[2016] JMCA Civ 56

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 36/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**SYLVESTER DENNIS**	**APPELLANT**
AND	**LANA DENNIS**	**RESPONDENT**

John Clarke for the appellant

Miss Tavia Dunn and Mark-Paul Cowan instructed by Nunes Scholefield DeLeon & Co for the respondent

25, 27, 28, 29 January and 29 November 2016

PHILLIPS JA

[1] This is an appeal against the decision of R Anderson J, made on 15 July 2011, granting summary judgment on a claim filed by the respondent to obtain money that she alleged was owed by the appellant, pursuant to an agreement made in the Superior Court of Justice for Ontario, Canada. The appellant is seeking to challenge the decision of R Anderson J on the bases that *inter alia*: (i) the pre-requisites for the enforcement of a foreign money debt in Jamaica had not been satisfied and so the agreement made in the Canadian court is unenforceable in Jamaica; and (ii) summary judgment ought

not to have been awarded in the matter since there were substantial issues in dispute between the parties which required investigation at trial.

Background

[2] The parties were married on 19 October 1974, in Ontario, Canada. The respondent filed a petition for divorce in the Superior Court of Justice, Ontario, Canada in May 1999. In paragraph 11 of the respondent's affidavit, filed in support of her divorce petition and sworn to on 9 November 1999, she indicated as follows:

> "I am aware that a claim for a division of property has not been sought and may be barred after the Divorce. However, we have divided the matrimonial property to my satisfaction and I am satisfied with the arrangement."

[3] The divorce became finalised on 28 February 2000, in Toronto, Ontario, Canada. The respondent thereafter sought and was given leave to amend her divorce petition to claim for equalization of net family property on 25 July 2003. The appellant represented himself during this application. The respondent thereafter filed proceedings for division of property in Canada and Jamaica in the Superior Court of Justice, Ontario, Canada. The property in Jamaica is situated at Unity District, Langton Hill in the parish of Saint Andrew comprised in certificate of title registered at volume 953 folio 409 of the Register Book of Titles (hereinafter referred to as "the property").

[4] The application for division of property had been set for trial before van Rensburg J in the Superior Court of Justice on 14 October 2008, at which time the learned judge conducted mediated settlement discussions. Arising from these discussions, the parties had agreed to a global settlement of all claims and the

respondent's attorney, Miss Mahzulfah Uppal, was ordered to prepare the minutes of the settlement in accordance with the agreement, to be reviewed by the parties and the learned judge in court the next day at 3:00 pm. On 15 October 2008, the minutes of the learned judge indicated that there were concerns about the mechanism and timing of the transfer of the respondent's interest in the property and so the matter was adjourned to 4 November 2008, so that Miss Uppal could consult with a Jamaican attorney to that effect and to finalise the order.

[5] On 30 October 2008, the appellant wrote to Miss Uppal indicating that he was reluctant to enter into the settlement being imposed on him. The appellant indicated that he had agreed to pay the respondent CAD$100,000.00 to dispose of the court matter because he had learned that his sons were subpoenaed to testify and he wanted to keep his children out of his legal affairs. He further indicated that he was impecunious as a result of his inability to work due to injuries he had received in an accident at the workplace, and so he would be unable to make payments to the respondent. He further indicated that he felt that his impecuniosity had prevented him from securing the services of an attorney which in turn severely hampered his opportunity to adequately present his case.

[6] In the said letter, the appellant further noted that on 5 June 2003, he had filed a motion against the respondent seeking spousal support, child support and half payment of a matrimonial debt which had also been ignored. The appellant also noted that in August 2003, the respondent had filed a motion to amend her divorce petition to include a claim for division of property, approximately three years after the divorce

judgment was issued. The appellant asserted that this amendment had been granted even though the respondent had written a letter to him, after their separation, indicating that he "can have it all" in Jamaica because her happiness was more important, and even though she had indicated in her divorce petition that there would be no claim for division of property. The appellant also stated in his letter that both parties had agreed to pay half of a loan and sell a trailer that was jointly owned and to share the proceeds equally. The appellant also asserted that the respondent had no interest in the property in Jamaica since she had made no meaningful contribution to its upkeep and there was a mortgage on the property in the sum of J$800,000.00 that had been jointly obtained and he had been making the payments with the help of family members.

[7] van Rensburg J, in minutes dated 4 November 2008, indicated that:

> "The parties have been unable to agree on the mechanism to effect the finding [sic] of the settlement and the release of [the respondent's] interest in the jointly held property in Jamaica. [The appellant] has reiterated his original position and is attempting to resile from the earlier settlement. That settlement that was entered into by the parties on October 14th is binding on them. Order to go in the terms agreed to and reflected in my endorsement of October 14th."

[8] On that said date van Rensburg J made the following order:

> "1. An order shall issue in the terms agreed to and reflected in the endorsement of October 14, 2008, which reflect a global statement of all claims are as follows:
>
> a. The [appellant] shall pay to the [respondent] the sum of $200,000.00 (Can.) as follows:

i. $100,000.00 on or before April 14, 2009; and

ii. A further $100,000.00 before October 14, [2009].

b. If there is a default on the first payment, the [appellant] will pay a penalty of $10,000.00.

c. If there is a default on the second payment, the [appellant] will pay a penalty of $20,000.00.

2. Upon the payments being made of the amounts in paragraph one (1) above, the [respondent] will release her half-interest in the jointly owned Jamaican property registered as Volume 953, Folio 409, in the Register Book of Titles, being part of Unity District, known as Langton Hill, in the parish of St. Andrew.

3. **THIS IS A FINAL ORDER** in this court and all other claims and cross-claims of the parties are dismissed. This is a global settlement and is intended to address the [respondent's] claims for support and for the sharing of debts including loans by Household Finance under loan number 102537 and Scotiabank.

4. **THIS FINAL ORDER** shall be enforceable as a Judgment in both Ontario and Jamaica.

5. **THIS FINAL ORDER** bears interest at the rate of 5 percent per annum on any payment or payments in respect of which there is a default from the date of default.

6. **ON CONSENT** the [respondent] is to make arrangements for the [appellant] to pick up the dining room set currently in her possession in January 2009.

7. There shall be no costs payable by either party."

[9] In a letter dated 20 July 2009, Mr Patrick Di Monte, a Canadian attorney, wrote to Miss Uppal indicating that he was retained by the appellant and would be seeking leave to extend time to appeal the decision of van Rensburg J. Miss Uppal responded in

a letter dated 22 July 2009, indicating that the time for appeal had passed and that the order had been made with the appellant's consent.

[10] The appellant failed to pay the sum as ordered and so the respondent filed a claim form and particulars of claim on 2 November 2009, in the Supreme Court of Judicature of Jamaica seeking the following orders:

> "1. An Order pursuant to the Partition Act for the partition and/or sale of ALL THAT parcel of land part of UNITY situate at LANGTON HILL in the parish of ST. ANDREW and being the land comprised in Certificate of Title registered at Volume 953 Folio 409 of the Register Book of Titles (hereinafter called "the Property") owned jointly by the [respondent] and the [appellant].
>
> 2. Such further orders and/or consequential directions for the sale of the Property as the Court thinks fit.
>
> 3. Alternatively, for the sums due pursuant to "global settlement agreement" reflected in order dated November 4, 2008 and issued by the Superior Court of Justice, Ontario, Canada as follows:-

Principal payment due	[CAD]$230,000.00
Together with interest at 5% per annum as follows: i. on the sum of [CAD]$110,000.00 from 15/4/09 to 2/11/09 *Daily rate of interest from* 3/11/09: [CAD]$15.07 ii. on the sum of [CAD]$120,000.00 from 15/10/09 to 2/11/09 *Daily rate of interest from* 3/11/09: [CAD]$16.44	 [CAD]$3,043.84 [CAD]$312.33
Court Fees	J$2000.00

Attorney's Fixed Costs on issue	J$10,000.00
Total Amount claimed	**[CAD]$233,356.17** **J$ 12,000.00**"

[11] The respondent particularised that as a result of the appellant's failure to pay the sums owed, she had not transferred her one-half interest in the property to him and the parties therefore remained joint owners of the property.

[12] The appellant filed a defence and counter-claim on 1 March 2010. In his defence he stated that:

(i) The respondent swore to an affidavit in support of her motion for divorce, wherein she indicated that the parties had divided the matrimonial property to her satisfaction and that she was satisfied with that arrangement.

(ii) Since 1978, the respondent has had no interest in the property, had not visited it, and made no contributions to its upkeep or development.

(iii) He bore all costs relating to the property, save and except CAD$3000.00 contributed by the respondent to effect repairs after damage caused by Hurricane Gilbert.

(iv) He had not been served with any settlement purported to have been arrived at by the parties and

the matter should have been tried instead of mediated.

(v) van Rensburg J in his order made on 4 November 2008, failed to consider that:

(1) there was a mortgage of J$800,000.00 on the property being paid by him and his relatives; and

(2) he was entitled to spousal support in the sum of CAD$800.00 per month from 1 March 2000 to present, plus CAD$20,000.00 representing half of joint loans taken by the parties, and repaid by the appellant and the cost of furniture removed unlawfully by the respondent from the appellant's home.

(vi) The appellant also contended that the order cannot take legal effect in Jamaica and does not bind Jamaican courts.

[13] On the appellant's counterclaim he sought, *inter alia*: (i) a declaration that the order made in Canada was not binding in Jamaica; (ii) a declaration that he is the sole owner of the Jamaican property; and (iii) a declaration that all the matters between the parties were settled in the divorce.

[14] The respondent thereafter filed an application for summary judgment on 13 April 2010, seeking the following orders:

> "1. That the [respondent] be granted summary judgment on the Claim in the sum of [CAD]$233,356.17 with interest at 5% per annum:
>
> i. on the sum of [CAD]$110,000.00; and
>
> ii. on the sum of [CAD]$120,000.00
>
> from November 3, 2009 to the date of judgment.
>
> 2. A declaration that the Counterclaim filed by [the appellant] is not properly before the court and the court therefore has no jurisdiction to try it.
>
> 3. An order that the Counterclaim be struck out.
>
> 4. Further and in the alternative to (2) and (3) above, an order that there be summary judgment for the [respondent] on the Counterclaim.
>
> 5. That the costs of these proceedings be awarded to the [respondent]."

[15] In this application for summary judgment, the respondent indicated that she was abandoning her claim for division of property. This application was made on the basis that the appellant had no real prospect of successfully defending the claim since *inter alia*: (i) he was indebted to the respondent under the global settlement agreement and he had consented to the agreement; and (ii) there was lack of compliance with rules 9.6(1), 18.2(2), 18.3(3), 18.5(5) and 18.6(2) of the Civil Procedure Rules, 2002 (CPR) with regard to his challenge of the court's jurisdiction to try a claim.

[16] In her affidavit filed 13 April 2010, in support of the application for summary judgment, the respondent deponed that she had indicated in her divorce petition that

the matrimonial property had been divided to her satisfaction, but further noted that she had been given permission to amend her petition for divorce to include a claim for division of property. She further contended that the settlement agreement addressed all claims made by both parties and so she was not indebted to the appellant. The appellant had failed to pay the sums owed and so she urged the court to grant the orders sought.

[17] The application was heard by R Anderson J on 15 July 2011, and he made the following orders:

> "1. Summary Judgment for the [respondent] on the claim in the sum of [CAD]$233,356.17 and:
>
> i. the sum of [CAD]$9,343.40 being interest on the sum of [CAD]$110,000.00 at the rate of 5% per annum from November 3, 2009 to judgment; and
>
> ii. the sum of [CAD]$10,192.80 on the sum of [CAD]$120,000.00 at the rate of 5% per annum from November 3, 2009 to judgement.
>
> 2. Summary Judgment for the [respondent] on the counterclaim.
>
> 3. Costs are to the [respondent] to be agreed or taxed.
>
> 4. Leave to appeal granted to the [appellant], if necessary."

Applications and appeals in Canada

[18] The appellant had filed a motion seeking to set aside the judgment of van Rensburg J, which was dismissed on 3 October 2011 by S S Seppi J of the Superior

Court of Justice. He thereafter filed an appeal from the order of S S Seppi J which was dismissed on 14 March 2013, by the Court of Appeal for Ontario. The appellant then filed a motion in the Superior Court for extension of time to file and serve the application for leave to appeal from the judgment of the Court of Appeal which was also dismissed on 4 December 2014.

The Jamaican appeal

[19] On 13 May 2014, the appellant filed a notice of appeal against the decision of R Anderson J dated 15 June 2011, seeking to set it aside with costs in this court and below to be taxed if not agreed. The grounds upon which this application was made are summarised as follows:

> (i) The learned judge failed to give consideration to whether the prerequisites for enforcement of a foreign money debt in Jamaica had been satisfied.
>
> (ii) The learned judge failed to consider that there were substantial issues in dispute that required investigation at trial such as:
>
> > (a) whether the appellant consented to the order;
> >
> > (b) what was the extent of the respondent's contribution to the Jamaican property; and

(c) what was the extent of the appellant's indebtedness to the respondent and the respondent's indebtedness to the appellant.

[20] The matter first came up for hearing on 25 January 2016, at which time Mr John Clarke, attorney-at-law for the appellant, indicated that the appellant had written a letter to this court, without his knowledge, and he requested time to obtain instructions from the appellant in that regard. The matter was thereafter adjourned to 27 January 2016, when submissions were made by counsel for both parties through to 29 January 2016.

Appellant's submissions

[21] Mr Clarke's first contention was that the learned judge erred in failing to consider whether all the prerequisites for the enforcement of a foreign money debt had been satisfied. He submitted that since there is no statute governing the reciprocal enforcement of judgments between Jamaica and Canada, the position at common law is applicable. At common law, enforcement of a foreign judgment requires a fresh action under which the foreign judgment debtor is sued on an obligation created by the judgment.

[22] Counsel asserted that while the judgment is enforceable as a simple money debt contract, the critical prerequisite of any contract is consent. Based on all the evidence before the court, counsel argued that the appellant had objected to the terms of the

order before it was formalised by the court. This is evident in the letter he wrote to the respondent's attorney, Miss Uppal, dated 30 October 2008, wherein he indicated that, *inter alia*, he was impecunious and could not afford to pay the sums stated to be paid by him under the order; the respondent owed him money for spousal and child support; and the respondent had made no contributions to the Jamaican property and so had no interest in it. Evidence of his objection could also be gleaned from the minutes of van Rensburg J, where the learned judge himself noted that the appellant had attempted to resile from his previous position before the order was formalised. Counsel asked the court to take note of the fact that the appellant also sought to challenge the order of van Rensburg J in the Canadian courts three times unsuccessfully. Counsel submitted that there is no affidavit evidence of the circumstances under which the parties arrived at a 'global settlement agreement' nor had there been affidavit evidence of Canadian law to explain the manner in which non-consensual orders could be imposed on the appellant. This issue of lack of consent, he argued, also raised public policy and natural justice considerations which had the effect of making the judgment unenforceable in Jamaica.

[23] In reliance on **Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd** [1993] 2 All ER 370, counsel posited that it is a valid defence for the appellant to claim that the judgment is for the enforcement of a foreign penalty. He submitted that it was evident from the tenor of the order that it is a penalty which accumulated to CAD$30,000.00 which, in the instant case could not be considered liquidated damages or even a genuine pre-estimate of loss. Moreover, he submitted,

the order contains sanctions to which the appellant had not agreed and in respect of which he had been denied an opportunity to defend. The order was therefore a penalty and unenforceable.

[24] Counsel for the appellant also contended that the judgment was unenforceable since the entire claim was based on land in Jamaica and the Judicial Committee of the Privy Council in **Pattni v Ali and another** [2006] UKPC 51 has held that a foreign country cannot adjudicate upon immoveable property in another country. He relied on **Pro Swing Inc v Elta Golf Inc** [2006] 2 SCR 612, to support his argument that van Rensburg J's order could not be severed since it is only once the monetary portion is satisfied, that the appellant would be given the entire interest in the property.

[25] Counsel argued that R Anderson J failed to consider that there were substantial triable issues which ought to have been considered at trial, such as the issue of consent, and whether the judgment was a penalty. Additionally, counsel mentioned that the instant case could not be decided without reference to foreign law and that must be done in accordance with rule 31.2 of the CPR. This absence of reference to foreign law, he submitted, raised other serious issues which require investigation at trial, which issues I have summarised thus:

1. Can a party to a divorce who swears that all matters relating to property were satisfactorily addressed apply for an amendment to that petition three years after the divorce has been made final?

2. Can a divorce petition be amended three years after it is finalised?
3. Can an unsigned unexecuted mediation agreement be ratified by court order without a trial?
4. What contributions did the respective parties make to the Jamaican property; what interest, if any, do they have in that property and what considerations did van Rensburg J give to these respective contributions?

[26] As a consequence, counsel submitted that the possibility that the judgment could be unenforceable as well as the presence of so many triable issues which require investigation, meant that summary judgment ought not to have been awarded in the instant case, and the learned judge erred in so doing.

Respondent's submissions

[27] Miss Tavia Dunn, for the respondent, agreed that the common law position of enforcement of judgments was applicable in the instant case, but went further to state that for the judgment to be enforceable: (i) the foreign court must be competent and must have jurisdiction over the parties; (ii) the judgment must be final and conclusive; and (iii) the judgment must be for a fixed sum not itself being a tax or penalty. She posited that all three conditions were satisfied in the instant case since: (i) the Superior Court of Justice in Canada is a court of competent jurisdiction; (ii) the judgment is final and conclusive in that all appeals against it were dismissed; and (iii) only the money portion of the judgment could be enforceable if, as per the learned authors of

Caribbean Private International Law, 2nd edition, pages 262-263, it could be severed from the rest of the order. Counsel contended that severability is possible since paragraph 1 of the order is not inextricably bound to paragraph 2.

[28] In relation to the issue of consent, counsel asserted that there was no evidence that public policy or natural justice principles were breached in arriving at the agreement. It was also counsel's contention that there was no evidence that the letter written to Miss Uppal was before the court and moreover, the fact that the appellant's attempt to resile from his position was refused does not vitiate his initial consent to the agreement. Counsel argued that the claim and cross claim filed by the parties had been merged into the global settlement which settled all issues in dispute between the parties and left no remaining issues which require determination at trial. Counsel asserted that although the appellant said he felt oppressed, he could not rely on the principle of undue influence since it had not been specifically pleaded. Moreover, in reliance on **Daniel v Drew** [2005] EWCA Civ 507, counsel urged this court to reject the appellant's claim of undue influence as he was aware of the contents of the agreement and had entered into the agreement freely.

[29] Counsel agreed that courts will not enforce foreign judgments for a penalty. However, she relied on **S A Consortium General Textiles v Sun and Sand Agencies Ltd** [1978] QB 279, to show that a penalty normally meant a sum payable to the state and not to a private plaintiff, so that the award of punitive or exemplary damages has been said not to be penal. However, in any event, she urged the court, in reliance on **Panos Eliades and others v Lennox Lewis** [2003] EWCA Civ 1758, to

separate the enforceable from the unenforceable portions of the judgment, if any, if the latter existed. Furthermore, it was counsel's submission that the instant case involved an action by the respondent to enforce and protect her private rights and as such was remedial and not penal. Additionally, counsel contended that the issue of whether the order was a penalty does not arise since the cumulative sum of CAD$30,000.00 had not been by virtue of consent but rather an order of the court.

[30] In all these circumstances, counsel submitted that the matter was indeed suited for summary judgment. She urged this court to dismiss the appeal as being without merit and order costs to the respondent.

Discussion and analysis

[31] The claim filed by the respondent had been decided on the respondent's application for summary judgment. The principles governing the award of summary judgments are set out in part 15 of the CPR. Rule 15.2 of the CPR provides that:

> "The court may give summary judgment on the claim or on a particular issue if it considers that-
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue."

[32] Lord Woolf MR in **Swain v Hillman and another** [2001] 1 All ER 91 has said that when the court makes an assessment of the "real prospect of success" on a claim, it is making a determination as to whether the prospects of success of that claim are 'realistic' as opposed to 'fanciful'. When distinguishing 'realistic' as opposed to 'fanciful'

prospects of success, regard must be had to the overriding objective, the interests of justice and whether there are serious issues which require investigation and ought to be determined at trial. (See **ED & F Man Liquid Products Ltd v Patel and another** [2003] All ER (D) 75 (Apr)). These principles have been endorsed in numerous cases before this court such as **Tikal Limited and others v Amalgamated (Distributors) Limited** [2015] JMCA App 11, **Island Car Rentals Ltd (Montego Bay) v Headley Lindo** [2015] JMCA App 2 and most recently in **Marvalyn Taylor-Wright v Sagicor Bank Jamaica Limited** [2016] JMCA Civ 38.

[33] In this appeal, the court must therefore assess whether R Anderson J was correct in the exercise of his discretion to grant summary judgment. This assessment must be made based on the principles set out by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 and endorsed by this court in a number of cases such as **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 and **Marvalyn Taylor-Wright v Sagicor Bank Jamaica Limited**. These cases show that, on appeal from the exercise of a judge's discretion, this court ought only to interfere where the judge misconceived or misapplied the law or misconceived the facts or there was a change in circumstances of the case, sufficient to show that the judge, in exercise of his discretion, was "palpably wrong".

[34] In the instant case, therefore, it is the task of this court to make an assessment as to whether the exercise of the learned judge's discretion to grant summary judgment on the respondent's claim was palpably wrong and ought to be set aside, in that, the

appellant had no real prospect of successfully defending the claim or any issue therein. This assessment can be made by examining two main issues:

1. Whether van Rensburg J's judgment is enforceable in Jamaica?
2. Are there other factual and legal issues which may impact enforceability?

Issue 1: Enforceability of van Rensburg J's judgment

[35] The respondent is seeking to enforce an order that was made in a Canadian court. The respondent may seek to enforce a foreign judgment under common law or statute. However, since there is no statutory framework existing between Jamaica and Canada, governing the enforcement of judgments, I am in agreement with both counsel that the appropriate channel for seeking enforcement of the judgment in this case is the common law.

[36] At common law, there are five recognised conditions for enforcement of a foreign judgment: (i) it must be given by a court of competent jurisdiction; (ii) it must be final and conclusive; (iii) it must be enforceable by or under Jamaican law; (iv) it must relate to a money debt and not immoveable property; and (v) it must be for a definite sum of money and should not contain a penalty. It is clear that van Rensburg J's order was issued by the Superior Court of Justice in Canada and so was issued by a court of competent jurisdiction. It is my view that the order is final and conclusive since it purports to finally determine the rights and liabilities of the parties and the order itself says that it is final. However, there are indeed questions (particularly in relation to an

application for summary judgment) as to whether the judgment is enforceable under Jamaican law and whether it is a money debt or relates to immoveable property and or contains a penalty. These issues will be addressed in turn.

Enforceability under Jamaican law

[37] Generally, a judgment given by a foreign court of competent jurisdiction that is final and conclusive is unimpeachable on the merits whether for error of fact or law. However, this presumption can be rebutted by the person seeking to impeach the judgment if it can be shown that: (i) it was obtained by fraud; (ii) its recognition or enforcement would be contrary to public policy; or (iii) it was obtained in a manner that contravenes the principles of natural justice.

[38] The appellant's complaints thus far have provided no basis for fraud and so the possibility for impeachment of the judgment on this ground would appear nonexistent. Nevertheless, the learned authors of Halsbury's Laws of England, 2011, Volume 19, paragraph 416 have said that a judgment issued by a foreign court of competent jurisdiction is regarded for procedural purposes:

> "...as creating a debt between the parties to it, the debtor's liability arising on an implied promise to pay the amount of the foreign judgment. The debt so created is a simple contract debt and not a specialty debt, and is subject to the appropriate limitation period."

As a consequence, in the instant case, since the contested order is purported to be one by way of agreement, the issue as to whether there was indeed a valid order based on the agreement or consent of the parties becomes an issue deserving examination. This court in **Adolphy DeCordova Samuels and others v Clough Long & Co** [2016]

JMCA Civ 28, in endorsing the principles set out by Lord Denning in a much earlier English Court of Appeal decision of **Siebe Gorman & Co Ltd v Pneupac Ltd** [1982] 1 All ER 377, has recognised the distinction between consent orders that evidence a real contract between the parties with which the court would only interfere on the same grounds as it would with any other contract, and orders made by the court to which neither party objects which can be altered or varied by the court in the same circumstances as any other order made by the court without the consent of the parties. It is clear that an essential element to any contract is that there must be an agreement between the parties and there must be an intention to enter into legal relations as a result of the agreement. Without this element, the agreement is invalid and unenforceable.

[39] The appellant had placed the issue of whether or not he consented to van Rensburg J's order at the core of his application before R Anderson J. The fact that the appellant had objected to the order before it was formalised is evident in the letter he wrote to the respondent's attorney dated 30 October 2008. It appears that he had always maintained that he was impecunious and unable to pay the amounts sought. He contended that the respondent owed him money. van Rensburg J himself noted the appellant's objection in his minutes as detailed in paragraph [7] herein. The absence of consent could raise the question of whether there was any intention to create legal relations in the contract that is being relied on by the respondent. Without an intention to create legal relations, a contract would be unenforceable in Jamaica or any other country. This issue of the absence of consent, which appears to have been raised, even

before the impugned order had been formalised, once proved, may also raise breaches of the principle of natural justice and ultimately be contrary to public policy. Consequently, in my view, this question raises triable issues which require investigation at trial and which could not be determined on a summary judgment application.

Whether the judgment relates to immoveable property or contains a penalty

[40] For foreign judgments to be enforceable by action at common law, the judgment cannot purport to transfer or dispose of property in another state. This principle was outlined by Lord Mance in **Pattni v Ali and another**, where at paragraphs 24 and 25 he said:

> "[24] ...The actual transfer or disposition of property is, in principle, a matter for the legislature and courts of the jurisdiction where the property is situate (state A), and will be recognised accordingly by courts in any other state (state B): see *Dicey, Morris & Collins* rr 120-124. This was described by Blackburn J in *Castrique v Imrie* at p 429 as a "more general principle" of which the rule relating to judgments in rem might "very well be said to be a branch". It does not depend upon the transfer or disposition in and under the law of state A being intended or purporting to bind the whole world. It is enough that it was intended to bind a person in the position of the person who in state B seeks to challenge the transfer or disposition in state A... It follows from it, conversely, that in the unlikely event that the courts of state A were to purport actually to transfer or dispose of property in state B, the purported transfer or disposal should not be recognised as effective in courts outside state A.
>
> [25] An order purporting actually to transfer or dispose of property is, however, to be distinguished from a judgment determining the contractual rights of parties to property. Courts frequently adjudicate on the rights to property and otherwise of parties before them arising from contractual transactions relating to movables or intangibles situate in other states; in doing so, common law courts apply the

> governing law of the relevant contract and the *lex situs* of the relevant movable or intangible to the contractual and proprietary aspects of the transaction as appropriate in accordance with principles discussed in the text to rr 120 and 124 in Dicey, Morris & Collins."

[41] van Rensburg J's order stipulates that upon the payment of the amounts specified, the respondent shall transfer her half-interest in the jointly owned Jamaican property. A question could arise as to whether this is a judgment for a money debt only. In fact, the order purports to transfer property in Jamaica and could be deemed unenforceable. It is of some import that the appellant abandoned her claim to an interest in the property in her application for summary judgment, as stated in paragraph [15] herein, and made a claim with regard to the money judgment only. Questions might arise as to whether the order of van Rensburg J could be severed in such a way that would allow the respondent to pursue the money portion only, as this would result in the ownership of the property remaining extant leaving that aspect of the judgment to be dealt with later by another court. The respondent would therefore have received the payments relative to the order and although having obtained summary judgment, there would have been no obligation on her to transfer her interest in the property. These issues make it clear to me that the case at bar was not one in which summary judgment ought to have been granted.

[42] The principle that a contract which contains the payment of a penalty is unlawful was approved by the Privy Council in **Workers Trust and Merchant Bank Ltd v Dojap** where Lord Browne-Wilkinson, at page 373 of the judgment, said:

> "In general, a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages, being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach."

He further stated at page 375 that:

> "...there is no doubt that the court will not order the payment of a sum contracted for (but not yet paid) if satisfied that such sum is in reality a penalty..."

And endorsed that statement at page 376 in this way:

> "There is clear authority that in a case of a sum paid by one party to another under the contract as security for the performance of that contract, a provision for its forfeiture in the event of non-performance is a penalty from which the court will give relief by ordering repayment of the sum so paid, less any damage actually proved to have been suffered as a result of non-completion..."

[43] van Rensburg J's order clearly stipulates it is only upon payment of the sums stated in paragraph (1) of the order and set out in paragraph [7] herein, that the respondent would transfer her half interest in the property to the appellant. The order also stipulates that where the appellant defaults in payments he is liable to pay a "penalty" of CAD$30,000.00. Consequently, the order itself attaches a sanction for non-payment in relation to the alleged contract between the parties and itself describes the payment of the CAD$30,000.00 as a penalty, without any indication that it could be justified as being a payment of liquidated damages or a genuine pre-estimate of the loss, which therefore means that it may be considered a penalty and could thus be unenforceable in our law.

[44] Counsel for the respondent had submitted that this court could sever the enforceable portions (money) from the unenforceable portions (the property and payment of penalty) of the order. However, I agree with counsel for the appellant that such a task may be impossible since all the orders are inextricably linked and it may not be readily amenable to separation. Nevertheless, whether this process is achievable is a serious issue which requires investigation, is not one which it could be said that the appellant had no real prospect of successfully defending, and therefore, in my opinion, ought not to be determined in a summary judgment application.

Issue 2: Are there other factual and legal issues which may impact enforceability?

[45] In my view, the instant case raises a number of questions which may impact whether the judgment is enforceable in Jamaica and which could impact the chances of success of the defence and counterclaim. The first issue deals with consent and has already been canvassed in paragraphs [37] to [39] herein. The defence filed by the appellant raised the issue as to whether the respondent had indeed settled matters relating to property and whether she had any interest in the property. The appellant also referenced the contributions made to the property by the respective parties and so questions arise as to whether van Rensburg J gave these assertions the proper, relevant or any consideration. It is also important to explore whether the applicant was prejudiced due to the absence of an attorney representing him when the order had been made. Therefore, cumulatively, these issues may have an impact on principles of public policy and natural justice.

[46] The other issue which relates to public policy and which may impact enforceability relates to what portion of Canadian law is applicable or inapplicable in Jamaica. Counsel for the appellant raised certain questions as to: (i) what is the law in Canada relative to amending a divorce petition three years after the divorce had been finalised; (ii) whether such an amendment could be effective, the petitioner having sworn that all matters had been settled satisfactorily and particularly in relation to property rights, in a different country and subsequent to receiving claims for spousal and child support; (iii) and can an unsigned mediation agreement have any efficacy in a Canadian court and does it require written ratification by the parties. Counsel for the respondent argued that the Canadian courts properly exercised their jurisdiction in all the cases cited by the appellant's counsel. However, neither party complied with the procedure which must be followed by a party who intends to adduce evidence on a question of foreign law as set out in rule 31.2 of the CPR. Additionally, questions of foreign law are issues of fact to be decided by the judge, on the evidence adduced before him. Foreign law is usually provided by the evidence of an appropriately qualified expert who may refer to foreign statutes or decisions. No such expert evidence was submitted in the proceedings before R Anderson J. So, the court would have received no assistance as to what is the law in Canada to be able to assess its efficacy and its applicability to Jamaica and ultimately, the enforceability of the order and whether it is contrary to public policy.

[47] These issues seem to beg the question as to whether there was a clear prospect of success for the respondent on her claim. As a consequence, in my view, the learned

judge was wrong to grant summary judgment and his order in that regard ought to be set aside.

Conclusion

[48] Given the circumstances outlined in the instant case, it appears clear to me that the claim filed by the respondent against the appellant ought not to have been the subject of a summary judgment application. So many questions arise as to whether the judgment is enforceable in Jamaica, having regard to the issue of consent; whether it relates to immoveable property or whether it prescribes a penalty; and is the money part of the judgment severable from the rest of the judgment. There are questions of public policy and the principles of natural justice which may impact the consideration of enforceability of a foreign judgment here in Jamaica. This situation is exacerbated by the fact that no reasons had been provided by the judge as to how he resolved these issues. It is therefore my view, that the appeal ought to be allowed, the orders of R Anderson J set aside and costs, both here and below, awarded to the appellant to be taxed if not agreed. The matter should be remitted to the Supreme Court to be heard by a different judge.

McDONALD-BISHOP JA

[49] I have read in draft the judgment of my sister Phillips JA and agree with her reasoning and conclusion. There is nothing I can usefully add.

F WILLIAMS JA (Ag)

[50] I too have read the draft judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. Appeal allowed.
2. Judgment of R Anderson J made on 15 July 2011 is set aside.
3. The matter is remitted to the Supreme Court to be heard by a different judge.
4. A date is to be fixed for case management conference at the earliest possible date.
5. Costs to the appellant, both here and below to be taxed if not agreed.