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CAUSE NO. 339/96

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

7 BETWEEN: JUAN COLERIO

PLAINTIFF

9 AND: MARTA ADA GRAZIELLA DE LUCA

DEFENDANT

13 **Appearances:**  
14 **Martin Jones of Campbells for the Plaintiff**  
15 **Kenneth John Farrow of Quin & Hampson for the Defendant**

18 **Before:** The Hon. Justice Levers

20 **Heard:** August 2, 2004



22 **JUDGMENT**

24 **Levers, J.**

27 The Plaintiff Juan Pedro Colerio comes by way of summons to this court for:

29 (1) Summary Judgment in this action against the Defendant Marta Ada Graziella  
30 De Luca or alternatively that the monies held in a joint account with the Bank  
31 of Butterfield (International) Cayman Ltd. be paid into court in proceedings  
32 before the National Court of the First Instance in Civil Matters no. 71 Buenos  
33 Aires, Argentina, court file no. 5529/1999 between De Luca, Noemi De Luca,  
34 Marta Ada Graziella, and

1 (2) that the costs of this application be paid by the Defendant to be taxed if not  
2 agreed and

3  
4 (3) for such other directions as the court might think fit.  
5

6 The summons is supported by two affidavits of the Plaintiff sworn on June 7, 2004 and  
7 July 19, 2004.  
8

9 **The Facts**  
10

11 The action concerns the beneficial ownership of certain funds now approximately  
12 U.S. \$242,000.00 which was formerly held in an account in the joint names of the  
13 Defendant De Luca and her parents Ruggero De Luca and Anastasia Ladislao De Luca.  
14 It was held at the Banco De Galicia (Cayman) Ltd.  
15

16 On a date unknown to the Plaintiff but before the September 10, 1995, Mr. and Mrs. De  
17 Luca, the parents of the Defendant set up an account with Banco De Galicia (Cayman)  
18 Ltd. The account number was 3806. Mr. and Mrs. De Luca were residents of Argentina.  
19

20 Marta De Luca, daughter of Mr. and Mrs. De Luca and the Defendant herein, was also  
21 named as an account holder and given authority to sign in relation to the account. It is  
22 alleged by the Plaintiff that Martha De Luca was added for convenience only. Between  
23 the opening of the account and September 10, 1995 when Mrs. De Luca died, substantial

1 funds were deposited into the account. Proceedings to determine the succession to her  
2 estate were commenced in Argentina on September 28, 1995. On December 24, 1995,  
3 Mr. De Luca died. Proceedings to determine the succession to his estate were  
4 commenced in Argentina on February 20, 1996. On September 29, 1999, Noemi De  
5 Luca, the Defendant's sister was appointed by the order of the Argentine court as the  
6 official prosecutor of the estate of both Mr. and Mrs. De Luca. On July 1, 1998, Noemi  
7 was replaced as the official prosecutor of the estate of her parents by Dr. Juan Colerio,  
8 the Plaintiff herein. Proceedings were commenced in Argentina on behalf of the parent's  
9 estate against the Defendant Marta, claiming the monies in several accounts including the  
10 account belonging to her parents in Banco De Galicia. The Defendant Marta defended  
11 these claims on the basis that the monies deposited in the accounts were hers and that she  
12 had earned these amounts working as an escort and building up an escort agency. On  
13 July 13, 2000, the National Court of First Instance in Argentina ruled that the money in  
14 the account belonged to the estate of Mr. and Mrs. De Luca and further ordered that the  
15 money should be transferred to the Banco De la Nacion Argentina, Tribunales Branch to  
16 the order of the court pending the resolution of issues concerning the distribution of their  
17 estates. On March 24, 2004, as a result of Marta appealing this decision, the Court of  
18 Appeal decision was issued. That Court upheld the decision of the National Court of  
19 First Instance and declared that the monies being held at this time in the name of  
20 Campbells and Quin & Hampson be held as part of the estate of Mr. and Mrs. De Luca.  
21 The issue of the ownership of the money in the Cayman account was dealt with on its  
22 merits by both the Court of First Instance and the Court of Appeal. The Bank  
23 commenced Inter-pleader proceedings in the Cayman Islands on June 26, 1996 pertaining

1 to these monies. Noemi claimed that the account formed part of the estate and  
2 accordingly fell to be distributed to her, in accordance with the laws of Argentina. She  
3 sought an order for payment to her of these funds as official prosecutor. Marta, the  
4 Defendant, filed a defence on June 1, 1998 claiming that the account was never funded  
5 by Mr. and Mrs. De Luca. That she was the sole surviving account holder in the account  
6 and that she was the sole and true beneficial account holder and that the monies in the  
7 account never formed part of the estate.

8  
9 As a result of actions taken by the present Plaintiff, Dr. Colerio, an order was made that  
10 the bank be dismissed from the proceedings after giving discovery and that the balance of  
11 the funds be paid into an escrow account. Dr. Colerio was substituted for Noemi in the  
12 Cayman proceedings and filed an Amended Statement of Claim. A Notice of Intention to  
13 Proceed was filed on October 14, 2003. It would appear that all parties progressed no  
14 further in this matter and were awaiting the decision of the Court of Appeal, in Argentina.

15

16 **The Plaintiff's Case**

17

18 The Plaintiff alleges that Marta the Defendant participated in court proceeding in  
19 Argentina that specifically dealt with and resolved the question of the ownership of the  
20 monies in the account. It specifically ordered that the monies be transferred to Argentina  
21 to be collated as part of the estate of Mr. and Mrs. De Luca and distributed in accordance  
22 with Argentina law. The Plaintiff has exhibited both judgments including one that  
23 clearly indicated that Marta was participating in the Argentine court proceedings and was

1 represented by a lawyer. In these circumstances, the Plaintiff submits that it is no longer  
2 open for Marta to continue to fund these proceedings and seek to re-argue the same  
3 points before the Grand Court in the Cayman Islands. The Plaintiff submits that the  
4 principles of issue estoppel applies based on the decision of the Argentine Court of  
5 Appeal and further submits that it would be an abuse of process for Marta to seek to raise  
6 any arguments in these proceedings which could and should have been raised in the  
7 Argentine proceedings.

8

9 **The Defendant's Case**

10

11 The Defendant submits that issue estoppel would only arise in certain circumstances and  
12 this case is not one in which it arises because he submits that the identity of the parties is  
13 not clear. The claimant in Argentina was the first Defendant's sister Noemi and Dr.  
14 Colerio replaced her. The Defendant submits that there is no privity of interest between  
15 Noemi and Dr. Colerio such that the latter can get the benefit of the Argentine decision.  
16 He relies on the case of *Carl Zeiss-Stiftung v. Rayner and Keeler Limited and others* No.  
17 2 All E.R. 1966 at page 536. In particular he refers the court to page 550 the speech of  
18 Lord Reid. (I will refer to that when I come to addressing the law in this judgment).

19

20 He submits that as *Megarry V-C* said in *Gleason v. J. Whipple and Company Ltd.* 1977  
21 1 WLR (510) Division 1977 at page 510 that this is "difficult territory". He therefore  
22 submits that this is not a fit case to be disposed of on an application for summary  
23 judgment.

1

2 The second point Mr. Farrow makes is that the identity of the subject matter is  
3 questionable. He accepts that decision of the Argentine court of appeal is to determine if  
4 the funds in question were provided by the Defendant's mother rather than the Defendant  
5 herself. He submits that the application of Argentine law has not been pleaded and that it  
6 is far from clear that it does apply. Although the mother may at the time of the transfer  
7 into joint names have been domiciled in Argentina, the Defendant was not, and at all  
8 material times the *situs* of the funds in question has been outside Argentina. Finally he  
9 says that there is a procedural defect in that the affidavits ignore the matters which are  
10 pleaded and raise a matter which is not. *Res judicata* he says must be pleaded and relies  
11 on the case of *Voght v. Winch* (1814 to 1823) All E.R. at page 270.

12

13 **The Law**

14  
15 A Foreign Judgment which is final and conclusive on the merits and not impeachable  
16 under any of the Rules 42-45 is conclusive on any matter thereby adjudicated upon and  
17 cannot be impeached by any error either of fact or of law. (See *Dicey and Morris The*  
18 *Conflict Of Laws*, that is Rule 41). This Rule holds good whether the judgment is relied  
19 upon by the Claimant or by the Defendant. It applies whether the judgment is  
20 *in personum* or *in rem*. This Rule in effect applies to foreign judgments, the principles  
21 well known in English domestic law under the name of Issue Estoppel. In *Carl Zeiss-*  
22 *Stiftung v. Rayner and Keeler* (see *supra*), a majority of the House of Lord's held that  
23 Issue Estoppel can be based on a Foreign Judgment. This decision was applied by a  
24 unanimous house in *The Senar No. 2* (1985 1 WLR p. 490).

1

2 Three conditions must be fulfilled before the doctrine can be applied:

3

4 (1) The Judgment of the foreign court must be a court of competent jurisdiction  
5 and must be final and conclusive on the merits in the sense of Rule 35;

6

7 (2) There must be identity of parties;

8

9 (3) There must be identity of subject matter, that is to say the issue must be the  
10 same.

11

12 The meaning of the word conclusive in Rule 41 according to *Dicey and Morris* is to a  
13 rule of English Law whereby a Foreign Judgment given by a court of competent  
14 jurisdiction and not impeachable on a number of strictly limited grounds is conclusive  
15 and not merely *prima facie* evidence of the matter therein.

16

17 The question to address is whether this Judgment of the foreign court in Argentina (The  
18 First Instance and the Court of Appeal) is a final and conclusive Judgment on the merits  
19 in the sense of Rule 35. If a Judgment is given by a court of a foreign country with  
20 jurisdiction to give that Judgment in accordance with certain principles then that  
21 Judgment may be enforced by a claim or counter-claim for the amount due and if the  
22 Judgment is for a debt or definite sum of money be final and conclusive. Under Rule 35,  
23 the important section for purposes of this application is no. 3:

1 “No proceedings may be brought by a person on a cause of action in respect of a  
2 Judgment which has been given in his favour in proceedings between the same  
3 parties or their privies in a court, in another part of the United Kingdom or in a  
4 court in an overseas country unless that Judgment is not enforceable according to  
5 clause 1 or not entitled to recognition according to clause 2 of this rule.”  
6

7 Clause 2 states that a final and conclusive Judgment on its merits if it is not impeachable  
8 is entitled to recognition in common law and may be relied on in proceedings in England.  
9 Mr. Farrow raises the question of the Judgment being final and conclusive on its merits.

10  
11 The Court of Appeal Judgment in Argentina states:

12 “should an amount remain unavailable until a final Judgment is entered in the  
13 collation proceedings or until the same is concluded by settlement or  
14 conciliation.”  
15

16  
17 He submits that those words make it not a final judgment. The proceedings in Cayman  
18 pertain to the ownership of the monies. The Court of Appeal held:

19 “considering that any matter in connection with the personal property forming the  
20 asset of the estate is ruled by Argentine law and pursuant to the event in a  
21 resolution of the probate proceedings filed in the country corresponding to the last  
22 domicile of the principals, a jurisdiction which is accepted by both co-heirs - the  
23 resolution issued on folio 120 is hereby extended in the sense that the amounts  
24 existing in Banco De Galicia (Cayman) Ltd. must be transferred to Banco de la  
25 Nacion Argentina, the Tribunales branch to the order of this Court and as  
26 belonging to the probate proceedings of Ladislao De Luca and Anastasia De Luca  
27 Ruggero.”  
28

29 It is therefore abundantly clear that after a trial in which Marta took part, submitted to the  
30 jurisdiction of Argentina (a matter which has been emphasized by the court of appeal),  
31 the monies were adjudicated as belonging to the estate. That is the very same issue that is  
32 before this court. Secondly, counsel submitted, that there is no privity of interest between  
33 the parties, as Dr. Colerio did not take part in the Mexican proceedings. However, a

1 careful reading of the authorities leaves me unable to agree with Mr. Farrow on the  
2 submission. I quote from *Carl Zeiss-Stiftung* at page 550:

3 “It has always been said that there must be privity of blood, title or interest. Here  
4 it would have to be privity of interest. That can arise in many ways, but it seems  
5 to me to be essential that the person now to be estopped from defending himself  
6 must have had some kind of interest in the previous litigation or its subject  
7 matter.”  
8

9 The Defendant in this case had interest in the previous litigation in Argentina, had  
10 interest in the subject matter and was defended by counsel in those proceedings.

11

12 The question of whether the estoppel must be pleaded or was pleaded is also raised by

13 Mr. Farrow. He submits that unless it is pleaded it cannot be relied upon by the

14 Defendant. The pleadings in this matter have been amended and filed sometime ago.

15 The Court of Appeal Judgment had just been delivered in Argentina. Mr. Farrow submits

16 that now instead of asking for Summary Judgment what should be done is that a

17 summons taken out to strike out the claim. I disagree. Once this court is satisfied that the

18 Judgment abroad is final and conclusive on the merits of the matter and not clearly on a

19 procedural point or a conditional point then it is my view that this court can recognize

20 that Judgment as final and conclusive under Rule 41 and Issue Estoppel will arise, albeit

21 that it has not been pleaded.

22

23 I agree with learned counsel for the Plaintiff that the Defendant should be estopped from

24 re-litigating the issues raised in Argentina and that it would be an abuse of process for the

25 Defendant to seek to raise any arguments in these proceedings which should and could

26 have been litigated in the Argentine proceedings.

1

2 Summary Judgment awards should not be made if there is a probable defence. In this  
3 case, the defence as it is filed, purely attempts to relitigate a matter which has already  
4 been litigated in Argentina and therefore I hold that the Plaintiff is entitled to Summary  
5 Judgment.

6

7 Counsel for the Defendant had indicated to me that he wished to address me on any  
8 consequential orders that could result from this decision. I have therefore not addressed  
9 the question of costs till I hear further submissions.

10

11 Dated this 17th day of August, 2004

12

13



14 Levers, J.  
15 Judge of the Grand Court

