IN THE COURT OF APPEAL OF BELIZE, A.D. 2010

CIVIL APPEAL NO. 4 OF 2009

BETWEEN:

SEABREEZE COMPANY LIMITED (In Receivership) Appellant

AND

PROPHECY GROUP L.C. Respondent

BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Appellant unrepresented.
E Courtenay SC for the respondent.

16 October 2009, 19 March 2010.

SOSA JA

[1] On 16 October 2009, the appeal having been withdrawn, I agreed with the other members of the Court that the cross-appeal by way of respondent's notice should be allowed; that the prayer for variation of the judgment of the court below dated 22 January 2008 in the terms set out in the respondent's notice should be granted and that the respondent should have its costs both here and below, to be agreed or taxed. I concur in the reasons for judgment set out by Morrison JA in his judgment, which I have now read in draft.

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SOSA JA

CAREY JA

[2} I entirely agree.

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CAREY JA

MORRISON JA

Introduction

[3] This is an appeal and cross appeal from a judgment of Muria J given on 17 December 2008 in an action by the respondent ("Prophecy") to enforce a judgment in the amount of US$2,417,232.62 obtained against the appellant ("Seabreeze") from the Circuit Court of Okaloosa County, Florida, in the United States of America. On 16 October 2009, the appeal having been withdrawn, the cross appeal was allowed and the judgment of Muria J varied in terms of Seabreeze's respondent's notice dated 23 February 2009, with costs to Seabreeze both here and in the court below. These are my reasons for concurring in that decision.

The background

[4] The matter has a long history which, in the light of the narrow issues which remained alive by the time it got to this court, can be shortly stated (with thanks to Muria J, to whose account of the background I am greatly indebted). Seabreeze, which is a company incorporated in Belize, was concerned with the business of real estate development and improvements on San Pedro, Ambergris Caye. The project out of which this litigation arose was "The Villas at

Banyan Bay" project, which involved the construction of 20 condominium units on property owned by Seabreeze on Ambergris Caye. Financing for the construction was provided by Prophecy, a company incorporated under the laws of the State of Florida, in the sum of US$1,083,000.00.

[5] The transaction was supported by two agreements, a Construction Agreement and an Option Agreement, both of which were dated 14 June 1996. Pursuant to those agreements, the date fixed for completion of the 20 units was 1 June 1998, but the project was not completed on that date and, in fact, was not completed until more than a year after that date.

The Florida proceedings

[6] Prophecy alleged various breaches of the agreements and filed action against Seabreeze in Florida (Case No. 00-1733-CA). In due course, on 12 September 2000, Seabreeze having failed to file or serve any document in the action within the time specified by the law, Prophecy obtained a default judgment ("the original default judgment") against Seabreeze in the sum of US$1,008,000.00, plus various other sums calculated pursuant to the Option Agreement, interest, court costs and attorney's fees. The total sum was also ordered to bear post-judgment interest at the legal rate until paid in full.

[7] It was also ordered that, in addition to paying the judgment sum, Seabreeze was to (a) provide an accounting of income received by it from sales and rental of condominium units; and (b) deliver to Prophecy, pursuant to the Option Agreement, units 0-4, 0-5 and 0-6 of the condominium.

[8] On 11 December 2000 the original default judgment was amended upwards to US$1,589,963.62, plus accruals on the contract at the rate of US$859.38 per day from 12 September 2000, and on 4 January 2001 there was a further upward adjustment in the judgment to the total sum of US$2,417,273.62

plus interest until payment. This was the judgment ("the second amended default judgment") which it was sought by Prophecy in these proceedings to enforce in Belize.

[9] Both amendments to the original default judgment were obtained as a result of letters written to the court on behalf of Prophecy, based on advice received by it from its legal advisors in Belize. That advice was to the effect that Belizean law only provided for the enforcement in the country of a lump sum money judgment, therefore making it necessary for the default judgment to be expressed in a manner that would enable Prophecy to satisfy this criterion. The second amended default judgment was therefore sought and obtained to include in a single sum, the original judgment amount, plus contractual accruals, plus a sum representing the value of units 0-4, 0-5 and 0-6.

[10] In arriving at this sum, the value attributed by Prophecy to each of the units in its request to the Florida court was US$262,000.00 and the final judgment sum of US$2,417,273.62 therefore reflected the addition to the original default judgment in this regard. It may be of no more than passing interest to observe that at the trial before Muria J, a witness for Seabreeze under cross-examination placed a value of US$250,000.00 on each of the units.

[11] On 21 January 2001 a copy of the second amended default judgment was sent by facsimile by Prophecy's American counsel to Seabreeze and on 21 January 2001 Seabreeze's Belize counsel wrote seeking an explanation of how the total shown in that judgment was arrived at. By letter dated 2 February 2001, Prophecy's Belize counsel replied, providing an explanation for the increase, stating that the amended default judgment of $2,417,273.62 plus interest "incorporates the full liquidated claim" and that the judgment was "now in a form enforceable by the Supreme Court of Judicature of Belize."

The Belize proceedings

[12] On 19 April 2009 Prophecy commenced proceedings in the Supreme Court of Belize by filing a specially endorsed writ of summons to recover the sum of $2,417,273.62, plus interest at 20% per annum. A defence was filed on behalf of Seabreeze on 14 May 2001 and an amended defence was filed on 25 March 2002.

[13] After a number of interlocutory applications by both sides (they are fully described and discussed by Muria J at pages 23 to 34 of his judgment). The matter finally came on for trial before Muria J on 18 March 2008. In a full and careful judgment given on 17 December 2008, the learned judge gave judgment for Prophecy in the sum of $1,575,963.62 with interest at 20%, but declined to allow the additional amount reflected in the second amended default judgment (the value of the condominium units), on the ground that that judgment was procured in breach of natural or substantive justice. This is the learned judge's conclusion on the issue:

> "In the present case there is no evidence that an application to the Florida Court, whether by letter or otherwise, was made by the claimant to have the value of the three condominiums units assessed so as to convert them into monetary damages. The evidence (Mr. Perri's letter dated December 29, 2000), his Witness Statement and his oral evidence in this trial does point, it seems to the Court, to the suggestion raised by the defendant, that the increase in the amount of the judgment debt was done subjectively by the claimant without judicial assessment. It is Mr. Perri's evidence that he placed the value of each of the Units at US$262,000.00. There was no counter-suggestion from the defendant since they had no knowledge that each of the three units would be converted into liquidated sum. It was in this trial that Mr.

> Paz Jr., when cross-examined by learned Senior Counsel for the claimant, that he suggested that each of the units was worth about US$250,000.00 [sic].
>
> The position must be obvious, that had there been a judicial assessment of the value of the three units, with representations made to the Florida Court by either side or being given the opportunity to do so, the defendant would have no recourse to come to this court in these enforcement proceedings and complain about the increase in the judgment debt. This is because the value of the units concerned would have been the value judicially assessed by the court following representations made or opportunity to do so, were given to both parties. That did not happen in this case. The increase by US$827,310.00 to the admitted judgment debt [of] US$1,575,963.62 making the total judgment debt US$2,417,273.62 was clearly done arbitrarily and without judicial assessment. This is contrary not only to the English sense of substantial justice, but also our sense [of] substantial justice here in Belize. This Court is therefore bound to refuse to enforce such judgment obtained in a foreign court." [pp 58-59 of the Record]

With regard to costs, the judge ordered that each party should bear its own costs.

The appeal

[14] On 9 February 2009 Seabreeze filed notice of appeal from this judgment on a number of grounds. By respondent's notice filed on 23 February 2009 Prophecy for its part sought a variation of the judgment to include the value of the three units excluded by Muria J and to provide for an order for costs in its favour.

[15] The matter first came on for hearing before this court on 12 June 2009, at which time Mr. Fred Lumor SC appeared for Seabreeze and advised the court that the appeal had been withdrawn and his retainer terminated by the receiver/manager. As a consequence he sought and was given leave to withdraw from the proceedings. The matter was then stood down to 19 June 2009, when Mr. Eamon Courtenay SC moved the court on behalf of Prophecy for an order that the respondent's notice be set down for hearing and this order was duly granted.

[16] The respondent's notice came on for hearing on 16 October 2009, with Mr. Courtenay SC again appearing for Prophecy and Seabreeze, though served with notice of the date, unrepresented. He submitted that Muria J had fallen into error in his conclusion that, because there had been no judicial assessment in relation to the second amended default judgment, that judgment had as a result been obtained in breach of the rules of natural justice. Mr. Courtenay pointed out that that very issue had in fact been previously ventilated and decided (against Seabreeze) in the various interlocutory applications which had been heard in the litigation before the matter came on for trial before Muria J and that the issue was therefore covered by the principles of issue estoppel and res judicata.

[17] In any event, Mr. Courtenay submitted, a consideration of the history of the Florida proceedings made it clear that it could not be properly maintained that the second amended default judgment had been obtained in breach of natural justice or Belizean principles of substantial justice.

Natural justice

[18] As Muria J correctly observed, in the absence of any arrangements for reciprocal enforcement of judgments such as the one obtained in Florida by Prophecy in this matter, direct execution of the judgment in Belize is not possible. However, the common law rule of enforcement by an action on the judgment will

apply in those circumstances and this is the rule that Prophecy sought to invoke by filing its specially endorsed writ to initiate these proceedings. In this regard, Muria J cited with approval the well known statement of Blackburn J in **Schibsby v Westenholz and others (1870) LR 6 QB 155, 159**, that "the true principle on which the judgments of foreign tribunals are enforced [in England] is … that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of this country are bound to enforce ...".

[19] In this regard, the rule is that a judgment in personam of a foreign court of competent jurisdiction which is final and conclusive on the merits is also conclusive between the parties and their privies as to any issue upon which it adjudicates (Halsbury's Laws of England, 4th edition, vol. 8, para. 725). However, such a judgment "may nonetheless be impeached on the ground that it was obtained by fraud, or that its recognition or enforcement would be contrary to public policy, or that it was obtained in proceedings which were contrary to natural justice" (Halsbury's, op. cit. para. 726).

[20] On the issue of fraud, Muria J expressly found against Seabreeze on the basis that there was nothing to suggest that the Florida Court had been defrauded into making its decisions to amend the judgments in the manner complained of. In particular, the judge found that it had not been established that Prophecy had been guilty of any fraud in obtaining the second amended default judgment. Because of the unusual course that this appeal has taken, nothing now turns on this finding.

[21] However, as already indicated, Muria J considered that the manner in which the amount of the second default judgment had been obtained offended against the principles of natural justice or substantial justice. In the well known case of **Pemberton v Hughes [1899] 1 Ch 781, 790**, Lord Lindley, after restating the principle that a judgment pronounced by a foreign court over persons

within its jurisdiction, and in a matter with which it is competent to deal, will not be the subject of investigation in an English court unless [the proceedings] offend against English principles of substantial justice." **Pemberton v Hughes** was cited with approval by the Court of Appeal in **Adams v Cape Industries Plc [1990] Ch 433, 566-7**, where Slade LJ (delivering the judgment of the court) said this:

> "It is sufficient, in our view, to derive the requirements of natural justice for the purposes of enforcement of a foreign judgment and the special defence thereto of breach of natural justice from the principles stated in *Pemberton v. Hughes* [1899] 1 Ch. 781 and relied upon by Scott J., namely: did the proceedings in this foreign court offend against our views of substantial justice?
>
> The notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration. The purpose of an in personam monetary judgment is that the power of the state through the process of execution will take the defendant's assets in payment of the judgment. In cases of debt and in many cases of contract the amount due will have been fixed by the acts of the parties and in such cases a default judgment will not be defective for want of judicial assessment. When the claim is for unliquidated damages for a tortious wrong, such as personal injury, both our system and the federal system of the United States require, if there is no agreement between the parties, judicial assessment. That means that the extent of the defendant's obligation is to be assessed objectively by the independent judge upon proof by the plaintiff of the relevant facts. Our notions of substantial justice include, in our judgment, the requirement that in such a case the amount of compensation should not be fixed subjectively by or on behalf of the plaintiff.

> We do not find it necessary to decide whether, if the local rules provide for service by the plaintiff of notice of a specific sum claimed for damages, a default judgment may be entered for such a sum without proof of judicial assessment and without there being breach of any requirement of natural justice. Scott J. thought that there could be no objection to such procedure and we think that in most cases that would be right. The matter does not arise for decision in this case and we express no concluded view. We would however not exclude the possibility of a defence being upheld if the facts justified the conclusion that, making due allowance for different levels of awards and of substantive law, the amount of the actual award was irrational."

[22] In this matter, it is clear from the evidence that was before Muria J that the Florida rules of civil procedure not only contemplate default judgments, but that they also permit amendments to such judgments (see Rules 1.500; 1.530 and 1.540 Florida Rules of Civil Procedure, 2007 edition). It does appear to be arguable, as Mr. Courtenay quite properly pointed out, that in seeking to amend the original default judgment the respondent utilised the wrong rule (cf Rule 1.530(8), permitting amendment on motion to the court and Rule 1.540 (a) permitting amendments occasioned by clerical mistakes). However, it is equally clear that the Florida rules also provide a remedy to a party in the position of Seabreeze who wished to seek relief from the second amended default judgment (Rule 1.540 (b)).

[23] That judgment was in fact served on Seabreeze just over two weeks after it had been perfected and Seabreeze took no steps to appeal or to seek relief from the judgment, although the basis upon which it had been sought and obtained had been fully explained to it by Prophecy's Belize counsel. In fact, it

was to be another two years before Seabreeze evinced any interest in the matter by seeking a copy of the Florida court file through its American counsel.

[24] In the Canadian case of **Geoffrey Saldamber and others v Frederick and Patricia Beals [2003] 35 SCR 416**, Major J, speaking for the majority of the Supreme Court of Canada, pointed out that although a domestic court asked to enforce a foreign judgment has "a heightened duty" to protect the interests of defendants by ensuring that minimum standards of fairness have been applied by the foreign court, "The burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action" (paras. 60 - 61).

[25] Major J went on to observe that in Canada, "natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend" (para. 65). This is, in my view, equally applicable to Belize. Applying those criteria, it appears to me that the Florida rules do lay out a fair procedure that provides for service of proceedings against a defendant, as well as a right to be heard in defence of the claim against him. Additionally, even after the entry of a default judgment against him, the rules provide an opportunity to the defendant to be heard on the matter.

[26] While it is in one sense true, as Muria J concluded, that there was no "judicial assessment" of the three condominium units, in considering whether the procedure followed was by that reason in breach of natural justice, I think it is necessary to bear in mind that, as Slade LJ put it in **Adams v Cape Industries Plc** (at page 566), "The notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration."

[27] The relevant proceedings in this case were default proceedings activated by Seabreeze's failure to take any steps in its own defence after service of the originating process on it. Nor did Seabreeze take any mitigating steps, even

after the event, to protect its position in the manner provided for by the rules. In such circumstances, it is almost invariably the case that when a default judgment is obtained it reflects to a large extent a claimant's own assessment of what is due to him from the defendant, subject always to the right to challenge it in some way. In the instant case, taking into account the full picture, it cannot be said in my view that the procedure adopted by Prophecy (and permitted by the Florida rules) was in any way unfair or offensive to our standards of substantial justice.

Res judicata/issue estoppel

[28] This point arises from the fact that at several points during the course of the Belize proceedings Seabreeze attempted to raise by way of defence, without success, the issue of a breach of natural justice in the Florida proceedings. By a decision given on 21 February 2006, on an application by Seabreeze to, among other things, amend its defence in the Belize proceedings to add a breach of natural justice, the Registrar in Chambers, after a consideration of the material put before her, concluded that there was no evidence that the second amended defence had been obtained in breach of principles of natural or substantial justice (the learned Registrar dealt with these as separate issues, although in Dicey & Morris on The Conflict of Laws, 13th ed., vol. 1, it is pointed out in footnote 20 on page 528 that the terms 'natural justice' and 'substantial justice'' "appear to be used interchangeably in this context"). In the result the Registrar refused to allow the amendment sought.

[29] The application to amend the defence was renewed before the Chief justice, in what Mr. Courtenay in his written submissions quite aptly described as "a rather novel application … to re-argue the very application dismissed by the Registrar." Be that as it may, the Chief Justice nonetheless entertained the application. In the course of a 47 paragraph long written ruling, Conteh CJ observed that Seabreeze had already had "a dress rehearsal, as it were" during the course of an earlier (unsuccessful) application, also before him, to stay the

proceedings. The Chief Justice concluded by refusing, as the Registrar had done, to allow the further amendment of the defence sought by Seabreeze.

[30] In these circumstances, it does appear to be the case that, as Mr. Courtenay submitted, by the time the matter came on for trial before Muria J, the issue of natural justice had already been determined against Seabreeze in the interlocutory proceedings, thus giving rise to an issue estoppel against it. This is how the principle is put in **Fidelitas Shipping Co. Ltd. v V/O Exportchleb [1966] 1 QB 630** (per Lord Denning MR at page 640):

> "The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given upon it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatam: see *King v. Hoare*. But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances, see *Badar Bee v Habib Merican Noordin,* per Lord Macnaghten."

[31] To similar effect is the judgment of Diplock LJ in the same case (at page 642):

> "In the case of litigation the fact that a suit may involve a number of different issues is recognized by the Rules of the Supreme Court which contain provision enabling one or more questions (whether of fact or law) in an action to be tried before others. Where the issue

> separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence: but such application will only be granted if the appellate court is satisfied that the fresh evidence sought to be adduced could not have been available at the original hearing of the issue even if the party seeking to adduce it had exercised due diligence.

[32] On the basis of the authorities, I therefore find myself in substantial agreement with Mr. Courtenay that an issue estoppel also arises in this case to prevent Seabreeze from re-opening the question whether the second amended default judgment was obtained in breach of natural/substantial justice, which was a point previously decided against it in the interlocutory proceedings.

Conclusion

[33] It follows from this that in my view Prophecy has made good its contention in the respondent's notice that the judgment of the Supreme Court should be varied in terms of the notice as follows:

(1) Paragraph 1 thereof should be amended to read:

> "the Second Amended Default Judgment of the Okaloosa County Court of Florida in the sum of US$2,417,273.62 is final and conclusive and the Claimant is entitled to the

enforcement of that sum in full, together with interest at the rate of 20% per annum from the date of that judgment."

(2) AND Paragraph 2 should read:

"the Defendant is entitled to the payment of its costs by the Plaintiff."

[34] It also follows that Prophecy is entitled to have the costs of this appeal, to be agreed or taxed.

MORRISON JA