CJ/CIB

IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS 6-08-03

CAUSE NO. 495/2001

BETWEEN:

BANCO MERCANTIL DEL NORTE, S.A. INSITUTUCION DE BANCO MULTIPLE, GRUPO FINANCIERO BANORTE

Plaintiff

AND:

CARLOS EFRAIN DE JESUS CABAL PENICHE

Defendant

APPEARANCES:
Counsel for the Plaintiff: Mr. Del Magner of Ritch & Conolly
Counsel for the Defendant: Mr. Ross McDonough of Campbells

Heard: 5th and 19th June 2003

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

There are two applications before me. One is an Application by the Plaintiff for Summary Judgment against the Defendant pursuant to GCR Order 14, rule 1.

The other is a Summons by the Defendant to dismiss the Plaintiff's claim and enter Judgment for the Defendant under the provisions of GCR Order 14, rule 12 and GCR Order 14(a), rule 1.

The Plaintiff

The Plaintiff seeks to enforce, in the Cayman Islands, a Judgment obtained against the Defendant in the Federal District Court of Mexico on the 23rd August 1995 which, including interests to the 14th August 2001, amounts to some US$42,750,195.00.

Leave of the Grand Court was obtained on the 20th August 2001 pursuant of GCR Order 11, rule (1)(m) to serve the Defendant out of the jurisdiction at Port Phillip Prison in Australia where he was incarcerated at that time.

The Plaintiff asserts that the Defendant has no defence to this action and that those matters pleaded in the Defence do not stand up and should be struck out.

The Defendant

The Defendant on the other hand, says that the Plaintiff's case does not come up to the test to be applied under Order 14. He says that there is doubt as to fact and law in this matter, which enables him to say that the Plaintiff is not entitled to judgment. The Defendant argues that there is a real and substantial question to be tried.

The Law

There is no Cayman Island law facilitating the registration and enforcement in the Cayman Islands of a Mexician judgment. The Plaintiff therefore issued a Writ and seeks to enforce the foreign judgment at Common Law and now asks for summary judgment.

Order 14, rule 1 reads:

> " (1) Where in an action to which this Rule applies a Statement of Claim has been served on a Defendant and that Defendant has given notice of intention to defend the action, the Plaintiff may on the ground that the Defendant has no defence to a claim included in the Writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for Judgment against that Defendant.
>
> (2) This rule applies to every action begun by Writ in the Court other than –
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> (a) an action which includes a claim by the Plaintiff for libel, slander, malicious prosecution or false imprisonment;
> (b) an admiralty action in rem; or
> (c) an action to which Order 86 applies.

Summary Judgment awards should not be given if there is a probable defence. In this case the Defendant argues that he does have a probable defence as the

Foreign Judgment was obtained as a result of various breaches. This therefore brings this Court to examine the conditions under which initially a Foreign Judgment would be accepted by these Courts and enforced.

There are two basic procedures for the enforcement of foreign judgment and in this instance it is enforcement at common law that has been sought. At Common Law, the Court will enforce the judgment of a foreign court in a claim in *personam* provided that the following conditions are satisfied:

1. The foreign Court had jurisdiction over the judgment debtor in accordance with the rules of Private International Law that is to say in one of the following four cases.

2. If the Judgment debtor was, at the time the proceedings were instituted, present in a foreign country

    (a) if the Judgment debtor was the Plaintiff or counterclaimed in the proceedings in the foreign Court.

    (b) If the judgment debtor, was the Defendant and submitted to the jurisdiction of the foreign Court by voluntarily appearing in the proceedings and contesting them on the merits; and

    (c) If the judgment debtor was the Defendant and before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the foreign Court.

4. The Foreign Judgment was not (a) procured by fraud or (b) given in breach of natural justice or (c) otherwise contrary to Cayman public policy.

The above reflects Rule 36 for recognition and enforcement of foreign Judgments. See Dicey and Morris:

> "Subject to Rules 37 to 39, a Court of a foreign country outside the United Kingdom has jurisdiction to give a Judgment in personam capable of enforcement or recognition in the following cases:
>
> *First Case* – If the Judgment debtor was, at the time the proceedings were instituted, present in the foreign country;
>
> *Second Case* – If the Judgment debtor was claimant in or counterclaim in the proceedings in the foreign Court;
>
> *Third Case* – If the Judgment debtor, being a Defendant in the foreign Court, submitted to the jurisdiction of that Court by voluntarily appearing in the proceedings;
>
> *Fourth Case* – If the Judgment debtor, being a Defendant in the original Court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that Court or of the Court of that country."

The Plaintiff bases his case squarely on the third case stated in Rule 36 that is that the Defendants submitted to the jurisdiction of the Court voluntarily. He seems also to seek an element of support from the first case that is that at the time the proceedings were instituted the judgment debtor was present in the

foreign country. The Defendant on the other hand argues strenuously that the proceedings were instituted when the judgment debtor was not present in the country and the only extent to which the Defendant submitted to the jurisdiction of the Mexican Court was to contest jurisdiction. That the case was never contested nor did he submit to the jurisdiction to argue the case on its merits.

A brief history of the facts of this matter will assist in setting the scene for the examination of the factual situation to ascertain whether it fits into the first case or the third case, at this stage to meet the burden in seeking summary judgment.

The Plaintiff's facts

The facts of this case are set out in the two Affidavits of Rafael Hernandez Hernandez, Judicial Co-Ordinator of the Plaintiff. The first sworn on 27th June 2001 (in proceedings 197 of 2001) and the second on 12th February 2002.

The salient facts, for the purposes of this Application, are as follows:

(i) On 10th August 1994, a Mexican Bank known as Banpais S.A. Institucion de Banca Multiple ("Banpais") on the request of the Defendant, loaned to him personally the sum of Sixty Million Mexican Pesos which amounted to approximately US$6,608,075.00 (at the conversion rates applicable at that time). This sum was paid over to Mr. Cabal and was secured by way of a Promissory Note, dated 10th August 1994.

(ii) As a consequence of impending criminal proceedings against him, Mr. Cabal fled the jurisdiction of Mexico and as a consequence, did not honour the said Promissory Note to Banpais. Mr. Cabal was eventually caught in Australia on 11th November 1998 and incarcerated pending extradition proceedings.

(iii) On 2nd June 1995, Banpais filed a Complaint with the Federal District Court of Mexico under Action No. 1238/95 claiming the sum of Sixty Million Mexican Pesos together with interest and cost. The Complaint sought Judgment against Mr. Cabal and that a Writ of Execution be issued against him to make payments of the amount of the Judgment. It further sought relief that if he failed to pay, that this property be seized to the extent necessary to pay the principle sum and additional claims.

(iv) Following the filing of that Complaint and non-compliance by the Defendant, on 23rd August 1995, final Judgment was entered against the Defendant in the sum of Sixty Million Mexican Pesos plus additional claims. The Judgment states, inter alia, in the fourth finding:

> "If the Defendant does not make payment as required by the terms of this document, the Defendant's property should be seized and auctioned to pay the Plaintiff the amount owed."

(v) After the Judgment had been entered against Mr. Cabal and steps were taken to enforce the Judgment against his assets, including an account held by him at Merril Lynch Bank in Switzerland, the Defendant, through his Mexican counsel, initiated proceedings in Mexico to set aside the Mexican Judgment.

(vi) More particular, Mr. Cabal, through his Mexican attorneys, issued what is described as "*Ampara Proceedings*" on 12th December 1995 in Mexico. In summary, Mr. Cabal alleged that his constitutional rights had been infringed principally because Banpais' proceedings had been served at the offices of Banco Union SA in Mexico which he claimed was not a

proper address for service and that the whole proceedings, including the Judgment, should be set aside and the execution of the Mexican Judgment brought to an end.

(vii) At first instance, Mr. Cabal succeeded with his *Amparo* claim with a decision on 11th June 1996. This decision was appealed by way of papers filed in the proceedings on 19th March 1997. On 15th July 1997, the Mexican Court of Appeal by a Judgment of Judge Victor Manuel Islas Dominguez, revoked the *Amparo* decision in favour of the Defendant and permitted execution of the Mexican Judgment entered by Banpais.

(viii) As a consequence of this decisions on the *Amparo* proceedings, Banpais holds an enforceable Judgment against the Defendant now increased with statutory interest to US$42,750,195.00 (converted from Mexican Pesos to US$ Dollars) and is entitled, pursuant to that Judgment and the decision of the Mexican Court of Appeal of 15th July 1997, to enforce the sum against any assets held by Mr. Cabal up to that Judgment sum.

(ix) Banorte, the Plaintiff in this action, has had assigned to it the claim against the Defendant in the following circumstances.

(x) Principally as a result of alleged frauds carried out by the Defendant (which forms the subject of the criminal proceedings (referred to in sub-paragraph (ii) above) the Mexican Government, through the IPAB (Institute of Protection of Banks), took over the affairs of Banpais. Subsequently, on behalf of Banpais the IPAB entered into an Agreement with the Plaintiff herein, another leading Mexican Bank, whereby the two institutions would merge and thereafter be known as Banorte. In effect, Banorte became the successor of Banpais and assumed all its assets and liabilities. This occurred on 16th February 2000.

(xi) As part of this arrangement, Banorte took an Assignment of all debts owing to Banpais including the sums due to it from Mr. Cabal. Indeed, Banorte

undertook responsibility to the Mexican Government to collect in all outstanding debts due to Banpais at the time of the merger. Any funds recovered in this action would be returned to the Government of Mexico through its agent, the IPAB.

(xii) Certain funds, which exceed US$2 million, are currently held at Barclays Bank PLC, Grand Cayman, in a joint account between the firms of Ritch & Conolly and Campbells. This money was transferred from an account in the name of Monofranc Limited held with Barclays Bank PLC. It is alleged by the Defendant's wife, Theresa Pasini de Cabal, that she owns those funds. The Plaintiff asserts (for the reasons set out in Mr. Hernandez' Affidavit in the action 197 of 2001, paragraphs 38 to 55) that the Monofranc account is in reality an asset of Mr. Cabal over which he exercises control through his wife, as nominee. The Plaintiff therefore claims that this asset is required to be applied directly in satisfaction of the Mexican Judgment. The respective claims over the funds held on the joint account are to be determined in the separate proceedings numbered 197 of 2001."

Defendant's physical presence

First Case – Was the judgment debtor at the time the proceedings were instituted present in the Mexico thereby giving the Mexican Court jurisdiction over this Defendant? A fundamental requirement for the recognition or enforcement of a foreign judgment in Cayman at Common Law is that the foreign Court should have jurisdiction according to the laws of the Cayman Islands.

The Plaintiff in this case argues that mere presence is sufficient to ground jurisdiction. He argues that the Defendant was a resident of Mexico and left

fleeing the country because of the various charges that could be laid against him and that he had a "presence" in the country in which he was formerly resident even when these proceedings were instituted. The Court of Appeal in *Adams v Cape Industries plc* [1991] 1 All ER at page 1004:

> "So long as he remains physically present in that country, he has the benefit of its laws, and must take the rough with the smooth, by accepting his amenability to the process of its courts. In the absence of authority compelling a contrary conclusion, we would conclude that the voluntary presence of an individual in a foreign country, whether permanent or temporary and whether or not accompanied by residence, in sufficient to give the courts of that country territorial jurisdiction over him under our rules of private international law."

The Court Appeal, in that case left open the question whether residence without presence would be a sufficient basis of jurisdiction. However, in *State Bank of India v Murjani Marketing Group Ltd etal* Unrep. March 27, 1991. (CA) Sir Christopher Slade was inclined to the view that residence (in the sense of principal home) would be a sufficient basis of jurisdiction, even if the Judgment debtor was not present in the foreign country at the time of the commencement of the proceedings, see page 21 of his printed judgment:

> "I, for my part, strongly incline to the view that, in broad terms, if a person for the time being has his principle home in a Foreign country, albeit without being a subject of that country, his mere temporary absence would not deprive the local Court of jurisdiction under English conflict of law rules. I am disposed to think that, notwithstanding his temporary

> absence, he would remain under an obligation to accept the jurisdiction of the Foreign Court – in other words, he would be deemed to have continued presence there."

On the evidence in the present case, the Defendant had his principle place of residence in Mexico and left Mexico with the intention of permanently residing elsewhere, to flee the jurisdiction. In any event what is clear is that at the time of service on the two addresses given the Defendant was not present at those addresses. Whether he maintained a residence is a question of fact. In those circumstances this Court is of the view that this is a triable issue. It is my view therefore on "the first case" under Rule 36, the Plaintiff is not entitled to summary judgment.

Third Case – If the Judgment debtor being a Defendant in a foreign court submitted to jurisdiction of that Court by voluntarily appearing in these proceedings then the foreign judgment is capable of enforcement. On the particular facts of this case, this particular rule has to be looked at extremely carefully. The Plaintiff relies heavily on the fact that the Defendant brought what is known as *amparo* proceedings in the Mexican Courts and thereby appeared to be submitting to the jurisdiction of the Mexican Courts voluntarily. The Defendant argues that on a translation of the Defendant's *amparo* complaint, the purpose of bringing the *amparo* proceedings was to obtain an order setting aside the deemed service of the proceedings on the Defendant. That, in fact, he only

challenged the validity of the service upon him in the *amparo* proceedings and that therefore he did not submit to the Mexican Courts jurisdiction on any other fact but jurisdiction. The Defendant also stresses that at no time did he seek to contest the case on the merits and that the *amparo* proceedings were a challenge to the Mexican Court's jurisdiction in granting judgment against him, in the light of the defective service alone. I am reminded by the Defendant's attorney, Mr. McDonough that such a challenge would not amount to a submission to the Cayman Courts jurisdiction see GCR Order 12, rule 8. The question therefore is as a result of the *amparo* proceedings being commenced by the Defendant did he submit to the jurisdiction of the Court in Mexico or was he purely contesting the jurisdiction? If he was contesting purely the jurisdiction of the Court, it could not be said that he voluntarily submitted and appeared in the proceedings. The Plaintiff argues that in the *amparo* proceedings he challenged the service of the proceedings on him and it was fully examined by the Mexician Court and that the Mexician Courts determined that under its law it had jurisdiction over the Defendant. As such the Cayman Court should not be invited to investigate the propriety of the current proceedings *de novo*. In my view, it is not a question of investigating the propriety of the foreign courts but whether the Cayman Courts under its rules would find that the matter had been adjudicated on its merits or whether it was purely a question of submission to the jurisdiction alone. I refer to the case of *Desert Sun Loan Corp. v Hill* [1996] CA 2 All ER, Evans L.J. rely on the following paragraph:

> "Where the defendant challenges the jurisdiction of the foreign Court and appears before that Court for that purpose, but for that purpose only, then s 33 of the Civil Jurisdiction and Judgment Act 1982 provides that he shall not be regarded as having submitted to the jurisdiction by reason only of the fact that he appeared in the foreign proceedings for that purpose. Thus the attempts by Mr. Hill to have the judgment of 2 January 1992 set aside by the Courts of Arizona on the basis that the Courts of Arizona did not have jurisdiction over him do not amount to a voluntary appearance conferring jurisdiction ex post facto on those Courts.
>
> As I understand these principles, voluntary appearance in a foreign proceedings in a way accepted by English as amounting to a voluntary appearance has to be shown. To show that there was a voluntary appearance in the proceedings in the eyes of the Court of the foreign country whose judgment the English Court is being asked to enforce is not sufficient, unless it amounts to a voluntary submission according to our rules.
>
> Thus the failure to respond to a writ nailed to the door of the foreign courthouse cannot amount to a voluntary appearance even if the foreign Court were to decide that it was a voluntary appearance.

I am of the view that the *amparo* proceedings was not a voluntary appearance by the Defendant and that in fact all he did was to contest the jurisdiction of the Courts. The Plaintiff through Mr. Del Magner has not put forward any other arguments to support his contention that this case was a voluntary appearance, save and expect to say that the Mexican Courts have already adjudicated on the merits of whether the notice was served or not. That in my view is not the appropriate approach. This Court has to be satisfied that it was a voluntary

appearance according to the Cayman law and not be guided or accept the fact that it was a voluntary appearance purely because the Mexican Courts have accepted it as such. A quote from the *Amparo* proceedings:

> "The fact that the complainant did not appear in trial to timely defend his interest does not mean that the proceedings was not fulfilled, because such non-appearance was planed precisely to take the *amparo* authority by surprise, which is exactly what happened, since even the *a quo* granted that requested *amparo*, arguing the alleged unlawfulness of the summons proceedings. Which fact did not prevent complainant from timely being aware of the opening and proceeding of the case to which he was summons. So much so that complainant, through his agent, practically kept an eye on the executory commercial suit, through the date when he, "by accident", became aware of the existence of such suit, precisely before the assets attached during the suit were auctioned, notoriously violating article 193 of the *Amparo* Law, since the compulsory jurisprudential thesis for the judge *a quo* was not fulfilled, and which can be found in the appendix to the Judicial Weekly of the Federation."

In the *amparo* proceedings the Court held that "the executory commercial suit is totally and absolutely legitimate." I am of the view that this was a purely jurisdictional hearing on the face of the record. The threshold for summary judgment application is not met in my view. The question will also arise in this case whether the judgment was obtained in breach of natural justice. Atkin L.J. in *Jacobson v Frachon* repeated in *Dicey* at paragraphs 1-150 sets out the fundamental principles of natural justice as follows:

> "Those principles seem to me to involve this, first of all that the Court being a Court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting its case before the Court."

The question of natural justice does not arise in view of my holding that there are real and substantial questions to be tried on both the first case and the third case under the rules. Therefore, I dismiss the application for summary judgment. The Defendant's application too is dismissed and the matter should proceed to trial.

Dated this 6th day of August 2003

Justice P. Levers
Judge of the Grand Court

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