IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 185 0F 2001

BETWEEN:

PROPHECY GROUP LC **CLAIMANT**

AND

SEABREEZE COMPANY LTD **DEFENDANT**

Coram: Hon. Justice Sir John Muria

17 December 2008

Mr. V.H. Courtenay S.C. with Mr. E.H. Courtenay S.C. for Claimant

*Mr. James Guthrie Q.C. with Mr. Fred Lumor S.C. and Mrs. R. Magnus-Ushe*r for Defendant

Judgment

Conflict of laws *– foreign judgment – enforcement proceedings – issues estoppel – foreign judgment final and conclusive – not impeachable unless for fraud, contrary to public policy or breach of natural justice/substantial justice – no judicial assessment of increased award of damages – judgment obtained in breach of natural justice or substantial justice.*

Conflict of laws *– foreign judgment – judgment final and conclusive – severance of amount of damages obtained in breach of natural justice or substantial justice – unexceptionable amount of award enforceable.*

Muria J: On 4 January 2001, Prophecy Group L.C (the Claimant) obtained a judgment against Seabreeze Company Limited (the defendant) issued by the Circuit Court of Okaloosa County, Florida, United States of America, for the sum of US$2,417,273.62 (the Foreign Judgment). The Claimant seeks to enforce that foreign judgment against the defendant in Courts of Belize as it is entitled to do so under common law.

Brief background

The brief background to the case between the claimant and defendant in this case which led to the law suit between them in the Circuit Court of Okaloosa County, Florida, USA, has its origin in San Pedro Ambergris Caye. The defendant, a company incorporated in Belize, was in the business of real estate development and improvements on San Pedro Ambergris Caye. The real estate development was in the nature of the construction of twenty condominium units on the defendant's property on Ambergris Caye ("The Villas at Banyan Bay" project). The claimant is a Florida company incorporated under the laws of the State of Florida, USA, which provided the fund in the sum of US$1,083,000.00, to the

defendant to finance the construction of the twenty condominium units. In this regard, the claimant and defendant entered into two Agreements, the Construction Agreement and the Option Agreement, both dated June 14, 1996. The project was, not completed by the due date, June 1, 1998, as agreed. The defendant however, completed the twenty condominium units well after June 1998, and sold the units to third parties. The defendant having been in breach of the Agreements, the claimant sued the defendant in the Florida Court and obtained judgment in default against the defendant.

The Default Judgments

As part of the background, it would also be helpful to set out the Default Judgments issued by the Florida Court in this matter. The First Default judgment was issued by the Court and signed by the Honourable Judge Barron on 12th September 2000 ("the original Default Judgment). Under the original Default Judgment, the Court ordered that the plaintiff, Prophecy Group LC shall recover from the Defendant, Seabreeze:

1. *The sum of $1,008,000.00 plus 20% per annum pro-rated on a daily basis beginning with the date of expiration of the two (2) year period*

with the option payment plus attorney's fees in the sum of $7,500.00, court costs of $90.50, the total sum to be recovered in the amount of $1,575,963.62 with post-judgment interest until paid in full.

2. *The defendant shall deliver to the plaintiff as part of the Option Agreement Units 0-4, 0-5, and 0-6 of the condominium.*

3. *The defendant to provide complete accounting of all income and expenses and distribution of all income which the defendant received from the sale of condominium units and for rental income.*

On 11 December, 2000 the original Default Judgment was amended by the Honourable Judge Barron *nunc pro tunc* to the amount of $1,589,963.62 plus accruals on the contract at the rate of $859.38 per day from September 12, 2000.

On 4 January, 2001, the Second Amended Default Judgment, *nunc pro tunc* to September 12, 2000 was signed by Honourable Judge Barron in the sum of $2,417,273.62 which total sum shall accrue post-judgment interest until paid in full. This is the judgment that is sought to be enforced here in the Courts of Belize.

Claim before the Supreme Court of Belize

The claim before this Court formerly brought by way of a specially endorsed Writ of Summons (now claim Form) claiming the recovery of the sum of US$2,417,273.62 together with interest at the post-judgment rate of 20% until payment, on a judgment debt duly issued in favour of the Claimant by the Circuit Court of Okaloosa County, Florida, against the defendant.

The Claimant's action has become necessary, since the absence of a treaty for the reciprocal enforcement of judgments between Belize and the USA would require the Claimant to bring an action on the judgment in the Belize Courts to enforce the judgment of the Florida Court. No direct execution of foreign judgments is possible between the two countries here concerned in the absence of a treaty for the reciprocal enforcement of judgment. The common law rule of enforcement by an action on the judgment, thus, applies: ***British American Cattle Company -v- Alfred Edwards,*** Supreme Court of Belize, Action No. 118 of 1990. See also ***Dicey and Morris, The Conflict of Laws*** 12th Ed. Vol. 1, Rules 34 and 35. The principle upon which the Courts act is that succinctly stated by Blackburn J in ***Godard -v- Gray*** (1870) LR 6 QB 139 at 149-150 and in ***Schibbsby -v- Westenholz*** (1870) LR 6 QB 155:

"... 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 the judgment is given, which the courts of this country are bound to enforce."

(See also ***Prophecy Group LC v Seabreeze*** (5 March 2004) Supreme Court Claim No. 185 of 2001.

The Claim was duly served on the defendant who entered an Appearance on 4 May 2001. The Defence was filed on 14 May 2001 and subsequently, on 25 March 2002, an Amended Defence was filed by the defendant.

Interlocutory Judgments

On behalf of the Claimant, Mr. Eamon Courtenay SC urged the Court to find that the case for the defence has been fully canvassed and determined by the Supreme Court of Belize in the various interlocutory judgments issued by the Court pursuant to the interlocutory applications made by the defendants in this matter. Counsel

has helpfully outlined the synopsis of the various interlocutory judgments he referred to. I feel that it would also be helpful to briefly refer to these interlocutory decisions before proceeding further in this judgment.

The first of these interlocutory judgments is the application by way of a Summons for Summary Judgment filed by the claimant on 12 November, 2001. The application was refused by Blackman J. on 22 March, 2002 and ordered the defence to file Amended Defence.

The second interlocutory application was filed by the defence on 3 June, 2003 for a stay of proceedings. In support of its application the defence relied on seven (7) grounds, namely:

1. *That the Foreign Judgment had been compromised and settled;*
2. *That the Foreign Judgment had been novated;*
3. *That the Foreign Judgment had been discharged by the aforesaid satisfaction or settlement;*
4. *That he Foreign Judgment was obtained by Fraud;*

5. *That the Foreign Judgment was "not final and conclusive";*

6. *That the Foreign Judgment was illegal as being contrary to the Exchange Control Regulations Act; and*

7. *That the Claimant was estopped from maintaining the Action because it had been settled.*

The Honourable Chief Justice heard and determined this application on 5 March, 2004. Each of the above grounds was heard and determined by His Lordship the Chief Justice, saved for ground four (4) alleging fraud which the defendant did not seek to pursue at the hearing of the application for a stay of proceedings. The third interlocutory application was for leave to appeal against the decision of the Chief Justice of 5 March 2004. Leave was granted. The fourth interlocutory application was for an order to file a second amended defence and to add Seferino Paz Jr. as a defendant. That application was refused by the Registrar on 21 February 2006. The fifth interlocutory application was a renewal of the fourth application, except this time, it was before the Hon. Chief Justice on the 29 March, 2006. His Lordship the Chief Justice refused both applications on 6th April, 2006 as did the Registrar on 21st February, 2006.

The sixth and final interlocutory application by the defence was for leave to appeal against the decision of the Chief Justice. The application was refused by Awich J. on 14th June, 2006.

It is important to bear in mind these interlocutory proceedings in the light of the manner in which the defence pursues its case in defending the claim by the claimant for enforcement of the foreign judgment. Among other things, there is one obvious trend in the way the defence seeks to fight its case, namely to argue its substantive points of Defence in support of its interlocutory applications. I share His Lordship the Chief Justice's comments on the approach taken by the defendant in resisting the Claimant's claim when he said in his decision on 6 April 2006:

> *"Seabreeze had already had a dress rehearsal, as it were, of its case by running its proposed Second Amended Defence in the form of its objections, if not all, but a substantial part of them in its earlier unsuccessful application to stay further proceedings".*

There is, of course, nothing to stop the defence from doing so, after all it has the conduct of its case in the hands of his attorneys-at-law. The consequence, and the defence must accept it, is that the court will pronounce on the issues raised for its determinations. Once the court has done so, the defence is bound by such determinations unless set aside on appeal. This is what "*issue estoppel*" is. The parties are bound by the Court's determination of the issues raised and cannot be allowed to re-litigate those issues. The only recourse is to appeal. The position is succinctly put in ***Fidelitas Shipping Co. Ltd -v- V/O Exportchleb*** [1966] 1QB. 630 where Lord Denning MR had this to say on the point at p. 640:

> *"That issue having been decided by the court, can it be reopened before the umpire? I think not. It is a case of "issue estoppel" as distinct from "cause of action estoppel" and "fact estoppel," a distinction which was well explained by Diplock L.J. in* ***Thoday v. Thoday****. 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 distinctly*

raised and 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 v. Habib Mercian Noordin*** *per Lord Macnaghten."*

A further elucidation of the principles on "*issue estoppel*" is also profoundly expressed by Lord Diplock at p. 642, as follows:

"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 provisions 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.

This is but an example of a specific application of the general rule of public policy, memo debet bis vexari pro una et eadem causa. The determination of the issue between the parties gives rise to what I ventured to call in ***Thoday v. Thoday*** *an "issue estoppel." It operates in subsequent suits between the same parties in which the same issue arises. A fortiori it operates in subsequent proceedings in the same suit in which the issue has been determined. The principle was expressed as long ago as 1843 in the words of Wigram V-C in* ***Henderson v. Henderson*** *which were expressly approved by the Judicial Committee of the Privy Council in* ***Hoystead v. Commissioner of Taxation."***

Thus the parties in the present proceedings are bound by the determinations by the court of those issues raised in previous interlocutory applications relating to this case.

Issues decided in interlocutory applications

In view of the clear legal principles stated in the authorities referred to, it is important to now ascertain what issues have been determined by the court in the previous applications relating to the dispute between the claimant and defendant in this case. I bear in mind the argument on behalf of the defence as put by Mr. James Guthrie Q.C. that issue estoppel does not apply in this case. However in view of the clear position in law on "issue estoppel" which Mr. Guthrie Q.C. did not seek to differ from, it would be appropriate that the court first ascertain which issues had already been determined by the Court and then decide whether the submission by the defence that "*issue estoppel*" does not apply here.

In the second interlocutory application the issues raised for the court's determination were seven (7) of them. These issues are also part of the defendant's Defence as pleaded. On 5th March, 2004 the Chief Justice gave his judgment and the issues were dealt with in his Lordship's judgment. I have read his Lordship's

judgment and I have no doubt whatsoever that the issues raised, save for the issue of fraud, have been determined by his Lordship. See paragraphs 22, 30, 31, and 37 of his Lordship's judgment. I will return to the issue of fraud later in this judgment.

The issue of whether the judgment of the Florida Court was final and conclusive had been decided upon by the Chief Justice. At paragraph 22 his Lordship said:

> *"I am therefore satisfied that in this case the sum is definite and certain in the foreign judgment sought to be enforced and that whatever change might have been done in the computation of the sum due under the judgment is a not variation such as to make it indeterminate or variable or inconclusive. I am prepared to hold and do hold that any change in arriving at the sum stated in the writ was as a result of the slip rule in order to correct and state the actual sum owed by Seabreeze. The judgment, I find, finally and conclusively determined Seabreeze's liability to Prophecy Group. From its date, that is, 4 January 2001, it became res judicata as between their privies."*

On the issue of whether the foreign judgment had been compromised, settled or novated the Chief Justice found in paragraphs 30 and 31 as follows:

> *"30. It is manifest that Prophecy Group did not get any satisfaction from the Deed of Assignment. But it is no answer to its claim on the foreign judgment that it has been satisfied, compromised, or discharged or novated by the Deed of Assignment, for which Seabreeze, the party actually indebted under the foreign judgment, was not a party nor did it provide any consideration. The Deed of Assignment itself, I hold, is no discharge, satisfaction or novation of the sum of US$2,417,273.62 due and owing under the foreign judgment from Seabreeze.*
>
> *31. For all these reasons, I am unable to hold that the Prophecy Group is estopped from proceeding on the foreign judgment entered in its favour by the Circuit Court of Okaloosa County, Florida, U.S.A."*

With regard to the point raised that the foreign judgment was illegal and contrary to public policy being contrary to the Exchange Control Act, the learned Chief Justice stated at paragraph 37:

> *"In any event, I am not persuaded that the Exchange Control Act nor its Regulations deal with foreign judgments, one such of which is the subject of the action by the Prophecy Group. I do not find anything that would be contrary to public policy in making the Courts of Belize available to Prophecy Group to enforce the judgment in its favour granted by the Okaloosa Circuit Court against Seabreeze."*

The foreign judgment, (Second Amended Default Judgment issued on 4th January, 2001) was final and conclusive for the purpose of enforcement, *albeit,* subject to an appeal. The evidence clearly established that there was no appeal against the Florida Court judgment.

Thus the issue of the finality and conclusiveness of the foreign judgment along with the other issues mentioned above had been determined by the Supreme Court

on 5 March, 2004. Unless they are successfully appealed against, those issues are binding on the parties in this case.

Appeal to the Court of Appeal

Having been aggrieved by the decision of the learned Chief Justice of 5th March, 2004 the defendant appealed, leave having been obtained, to the Court of Appeal. On 8th October, 2004 that appeal was withdrawn. The consequence of that withdrawal must be that the issues determined by Supreme Court in the Chief Justice's judgment of 5th March, 2004 remain binding on the parties in this case. Neither party will be permitted to re-open those issues and I so hold.

Mr. Guthrie Q.C., in his submission, conceded that *prima facie* all the judgments, namely the Default Judgment dated 12th September 2000, first Amended Default Judgment dated 11th December 2000 and the Second Amended Default Judgment dated 4th January 2001 were final and conclusive. This is so, as Counsel noted, in view of Mr. Antonacci's evidence. Counsel was content to submit, however, that if this Court finds that the Second Amended Default Judgment was obtained by fraud or in breach of substantial/natural justice, then it matters not whether that judgment was final and conclusive or not.

Respectfully, I feel the concession by Mr. Guthrie Q.C. is appropriate in this case in the light of the earlier decisions of this Court, in this matter, together with the evidence now produced before the Court in this trial.

Whether fraud is a live issue

The issue of fraud is one of the pleaded issues in the defence filed by the defendant. It is the Claimant's case that the issue of fraud had been dealt with in the Chief Justice's decision of 5th March, 2004 where it was recorded at page 11 as follows:

> *"In the body of the Summons, Sea Breeze had additionally asked for the stay of proceedings on the grounds that the Second Amended Default Judgment of the 4th January 2001 was obtained by fraud. However, Mr. Fred Lumor S.C., for Seabreeze, conceded that he would not press this ground on the Court."* `

The claimant suggested that the issue of fraud had been 'abandoned' by the defendant and so it cannot now rely on it. The defendant, on the other hand, is adamant that the issue of fraud is still on foot for the court to determine at the substantive hearing.

Mr. Fred Lumor S.C. might not have been elegant in his words when he said that "*he would not press this ground*" on the court, but I cannot conceivably conclude, as suggested by Mr. Eamon Courtenay S.C., that he (Mr. Lumor) was abandoning the substantive issue of fraud raised in the defence. Further there was no pronouncement by the Chief Justice on the issue of fraud. I read his Lordship's words as simply saying that in the defendant's application for a stay of proceedings, Mr. Lumor S.C. would not be pressing the ground of fraud on the court as one of the grounds for seeking an order for a stay. This is also consistent with his Lordship's approach to the issues raised in the application before him.

As Mr. Lumor S.C. did not seek to pursue the ground of fraud in that application, no determination on that issue had been made, unlike the other issues which I had already mentioned earlier. I am inclined to suggest that his Lordship the Chief Justice was mindful that the issue of fraud, as raised in the defence, would be

fought out at the trial. It is therefore not correct to say, as Mr. Courtenay S.C. stated, that there is no other legal defence to be advanced by the defendant and so there is no issue left to be tried.

As noted by the Court of Appeal when the appeal against the Chief Justice's decision was compromised before it "*that upon the decision of the Chief Justice refusing the application for a stay of further proceedings the substantive application should proceed to a trial*." Thus the claimants' claim *"is yet to be pressed home*" with a live issue of fraud still to be determined at the trial. The issue of fraud is therefore not *res judicata* and must be dealt with here in this trial. The question is whether or not it can be proved. Since fraud is still a live issue before this court, I shall consider it in this judgment.

Guiding Principles

Having held that the foreign judgment in question was final and conclusive for the purpose of enforcement, let me set out the guiding principles to be applied when seeking to enforce such foreign judgment. I say "guiding principles" because they are subject to certain qualifications which have to be satisfied. The principles are set out in ***Halsbury's Laws of England*** (4th edition) Vol. 8 paragraph 725 et seq.

which Counsel for the claimant made reference to. At paragraph 725, the learned author states:

> *"Subject to three exceptions, a judgment in personam of a foreign court of competent jurisdiction which is final and conclusive on the merits is conclusive ... between the parties and privies as to any issue upon which it adjudicates. It is not impeachable or examinable on the merits, whether for error of fact or of law ...."*

and at paragraph 726, the learned author goes on to add:

> *"Although every presumption is to be made in favour of a foreign judgment, and the burden of proof lies on the party who seeks to impeach it, such judgment may 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."*
>
> See also ***Godard v Gray*** (above) and the Singapore case of ***Ralli v Angullia*** (1917) 15 SSLR 33.

These statements of principles have been repeated and restated in many judicial pronouncements by the courts. Counsel for both parties referred to a number of authorities on the point. I need not deal with all of them except to mention two of them. In ***Jet Holdings Inc. -v- Patel*** [1990] 1 QB 335, 343-344, Staughton LJ referred to the rules on enforcement of foreign judgment at common law as set out in ***Dicey & Morris, The Conflict of Laws,*** 11th ed. (1987), rules 42-46, as follows:

> *"42. A foreign judgment which is final and conclusive on the merits and not impeachable under any of rules 43 to 46 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either (1) of fact; or (2) of law.*
>
> *43 (1) A foreign judgment is impeachable if the courts of the foreign country did not, in the circumstances of the case, have jurisdiction to give that judgment in the view of English law in accordance withy the principles set out in rules 37 to 41 inclusive . . . .*
>
> *44 A foreign judgment relied upon as such in proceedings in England is impeachable for 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.

……..

46. A foreign judgment may (semble) be impeached if the proceedings in which the judgment was obtained were opposed to natural justice."

The other case law authority of importance to the present case is that of ***Adams -v- Cape Industries PLC*** [1990] Ch. 433 on which Mr. Guthrie Q.C. placed particular emphasis in relation to the issue of natural justice/substantial justice. I will return to these two cases later when I come to consider the defence of breach of natural/substantial justice. For now, let me turn to the defendant's claim of fraud.

In the light of the above principles and the finding of the Court that the Foreign Judgment in question is final and conclusive, the defence now has to bring itself within one of the three exceptions to the rule in order to impeach the judgment sought to be enforced. However, in the present case, only two of the exceptions need to be considered, namely fraud and breach of natural justice. The exception of public policy had already been determined by the Chief Justice on 5th March 2004, and there is no appeal on foot against that determination. To these exceptions, I now turn.

The fraud exception

I deal first with the exception of fraud. Any judgment obtained by fraud is liable to be impeached. The party seeking to attack the judgment on the ground of fraud, however, faces stringent task of satisfying the court on the allegation. The reason for this is that there must be finality to litigation and the party in whose favour the judgment was given is entitled to the benefit of his judgment. See ***Halsbury's Laws of England,*** 4th ed. Vol. 26 para. 560; see also ***Hunter -v- Chief Constable of the West Midlands Police*** [1982] A.C. 529.

Before doing so , let me just point out that there is evidence both from the claimant and defendant to suggest that the defendant accepted the amount awarded in the Default Judgment (Judgment No. 1) dated 12th September 2000 by the Okaloosa County Court of Florida in the sum of US$1,575,963.62. Mr. Guthrie Q.C. also did not seek to persuade the Court otherwise. The full thrust of the defendant's case and the firm and forceful argument presented by Counsel for the Defendant however, is against the Second Amended Default Judgment (Judgment No. 3) issued on 4th January 2001 by the Okaloosa County Court of Florida in which the

amount of US$2,417,273.62 was entered against the defendant. Mr. Guthrie Q.C. stress that the amount in Second Amended Default Judgment ought not to be enforced in the Courts of Belize on the grounds that it was obtained by fraud and/or in breach of the rule of substantial/natural justice.

Mr. Guthrie Q.C. started off his submission on this issue of fraud by setting out what ***Dicey & Morris and Collins on the Conflict of Laws*** 14th ed. Vol. 1 p. 622 para. 14R127-14-140 says on fraud for the purpose of impeaching a Foreign Judgment. The learned authors state:

> *"A foreign judgment relied upon as such in proceedings in England, is impeachable for 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."*

To buttress the defendant's allegation, Counsel relied on twelve (12) particulars as constituting fraud on the part of the claimant when it obtained the Second Amended Default judgment. They range from allegations of the claimant making

incorrect statements or misrepresentations to the Florida Court to dishonestly entering judgment in the books of the Florida Court of the Second Amended Default Judgment (Judgment No. 3) when (claimant) agreed and demanded payment of the judgment debt in the sum of $US1.5 million contained in the Default Judgment of 29th November 2000 nunc pro tunc to 12th September 2000. Mr. Guthrie Q.C. also relied on a number of case law authorities in support of the defendant's claim of fraud. These include the cases of ***Abouloff -v- Oppenheimer*** (1882) 10QBD 295***; Vadala -v- Lawes*** (1890) 25 QBD 810***; Syal -v- Heyward*** [1948] 2KB 443***; Jet Holdings -v- Patel*** [1990] 1QB 335***; Commercial Innovation Bank Alfa Bank -v- Kozeny*** (2002) 61 WIR 34***; Owens Bank -v- Bracco & Others*** [1992] 2 A.C. 43. However, the circumstances in those cases were very different from the facts of the present case with which we are dealing here. The above cases cited on behalf of the defendant were concerned with situations whereby the defendants participated in the Foreign Court proceedings and the Foreign Court had dealt with the issue of fraud. In subsequent enforcement proceedings in the English Courts, the issue of fraud were again raised and relied upon. That is not the situation in our present case here.

In this case the claimant is seeking to enforce the foreign judgment in Belize. The defendant did not take part in the Florida Court proceedings. Default Judgments

were obtained against defendant. The defendant's objection to the enforcement of the said judgment on the ground that it was obtained by fraud, is raised for the first time at these enforcement proceedings in this Court. However, as pointed out in ***Jet Holdings*** when fraud is raised in enforcement proceedings, the Court has to consider the facts afresh irrespective of the foreign court's decision in order to determine the issue of fraud.

The allegations contained in the twelve(12) particulars of fraud raised by the defendant, if substantiated, may well demonstrate that the Florida Court was mislead into accepting the claimant's request to enter the Second Amended Default Judgment (Judgment No.3) in the sum of $2, 417, 273.62. The test, with respect, is not whether the party concerned misleads the judicial tribunal as suggested by Counsel for the defendant, but rather whether the party concerned (claimant) deliberately misleads so as to deceive the judicial tribunal (Florida Court) in this case.

In addition to the other matters mentioned in the evidence of Mr. Perri, Mr.Antonacci and Mr. Paz Jr., their evidence put together can in no way justify any finding that there is fraud on the claimant's part or upon the Florida Court in

this case. Correctly or not, Mr. Perri made no secret of the reason for seeking the Second Amended Default Judgment. Having been told of the Second Amended Default Judgment the evidence of Mr. Paz Jr. is that, the defendant sought and obtained legal advice from US Counsel in respect of that Judgment and that the defendant did not take any step in the Florida Court on that Judgment. The circumstances plainly were not such as to ground any claim of fraud either on the part of the Claimant or the Florida Court. The elements of misleading and deception of a judicial tribunal are referred to in ***Regina -v- Humprys*** [1997] AC 1, 21, case cited by Counsel. I do not think that the evidence given in this trial can be said to establish that the claimant deliberately mislead the Florida Court so as to deceive that Court into granting judgment No. 3 to the Claimant.

The cases of ***Abouloff -v- Oppenheimer*** and ***Vadala -v- Lawes*** referred to by Counsel for the defendant, in my view, do not add much to the defendant's claim of fraud in this case. Those two cases would appear to be at variance with the principle that English judgments can only be impeached for fraud if new evidence of a decisive character has been newly discovered since trial. However the two cases have not been overruled by the House of Lords and are justified on other grounds.

The common law rule requires that for a foreign judgment to be impeached for fraud, the defendant must show *prima facie* there was fraud in obtaining the foreign judgment. The question therefore is: Whether, prima facie, the Florida Court was defrauded in this case/or was there fraud on the part of the Claimant?

Despite the forceful argument of Mr. Guthrie Q.C. on this aspect of the defendant's case, I am unable to find that the Florida Court was defrauded into making its decisions to amend the judgments complained of nor am I satisfied that there was fraud on the part of the claimant in obtaining the Second Amended Default Judgment complained of.

On the issue of fraud, pleaded by the defendant, I have to respectfully agree with Mr. Courtenay SC that the defence of fraud cannot succeed in this case.

Mr. Guthrie Q.C., in his helpful submission, was forthright in appreciating the difficult task of establishing fraud on the part of the claimant or upon the Court in this case. Counsel intimated, however, that it was not necessary to accuse the

claimant of a deliberate fraud in the sense that it sets out to mislead the Court dishonestly since the judgment concerned can be impeached on another ground, namely a breach of natural justice as set out in ***Rule 46, Dicey and Morris on the Conflict of Laws,*** 11th ed. (1987) and affirmed in the ***Jet Holdings case*** referred to earlier. This is the ground and the second exception upon which Counsel laid firm stress, and to which I will now turn.

Natural Justice/Substantial Justice

The defendant's case on this ground is that the Second Amended Default Judgment in the sum of $2,417,273.62 was obtained contrary to natural justice because it was obtained without judicial assessment. In other words, the sum of US$2,417,273.62 obtained in the Second Amended Default Judgment was arrived at arbitrarily by the Claimant and without any basis.

The claimant raised the point that the defendant cannot avail itself of this defence of breach of natural justice because it has not pleaded it. I feel the claimant's assertion here belies the fact that it has also not pleaded the value of the three condominium units by way of damages in its claim. In any case, the defendant, in my view, is entitled as a matter of law to rely on the defence of breach of natural

justice in proceedings to enforce a foreign judgment in Belize. It is one of the exceptions to the rule as stared in ***Halsbury's Laws of England*** (4th ed.) Vol. 8 para. 725 et seq. set out above.

The Claimant's argument as to how the sum of US $2,417,273.62 was arrived at is simply that the defendant admitted owing the Claimant US$1,083,000.00 plus contractual accruals and interest giving the total owing the sum of US$1,575,963.62. In addition to that, the defendant agreed to transfer the three (3) condominium units to the Claimant but failed to do so. Mr. Perri placed the amount of US$262,000.00 as the value for each unit. Thus, the admitted amount of US$1,575,963.62 plus US$262,000.00 for each of the condominium units together with interest and accruals have made up the total amount of $2,417,273.62 claimed in the Second Amended Default Judgment. Mr. Courtenay S.C. also found support for his contention in the evidence of Mr. Paz Jr. in this trial where he said, when cross examined by learned Senior Counsel, that each of the condominium units is worth about US$250,000.00.

An additional basis relied upon by Mr. Courtenay S.C. is the argument that the sum of US$2,417,273.62 was the correct amount due under the Second Amended

Default Judgment under the "***Slip Rule"***, taking into consideration the various factors which I have alluded to above.

Mr. Guthrie Q.C. strongly urged the Court to find that the alteration of the amount of the judgment debt to the figure now of $2,417,273.62 which represents an addition of US$827,310.00 cannot be justified under the "***slip rule***" principles. His Lordship the Chief Justice ruled that the sum (US$2,417,273.62) stated in the writ "*was as a result of the operation of the* ***slip rule*** *in order to correct and state the actual sum owed by Seabreeze"* under the judgment in default obtained against it by the claimant. Counsel is in effect asking that I reconsider the point and find that the "***slip rule***" principles do not apply here, which will be contrary to what His Lordship the Chief Justice had earlier decided. It must be noted that as a matter of principle, it is open to a judge of the same Court in the court hierarchy to decide a point differently from another judge of the same Court. When that is done, a judge is not sitting in appeal and he is not overruling the other judge. He simply does "not follow" that other judge's decision. The consequence, of course, is that there will be conflicting decisions by two judges of the same Court which will later have to be settled by the Court of Appeal. Generally, refusal by a judge to follow a decision of another judge of same Court is rare.

In these proceedings it is still open to this Court to determine the application of the "***slip rule***" in the light of the evidence from the expert witnesses from both parties and may decide the point in the same way as His Lordship the Chief Justice had done or otherwise. In this case, I have the benefit of the evidence of two expert witnesses at this trial, both of whose evidence are helpful. However, I am happy that on their evidence, the issue of "***slip rule***" no longer matters in the resolution of this case. It is therefore not necessary to deal with the issue here.

On the evidence of the expert witnesses and upon acceptance by Counsel for the defendant, that the judgment complained of can be regarded as final and conclusive, which sits neatly with the Chief Justice's decision given on 5th March 2004, the judgment sum stated in the writ must be taken as the defendant's indebtedness to the claimant. It is final and conclusive. The only question for further consideration by this Court in these enforcement proceedings is, therefore, whether the Second Amended Default Judgment should be enforced in the amount claimed. The case law authorities make it clear that if such judgment was obtained by fraud or its enforcement would be contrary to public policy or the proceedings

in which the judgment was obtained were contrary to natural justice, then it ought not to be enforced.

I have scanned through the evidence presented at this trial and I can find no evidence to show how the increase from US$1,575,963.62 to US$2,417,273.62 was assessed nor was there any steps taken under Rules 1.500 (e) and 1.530(g) of the ***Florida Rules of Civil Procedure*** 2007 Edition, to justify the increase of US$827,310.00.

For the sake of completeness, I set out the two Rules referred to, and which I feel bring home the defendant's point that the increase of US$827,310.00 cannot simply be added to the existing judgment debt at the behest of one party:

> *"**RULE 1.500.***
>
> ……..
>
> *(e) **Final Judgment**. Final judgments after default may be entered by the Court at any time, but no judgment may be entered against an infant or incompetent person unless represented in the action by a general guardian,*

committee, conservator, or other representative who has appeared in it or unless the court has made an order under rule 1.210(b) providing that no representative is necessary for the infant or incompetent. If it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter to enable the court to enter judgment or to effectuate it, the court may receive affidavits, make references, or conduct hearings as it deems necessary and shall accord a right of trial by jury to the parties when required by the Constitution or any statute.

……..

RULE 1.530.

……..

(g) ***Motion to alter or amend a Judgment****. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment, except that this rule does not affect the remedies in rule 1.540(b)."*

I note that Mr. Perri referred to other provisions of the above two Rules, but omitted to deal with the two provisions set out above. Mr. Antonacci's expert

opinion that the above two provisions of the rules had not been followed remained unanswered.

It is true that the defendant was adjudged on 12th September 2000 to pay to the Claimant the sum of US$1,575,963.62 and to deliver the three condominium units 0-4, 0-5 and 0-6. The defendant has accepted that order. It is the second part, of that order, namely the delivery of the three units that leads the claimant to seek the second amended default judgment converting the value of the units into monetary value so that it can be enforced in the Belize Courts. I do not think that the claimant is necessarily prohibited from seeking to convert the value of the units into monetary sum so that it can be enforced in the Belize Courts. But the order to deliver up the said units is totally different from the order awarding damages to the clamant in an amount representing the value of the three units. The latter would require some form of assessment by the Court before it can arrive at the appropriate amount as to the value of each of the three condominium units. Such judicial assessment, in my considered view, can only come about after some evidence or material or representation is placed before the judge to enable him to enter the amount in the judgment. The opportunity to put such evidence or material or representation before the judge must be given to both sides. Without those basic steps taken, it would be difficult to conclude that there has been judicial

assessment made on the value of the three condominium units before arriving at the total amount of US$2,417.273.62, and that our sense of justice has not been offended.

The cases of ***Adams -v- Cape Industries PLC, (above) Pemberton -v- Hughes*** [1899] 1 Ch 781***, Jacobson -v- Frachon*** (1928) 138 LT 386 and ***Leathon Leather & Trading Co. -v- Ngai Tak Kong etal*** (1977) 147 DLR (4^{th}) 377 cited by Mr. Guthrie Q.C. support the principle advanced on behalf of the defendant on the issue of breach of natural justice or substantial justice. To demonstrate the principle, I need only refer to three passages, one from ***Adams -v- Cape Industries,*** another from ***Pemberton -v- Hughes*** and the other from ***Jacobson -v- Frachton***.

In ***Adams -v- Cape Industries*****, t**he Court of Appeal reiterated and affirmed the principle as pronounced by Scott J in the Court below in relation to a foreign judgment in personam. The Court of Appeal said at p. 566 G:

> *"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 money 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 each 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 tortuous 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."

And at p. 571 B the Court of Appeal, affirming the judgment of Scott J. in refusing to enforce the foreign judgment went on to add:

"... the defendants, when the judgment was served upon them, could not and did not know the method by which damages had been assessed from anything stated in the judgment. The recitals in the judgment were, as Scott J held, false and misleading: there had been no hearing at which damages

had been assessed. The facts as to what happened in the Tyler court became known to the defendants at least when evidence was given in the proceedings before Scott J. There was, as we understand it, no evidence from the defendants directed to the question when they first had knowledge of the method adopted by Judge Steger for assessing damages. There is, however nothing to indicate that they were aware of the method adopted at any time before the date when, after the claims were made on them in this country on the basis of the default judgment, the circumstances in which the judgment was made were investigated for the purposes of these proceedings."

In ***Pemberton -v- Hughes***, Lord Lindley accepted that an English Court does not sit to investigate the propriety of proceedings in a foreign court over persons, "*unless they offend against English view of substantial justice*" (at p. 790) or as Lord Vaughan Williams said in the same case at p.797,

"... unless there has been some defect in the initiation proceedings, or in the course of proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as for instance case where there had been not only no service of process but no knowledge of it..."

In ***Jacobson -v- Frachon***, Lord Atkin had this to say on the point:

> *"Nevertheless as the Master of the Rolls say, it cannot be impeached upon that ground, but it can be impeached if the proceedings, the method by which the court comes to a final decision, are contrary to English views of substantial justice. The Master of the Rolls seems to prefer, and I can quite understand the use of the expression, "contrary to the principles of natural justice"; the principles it is not always easy to define or to invite everybody to agree about, whereas with our own principles of justice we are familiar. Those principles seem to me to involve this, first of all that the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant; the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.*
>
> *A court of competent jurisdiction ... may very well, either in accordance with its rules or in violence of them, refuse a substantial hearing to the party, and, if invalidated on the ground that it was contrary to natural justice."*

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 condominium 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.

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 US$1,575,963.62 making the total judgment debt of US$2,417,273.62 was clearly done arbitrarily and without judicial assessment. That is contrary, not only to the English sense of substantial justice, but also our sense substantial justice here in Belize. This court is therefore bound to refuse to enforce such judgment obtained in a foreign court.

The final consideration is whether the whole US$2,417,273.62 should not be enforced. On the case and arguments presented by Mr. Guthrie Q.C. on behalf of the defendant before this court, it is not the defendant's case that the whole of the US$2,417,273.62 ought not to be enforced, should the amount in the Second Amended Default Judgment (Judgment No.3) be found to be obtained in breach of natural justice or substantial justice. The defendant has accepted that the judgment debt in the sum of US$1,575,963.62 is enforceable against it. It is the objection to the increase giving rise to the amount of US$2,417,273.62 that is at the heart of the defendant's case.

In this regard, the case of ***Raulin -v- Fisher*** [1911] 2 KB ***93*** provides the guide. In that case the French judgment imposed a criminal penalty and awarded damages by way of civil compensation against the defendant. The English court held that the judgment should be treated as severable, so that the award of damages could be enforced, thereby avoiding the defendant's plea that an English court should not assist in enforcing a penal judgment of a foreign court.

Following the principle adopted in ***Raulin -v- Fisher***, the position as reiterated by Lord Justice Potter in ***Eliades & Others -v- Lewis*** [2003] EWCA Civ. 1758; [2004] 1 All E.R 1196; [2004] 1 WLR 692, is very much in point when he said:

> *"In **Raulin -v- Fisher** (above) the circumstances were different from those in this case. However, that decision indicates, rightly in my view that in a situation where the court is asked to enforce a foreign judgment for a particular sum and it is faced with a plea by the defendant that the judgment is unenforceable, it should first examine whether and to what extent that judgment falls within the exception to enforceability relied on. If, upon such examination, it is apparent that part only of the judgment falls within that exception, the court should then consider whether the unexceptionable part*

can readily be distinguished, separated and quantified for the purposes of enforcement. If it can, then that separable part should be recognized and enforced. In that respect, the fact that a money judgment is in a form of a single judgment for the total of its separately quantifiable parts should be no barrier to enforcement in respect of the part or parts which are unexceptionable."

The ***Eliades -v- Lewis*** case deals with enforcement of foreign judgment of New York Court in England and the application of the *Racketeer Influenced and Corrupt Organizations ("RICO") Act* of United States, which entitles an injured in his business or property through racketeering to recover threefold the damages sustained. Under the English Act, the *Protection of Trading Interest Act 1980* (the 1980 Act), a judgment for multiple damages cannot be enforced in England. The court recognized that the 1980 Act presents a statutory exception to the common law principle as set out in ***Schibsby -v- Westenholz*** (above), but it does not preclude enforcement of a part of a judgment that is unexceptionable.

In other words, in our present case, the increased element of the judgment is not to be treated as 'infecting' the nature of the judgment as a whole but only to preclude

enforcement of that amount added as damages representing the value of the three condominium units.

Conclusion and order

In the light of the evidence and for the reasons given in this judgment, I conclude that although 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, the claimant is only entitled to enforce the sum of US$1,575,963.62, that is, excluding the added amount of US$827,310.00 which gave rise to the total amount of US$2,417,273.62 sought to be enforced against the defendant in this case. I would therefore order judgment for the claimant against the defendant in the sum of US$1,575,963.62, the sum which has not yet been satisfied, compromised or discharged or novated, and which sum can be enforced in the Courts of Belize, together with interest at the rate of 20% per annum from the date of judgment.

On the question of costs, I feel that since each party has some measure of success in this trial, it would be appropriate, in the circumstances, that each party should bear its own costs.

Order

1. Judgment for the Claimant in the sum of US$1,575,963.62 with interest at the rate of 20% per annum from date of Judgment, i.e. from 12th September 2000, enforceable in the Courts of Belize..

2. The additional sum of US$827,310.00 representing the value of the three (3) condominium units cannot be enforced against the defendant in the Courts of Belize.

3. Each party to bear its own costs.

(**Sir John Muria**)