

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

No. 456 of 2010

BETWEEN:

NYGARD HOLDINGS LIMITED

CLAIMANT

(Operating as NYGARD CAY BAHAMAS or NCBR)

AND

MICHELLE MAY

FIRST RESPONDENT

ALLAN MAY

SECOND RESPONDENT

Before the Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of the High Court

2010: July 14, 21, 28

2011: March 28

**Mr. Bryan Weekes of Weekes Kissoon Deane, Attorneys-at-Law for the Claimant
Mr. Ivan A. Alert for the Defendants**

DECISION

Introduction

- [1] This is an application for the discharge of an order granted by my sister *Goodridge J* registering a judgement obtained by the Defendants against the Claimants in Bahamas in the High Court of Justice of Barbados pursuant to *section 3 of the Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act Cap. 201 of the Laws of Barbados*.
- [2] The matter first came to the attention of this Court as an application for an urgent without notice freezing order filed by the Claimants Nygard Holdings Limited (“Nygard”) against the Defendants, Michelle May and Allan May (“the Mays”). The order was granted on 2nd July 2010, restraining disposal of their assets, as well as travel out of Barbados, and mandated delivery up of the May’s passports. The Mays were also required to attend an oral examination as to their means and assets of satisfying a judgment evidenced by the certificate of taxation issued by the Supreme Court of the Commonwealth of the Bahamas Common Law Side issued on the 6th December for \$187, 651.44 Bahamas dollars, and which was registered in Barbados

pursuant to an order of the Court on 7th May 2010. The order was in the following terms:

“1.The First and Second Defendants appear before the Registrar of the Supreme Court or such Officer of the Court as this Honourable Court may deem appropriate on the 6th day of July 2010 at 11:30 in the forenoon at the Supreme Court Complex, Whitepark Road, St. Michael to be orally examined as to their means and assets of satisfying a Judgment evidenced by the Certificate of Taxation issued by the Court of Appeal of the Commonwealth of Bahamas on the 9th day of August 2006 in Appeal No. 54 of 2005 between the parties herein pursuant to an Order for costs contained in the judgment of the Court of Appeal of the Commonwealth of the Bahamas in the said matter and dated the 22nd day of November 2005 where it was certified that :-

The Defendants do pay the Claimant the sum of \$43,345.00 in the currency of the Commonwealth of the Bahamas being \$88,339.00 in the currency of Barbados

and which Judgment was ordered to be registered in the High Court of Justice in Barbados pursuant to Section 3 of the Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act Cap 201 of the Laws of Barbados by the Order of Madam Justice Kaye Goodridge Judge of the High Court on the 7th day of May, 2010;

2. That the First and Second Defendants are restrained from leaving Barbados until further Order of the Court;
3. That the First and Second Defendants immediately deliver up all of their passports to the Registry of the High Court of Barbados, Whitepark Road, St. Michael;
4. The Defendants are prohibited from dealing with their assets as more fully set out hereunder.”

[3] On the 22nd July 2010, the order was discharged without any opposition from the attorney-at-law from Nygard in the following terms, inter alia:

“The Court being satisfied that the Defendants have complied with the terms of the Order of the Court made herein on the 2nd day of July, 2010 that the Defendants do inform the Claimant in writing of all their assets in Barbados and elsewhere whether in their own names or not and whether solely or jointly owned, giving the value, location and details of all such assets by having filed Affidavits herein on the 15th day of July, 2010 setting out to the satisfaction of the Court the required information

IT IS HEREBY ORDERED:

1. That the terms of the Order granted on the 2nd day of July, 2010 whereby it was ordered:

1. That the First and Second Defendants are restrained from leaving Barbados until further order of the Court;

2. That the First and Second Defendants immediately deliver up all of their passports to the Registry of the High Court of Barbados, Whitepark Road, St. Michael.

are hereby discharged.”

[4] The order “unfroze” the Mays’ bank accounts, as well as removed the restraint on travel.

[5] The freezing order was predicated on the assertion by Nygard that a judgment obtained by them against the Mays in the High Court of the Bahamas was valid. The Mays, by an amended Notice of Application dated 12 July 2010, have applied to this Court for an order that:

1. The order granted ex parte herein by the Honourable Madam Justice Kaye Goodridge on the 7th day of May 2010 be discharged.

2. There be an inquiry whether the Defendants have sustained any and if so what damage by reason of the said order of 7 May, 2010 which the Claimant ought to pay the Defendants by virtue of that order.

3. That the costs of and occasioned by all proceedings in the suit be provided for.

[6] This is the application which the Court is considering.

THE FACTS

[7] This Application was supported by Affidavits dated 9 July 2010 of Michelle May and Allan May, “filed in opposition to and in support of the discharge of the order”. Mrs. May deposed that prior to her employment with NCBR, she worked for Royal Caribbean cruise lines; while Mr. May was unemployed at the time. Based on representations made by Nygard, Mrs. May resigned from her job at Royal Caribbean and travelled to the Bahamas to commence work at Nygard’s facility. Both Defendants were to be employed as managers.

[8] Shortly after beginning their work for Nygard, the Mays allege that they realized that some of the representations made by Nygard to them had been false. It is alleged that

Nygaard intentionally did not seek work permits for its employees, and the Mays did not receive work permits which made their employment illegal.

- [9] The Mays commenced their employment on 8 July 2003 and terminated their employment on 30 September 2003. They alleged that they were forced to surrender their passports and were held against their will by Nygaard. They were unable to move to and from the facility without the express approval of Peter Nygaard. When they recovered their passports they left Nygaard's facility in the Bahamas.
- [10] They brought proceedings against Nygaard in Florida, USA, and Nygaard responded with an action in the Bahamas, and obtained a judgment from the Bahamian Courts. It is not disputed that the United States Federal Court and the Ninth Circuit Court of Florida did not recognize the Bahamian judgment.
- [11] It is the contention of the Mays that they were never served with any notice of the proceedings for taxation in the Bahamas whereby the judgement was obtained.
- [12] Mrs. May deposed in her Affidavit as follows:
- “11. I was never served with any notice of proceedings concerning any action of the Claimant in the Bahamas for taxation of costs and I did not appear at such proceedings. I am not ordinarily resident in Nassau Bahamas, other than the brief period of employment aforementioned. I did not carry on business in Nassau Bahamas.
12. I became aware of these proceedings in Barbados for the first time on or about Monday the 5th July 2010.
16. To the best of my knowledge the Claimant has always known of my whereabouts since I left its employment in 2003. I have never tried to conceal my whereabouts nor to evade the Claimant. I have never fled any jurisdiction in fear of or as a result of any action of the Claimant...”
- [13] While in St. Vincent on or about October 2004 – September 2005 the Defendants were informed that the Claimant sought to register the Bahamian judgment in that jurisdiction and in 2008 the Defendants were informed that the Claimant sought to do the same in St. Lucia.
- [14] The Affidavit of Mr. May is on identical terms.
- [15] The evidence of Mr Abraham Rubinfeld, Barrister and Solicitor, was filed by affidavit dated July 14 2011. In it, he admits that the attorneys-at-law for the Mays were served with the notices for taxation. An affidavit of service to the Mays attorneys was exhibited. The Mays themselves were not personally served and I accept that at the time they were not in the jurisdiction.

[16] By the Order of *Goodridge J* dated 7 May 2010, the certificate of taxation issued by the Bahamian Court was registered in the High Court of Justice. The Order stated:

“1. The Certificate of Taxation issued by the Supreme Court of the Commonwealth of the Bahamas Common Law Side issued on the 6th day of December, 2005 in Matter No. 01703 of 2003 between the parties herein pursuant to an Order for Costs contained in the Judgment of the Supreme Court of the Commonwealth of the Bahamas Common Law Side in the said matter and dated the 20th day of September, 2005 where it was certified that:

The Defendants do pay the Claimant the sum of \$187, 651.44 in the currency of the Commonwealth of the Bahamas being \$382, 574.37 in the currency of Barbados;

be registered in the High Court of Justice in Barbados pursuant to Section 3 of the Foreign and Commonwealth Judgements (Reciprocal Enforcement) Act Cap 201 of the Laws of Barbados.”

ISSUE

[17] The primary issue for the Court is whether these Certificates of Taxation were properly registered in Barbados, and whether the judgment itself can be said to have been properly registered.

[18] It is the contention of counsel for the Mays that it was not.

THE LAW

[19] The law governing an application to set aside the registration of foreign judgments in Barbados is set out in *Part 72.7 (3)* of the *Supreme Court (Civil Procedure) Rules (2008) (CPR)*. It provides:

“(3) Where the Court hearing an application to set aside the registration of a judgment is satisfied that

(a) the judgment falls within any of the cases in which a judgment may not be registered under the provisions of any relevant enactment; or

(b) it is not just or convenient that the judgment should be enforced within the jurisdiction

it may order the registration of the judgment to be set aside on such terms as it directs.”

[20] The amended Notice of Application listed a number of grounds, the most relevant of these is ground five.

[21] Ground five relates to *Section 3 (2) of the Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act Cap. 201 of the Laws of Barbados (the Act)* which states:

“No judgment shall be ordered to be registered under this section if –

- (a) The original court acted without jurisdiction; or
- (b) The judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court; or
- (c) The judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or
- (d) ...
- (e) ...
- (f) The judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.”

[22] In the instant case the Defendants gave evidence that they sought to challenge the jurisdiction of the Bahamian court in the original substantive action via their attorney at-law at the time as indicated in their Affidavits filed 9 July 2010. This is not disputed by the Claimant Nygard.

[23] Counsel for the Defendants argued for the discharge of the 7th May 2010 Order of the Court pursuant to the factors set out at *section 3 (2) of the Act*. Counsel first addressed *s. 3 (2) (b) of the Act* and contended that the Defendants were not subjects of or ordinarily resident in the Bahamas. He further submitted that they were not carrying on business and their legal status from 8 July 2003 to 30 September 2003 was that of tourists. Further, counsel contended that corollary activities, including pre-contractual negotiations and representations, with regards to the employment agreement were made in Miami, Florida, USA not the Bahamas.

[24] The Defendants were not within the jurisdiction of the Bahamas prior to the substantive action and the costs proceedings in which the Certificates of Taxation were issued.

[25] Moreover, Counsel submitted that there was no voluntary appearance by the Defendants nor was there any other submission to the jurisdiction of the Bahamas within the meaning of *s. 3 (2) (b) of the Act*.

- [26] Counsel relied on the principles laid down in *Schibsby v Westenholz* [1870] LR 6 QB 155 to establish that the Defendants were not such persons as to be bound by the judgment of the Certificates of Taxation.
- [27] Counsel then turned to s. 3 (2) (c) and it was argued that the requirements of that section were not met as there was no due service as contemplated by *the Act*. Counsel asserted that any service on the former attorneys of the Defendants could not amount to due service of the material proceedings; that being the Costs proceedings.
- [28] Counsel for Nygard made reference to *Part 72.7 (3)* of the *CPR* and asserted that the Defendants did not prove that s. 3 (2) (a) – (f) of *the Act* were applicable to the judgment registered in this jurisdiction. Counsel also took issue with the Defendants’ reliance on *Part 72.7 (3) (b)* of the *CPR* and argued that the affidavits of Mr. Abraham Rubinfeld filed on 12 April 2010 and 18 May 2010 satisfied the requirements of the *Evidence Act Cap. 121* and *Part 72.2 (1)* of the *CPR*.

The nature of the service process

- [29] Were the proceedings served on the Mays? The approach of the English courts on jurisdiction and service of process can be found in **Dicey, Morris and Collins on Conflict of Laws (14th ed.) section 11 – 097** which states “the foundation of jurisdiction in *personam* is service of process.”
- [30] Substituted service may be ordered by the Court in cases where the defendant is outside the jurisdiction. However, this option only exists in limited circumstances as shown in *Myerson v Martin* [1979] 3 All ER 667 where it was held:
- “If the defendant was at the time outside the jurisdiction and the plaintiff in ignorance of the fact issued a writ for service within the jurisdiction he would have to wait for the defendant to come within the jurisdiction and serve him personally, there could not be substituted service in such a case. If the defendant was within the jurisdiction at the time the writ was issued and the plaintiff issued a writ for service there, he could obtain an order for substituted service even if the defendant had left the jurisdiction since the issue of the writ.”
- [31] More recently in the case of *Chellaram and another v Chellaram and ors.* [2002] 3 All ER 17 it was held that:
- “CPR Pt 6 had not changed the fundamental rule of English procedure and jurisdiction that a defendant could be served with originating process within the jurisdiction only if he were present in the jurisdiction at the time of service or deemed service.”

- [32] The Australian courts have also adopted the foregoing position with respect to substituted service as shown in *Laurie v Carroll* (1958) 98 CLR 310 where it was held that an order for substituted service cannot be made where at the time of the issue of the writ, personal service was not possible upon the defendant.
- [33] In *Mondial Trading Pty Ltd. v Interocean Marine Transport Inc* [1985] 65 ALR 155, Dawson J applying *Laurie v Carroll* said “... at no time could personal service of the writ have been effected within the jurisdiction and, without application having been made and the necessary orders obtained, service cannot, in the absence of agreement, be effected outside the jurisdiction either personally or by substituted service.”
- [34] The more recent case of *ASIC v Sweeney (No. 2)* [2001] NSWSC 477 also follows the authority of *Laurie v Carroll* that “substituted service of an originating process for an *in personam* claim can be ordered where the defendant is outside the jurisdiction, if direct personal service could have been effected under the rules of court”.
- [35] Counsel for the Defendants further contends that the registration of the judgment in Barbados is simply an attempt to harass the Defendants and that such public policy concerns guided the US Courts in their consideration of the Bahamian judgment.
- [36] In the final Judgment of the Ninth Circuit Court of Orange County, Florida it was held that the Bahamian judgment should not be recognised based on the following:
- “First, it is repugnant to the public policy of this state. The public policy of the State of Florida supports the right to jury trial, the right of parties to discovery, and the right of an individual who is a victim of fraud to seek an award [for] punitive damages. The Bahamian Court found it was oppressive to require the Plaintiffs [Nygard] to be subjected to those procedures and remedies. That Order, however, is clearly in conflict with the public policies of the State of Florida.
- Second, the foreign judgment conflicts with final and conclusive orders entered by U.S. courts. In addition to the three orders entered by the federal court holding that Mays had the right to have her lawsuit heard in the United States, the final judgments entered in their favour and against Nygard implicitly recognized the Mays’ right to bring their action in Florida. Those rulings were affirmed by the Eleventh Circuit. Accordingly, they conflict with the judgment of the Bahamian Court.”
- [37] In the instant case the Defendants had left the Bahamas before the Claimant brought its claim against them and service was made to the Defendants’ Attorney-at-Law at the time.

- [38] The Court accepts the evidence of the Defendants that they were not properly served by the Claimant and that no application was made for substituted service to be carried out.
- [39] Accordingly, the judgments in the original court proceedings fall within s. 3 (2) of *the Act* and as such the registration of the judgment in Barbados is set aside pursuant to **Part 72.7 (3)** of the *CPR*.

Jacqueline A.R. Cornelius
Judge of the High Court