted in ***Abouloff*** (supra) is completely inconsistent with that adopted by the English court vis-.-vis its own domestic judgments. This is elucidated clearly in the following passage from ***Dicey and Morris on Conflict of Laws*** (13th Ed) at pp 518-519:

> *A party against whom an English judgment has been given may bring an independent action to set aside the judgment on the ground that it was obtained by fraud; but this is subject to very stringent safeguards, which have been found necessary because otherwise there would be no end to litigation and no solemnity in judgments. The most important of these safeguards is that the second action will be summarily dismissed unless the claimant can produce evidence newly discovered since the trial, which evidence could not have been produced at the trial with reasonable diligence, and which is so material that its production at the trial would probably have affected the result, and (when the*

fraud consists of perjury) so strong that it would reasonably be expected to be decisive at the rehearing and if unanswered must have that result. But it does not matter whether the fraud is extrinsic, e.g., consists in bribing witnesses, or intrinsic, e.g., consists in giving or procuring of perjured or forged evidence.

In contrast, the Canadian courts declined to follow ***Abouloff*** (supra). In **Jacobs v Beaver Silver Cobalt Mining Co** [1908] 17 OLR 496, Garrow JA of the Ontario Court of Appeal offered the following critique of ***Abouloff*** and ***Valada*** (at p 505):

*It can be matter of little wonder that there should be a hesitation to accept as law all the dicta contained in the judgment in **Abouloff v Oppenheimer**, where the consequences so well pointed out by Hargaty, C.J. in **Woodruff v McLennan**, are or may be to practically abrogate the whole doctrine of res judicata both as to native and foreign judgments. A doctrine so useful and so well established, resting not alone upon a consideration of the private convenience of litigants, but upon the broader foundation of public policy, should, one would think, require more for its abrogation than the mere dicta of one or even more Judges, here or elsewhere, however eminent.*

Abouloff v Oppenheimer *(Unreported) DISPLAY.TEXT="25 QBD 310">. But the judgment rests not upon the actual decision in the former case, but upon the dicta to which I have referred. Early in the judgment of Lindley, LJ, appears this statement, p. 316: "There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, there is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits. Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of **Abouloff v Oppenheimer** ... But until **Abouloff**`s case the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without reopening the merits, had never come forward for explicit decision. **That point was raised directly** in the case of **Abouloff v Oppenheimer**, and it was decided. I cannot fritter away that judgment," etc.*

*With the greatest deference, it seems to me that this statement is open to two serious objections: (1) it in no way takes account of or defines **the nature** of the fraud which can be successfully opposed to a judgment, whether native or foreign, for it is admitted the rule is the same, and (2) the point was not explicitly raised in **Abouloff v Oppenheimer**, where the facts were all admitted by the demurrer.*

The combination of the two rules, with which no one quarrels, is made easy and without the reproach of any thing like hairsplitting, if my first objection is answered, as I think it should be, in the line of authorities which no one can question, namely, that the fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the Court and so passed on into

> *the limbo of estoppel by the judgment. This estoppel cannot, in my opinion, be disturbed except upon the allegation and proof of new and material facts, or newly discovered and material facts which were not before the former Court and from which are to be deduced the new proposition that the former judgment was obtained by fraud. The burden of that issue is upon the defendant, and until he at least gives prima facie evidence in support of it; the estoppel stands. [Emphasis is added.]*

What Garrow JA advocated was that a court should only look into the merits of a foreign judgment if extrinsic fraud was alleged or if the defendant had discovered evidence of intrinsic fraud after the foreign judgment was passed. And what would constitute extrinsic fraud was elaborated in the earlier Ontario Court of Appeal decision in **Woodruff v McLennan** [1887] 14 OAR 242 as being:

> *the defendant had never been served with process, that the suit had been undefended without defendant`s default, that the defendant had been fraudulently persuaded by plaintiff to let judgment go by default ... or some fraud to defendant`s prejudice committed or allowed in the proceedings of the other court.*

The approach advocated by Garrow JA was followed by the courts of several other provinces in Canada, eg Nova Scotia in **Manolopoulos v Pnaiffe** [1930] 2 DLR 169; Alberta in **Union of India v Bumper Development Corp** [1995] 7 WWR 80; and British Columbia in **Roglass Consultants Inc v Kennedy** [1984] 65 BCLR 393.

In Australia, the courts there also seem to be moving away from ***Abouloff*** (supra). The leading case would appear to be **Keele v Findley** [1990] 21 NSWLR 444 where the New South Wales Commercial Division preferred the Canadian approach. Rogers CJ (NSW) held that fraud was a defence to an action on a foreign judgment only if there had been a new discovery of material evidence which would establish fraud and make it reasonably probable that the opposite result would have been reached. He felt that the current English position came about because the courts had failed to take proper account of the developments in the law relating to domestic judgments.

However, notwithstanding these Canadian and Australian authorities, the English Court of Appeal reaffirmed the ruling in ***Abouloff*** (supra) in **Owens Bank v Bracco** [1991] 4 All ER 833[1992] 2 WLR 127 and held that, as far as fraud was concerned, the enforcement of a foreign judgment was not the same as the enforcement of an English judgment in that there was no requirement of any fresh evidence before an English court could try the issue of fraud. This Court of Appeal decision was affirmed by the House of Lords where Lord Bridge, with whom the other Law Lords concurred, stated that if the law were in need of reform, it was for the legislature, not the judiciary, to effect it. While ***Bracco*** involved enforcement under the Administration of Justice Act 1920, the House felt that the word `fraud` in the Act should be given the same sense as in common law.

Interestingly, in this regard, there is a Court of Appeal case which sought to limit the scope of the ***Abouloff*** line of cases: **House of Spring Gardens v Waite** [1991] 1 QB 241[1990] 2 All ER 990. ***Waite*** concerned two Irish judgments where in the original judgment (given in 1983 and on which enforcement was sought), the issue of fraud was canvassed and decided upon and the same issue of fraud was also examined in a separate and second action in Ireland (in 1987). The court held that it was the judgment in the second action which created the estoppel. In seeking to distinguish the situation there from the other cases, Stuart-Smith LJ stated ([1991] 1 QB 241 at 251; [1990] 2 All ER

990 at 997):

> *In none of these cases was the question, whether the judgment sued upon here was obtained by fraud, litigated in a separate and second action in the foreign jurisdiction.*

In the alternative, the court in ***Waite*** (supra) felt that it would amount to an abuse of process to allow the defendant to re-litigate the issue. But the court also noted that the result would have been different and the question of whether there had been fraud re-examined if it had been possible to impeach the 1987 judgment on the basis that the judgment had itself been obtained by fraud or to produce new evidence of fraud in relation to the earlier judgment.

Our approach

There were, therefore, before us, two distinct views as to how a domestic court should treat a foreign judgment where fraud is raised in relation to that foreign judgment. One is that enunciated in ***Abouloff*** (supra) and the other advocated by the Canadian-Australian cases which sought to limit the circumstances under which a domestic court may re-open an issue already determined by a foreign judgment including an allegation of fraud. In our judgment the approach adopted in ***Abouloff*** has less to commend itself as it would only encourage endless litigation. It is of paramount importance that there should be finality. Every losing party understandably would like to litigate the issue over again with the hope that a different tribunal would look at the fact situation differently. But that can never be a good reason for allowing a losing party to re-open issues. To liberally allow a party to do so would be to permit that party to have a second bite at the cherry, an eventuality which is generally abhorred by all civilised systems of law. Of course, we are conscious that the rule against re-opening issues is not absolute. There are exceptions but they are subject to safeguards. In England, an issue already adjudicated upon by the domestic courts would not, as a rule, be allowed to be re-litigated. There is no logical reason why a different rule should apply in relation to a foreign judgment.

It is also vitally important that no court of one jurisdiction should pass judgment on an issue already decided upon by a competent court of another jurisdiction. This is the doctrine of comity. After all, two tribunals, both acting conscientiously and diligently, could very well come to a different conclusion on the same facts. There is no question of which is being more correct. To seek to make such an evaluation would be an invidious exercise and could lead to the undesirable consequence which we have mentioned before of encouraging judicial chauvanism. It must be borne in mind that the enforcement forum is not an appellate tribunal vis-.-vis the foreign judgment.

We note here that in **Owens Bank v Etoile Commerciale SA** [1995] 1 WLR 44, Lord Templemen, in delivering the judgment of the Privy Council observed that it did not `regard the decision in ***Abouloff*** ... with enthusiasm`. In ***Etoile Commerciale*** the Privy Council adopted the approach taken by the Court of Appeal in ***Waite*** (supra) rather than that in ***Abouloff*** .

In our judgment, the approach taken by the Canadian-Australian cases and ***Ralli v Angullia*** (supra) is more in line with principles of conflict of laws and treats foreign judgments in the same way as domestic judgments. It is consonant with the doctrine of comity of nations. It avoids any appearance that this court is sitting in an appellate capacity over a final decision of a foreign court. We, therefore, ruled that where an allegation of fraud had been considered and adjudicated upon by a

competent foreign court, the foreign judgment may be challenged on the ground of fraud only where fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case. There is no necessity for us to offer any views on the jurisprudential question whether a foreign judgment created a new and independent obligation distinct from that of the underlying or original cause of action, raised by Woodward J in ***Ralli v Angullia*** .

This common law principle of according finality to a foreign judgment was at one time thought to be based on the doctrine of comity. English judges then believed that the law of nations required the courts of one country to assist those of any other and they feared that if foreign judgments were not enforced in England, English judgments would not be enforced abroad: **Roach v Garvan** [1748] 1 Ves Sen 157 at 159. However, this theory seems to have given way to what is known as the doctrine of obligations, namely, that the foreign judgment imposes a duty or obligation on the defendant to pay the judgment sum which the courts in the enforcement country are bound to enforce: **Schibsby v Westenholz** [1870] LR 6 QB 155 at 159. Whatever may be the correct legal foundation, or for that matter it could be a combination of both, the cardinal principle is that no one court should sit in judgment over the final decision of a competent court of another jurisdiction. A party, litigating in a foreign court, must diligently muster all the evidence and raise all pertinent issues in that forum. He should not have any expectation that any carelessness or omission on his part could nevertheless be made good in the forum of enforcement.

Fresh evidence of fraud

As stated before, the fresh evidence alleged by Hong were the two sworn statements of Chew Kia Lee and Yeo Seok Lee. According to Les Placements it was Hong who objected to the admissibility of the two sworn statements and prevented them from being admitted in the Canadian proceedings. Yet in the proceedings here, he sought to rely on them to show that the Canadian judgment was obtained by fraud. He should not be allowed to blow hot and cold. He knew of the existence of the statements and of what the two persons stated therein. It was too late for Hong to change his mind now. There was, therefore, no new evidence.

That should dispose of this appeal. But we would go further and say that even if the two statements were admitted in the Canadian proceedings, it would not have made a difference to the court`s verdict. In their statements, both Chew Kia Lee and Yeo Seok Lee stated that the loan of C$350,000 was from Germain to Wiraco. But one critical uncontrovertible piece of evidence before the Canadian court was that the sum of C$350,000 was transferred from Les Placements to Wiraco. It might well be that Pierre told Chew that the money was from Germain without distinguishing Pierre`s father`s company from his father. Similarly, when Yeo heard Hong suggesting that Pierre borrow money from Germain, Hong did not distinguish Pierre from Wiraco. It was never suggested that Pierre himself wanted to borrow from his father. It was probably understood by all that Wiraco was borrowing from Les Placements. In conversations, such a manner of reference is often present. Quite clearly, the evidence of Chew Kia Lee and Yeo Seok Lee would not prove anything to the contrary. More importantly, why did Hong sign the loan agreement if he had not intended to guarantee the loan from Les Placements to Wiraco? It is true that the loan agreement was in French. Les Placements claimed that it was orally interpreted to Hong. While Hong disputed this, he did not explain why he, a former principal of Price Waterhouse and therefore a person experienced in business, would have signed a document he did not understand. At the very least, he would have seen from the loan agreement that the agreement was between Les Placements and Wiraco. In any case, he had also provided no reason

for signing the extension agreement. The irrefutable inference was that there was no fraud and Hong in fact agreed to guarantee the loan from Les Placements to Wiraco. His claim that there was fraud was without merit.

Outcome:

Appeal dismissed.

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