IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. : 2010 HCV 02228

IN CIVIL DIVISION

BETWEEN	**PERLA DEL CARIBE INC.**	**CLAIMANT**
AND	**DYC FISHING LTD.**	**DEFENDANT**

Application to register money judgment recovered by the Claimant against the Defendant in Florida USA Court; Defendant resists application on ground that Florida Court did not have jurisdiction to hear matter; also, that judgment vitiated by fraud on the part of Claimant. Whether defendant submitted to jurisdiction of Florida Court; whether fraud established.

Abraham Dabdoub Esq. and Ms. Nicole Murray instructed by Dabdoub and Dabdoub for the Claimant/Applicant; Roald Henriques Esq. Q.C and Christopher Dunkley Esq. instructed by Phillipson Partners for the Defendant/Respondent

Heard : February 1 and 2, and May 11, 12, 13, 16 and 17 and December 20, 2011

ROY ANDERSON J

[1] The Claimant, PERLA DEL CARIBE INC., (hereinafter "Perla" or the "Claimant") is a corporation duly incorporated under the laws of the State of Florida, United States of America with address and principal place of business at 750 West 20th Street, Hialeah, Florida 3310, United States of America. It claims against the Defendant DYC FISHING LTD, (hereinafter "DYC" or the "Defendant") a company duly incorporated under the Companies Act of Jamaica and having its registered office and principal place of business at 23 Brentford Road, Kingston 5, Jamaica. The application by the Claimant is for:-

1. Judgment to be entered for the Claimant against the Defendant in the sum of One Million Seven Hundred and Twenty-Six Thousand Two Hundred and Forty Two dollars and Twenty Cents ($1,726,242.20) currency of the United States of America and Dollars together with interest thereon at the rate of 6%

per year from the 14th day of January 2010 until payment pursuant to a Judgment handed down against the Defendant in favour of the Claimant in the CIRCUIT COURT OF THE 11TH DISTRICT IN MIAMI-DADE COUNTY, FLORIDA and

2. recovery of the sum of One Hundred and Twenty-Nine Thousand Eight Hundred and Sixty-Seven Dollars and Seven Cents ($129,867.07) currency of the United States of America plus interest at the rate of 6% per annum from the 20th day of April 2010 to the date of payment pursuant to an Order for taxable costs and Attorneys Fees made on Tuesday the 20th day of April 2010 by CIRCUIT COURT JUDGE MARC SCHUMACHER.
3. That the defendant be made to pay the Costs of this Claim
4. Such further other Order as the Court sees fit.

[2] In its defence to the Fixed Date Claim Form filed by the Claimant, DYC Fishing Limited disputes the claim on the following grounds;

1. That the judgment entered against the Defendant in favour of the Claimant in the Circuit Court of the 11th District in Miami Dade County, Florida, for the recovery of the United States Dollar One Million Seven Hundred and Twenty-Six Thousand Two Hundred and Forty Two Dollars and Twenty Cents (US$1,726,242.20) together with interest thereon at the rate of 6% per year from the 14th day of January 2010 until payment pursuant to a judgment handed down against the Defendant in favour of the Claimant in the 11th District in Miami Dade County, Florida ought not to be recognised and or enforced against the Defendant in the jurisdiction of Jamaica as being unenforceable in law and in fact.

2. That the judgment entered against the Defendant in favour of the Claimant in the Circuit Court of the 11th District in Miami Dade County, Florida, for the recovery of the United States Dollar One hundred and Twenty Nine Thousand Eight Hundred and Sixty Seven Dollars and Seven Cents ($129,867.07) together with interest thereon at the rate of 6% per year from the 20th day of April 2010 to the date of payment pursuant to an

Order for taxable costs and Attorney's fees made on Tuesday, the 20th day of April 2010 by Circuit Court Judge Marc Shumacher ought not be recognised and or enforced as against the Defendant in the jurisdiction of Jamaica as being unenforceable in law and in fact.

[3] In essence, the Defendant contends that its position in the foreign proceedings was that the Florida court had no jurisdiction. As a result, it did not comply with the foreign court's order for disclosure of material which would otherwise have been confidential to the Defendant and its third party associates. Moreover, in this Court, it is also contending that the Florida judgment was obtained by Fraud.

[4] In submissions on behalf of the Claimant, Mr. Dabdoub for the Claimant recounts what he describes as the "background facts" giving rise to the claim in this court. He states that on January 14, 2010 judgment was entered in favour of the Claimant and against the Defendant for the sum of One Million, Seven Hundred and Twenty Six Thousand Two Hundred and Forty Two Dollars and Twenty cents (US$1,726,242.20) together with interest at 6% per annum from the date aforesaid until payment. The issue of costs and attorneys' fees was reserved for a later hearing.

[5] That issue was decided upon on the 20th day of April 2010 when Circuit Court Judge Marc Shumacher made a further order for payment in the sum of One hundred and Twenty Nine Thousand Eight Hundred and Sixty Seven Dollars and Seven cents (US$129,867.07) plus interest at 6% from April 20, 2010 to the date of payment, in respect of costs and attorneys' fees. The Fixed Date Claim Form in respect of which this hearing is being held seeks the registration of a judgment for the total of both sums pursuant to section 3(2) of the Judgments (Foreign) (Reciprocal Enforcement) Act ("the Act") and the Common Law. Section 3(2) of the Act is in the following terms:

> (2) Any judgment of a superior court of a foreign country to which this part extends, other than a judgment of such a court given on appeal from a

court which is not a superior court, shall be a judgment to which this Part applies, if:-

(a) it is final and conclusive as between the parties thereto; and

(b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of like nature, or in respect of a fine or other penalty; and

(c) it is given after the coming into operation of the order directing that this Part shall extend to that foreign country.

[6] It is the contention of the Claimant that the judgment against the Defendant was given after a protracted period of seven (7) years of contested litigation between the parties in the Florida Courts. It was eventually given against the Defendant when it failed to comply with orders of the Florida court to produce certain documents. On account of that failure, the trial court struck out the Defendant's pleadings and entered judgment for the Claimant. The judgment was appealed by the Defendant to the Third District Court of Appeal which upheld the judgment but remitted the assessment of damages to the 11th Judicial Circuit Court of Florida

[7] The Claimant submits that in DYC's defence to this Fixed Date Claim Form, it is seeking to re-litigate issues already decided by the foreign court. And while it is true that the Defendant had also raised the issue of fraud in the Florida Court, as it has again done before this court, it is not clear that what the Defendant is seeking to do is to re-litigate the issues then before the court. It was submitted by the Claimant that while section 6(1)(a)(iv) of the Act provides that a judgment registered pursuant to its provisions may be set aside if the judgment was obtained by fraud, that concept is not defined in the Act. Section 6 (1) (a) (ii) also provides that a person against whom a foreign judgment has been registered is entitled to have it set aside if the registering court is satisfied that

(ii) the courts of the country of the original court had no jurisdiction in the circumstances of the case..

[8] In addition, the Claimant submitted that the principles of the Common Law indicate that a foreign judgment will be enforceable if it complies with the terms of

the dictum of Lord Lindley in **Pemberton v Hughes** (1899) 1 Ch. 871 applying the earlier celebrated case of **Abouloff v Oppenheimer** (47 L. T. Rep. 325; 10 Q. B. Div. 295)

> "If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, *unless they offend against English views of substantial justice.*" (Emphasis mine)

According to the Claimant neither section 6(1) (a) (ii) nor (iv) of the Act affords the Defendant a basis to resist the registration and enforcement of the judgment of the Florida Court and this Court should grant the application in the Fixed date Claim Form.

JURISDICTION

[9] With respect to the issue of whether jurisdiction in the Florida Court had been established, the Claimant submitted that it was clear that the Florida Court did have jurisdiction. Registration should not, therefore, be denied on the basis of a lack of jurisdiction. It was the view of the Claimant that the Defendant had failed to recognize that there are three ways in which jurisdiction in the foreign court (the 11th Judicial Circuit in and for Miami-Dade County, Florida, referred to as "the Florida Court") may be established, namely:-

1. Jurisdiction by virtue of an agreement between the parties.
2. Jurisdiction by virtue of the Defendant having a real and substantial connection with the State of Florida and
3. The Submission by the Defendant to the jurisdiction of the Florida Court by Actions which constitute jurisdiction.

[10] It was acknowledged that there had been no agreement between the parties as to jurisdiction. However, the Court was strongly urged to the view that the available evidence proved that either on the basis of a real and substantial connection with the jurisdiction (Florida) or by virtue of submission by the Defendant, the Florida Court had jurisdiction. In support for this proposition, the

Claimant made the following submissions as being factual evidence of either or both bases, which evidence the court was being asked to accept.

1. It was said that the defendant fully litigated the question of jurisdiction in the Florida Court which ruled on the 22nd February 2005 that it was established that the Defendant had submitted itself to the jurisdiction of the State of Florida by engaging in a number of commercial transactions in the State of Florida.
2. Further, the Claimant argued that the defendant appealed the ruling to the Third District Court of Appeal which on August 31, 2005, upheld the ruling of the lower court in respect of jurisdiction.
3. The records of the Florida court indicate that thereafter the Defendant took active steps in litigating the issues before the Florida court thereby accepting the jurisdiction of the Florida court.
4. In an affidavit filed by Frank Cox of DYC Fishing Ltd. in the Circuit Court of the 11th Judicial District in and for the Miami-Dade County, Florida, on the 27th Florida 2002, the Defendant in effect admitted the jurisdiction of the Florida Court when at paragraph 7 he stated: "Accordingly, each time Essex sells a container of conch, it issues a purchase order to DYC and DYC then has the product released from *its cold storage in Miami Florida* to the shipper of the product".(Emphasis mine)
5. Again at paragraph 12 of the said affidavit Frank S. Cox states: "*Anchor Seafood has been acting as the agent of DYC Fishing Ltd to assist with the storage of the containers of conch in Miami Florida, as well as to assist with the invoicing and collection of proceeds"* (Emphasis mine)
6. The question of jurisdiction was fully litigated by the Defendant in the Florida Courts including an appeal to the Third District Court of Appeal. The Defendant could have appealed further to the Florida Supreme Court but did not. Instead, it chose to take active steps in defending the claim and fully litigating the issues.

If the Court accepts the aforementioned as factually correct, it was submitted that the Claimant must succeed in establishing that the Florida Court did in fact, have jurisdiction.

[11] Like DYC, Perla also relies on the case of **Adams v Cape Industries** [1990] 2 WLR 657 in support of the submission that the Florida Court had properly claimed jurisdiction to hear the matter. In that case, the judgment creditor, Adams was one of the 206 members of a class action lawsuit filed in Tyler, Texas, USA. There were two class action lawsuits, Tyler 1 and Tyler 2. The judgment debtor, Cape Industries took part in the Tyler 1 settlement but not in the Tyler 2 settlement. Cape felt that it was better to get a default judgment entered against them and resist the enforcement of the judgment in England. There was no judicial assessment of damages in Tyler. Adams filed a writ and statement of claim to enforce the default judgment against Cape. Cape denied that the Tyler, Texas court had, for the purpose of English Law, jurisdiction over them. The court held that the judgment was unenforceable and Adams appealed to the Court of Appeal. The Court of Appeal affirmed the lower court decision.

[12] The judgment of the Court of Appeal in **Adams** confirmed and adopted the earlier decision in **Okura & Co. Ltd v Forsbaka Jernverks Acktiebolag** [1914] 1 K.B. 715 C.A. that –

> "A foreign corporation is "here" as to be amenable to the jurisdiction of [English] courts based on the rule from the **Okura** case [1914] 1 KB 715, 718-719:
> "First, the acts relied on as showing that the corporation is carrying on business in this country must have continued for a sufficiently substantial period of time.....Second, it is essential that these acts should have been done at some fixed place of business..... Third corporation must be 'here' by a person who carries on business for the corporation in this country. It is not enough to show that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country..... "

[13] It was the Claimant's submission that unlike in **Adams v Cape**, where it was found that Cape did not have presence in Texas as the agent was not acting on

behalf of Cape but was carrying on the business of the agent and not Cape's, this defendant had presence in the State of Florida. This could be substantiated by the fact that it leased a cold storage facility and transacted business with various Florida suppliers for its products. The argument could be made that the defendant also carried on business in Florida as it did business with and through its joint venture with the Claimant.

[14] It was argued that the facts of the instant case were distinguishable from the facts in **Adams** in that there was evidence before the Florida Court to establish jurisdiction in that Court. In fact, some of that evidence appears to come from the Defendant itself and its agent in Florida, Frank Cox. This evidence is contained in the various documents before the Court and according to the Claimant's submissions included, but was not limited to, the following evidence and facts;

1. It is a fact, asserted by both Plaintiff and Defendant, that the Defendant had product in storage in Florida for a minimum period of two years.
2. At Paragraph 11 of the Affidavit of Frank S. Cox filed the 27 February 2002 it is stated that "As can be seen from all the legal documents attached hereto as Exhibits "B" through "F" neither Perla, Anchor Seafood nor Placeres & Son have any ownership interest in the containers. As is evidenced by the bills of lading, commercial invoices, cited certificates and movement certificates, the shipper, exporter and owner of these containers of conch is DYC.. (See Defendant's Volume 1 at Page 519).
3. At paragraph 12 of the same Affidavit it s stated that "Anchor Seafood Inc. has been acting as the agent of DYC Fishing Ltd. to assist with storage of the containers of conch in Miami, Florida as well as to assist with the invoicing and collection of proceeds. (See Defendant's Volume 1 at Page 519).
4. Also in the said Affidavit at Paragraph 13 the Affiant states "Accordingly, on February 26, 2002, I sent correspondence to Tony Martinez, and Anchor Seafood Inc. advising them that they are to no longer to act as DYC's agent, store DYC product on behalf of DYC or Invoice Essex's customers for the

product shipped. See attached Exhibit "G". Defendant's Volume 1 at Page 520 and 547-548.

5. In his Deposition of July 28, 2004 at Page 65-66 Mr. Frank Cox in answer to a question stated that "That's not correct. Initially the account was set up by Anchor Seafood on behalf of DYC, but sometime around------ I think it was March of 2002 they were – on or around March of 2000 the products were transferred to the accounts of DYC..
6. Invoices from Anchor Seafood Inc. To Essex Exports Inc. indicating that at least from 24.10.01 anchor Seafood has acted for DYC as agent in invoicing product to Essex Exports Inc. Pursuant to the agreement between DYC and Essex. (See Defendant's Volume 1 Pages 508 to 514).
7. There is an invoice from Anchor Seafood Inc. To DYC Fishing Limited indicating that DYC Fishing Limited paid customs duties on the shipments sent by DYC Fishing Limited to its Cold Storage facility at U.S. Cold Storage, clearly providing evidence that not all the product was "in transit" or "in bond" as customs duties were paid on some of the shipments. (See Defendant's Volume 2 Pages 910 to 914).
8. Invoices from U.S. Cold Storage to DYC Fishing Limited indicating that from March 2002 to at least December 2002 DYC stored product in Florida at that location and that said product was sold to Essex Exports Inc., a Florida Corporation, with offices at 550 SW 12th Avenue, Deerfield Beach, Florida 33442. (See Defendant's Volume 1 Pages 400 to 414).
9. Wire Transfer from Essex to DYC Fishing Limited's account held at Dehring Bunting and Golding Ltd. At 777 Brickell Avenue, Miami, Florida clearly establishing that DYC Fishing Limited maintained an account with Dehring Bunting and Golding Limited at that address. (See Defendant's Volume 2 Pages 1261 to 1279).(All emphases in this paragraph supplied)

[15] It was submitted that in light of the foregoing factors, DYC had satisfied the three criteria articulated in **Adams v Cape** for establishing a "real and substantial connection" to ground jurisdiction in the foreign court, which case had adopted

and confirmed the earlier decision in **Okura** as the law. It was stated that the evidence clearly established the following:-

(1) That the Defendant DYC, a Jamaican Corporation, carried on business in Florida for a sufficiently substantial period of time from at least 2001 to the end of December 2002.

(2) That the Defendant DYC carried on this business from a fixed place, first through its agent, Anchor Seafood Inc., a Florida Corporation, and through DYC's admission that it maintained a cold storage facility for the storage of its product from which facility its product was sold and shipped as well as maintaining an account at Dehring, Bunting and Golding Limited at 777 Brickell Avenue, aforementioned.

(3) That the Defendant DYC appointed Anchor Seafood Inc. as its agent for the purpose of carrying out DYC's business in Florida. That Anchor obtained buyers, invoiced and shipped product until DYC terminated their agency by letter dated February 26, 2002.

[16] With equally strong assertions, the Defendant contends that the foreign court had no jurisdiction. It said that this is why it did not comply with the foreign court's order for disclosure of material which would otherwise have been confidential to the Defendant and its third party associates. Reference was made to the Affidavit of Frank S. Cox of DYC Fishing dated **February 27, 2002** in which it was stated that DYC Fishing Ltd. was a Jamaican company with business address at 23 Brentford Road, Kingtson, Jamaica. He also deponed that since 1995 DYC had done business with Tony Martinez of Anchor Seafood and Enrique Placeres, Sr. of Placeres and Son for the importation, exportation and distribution of seafood products and since 1996, Martinez and Placeres and DYC have invested money in an informal partnership for the processing, importation, exportation and distribution of conch and other seafood products. He said that in 1996 DYC conducted approximately $10, 000,000.00 in business. According to Mr. Cox in 1998 Placeres and Martinez formed a Florida corporation by the name of Perla Del Caribe, Inc. (Perla) to formalise the partnership between Placeres

and Martinez. Throughout 1998 and 1999 DYC and Perla were involved in an oral partnership.

Defendant's Submissions

[17] In dealing with the issue of jurisdiction the Defendant also relied on **Adams and Others v Cape Industries PLC and Another** where some 462 plaintiffs brought actions in the United States Federal District Court at Tyler Texas [Tyler 1 Court] for damages for personal injuries allegedly suffered as a result of exposure of asbestos dust. The defendants included Cape, Capasco, N.A.A.C., the South African mining subsidiary and other parties including the United States Government. Cape and Capsaco had entered motions protesting the jurisdiction of the Tyler court and had filed defences as to the merits which, inter alia, repeated the jurisdiction protests. A further 206 plaintiffs instituted actions in the Tyler court [Tyler 2 Court] against the same defendants. Cape and Capasco took no part in the proceedings maintaining that the court lacked jurisdiction over them. They were prepared to let default judgments be entered against them but to resist their enforcement in England. The 206 plaintiffs agreed to settle their claims against the United States Government if they would finance the steps to be taken to enforce those default judgments against Cape and Capasco. This agreement was what led to these proceedings. Since Cape and Capasco were in default the pleaded allegations against them were, save in exception to damage, taken to be admitted, but no judicial hearing took place. The plaintiffs contended that Cape and Capasco had submitted to the jurisdiction in Tyler 1 court and so submitted to the jurisdiction in Tyler 2 court and that Tyler 2 court had jurisdiction over Cape and Capasco by reason of their presence in Illinois when the Tyler 2 court actions commenced.

[18] Scott J. dismissed the action and held, inter alia, that the jurisdiction of a foreign court over the defendants could be established either on a territorial basis by showing that the defendants were present within the territory of the foreign court or on a consensual basis by showing that the defendants had consented to the

foreign court exercising jurisdiction over them and that the Tyler 1 court action was distinct from the Tyler 2 court action. He held that there is no evidence of Cape and Capasco contracting to submit or made any representation of willingness to submit to the jurisdiction. Also that, the presence of N.A.A.C. and C.P.C. in Illinois did not constitute the presence of Cape or Capasco in Illinois.

On appeal it was held dismissing the appeal, that "an overseas trading corporation was likely to be treated by the English court as present within the jurisdiction of the courts of another country only where either such a corporation had established and maintained at its own expense in that other country a fixed place of business and had carried on from there its business for more than a minimal period of time through its servants or agents or through a representative". It was also held that as a matter of principle the onus fell on the plaintiff who sought to enforce a judgment of a foreign court, to demonstrate the competence of that court and that it was only the judgment of the competent foreign court recognised as such by English law which could bind the defendant. Hence the onus was discharged from the defendants to disprove the competence of the Tyler court to give judgment against them because they had shown that they were not present in the United States.

[19] DYC cited **Adrian Briggs, "Civil Jurisdiction and Judgments",** 5th Edition, 2009, p. 728 to the effect that,

> "*this case may be authority for the view that when it comes to the recognition of foreign judgments, the carrying on of business is still not enough, and that it is the having of a place of business from which this business is done which is an essential requirement.*"

DYC argues that this is similar to the instant case where the Defendant has maintained that the company *is not present in the United States*; that DYC Fishing has established and maintained their place of business in Jamaica and so were not bound by the Florida court and incessantly contend that they did not voluntarily submit to the foreign jurisdiction. According to Briggs, pg. 729, *"if the defendant appears and defends the merits of the claim he will, in general, be*

held to have submitted to the jurisdiction of the court...whether the defendant took a step in the action to contest the merits, if he did, his act will be seen as a submission." (Emphasis Mine) But note that a court will not infer an agreement to submit in the absence of good evidence.

[20] In **Adams** the plaintiffs relied upon the inferences which they contended must be drawn from the various steps taken by Cape and Capasco in the Tyler 1 actions. Cape and Capasco denied that those steps can be represented as their agreement to submit to the jurisdiction in other actions. In the instant case the Defendant submits that any and all subsequent participation before the foreign court by DYC was grounded in its loss on the jurisdictional point and at no time reflected a submission and acceptance of that jurisdiction. That the judgment was given against the Defendant for non-compliance with the foreign court's order, was put forward as further evidencing the Defendants implicit resistance to recognition of the jurisdiction of the foreign court.

Jurisdiction - Real and substantial connection

[21] The Claimant has submitted that the decision in **Adams v Cape** could be distinguished from the facts in the instant case. There the English Court of Appeal had found that the Texas Court *had breached its own rules of procedure* and that "under the concept of reasonable expectation, breach by the foreign court of one of its own rules of procedure renders the foreign judgment unenforceable as offending our rules of substantial justice". In the instant case, there had been no breach of the Florida court rules.

[22] While the dicta of the English Court of Appeal does not seem conclusive as to whether a "real and substantial connection" has been demonstrated in this case, it does seem that, on a balance of probabilities and on the evidence of the respective filings by each side as set out in paragraphs 10 and 14 above and which I accept as proven, that the Defendant had a real and substantial connection with Florida. Before moving on to consider the question of voluntary

submission, I want to make an observation in relation to the Defendant's submission that **Briggs** suggested that the **Adams** case "may be authority" for the proposition "that when it comes to the recognition of foreign judgments, the carrying on of business is still not enough, and that it is the having of a place of business from which this business is done which is of essential requirement." In that regard, it is to be noted that it was the Defendant's own submission that the goods warehoused in Florida were "in transit" and therefore is "not even actually within the territorial limits of the United States" and that "all this product is not being sold within the United States [the State of Florida] but rather is being sold to foreign countries including the French islands". The submission about not being "actually within the United States" is neither factually nor legally correct. Further, it is difficult to understand how, in circumstances in which the Defendant has a proprietary interest in goods of which it has a right to dispose from a particular physical address in the state of Florida by giving instructions, it can be said that it is not doing business from that physical location.

Jurisdiction - Voluntary Submission to the Jurisdiction

[23] In the event that I am not correct in relation to this finding of real and substantial connection with the Florida jurisdiction, it is necessary to consider whether there has been a "submission to the jurisdiction" so as to have conferred proper jurisdiction on the Florida Court. In **Adams,** Scott J had stated:

> *"Prima facie, a foreign court does not, in the eyes of the English law, have jurisdiction over an absent foreigner. But if the foreigner consents to the court exercising jurisdiction over him, the position is different. The element of consent is clearly present if the foreigner, as plaintiff, commences proceedings in the foreign court. It is also present if the foreigner, as defendant, makes a voluntary appearance without protest in the foreign court."* pg. 679.

[24] The Defendant has consistently maintained, not only that it did not have a real and substantial connection with Florida so as to give rise to jurisdiction in that state, but that it did not voluntarily submit to the jurisdiction of the Florida Court. It says that it always asserted that that court did not have jurisdiction and that its

decision not to pursue an appeal to the Florida Supreme Court after the Third District Court of Appeals had ruled against it on the question of jurisdiction was itself further testament to its consistent position. On the other hand, the Claimant insists that the Florida court was correct in claiming jurisdiction based on the following facts which are supposedly uncontroverted and demonstrate that the Defendant did in fact consent to the Florida Court exercising jurisdiction.

[25] The Claimant in response to the authorities and submissions of the Defendant asserts that it is not factually or legally correct to say that DYC had not so submitted.. According to the Claimant, the evidence before this court shows that the First Amended Verified Complaint was filed by the Claimant in Florida on April 15, 2002. A Second Amended Verified Complaint was filed in that court on June 27, 2002, and the Defendant had on July 29, 2002 filed a Motion to Dismiss the said Second Amended Verified Complaint for lack of Personal Jurisdiction and failure to state a cause of action. Over two (2) years later on December 14, 2004, the Defendant filed a "Notice of Withdrawal of Motion to Dismiss for Lack of Personal Jurisdiction" and on the same day filed an Answer and Affirmative Defenses. Approximately two (2) months later, on February 22, 2005 the Florida Court held an evidentiary hearing. It was the finding of that hearing that "the exercise of personal jurisdiction over the Defendant DYC Fishing comports with Florida statute 48.193 and that DYC has sufficient contacts with the state of Florida for this Court to exercise jurisdiction and it is reasonable for the court to do so". That decision was appealed by the Defendant to the Third District Court of Appeals by way of an appeal on April 29, 2005 and the appeal was dismissed and the ruling of the Circuit Court upheld by a ruling in the Third District Court of Appeal on August 31, 2005.

[26] In support of the submission that the Defendant had not submitted to the jurisdiction, Defendant also cited **Briggs "Civil Jurisdiction and Judgments"** According to the learned author,

"As an alternative to being present, the defendant may have submitted to the jurisdiction of the court. If he did, he is bound by the decision on the merits: if this goes against him he has no one but himself to blame: *volenti non fit injuria*. It is necessary to distinguish three versions of submission by a defendant to the jurisdiction of the foreign court.

[27] Whether a defendant has submitted by voluntary appearance or participation in the action is in the first place determined by the Common Law. The question to ask is whether the defendant took a step in the action to contest the merits. If he did, his act will be seen as submission. In a case in the Supreme Court of Queensland, Australia, **de Santis v Russo** [2001] QCA 457 (26 October 2001) McPherson J.A. delivered the main judgment of the Court: This case was an appeal by Mirella de Santis against an order dismissing her application under section 7 of the **Foreign Judgments Act 1991 (Cth)** to set aside a foreign judgment registered in the Supreme Court of Queensland under section 6 of that Act. The terms of the sections of that act are similar to sections of the Judgments (Foreign) (Reciprocal Enforcement) Act here in this jurisdiction and I believe that what the court said in that case may be helpful in the instant matter.

[28] In the Queensland statute, section 7 (1) authorises a party against whom a registered judgment is enforceable to apply to the court of registration to have the judgment set aside. Our section 6(1) contemplates the making of such an application. I also proceed on the basis that any circumstance which would allow for setting aside a registration would provide a sufficient basis for denial of registration. Section 7(2) of the Queensland statute provides:

"**(2)** Where a judgment debtor duly applies to have the registration of the judgment set aside, the court:

(a) must set the registration aside if it is satisfied:
(iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case."

Section 7(3) proceeds to add:

"(3) For the purposes of subparagraph (2)(a)(iv) and subject to subsection (4), the courts of the country of the original court are taken to have jurisdiction:

(a) in the case of a judgment given in an action *in personam*:

(i) if the judgment debtor voluntarily submitted to the jurisdiction of the original court."

Section 7(5) provides:

"(5) For the purposes of subparagraph (3)(a)(ii), a person does not voluntarily submit to the jurisdiction of a court by:

(a) entering an appearance in proceedings in the court; or

(b) participating in proceedings in the court only to such extent as is necessary for the purpose only of one or more of the following:

(c)

(d) contesting the jurisdiction of the court".

[29] The substance of the foregoing provisions in the Queensland statute is captured in section 6(1)(a) (i), (ii), (iii) and (iv) and section 6(1)(b) of our Act. Voluntary submission is specifically dealt with in section 6(2) which is in the following terms:

(2) For the purposes of this section, the courts of the country of the original court shall, subject to the provisions of subsection (3) be deemed to have had jurisdiction –

(a) in the case of a judgment given in an action *in personam*-

(i) if the judgment debtor being a defendant in the original court submitted to the jurisdiction by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of the court.

McPherson J.A. said at paragraph 11 of the judgment:

[11] If the judgment can be sustained at all, it must be in the character of one that was founded on a voluntary submission within s 7(3)(a)(i) to Italian jurisdiction. {*See our Act section 6((2)(a)(i)*} The Act does not define what is meant by voluntary submission; but s 7(5) describes what does not constitute it. {*See our Act section 6(2)(a)(i)*} Merely (a) entering an appearance in the proceedings in the foreign court is not; nor is (b)

> participating in those proceedings, provided in either of those cases that (so far as relevant here) the only purpose is: (d) to contest the jurisdiction of the court. .....A conditional appearance limited to the purpose of contesting the jurisdiction or even participation in the proceedings only to the extent necessary for that purpose, does not now, even if it may at common law, involve a voluntary submission to the jurisdiction.

[30] I adopt, with respect, the dicta of the learned judge of appeal as it appears to be parallel to the situation in the instant case. It seems to me that so long as the Defendant resisted the Second Amended Verified Complaint on the basis of want of jurisdiction, as it did when it filed its Motion to Dismiss for Lack of Personal Jurisdiction and failure to state a cause of action, it would have had the protection of the Act. However, when it filed its Notice to Withdraw Motion to Dismiss and filed an Answer and Affirmative Defences on December 14, 2004, it relinquished the protection which it would hitherto have enjoyed. I am satisfied and so hold, that the Defendant cannot now assert that it never submitted to the jurisdiction of the Florida Court. Its decision not to pursue the matter beyond the Third District Court of Appeals to the Florida Supreme Court is at best equivocal and cannot now be said to be on the basis of a denial of jurisdiction. I accordingly hold that the Claimant has satisfied its duty to show that jurisdiction did in fact, reside in the Florida Court.

[31] Before finally leaving the question of jurisdiction to move to the allegation of fraud as a basis for refusing registration, I wish to make some general comments on some of the submissions of the Defendant which appears to be misconceived. It was submitted that "the challenge mounted against the jurisdiction in the foreign court is sufficient to establish that fact as a defence in a local Court of competent jurisdiction over the defendant when the claimant now seeks to move into this, not to litigate, but to have its foreign judgment recognized". If what is being submitted is that the mere fact of challenge to jurisdiction in the Florida Court is to be taken *as evidence of lack of jurisdiction*, that is not correct. It is true that merely because the foreign court has claimed jurisdiction does not bind the local, registering, court to find that that position was correct. The local court must look at the issues and make a determination in light of its own laws and procedures

and a determination of its view of substantial justice. So, a determination by this Court is not to be seen as rubber-stamping the finding of the Florida Court as to jurisdiction. It is the result of an examination of the principles which guide this Court in coming to a conclusion as to whether that decision was correct.

[32] It was also submitted that "what the Claimant's case before this Honourable Court failed to disclose is that the finding in his favour on the challenge to the jurisdiction by the foreign Court in no way binds this Court in circumstances where, by its own determination the foreign Court did not have jurisdiction over the defendant". In this regard, I did not understand from the Claimant's pleadings or submissions that it was being suggested that the issue of jurisdiction was not one on which this Court could rule, regardless of the Florida Court's ruling. What the Claimant was saying was that by virtue of the criteria in the authorities cited and supported by **Briggs** cited by the Defendant, the Florida Court had, in fact, correctly taken jurisdiction. Moreover, it is not clear from the submissions and indeed it is quite ambiguous as to whether the expression "by *its own determination* did not have jurisdiction over the defendant" refers to the Florida court or the local court.

FRAUD

[33] I turn now to consider the issue of fraud which the Defendant submitted vitiated the judgment of the Florida Court and forms a basis for the denial of registration. Both at Common Law and under the Act, it is said that fraud vitiates the foreign judgment. (See section 6(1)(a)(iv) of the Act). What is unclear is the nature and the precise extent of the concept of fraud, which vitiates the foreign judgment. The Defendant sets out in its defence, a number of factors which it alleges amount to fraud and asserts that the judgment of the Florida was "founded on fraud". It alleged that the Claimant

a) Fraudulently misrepresented the true nature, relationship and workings of its joint venture with the defendant;
b) Made false claims

c) Through its principals and shareholders swore to and made false statements;

d) Tendered a false document.

[34] Specifically, DYC contended in its submissions on fraud that the Claimant had produced an "agreement" in support of its claim for the first time on litigation knowing it to be a contrived document, and entirely fraudulent in its nature. However, I am not satisfied that the Defendant has substantiated this averment as although the Defendant's principal said he saw this document for the first time during a deposition in May 2004, other evidence suggested otherwise. The submissions on behalf of the Defendant are general in nature and do not provide particulars which are critical. It is trite that fraud must be strictly pleaded and proven. In its "Defence" filed in the instant matter, the Defendant also set out in paragraph 10 (a) to (g) items allegedly fraudulently pleaded by the Claimant in the Florida Court in order to fraudulently mislead that court. These pleadings were as follows:

a) That upon providing US$350,000.00 to the defendant, the defendant obligated itself to an exclusive contract knowing the same to be false;

b) In its claim that the DYC-Perla joint venture entered into an exclusive agreement with a third party, Essex Exports Inc.;

c) In its claim that a third party defendant Anchor Seafood diverted shipments of seafood that were meant to belong to it and that such diversion required its consent;

d) In its claim that it's property or corporate assets were seafood processed at the defendant's facility;

e) In its claim that it had a contract with a third party, (Essex Exports Inc.) which contract it was unable to produce and subsequently withdrew its claim against said third party;

f) In its claim that any invoicing for seafood products produced or procured by the defendant required its authorisation or consent;

g) In its claim that it had authority over the seafood products produced or procured for the defendant;

and were made for the purposes of prejudicing the foreign court's opinion of the defendant in its interlocutory applications for control of the defendant's products claiming:-

[35] It was submitted for the Claimant, that all these matters had been raised and vigourously argued in the Florida proceedings and that the Defendant was now seeking to re-litigate. I should note that Claimant's submissions are in at least one respect contradictory. The submissions state at paragraph 3 that "All the 'Particulars of Fraudulent Misrepresentation' pleaded were issues raised and adjudicated on in the Florida Courts". Yet, at paragraph 29 of the Skeleton Submissions it was stated that:"There was no allegation of fraud raised at any stage of the proceedings before the Florida Court". Notwithstanding this, however, I accept that, based upon the evidence provided in the transcripts of the proceedings before the foreign court, no new factual allegation of fraud, whether pleaded bare or with particularity that is alleged not to have been available to the Defendant in the proceedings before the Circuit Court in Florida, has been made. Based upon the evidence presented, no facts have been averred and proven which could lead this court to a conclusion that the judgment of the Florida Court had been obtained by fraud.

[36] The Defendant relies upon **Briggs** (op cit) who stated:

> "If a judgment is otherwise entitled to recognition, the court will not permit a re-examination of the merits of the claim which gave rise to it, even if it is alleged that the judgment was wrong in fact or in law or in both. But an exception is made where it is alleged that the judgment was obtained by fraud." [p. 756]

[37] The Defendant also seeks to rely upon the well-known case of **Abouloff v Oppenheimer &Co.** [1882]10 QBD 295. In **Abouloff**, the Plaintiff sought enforcement of a Judgment handed down in Tiflis. The defendant in that case argued in the enforcement proceedings, that the fact that the goods in dispute were in possession of the plaintiffs was fraudulently concealed from the Court of Tiflis by the Plaintiff. The Plaintiffs argued that the Defence was bad as the

Defendant's allegations had been raised in the Court in Tiflis, that the same defences were examined and that therefore the allegation if fraud could not be litigated again in the English Courts. The Court of Appeal in dismissing this argument held that "the English courts do enforce obligations created by judgments, but that it has always been held in the courts of this country to be an answer to an action upon a judgment, that that judgment has been obtained by the fraud of the party seeking to enforce it" (Page 300). Lord Coleridge C.J. went on to say that if the allegation can be proved "it vitiates the judgment and discharges the defendant from the obligation which would otherwise be thereby created" (Page 301). He further highlighted the general proposition that 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 so that no man shall take advantage of his own wrong. [p. 300] He went further to point out that

> "I do not think that the general proposition, broad as it is, is to be subjected to any limitation...and I am of the opinion that the fraud of the person who has obtained the foreign judgment, is none the less capable of being pleaded and proved as an answer to an action on the foreign judgment in a proceeding in this country, because the facts necessary to be proved in the English courts were suppressed in the foreign court by the fraud on the part of the person who seeks to enforce the judgment which the foreign court was by that person misled so as to pronounce."

[38] The principle articulated in Abouloff was applied in **Vadala v Lawes** [1890] 25 QBD 310. It was also followed in **Jacobson v Frachon** 138 L.T.386 in the U.K. Court of Appeal in November 1927. It should be noted that even in this early case the breadth of the concept of fraud in the foreign court was being constrained although the court of Appeal applied **Abouloff** and **Pemberton v Hughes** There Lord Hanworth M.R. in delivering his judgment made it clear that there had to be fraud by the party seeking to enforce the judgment or someone acting on his behalf and not, for example, by an expert witness.

> Perhaps the best statement of the law as to how far fraud will invalidate the judgment is to be found in the case to which Mr. Samuels called our

attention. As Lord Coleridge says in **Abouloff v. Oppenheimer** (47 L. T. Rep. 325; 10 Q. B. Div. 295) quoting from De Grey, C.J., in the **Duchess of Kingston's case**, 2 Sm. L. C., 11th edit., 731

> "Like all other acts of the highest judicial authority it is impeachable from without; although it is not permitted to show that the court was mistaken, it may be shown that they were misled."

But he was dealing in that case with a case of fraud. In **Professor Dicey's book on Conflict of Laws** he puts it in this way (4th edit., rule 105, p. 437):

> "A foreign judgment is invalid which is obtained by fraud. Such fraud may be either (1) fraud on the part of the party in whose favour the judgment is given; or (2) fraud on the part of the court pronouncing the judgment."

Now it is not suggested here that there was any fraud on the part of the court pronouncing the judgment, nor indeed is it suggested that there was fraud on the part of the party in whose favour the judgment was given, but merely that the court acted upon evidence which unfortunately was made available to it. I think perhaps, a better statement of the rather narrow view, or the limits within which fraud can be considered, is to be found stated by Brett, L.J., as he then was, at p. 307 of **Abouloff v. Oppenheirner** to which fortunately our attention was called.

> "It is immaterial to consider whether it was erroneous by reason of a wrong appreciation of the evidence or of the law, or by reason of frauds perpetrated on the courts by witnesses other than the plaintiff and her husband; the only manner in which that foreign judgment can be rendered ineffective upon the ground of fraud, is by proving that it was obtained by the fraud of the plaintiff, who now relies upon it."

When one applies that standard to the present case it is plain that however forcibly, however justifiably learned counsel on behalf of Messrs. Jacobson and Messrs. Jacobson themselves may present their case, however indignant they may feel that their case was not properly handled by Mr. Varenne and not fully considered nor tried, yet the evidence now before the court falls far short of what is necessary to enable us to set aside the judgment of a competent court that had jurisdiction in this matter over Messrs. Jacobson. It is for these reasons that I think Roche, J. was right in the view that he took on the main point in holding that the judgment must be given effect to in this action.

[39] One of the cases relied upon by the Defendant in relation to the issue of fraud is from the New South Wales Supreme Court, **Ki Won Yoon v Young Dung Song** [2000] NSWSC 1147 (8 December 2000). The learned judge Dunford J carefully reviewed the authorities and determined that **Abouloff** was still good law in New South Wales. In that case,

> The plaintiff is a resident of South Korea and the defendant a resident of Australia. Although the defendant was not present at the hearings in the South Korean courts, and himself gave no evidence therein, he was represented at first instance and on appeal by an experienced lawyer who presented evidence, made submissions and took an active part in the proceedings on his behalf, thereby submitting to the jurisdiction, and in fact it was the defendant who appealed against the decision of the court of first instance.

[40] The defendant claimed that the judgment in the Korean court was obtained by fraud in that the plaintiff had made misrepresentations before the foreign court. The learned judge found in favour of the defendant and refused to grant registration of the judgment. In an exhaustive review of the long line of cases from Abouloff, he discussed several of the authorities referred to by both sides in the instant action and I believe that I will be forgiven if I reproduce a significant part of his judgment as he reviewed the developments. Starting at paragraph 15, he says:

> 15 One of the grounds on which an action at common law on a foreign judgment may be defended is that the foreign judgment was obtained by fraud: **Nygh: Conflict of Laws in Australia**, 6th ed. at 154, but the decisions are not all consistent as to what constitutes fraud in this context. In relation to domestic judgments a party asserting that a judgment has been procured by fraud must show that there has been a new discovery of something material, in the sense that fresh facts have been found since the original judgment, which by themselves or in combination with previously known facts would provide a reason for setting aside the judgment: **Wentworth v Rogers (No. 5)** (1986) 6 NSWLR 534 at 538 and the cases there cited.
>
> 16 But a different rule has been applied in England in respect of foreign judgments and it has been held that it is not necessary to show that fresh facts have been found since the original judgment; but it is sufficient to show that the foreign court was misled into coming to a

wrong decision by evidence which was false: **Abouloff v Oppenheimer & Co.** (1882) 10 QBD 295, followed in **Vadala v Lawes** (1890) 25 QBD 310 where Lindley LJ at 316-17 stated the rule in the following terms:

> " . . . 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."

These cases have been applied in the English courts a number of times since, e.g. **Syal v Heyward** [1948] 2 KB 443, **Jet Holdings Inc. v Patel** [1990] 1 QB 335, and distinguished in **House of Spring Gardens Ltd v Waite** [1991] 1 QB 241 where there had already been an application in the foreign court to set aside the judgment on the ground of fraud.

17 The principle has been criticised by text writers, e.g. **Cheshire & North: Private International Law** 13th ed. at 444, and in **Wentworth v Rogers (No. 5)** where Kirby P at 541 said that, "the reasoning might be no more than a reflection of the attitudes of the English judiciary at the apogee of the British Empire". See generally **Nygh: Conflict of Laws in Australia** 6th ed. at 154-156.

18 In **Owens Bank Ltd v Bracco** [1992] 2 AC 443, the House of Lords was invited to overrule **Abouloff v Oppenheimer & Co.** and **Vadala v Lawes**, either as having been wrongly decided in the first place, or alternatively on the ground that, even if the original decisions could have been justified 100 years ago, that they rest on a principle which is unacceptable today and out of accord with the approach of the court to other issues arising in the field of private international law, but the House having regard particularly to English statutory provisions similar to s 7(2)(vi), declined to do so.

19 **Abouloff v Oppenheimer & Co.** was treated as the law by Fox J in **Norman v Norman (No. 2)** (1968) 12 FLR 39 at 47 while in **Res Nova Inc. v Edelsten** (unreported - Common Law Division - 7 May 1985 - BC 8500840) Foster J, after expressing considerable doubt as to whether it was open to him to differ from the English Court of Appeal decisions, found it unnecessary to decide as he was satisfied that the issue of fraud upon the court was not raised or adjudicated upon in any of the proceedings in the foreign courts, and therefore, although the trial court in this State would be called upon to consider evidence called before the foreign courts, it would not be asked to merely retry an issue already tried there.

20 However, in **Keele v Findley** (1990) 21 NSWLR 444, Rogers CJ held that the English decisions no longer represented the law of Australia and should not be applied. His Honour held that the same rule should apply to impugning foreign judgments on the ground of fraud as apply to impugning domestic judgments on that ground. In reaching that position his Honour placed reliance on Canadian authorities such as **Jacobs v Beaver Silver Cobalt Mining** (1908) 17 OLR 496 and referred to the obiter remarks of Kirby P in **Wentworth v Rogers (No. 5)**, although as Kirby P had pointed out at 457, there may be reasons of principle for applying a different rule to the judgments of foreign courts to that applied to domestic courts, given the great variety of judicial systems which operate and the entitlement of domestic courts to reserve to themselves an assessment of the integrity of the process upon which the judgment was based. His Honour referred to **Norman v Norman (No. 2)** and noted that the remarks were obiter, but was not referred to **Res Nova Inc. v Edelston**.

21 The matter was again considered by Graham AJ in **Close v Arnott** (unreported - Common Law Division - 21 November 1997 - BC 9706194) and his Honour pointed out that the Canadian decisions had been referred to by Lord Bridge in **Owens Bank v Bracco** at 487, along with the criticism by text writers, but that his Lordship made no reference to **Keele v Findley** (In this regard I note that it was cited in argument in **Owens Bank Ltd v Etoile Commerciale** SA [1995] 1 WLR 44 in the Privy Council, but was not referred to in the judgment.). Graham AJ said that if it were necessary, he would distinguish **Keele v Findley** and find that the English rule continued to apply in New South Wales in respect of actions to enforce judgments obtained in undefended proceedings in a foreign court where the defendant has, for good reason, been unable to meet the plaintiff's case in that court, but went on to say:-

> "In my opinion, the very circumstances of this case demonstrate the need for a rule which treats the deception of a foreign court as more serious than an Australian one. If it had been necessary for the defendant to rely upon his own intrinsic evidence, which in theory he could have presented to the court in New York, to establish the first plaintiff's fraud, I consider that, in a case such as this, he ought to be permitted to do so."

22 Notwithstanding the various criticisms that have been made of the **Abouloff** rule, I am satisfied that it correctly states the law in relation to foreign judgments and that if such law is to be changed, it should be by Parliament and not by the Courts. Consequently I am not satisfied that **Keele v Findley** was correctly decided. Indeed the facts of this

> case demonstrate in my mind good reason for applying a different test of fraud in respect of foreign judgments to that applied in respect of domestic judgments; although for reasons which appear hereunder I am also satisfied that even if the domestic judgment test were applied, the defendant would satisfy that test in the present case.

[41] While the Claimant does not dispute the ratio expressed by Lord Coleridge in **Abolouff**, it was submitted that, as is shown in the excerpt from the judgment in **Yoon v Song** above, considerable doubt has been thrown upon its continued validity in many cases subsequent to it in various jurisdictions as well as by learned academics. Indeed, it seems clear from a review of the authorities that there is some discomfort with the continued application of the rule from that case.

[42] The Claimant cited the Supreme Court of Canada case **Beals v Saldanha** [2003] S.C.R. 416. In **Beals v Saldanha** the general principle is articulated that neither foreign nor domestic judgments will be enforced if obtained by fraud. However, the principle is and should be construed narrowly as it relates to proceedings for the enforcement of foreign judgments where the issue of fraud had already been raised unsuccessfully in the foreign proceedings. It should be noted that one of the concerns expressed in **Beals** which had also arisen in **Close and Anor v Arnot** {Matter No: 10107/96 [1997] NSWSC 569} and **Hong Plan Tee v Les Placements Germain Gauthier Inc** {[2002] 2 SLR 81} was that defendants could use this defence as a means of a re-litigating issues previously tried.

[43] In **Beals**, it was argued that the claimant had secured the judgment in the state of Florida by fraud. The appellants who were residents of Ontario sold a vacant lot situated in Florida to the respondents. A dispute arose as a result of that transaction and in 1986 the respondents sued the appellants and two other defendants in Florida. A defence was filed but the appellants chose not to defend any of the subsequent amendments to the action. Pursuant to Florida law the failure to defend the amendments had the effect of not defending the action. The appellants were subsequently noted in default and were served with a notice of a jury trial to establish damages. They did not respond to the notice neither did

they attend the trial. The jury awarded the respondents US$120,000 in compensatory damages and US$50,000 in punitive damages.

[44] Upon receipt of the monetary judgment against them the appellants sought legal advice. They were advised by an Ontario lawyer that the foreign judgment could not be enforced against them in Ontario. Relying on this advice the appellants took no steps to have the judgment set aside or to appeal the judgment in Florida. The damages were not paid and an action was started in Ontario to enforce the Florida judgment. By the time of the hearing in 1998 the foreign judgment with interest had grown to approximately C$800,000. The trial judge dismissed the action for enforcement primarily on the ground that there had been fraud in relation to assessment of damages. The Court of Appeal allowed the respondent's appeal deciding that the judgment of the Florida court should be enforced. It was held per the majority, 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 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 judgment."

[45] The defence of fraud was not made out since the appellants had not claimed that there was evidence of fraud that they could not have discovered had they defended the Florida action. Thus, in the absence of such evidence, the trial judge erred in concluding that there was fraud. 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. 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. A 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.

[46] The Claimant also pointed to other recent cases where courts have expressed some reservation about the rule in **Abouloff.** These included the English Court of Appeal in **House of Spring Gardens Ltd. V Waite** [1991] 1QB 241; [1990] 2 All ER 990 where Stuart-Smith LJ expressed the view that **Abouloff** and **Vadala** "were decided at a time when our courts paid scant regard to the jurisprudence of other countries". Other cases cited by the Claimant included **Owens Bank Ltd. V Etoile Commerciale S.A**. [1995] 1 WLR 44 a case in the Privy Council case, where Lord Templeman went on to say that their lordships did "not regard the decision in **Abouloff's** case with enthusiasm". It was further submitted that this approach to fraud in conflicts of laws had been adopted by the Courts in Singapore.

[47] **Hong Plan Tee v Les Placements Germain Gauthier Inc**., another case cited by the Claimant, was a case in the Singapore Court of Appeal. There the court (per Chao Hick Tin J.A.) examined of the issue of fraud as a defence to the enforcement of a foreign judgment. The court came down on the side of the view that fraud in foreign judgments should not be treated any differently than fraud in domestic judgments. In so doing it sided with the view emerging from the Canadian jurisdiction. The Court rejected the submission that, having raised the point that the foreign judgment was obtained by fraud, that fact should suffice to preclude the Judgment from being enforced in Singapore, and that the action should be allowed to go on for trial. It was felt that this approach was preferable because:

> "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".

[48] Another case relied on by the Defendant is ***Owens Bank Limited v Fulvio Bracco and Bracco Industria Chimica Spa.*** [1992] 2 AC 443, which also applied **Abouloff** where it was held that there was no requirement as there was in the case of an action to set aside an English judgment on the ground of fraud, that the fraud should be established by fresh evidence that had not been available to the defendant at trial and could not with reasonable diligence have been discovered by him before the judgment had been delivered.

[49] In the English Court of Appeal in **Westacre Investments Inc v JugoImport-SDRP Holding Company Limited & Ors.** [1999] EWCA Civ. 1401, we find another example of the move away from **Abouloff**. There the court was of the view that it was "anomalous that enforcement of a foreign judgment can be attacked without any requirement that the evidence must be evidence not available at the trial, and apparently without regard to the question whether the impact of that evidence would be likely to be decisive".

[50] While the foregoing clearly indicates a divergence of views between the traditional English rule as exemplified by **Abouloff** and a more modern view as demonstrated by the approach of the Canadian courts, I am of the view that ultimately the matter is to be decided by reference to a recent decision of our local Court of Appeal where his Lordship Justice Karl Harrison J.A. delivered the judgment of the Court. In the case of **Richard Vasconcellos v Jamaica Steel Works Limited (formerly Jamaica Steel and Plastic Limited), Ishmael Gafoor and Amelita Gafoor** SCCA No 1 of 2008 the learned judge of Appeal found favour with the **Beals** case and pointed out at Para. 38 that "**Beals** has been followed in a number of Canadian decisions such as **Minnesota Valley Alfalfa Producers Co-operative v Baloun** 2008 ABCA 131 (CabL11); **Cabaniss v Cabaniss** 2006 BCSC 107 (CanL11) and **State Bank of India v Navaratna** 2006 CanL11 8887 (ON S.C.) His lordship specifically referred to submissions made by counsel before the court citing **Abouloff** as well as dicta by Lindley L.J, (as he then was). As in the instant case, so in the matter before the Court of

Appeal, counsel argued that once an allegation of fraud had been made in an affidavit, a triable issue arose which obliged the court to allow the defendant to proceed to trial of the application. His lordship also appeared to adopt the dictum of Graham J in **Close and Anor v Arnott** (above) in which the Australian Supreme Court emphasized the importance of finality in litigation.

> 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".

[51] I adopt the learned judge of appeal's dictum that it is a wrong view of the law 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 v Etoile.**

[52] Finally, in the instant proceedings, there was some indirect submission to the effect that since the decision against the Defendant in the Florida Court had been based upon the striking out of the pleadings for failure to obey court orders, this was like a default judgment and so was not a judgment "on its merits" so as to be liable for enforcement. Again, I adopt the dicta of the learned Karl Harrison J.A in the **Vasconcellos** case where he said:

> "It matters not that the foreign judgment was obtained by default provided that the proceedings were conducted in a fair manner".

[53] I can find no evidence to lead me to the view that the proceedings in the Florida Court were not conducted in a fair manner and I accordingly hold that the Claimant succeeds on its Fixed Date Claim Form. I grant an Order in Terms of the Fixed Date Claim Form dated April 27, 2010 paragraphs 1 and 2 and filed by the Claimant herein. Costs are to be the Claimant's to be agreed or taxed.

P.P. Encl.

[54] I do however recognize that this matter is of considerable importance and accordingly I grant a Stay of Execution for Twenty One (21) Days so that the Defendant may have time to consider whether it wants to appeal this decision.

.....

ROY K. ANDERSON

PUISNE JUDGE

DECEMBER 20, 2011