BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 34 of 2012
BETWEEN

NYGARD HOLDINGS LIMITED **APPELLANT**

AND

MICHELLE MAY **RESPONDENTS**
ALLAN MAY

Before the Hon. Sir Marston C.D. Gibson K.A., Chief Justice; the Hon. Sandra Mason; and the Hon. Andrew Burgess, Justices of Appeal

Mr. Bryan L. Weekes of Messrs Bryan Weekes & Associates for the Appellant
The Respondents did not appear either by counsel or in person

2020: September

DECISION

GIBSON CJ:

Introduction

[1] This appeal raises interesting issues in private international law or the conflict of laws as it is also called. It involves three jurisdictions, namely The Bahamas, where judgments and two cost orders were issued ("the Bahamian orders"); the State of Florida, where there was litigation based on facts similar to those which were adduced in The Bahamas, resulting in a conflicting judgment, and which refused to recognise or register the Bahamian

judgments; and Barbados, where the Bahamian orders were initially registered but which registration was discharged on the ground that the defendants in The Bahamas litigation (the applicants who had sought discharge of the registration of the Bahamian orders) had not been served with those orders. At issue are questions regarding jurisdiction and registration and recognition of foreign judgments, pivotal issues in the conflict of laws in a world grown, and continually growing smaller not just by ease of travel but by technological advancements such as the internet and social media.

[2] This is an appeal against the order of the High Court (**Cornelius J)** directing the discharge of a prior order of another High Court judge (**Goodridge J**, as she then was) which had granted the registration of the Bahamian cost orders contained in judgments obtained by the appellant, Nygard Holdings Ltd ("NHL") against the respondents Michelle and Alan May ("the Mays"). The cost orders were registered in the Barbados Supreme Court pursuant to ***section 3*** of the ***Foreign and Commonwealth Judgment (Reciprocal Enforcement) Act Cap 201*** (the ***Act***).

[3] The decision of **Cornelius J** was grounded in ***Part 72.7(3)*** of the ***Supreme Court (Civil Procedure) Rules 2008*** ("**CPR**") which provides that a court, "upon hearing an application to set aside the registration of a judgment. . . *may* order the registration of the judgment to be set aside on such terms as it

directs" (emphasis added). The main issue for this Court's determination is whether, in reviewing the exercise of the judge's discretion under ***Part 72.7(3)*** pursuant to settled principles governing such review by this Court, it can be said that the judge proceeded upon an erroneous basis of law requiring reversal of her decision. That requires a review of the relevant rules of the conflict of laws regarding how courts obtain personal jurisdiction over parties and the recognition and registration of the judgments so obtained.

[4] For the reasons which follow, I conclude that the judge exercised her discretion improvidently and so the appeal must be allowed and the order discharging the registration set aside. However, I must state at the outset that the way in which the argument was placed before the trial judge by counsel did not properly raise the issues central to the resolution to this case. Indeed, the supporting affidavit filed by the Mays on which the judge relied was misleading.

[5] As will become clear, however, the Bahamian judgments which resulted in the cost orders, like all judgments and cost orders, were only the conclusion of the Bahamian litigation cycle. What happened in that litigation leading up to the orders is as crucial as the issuance of the orders. It is for this reason that I have searched the judgments of both the High Court and Court of Appeal of the Bahamas to discover the basis upon which the Bahamian Court assumed

jurisdiction over the Mays and whether they were, in fact, properly served with process commencing the Bahamian litigation.

[6] Rather than a purely chronological recitation of the facts and circumstances, I have opted for a reverse chronological order, beginning with the latest facts and then moving to the foreign litigation. It will then be clear that the Bahamian litigation began with good service on the Mays under Order 11 of the Rules of the Supreme Court of the Bahamas followed by their unconditional appearance in the Bahamian Courts and full participation in the litigation.

Factual and Procedural Background

The Underlying Local Proceedings

[7] As noted before, the proceedings in the Courts below related to the registration of two Bahamian cost orders. The first was a Certificate of Taxation issued on the 6th day of December 2005 in Matter No. 01703 of 2003 pursuant to *an Order for costs* contained in the judgment of the Supreme Court of the Bahamas Common Law Side dated the 20th day of September 2005 which "certified that [the Mays] do pay [NHL] the sum of $187,651.44 in the currency of the Commonwealth of the Bahamas" or BDS $382,574.37."

[8] The second was a Certificate of Taxation issued by the Court of Appeal of the Bahamas on the 9th day of August, 2006 in Appeal No. 54 of 2005 pursuant

to *an Order for costs* contained in the Judgment of the Court of Appeal dated the 22nd day of November 2005 which "certified that [the Mays] do pay to [NHL] the sum of $43,354.00 in the currency of the Commonwealth of the Bahamas" or BDS $88,339.00.

[9] By application filed on 20th April 2010, NHL applied *ex parte* pursuant to **Part 72 of the CPR** for an Order that both certificates of taxation issued by the Supreme Court and Court of Appeal of the Commonwealth of the Bahamas be registered in the High Court pursuant to **section 3** of the **Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act Cap 201** of the **Laws of Barbados**. By order entered 12th May 2010 (***Goodridge J***, as she then was), the certificates of taxation were directed to be registered.

[10] The Mays filed an application seeking the discharge of the registration of the judgment on the basis that the notice of taxation of the costs had not been served on them personally. In her supporting affidavit sworn to on 9th July 2010, the wife, Michelle R. May ("MRM") deposed:

> 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.

[11] Many of the facts before the trial judge were set forth in the affidavits of the

Mays filed on 9th July 2010 in support of their application to discharge an order of Cornelius J dated 2nd July 2010 granting interim injunctive relief against them. Supplementing that affidavit was a document entitled "Plaintiffs' Statement of Undisputed Material Facts Filed in Response to Defendants' Statement of Undisputed Material Facts" electronically filed on August 22, 2005 with the Clerk of the United States District Court for the Middle District of Florida, Orlando Division, in an action in which the Mays had sued NHL in the Florida Courts seeking damages.

[12] The facts were, for the most part, undisputed. In her affidavit and statement, Michelle Roxanne May ("MRM") deposed that the circumstances giving rise to the present proceedings dated back to 2003 based on representations made to them in Miami, Florida by NHL and its servants. She and her husband are citizens of the United States. In April 2003, she and her husband had resided in Cape Canaveral, Florida, where they had been resident for the preceding two years. At the time, she was employed by Royal Caribbean Cruise Lines as a human resources professional while her husband was unemployed. During that same month, she had responded to an advertisement by NHL seeking the services of a husband and wife team.

[13] The Mays were interviewed on three occasions in Florida. On the third occasion on 7th June 2003, the interview was conducted by Peter Nygard

"PN"), a principal of NHL, who had travelled to Miami Beach, Florida and conducted the interview there. Following the Miami Beach meeting with PN at which certain representations were made, the Mays were offered, and accepted management positions at NHL's facilities at Nygard Cay Bahamas Resorts. Thereafter, MRM alleged, she resigned her position with Royal Caribbean and her husband discontinued the interview process for an alternate job which he was seeking. They both moved to the Bahamas from Florida. One of the bases of the lawsuit in Florida were the expenses incurred in the move, including the costs of both breaking their lease and putting their possessions in storage.

[14] The Mays began working with NHL in the Bahamas in July 2003. MRM swore that one of the express representations made to her and her husband was that they would be supplied with and be covered by what PN called a "blanket work permit" allowing them to work in the Bahamas. She also noted that she and PN had discussed the issues of how employees were treated and he had assured them that all employees were treated like family.

[15] However, soon after their arrival in the Bahamas, the Mays discovered that the representations were false. MRM alleged that return tickets were purchased for them as part of an elaborate scheme to deceive the Bahamian authorities into believing that they were only tourists at the resort and not, as

they were in fact, non-Bahamian workers. MRM deposed in the Florida proceedings that she had emailed an agent of NHL seeking information as to how to complete the Bahamian "Immigration/Customs Declaration Form" and was told that they should indicate that they were "guests" of PN. They were uncomfortable with that and stated in the form that they were there for both business and pleasure.

[16] In mid-August 2003, it became apparent that NHL had never submitted their names to the Bahamian Ministry of Labour and Immigration for consideration for work permits and had not paid fees necessary for them to work in the Bahamas. The Bahamian authorities denied that there was such a thing as a "blanket work permit." In fact, the deception of the Bahamian authorities by the non-Bahamian workers of NHL did not cease until 3rd October 2003 when the Bahamian Immigration officials arrested a number of American and Canadian NHL workers at a checkpoint near the resort.

[17] Moreover, the Mays were required to hand in their passports to NHL and were not free to come and go from the compound as they wished. In addition, it appeared that the workers were not treated well. As to the issue of why the previous manager and his wife had left the employ of NHL, PN had intimated to the Mays that they had left because they were perfectionists. The Mays discovered that they had actually left because the resort was not as it was

represented to them and, as with the Mays, that couple had never been issued with work permits and had been, like the Mays, working illegally in the Bahamas.

On 25th August 2003, the Mays went to the US Embassy to discuss their situation with an embassy representative, including their legal status and continued working without work permits. They were advised to "leave at the first opportunity." They terminated their employment with NHL on 30th September 2003 with one day's notice pursuant to their contract and returned to Florida.

The Decision Appealed From

[18] The matter was heard by ***Cornelius J*** who agreed that the Notice of Taxation of Costs had not been served on the parties but upon their attorneys in the Bahamas. By Order dated 28th March 2011, the Judge directed the discharge of the order of ***Goodridge J***.

[19] ***Cornelius J*** exercised her discretion under ***CPR Part 72.7(3)*** which provides that, in certain circumstances, a court hearing an application to set aside the registration of a judgment may order that the registration be set aside. The trial judge referred to **section 3(2)(c)** of the **Foreign and Commonwealth Judgments (Reciprocal Enforcement) Act Cap 210** of the **Laws of Barbados** ("**the Reciprocal Enforcement Act**") which provides that a

judgment shall not be ordered to be registered if the judgment debtor was not duly served with the process of the original court and did not appear.

[20] The judge noted that the Mays "gave evidence that they sought to challenge the jurisdiction of the Bahamian court in the original substantive action via their attorney. . ." and that "[t]his was not disputed by the Claimant Nygard." She recounted that the Mays' counsel had submitted before her that "they were not carrying on business and their legal status from 8 July 2003 to 30 September 2003 was that of tourists." (see paras [22] to [23] of the Decision].

[21] The trial judge also noted that "[t]he [Mays] had not been within the jurisdiction of the Bahamas prior to the substantive action and the costs proceedings in which the Certificates of taxation were issued." (see, para [24] of the Decision in the Court below). Before her, counsel "submitted that there had been no voluntary appearance by the Mays nor was there any submission to the jurisdiction of the Bahamas within the meaning of ***section 3(2)(b)*** of the Act." (see para [25]). She "accept[ed] the evidence of [the Mays] that they had not been properly served by [NHL] and that no application was made for substituted service to be carried out."

[22] It should be noted that NHL had pursued the Mays and sought to register the Bahamian Judgment in other states in which they had resided including St. Vincent and the Grenadines, and St. Lucia.

The Foreign Litigation

The Bahamas

[23] In their papers filed in support of the application seeking the discharge of the Order of the High Court directing the registration of the Bahamian Judgment, the Mays claimed, and the trial judge accepted, that their only appearance in the substantive Bahamian action was to challenge the jurisdiction of the court. However, the Bahamian record belies that position.

[24] The facts underlying the Bahamian litigation are taken from the judgments of *Longley J* in the Supreme Court of the Commonwealth of the Bahamas dated 31st May 2005, as well as the reasons of *Osadebay JA* in the Court of Appeal of the Bahamas dated 22nd November 2005. Sometime in December of 2003, NHL commenced an action in the Supreme Court, Nassau, Bahamas, against the Mays claiming damages for breach of contract and the return of certain documents containing confidential information which, it alleged, the Mays had unlawfully removed from NHL's premises without its consent.

[25] By then the Mays had returned to Florida. Pursuant to the leave of the Court granted to NHL upon its application under Order 11 Rule 1(f) of the then Bahamas Rules of the Supreme Court (the so-called "long arm jurisdiction"), the writ was served personally on the Mays at their address in Florida. It should be noted that Order 11 Rule (1)(f) of the Bahamian Rules of the

Supreme Court was an exact replica of Order 11 Rule 2(1)(f) of the then Barbados Rules of the Supreme Court 1982. That jurisdiction is now contained in Rule 7 of the Civil Procedure Rules of The Bahamas, and **Part 7** of the **Barbados CPR**.

[26] Upon being personally served with the writ in Florida, the Mays retained counsel who entered an appearance and filed a defence to the action which progressed towards a hearing. Their attorney-at-law was a Mr. Rigby of Gibson, Rigby & Co. About one month *after* NHL's action was commenced in the Bahamas, the Mays commenced the action, mentioned earlier, in the US District Court, Middle District of Florida, against NHL for breach of contract, fraud and declaratory judgment based on a representation alleged to have been made to them by NHL in relation to the obtaining of work permits for them in the Bahamas, a representation which, they claimed, induced them to enter in the employment relationship with NHL.

[27] Meanwhile, NHL filed an application in the Bahamian Courts seeking to enjoin the Mays from continuing the suit which they had filed in Florida. The Mays were again represented in the injunction proceedings by Mr. Rigby while NHL was represented by a Mr. Turnquest. On 31st May 2005, *Longley J* granted the anti-suit injunction against the Mays ordering them to desist

from continuing to prosecute the Florida action which they had commenced one month after being served with the Bahamian action.

[28] It is useful to note the arguments which were made to *Longley J* and his Lordship's response. Mr. Turnquest for NHL had contended that Bahamian law governed the contract and that the majority of the issues in the Florida action would have to be determined presumably by an expert in Bahamian law. He further contended that the majority of the witnesses were in the Bahamas and that the contract was performed in the Bahamas.

[29] In response, Mr. Rigby argued that the injunction sought by NHL was an equitable remedy requiring NHL to come with clean hands. He stated that equitable principles should apply and that PN's hands were not clean since "he has, by his own admission, allowed [the Mays] to work in the Bahamas illegally. . ." As to this contention, *Longley J* noted, at para [17], that "[t]o the extent that this would be a matter for trial it seems to me that this should not weigh in the balance as to how the court should exercise its discretion."

[30] It is notable, however, that, at this stage, the contentions of Mr. Rigby went beyond a simple denial of jurisdiction in the Bahamian courts, as the Mays had claimed in their affidavits before ***Cornelius J***. Mr. Rigby had, in fact, argued the merits of the anti-suit injunction, namely that PN did not come to equity with clean hands and did not deserve an equitable remedy.

[31] However, the issue of jurisdiction actually arose before *Longley J*. At para [22], *Longley J* agreed with Mr. Rigby's contention that the Mays had not voluntarily submitted to the jurisdiction of the Bahamian courts (even though they had entered an appearance and filed a defence). However, his Lordship stated that "[t]he defendants were properly served with notice of these proceedings" and he cited the well-known dicta of Romer LJ in *Re Lidell's Settlement Trusts, Lidell v Lidell*, [1936] Ch. 374 that "the moment a person is properly served under the provisions of order 11, that person so far as jurisdiction is concerned, is precisely in the same position as a person who is in this country." (See, also, generally, Hon. Winston Anderson, JCCJ, *Caribbean Private International Law* [Sweet & Maxwell, 2014], at paras [8-012] – [8-020], pp. 174-184).

[32] In the same para [22], *Longley J* observed that "[i]t is clear that the US action is concerned with the validity and enforcement of the same contract that undergirds the local action" and, at para [23], he noted that he was "satisfied that the [Mays were] amenable to the jurisdiction for the purposes of the injunction sought."

[33] *Longley J* then issued the order enjoining the Mays from pursuing their Florida action and the Registrar of the Supreme Court of the Bahamas entered an order requiring the Mays to pay the costs of the action. This is one of the cost orders

which was the subject of the local application in the Court below. The Mays ignored the order of *Longley J* and continued their Florida action. In response, *Longley J* found them in contempt of court.

[34] The Mays appealed to the Court of Appeal of the Bahamas challenging the order of *Longley J*. They had not paid the costs as per the Registrar's order, and applied to the Court of Appeal for an extension of time to comply with the Registrar's order and for a stay of the decision of *Longley J*. By order dated the 7th October 2005, the Court of Appeal dismissed the order with reasons to follow and, on 18th October 2005, dismissed, with reasons to follow, the Mays' motion to restore their appeal (see, *Michelle May and Allan May v Nygard Holdings Ltd, Civil Appeal No. 54 of 2005*). The Court's reasons were delivered on 22nd November 2005 by *Osadebay JA*.

[35] *Osadebay JA* began by noting that the Mays' Notice of Motion of 9th September 2005 seeking a stay of the Order of *Longley J* was supported by their attorney's affidavit explaining that they were unable to comply with an Order of 29th July 2005 requiring them to post a bond. This was owing, they had claimed, to the late receipt of the cheque to post the bond. But for the administrative error at the bank, the funds would have been available to post the bond. As *Osadebay JA* observed at para [11]:

> "The affidavit purported to lay blame on a bank which was not a party to these proceedings and who had no opportunity to defend itself."

[36] The Mays' attorney's affidavit continued that if the stay of the decision of *Longley J* was not granted, they would "suffer grave and serious prejudice *in the Florida action as a trial date will be lost* and will continue to suffer prejudice in the local proceedings." (Emphasis added). Again, *Osadebay JA* observed at para [13] that "[i]t was interesting to note that that affidavit of [the Mays' attorney] was sworn to on the 27th September, 2005 and filed in this matter on 30th September, 2005, when the [Mays'] said suit in Florida, USA, against [NHL] had been disposed of on the 21st September 2005 by [the decision of] Judge David A. Baker."

[37] Explaining why the Court of Appeal ultimately dismissed the Mays' application, *Osadebay JA* stated:

> 14. While the applicants have not purged their contempt of court as found by Longley J, they sought an Order of this Court, to restore their appeal against the anti-suit injunction ordered by Longley J. which appeal had been dismissed for non-compliance with the Order of the Registrar of this Court. They sought an extension of time to enable them to comply with the Registrar's Order. They also sought a stay of the anti-suit injunction Order pending the determination of their appeal
> . . .
> 17. Counsel for the applicants in arguing this application before us conceded that the claim of the applicants against the respondent commenced in the State of Florida, USA, could have been brought as a counter-claim in the respondent's action in The Bahamas – *which action was first in time*. That was a remarkable shift from his original contention that the applicant's case against the respondent was a single forum case with the State of Florida, USA being the sole jurisdiction. That concession having been made, it became difficult for the applicants to show an arguable appeal against the anti-suit injunction granted by Longley J.
> 18. It was for these reasons that we dismissed the application of the applicants for an Order to restore the appeal, and Order to enlarge the time for compliance with

> the Registrar's Order and an Order to stay Longley J's decision on the anti-suit injunction.
> [Emphasis added]

[38] I note that *Osadebay JA* had also observed, at para [5](3) of his reasons that *Longley J* had decided that the Mays, having entered an unconditional appearance and filed a defence to NHL's action in the Supreme Court and were therefore amenable to the jurisdiction of the Bahamian Court for the purpose of the injunction sought. It bears noting, however, that *Longley J* appears to have decided, at para [20], the exact opposite.

The Florida Litigation

[39] Several of the facts adduced in the Florida litigation have been stated above at paras [10] to [17] and need not be repeated here. On 13 December 2005, final judgment was entered for the Mays against NHL in their breach of contract action in the Florida court. The Florida court found that it had properly exercised personal jurisdiction over NHL and had properly refused to dismiss the action on the basis of *forum non conveniens*.

[40] On 20th April 2007, NHL sought to have the Bahamian judgment and the related Certificate of Taxation recognised in Florida. By Order dated 10th July 2007, the Circuit Court of the Ninth Judicial District, Orange County, Florida, refused to recognise the Bahamian judgment. In addition to the reasons stated above in para [11] above, the Circuit Court found that the judgment was

repugnant to the public policy of the state of Florida which permitted a jury trial and punitive damages whereas neither was permitted in the Bahamas. Moreover, the Mays were entitled, for the reasons stated, to bring their action in Florida, and the Florida judgment was in conflict with the Bahamian judgment.

The Appeal

[41] It should be noted, at the outset, that while the Mays were represented in the High Court proceedings by Mr. Ivan Alert, by the time of the appeal, he had withdrawn. Neither of them ever appeared nor entered an appearance in the appeal despite being served by publication in the 28th December 2014 and the 4th January 2015 editions of the Sunday Sun.

[42] Appellant NHL argues that the decision of the trial judge should be overturned. The trial judge erred in law when she equated 'duly served' to mean that the respondents had to be personally served. Mr. Weekes for NHL submitted that the Act required that the process of the original court had to be served on the respondent and did not state that service had to be personal service. He stated that due service could be lawfully effected on a duly appointed agent such as the attorney on record and that such service was good service (see, ***Lady de Pole v Dick*** **(1885) 29 Ch. D. 301**). He maintained that

this applied even after judgment (see, ***Bagley v Maple & Co.*** **(1911) 2 QB 149**).

[43] Mr. Weekes then referred to **CPR Part 6** regarding methods of service of documents. He stated that documents which were not originating process did not need to be served personally but could be served either at the address for service given by the party or, failing that, on the attorney-at-law on the record. He contended that there was a duty on litigants to inform their legal representatives of their whereabouts so that they could be contacted in relation to matters for which they were named parties.

DISCUSSION

The Registration of the Cost Orders - Jurisdiction

[44] The starting point in any consideration of this matter is the Act. **Section 3(2)** of **the Act** sets out the provisions under which a foreign judgment should be registered and is in the following terms

> 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 public policy or for some other similar reason* could not have been entertained by the registering court.

[Emphasis added]

[45] **CPR 72.7 (3)**, which sets out that part of the rules governing applications to set aside the registration of judgments in Barbados, provides as follow:

> 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.
>
> [Emphasis added]

[46] The word "may" imports the idea that the setting aside of the registration was a matter within the trial judge's discretion. The principles circumscribing, indeed, restricting this Court's approach to the review of a trial judge's exercise of discretion are well settled. In the recent decision of **Knox v Deane, Civil Appeal No. 6/2010** (**decided 26th June 2020**), this Court reiterated the principles laid down "[i]n the now seminal decision of this Court in **Toojays Ltd v Westhaven Ltd (Civ. App. No. 8 of 2010**)" which cited the *dicta* of *Lord Woolf CJ* in *Phonographic Performance Ltd v AEI Rediffusion Music Ltd (1999) I WLR 1507, 1523-D* that "[b]efore the [appellate] Court can interfere, it must be shown that the judge has either erred in principle or has left out of account or has taken into account some feature which he should or

should not have considered, or that his decision was wholly wrong because the Court was forced to the conclusion that he has not balanced the various factors fairly in the scale."

[47] In the decision of the Court of Appeal of Trinidad and Tobago in *Jetpak Services Ltd v BWIA International Ltd (1995) 55 WIR 562, 568, de la Bastide CJ,* as he then was, observed that "it is only in circumstances where the exercise of the judge's discretion is based on a misunderstanding or misapplication of either the law or the evidence that an appellate court is entitled to set aside the exercise of the judge's discretion and exercise an independent discretion of its own."

[48] In *Hadmor Productions Ltd v Hamilton* [1989] 1 AC 191, 220, also cited in **Toojays**, Lord Diplock, after noting that "the function of an appellate court…is not to exercise an independent discretion" observed that the appellate court

> "must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him *or upon an inference that particular facts existed or did not exist*, which, *although it was one that might legitimately have been drawn upon the evidence before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal*…"
> [Emphasis added]

[49] The question, then, must be whether there was error in the trial judge's exercise of her discretion to discharge the registration of the Bahamian judgment ordered by another judge based on "further evidence that ha[d] become available by the time of [this] appeal." I answer this question in the affirmative based upon the evidence revealed in the Bahamian decisions.

[50] I turn first to the language of the **Reciprocal Enforcement Act.** What is clear in that language is that **section 3(2)**, **subparagraphs (a)** through **(f)** are linked by the word "or" which suggests a disjunctive and not conjunctive construction. Stated differently, the presence of *any* of the vitiating circumstances enacted in *any* of those subparagraphs would be sufficient to require ("*[n]o judgment shall* be ordered to be registered under this section if….").

[51] The contention of the Mays before the trial judge was predicated on their not having been served with process. But a perusal of the discussion above at paras [23] through [35] shows that this statement in the Mays' affidavits was untrue. They had, indeed, been personally served with process at their address in Florida under Order 11 of the Bahamian RSC. The effect of this is stated in **Anderson**, *Caribbean Private International Law*, supra, at para 8-012:

> "If the defendant is not present within the territorial limits of the forum, and does not submit to jurisdiction, then the forum will only be competent if process is properly served on the defendant outside the jurisdiction. Service outside the jurisdiction is often referred to as service *ex juris*. The power to assume jurisdiction

> in this way is provided for in the Rules of the Supreme Court traditionally under Ord 11 but now under CPR r.7. A major objective of the Rule is to allow cases that are closely connected with the forum, but in respect of which no jurisdiction exists pursuant to presence or submission, to nevertheless be tried in the forum. Such cases should be tried locally because they are closely connected with or affect the interests of the forum, in some important way."

[52] But this does not resolve the entire issue since the question still arises whether the orders which ensued from this service were registrable in Barbados. **Section 3(2)(a)** provides that a judgment shall not registrable if "*the original court acted without jurisdiction*." What does jurisdiction mean in this context? In ***Reid v Reid, [2008] CCJ 8***, at **para [27]**, ***Saunders JCCJ***, as he then was, observed:

> "A fundamental requirement for the enforcement of a foreign judgment at common law is that the foreign court should have had jurisdiction according to our rules of private international law. In *Emanuel v Symon* ([1908] 1 KB 302,309) Buckley LJ listed a number of matters which would ordinarily ground jurisdiction. The list includes the following: . . .where the defendant has voluntarily appeared…"

[53] In *Caribbean Private International Law*, Anderson, *op. cit.*, at para 10-004A:

> By far the most important essential element of enforcement proceedings is the jurisdictional competence of the foreign court that gave the judgment. The foreign court must have possessed jurisdiction in the international sense, that is, under Caribbean Private International Law Rules recognizing the competence of the foreign court. It is not enough that the foreign court was competent under its own domestic rules. Nor is it sufficient that it had jurisdiction on the grounds that the Caribbean forum would itself regard as sufficient to establish its own jurisdiction. What is required is jurisdiction under the Caribbean rules for Private International Law for the recognition of foreign judgments. Nothing else suffices.

See, further, JHC Morris The Conflict of Laws, 7th Edn, 2009, McClean and

Beevers (Sweet & Maxwell-Thompson Reuters), para 7-017 which states that:

> "The most fundamental of all requirements for the recognition and enforcement of foreign judgments in England. . .is that the foreign court should have had jurisdiction according to English rules of the conflict of laws."

[54] The question then is, did the Bahamian Court have jurisdiction over the Mays according to Barbadian or Caribbean rules of Private International Law? The answer is yes. A perusal of the judgment of *Longley J* and the reasons of *Osadebay JA* support that conclusion. In the first place, the facts indicate that the Mays were served personally with process at their residence in Florida with leave of the court under RSC Order 11 r. 1(f). It is now well settled, as *Romer LJ* stated in *Re Lidell's Settlement Trusts, Lidell v Lidell*, [1936] Ch. 374 (cited by *Longley J*) that "the moment a person is properly served under the provisions of order 11, that person so far as jurisdiction is concerned, is precisely in the same position as a person who is in this country." That should suffice as an answer to the question whether the Bahamian Courts had jurisdiction over the Mays.

[55] But more crucially to this question was their response to being served with process. For they did not merely challenge the jurisdiction of the Supreme Court of the Bahamas, as they could have done. The Mays they retained counsel, entered an appearance and filed a defence. In the language of *Osadebay JA*, they had filed "an unconditional appearance." They also

commenced an action in Florida and, in response to an anti-suit action seeking an injunction, they contended that the Bahamas was not the convenient forum and that Nygard was not entitled to an injunction because he did not have clean hands. In ***Reid v Reid***, above, ***Saunders JCCJ*** cited the decision in *Emanuel v Symon* for the proposition that a voluntary appearance in the foreign court confers jurisdiction on that court. **Anderson**, *op. cit*. at para 10-008, notes that "a defendant who voluntarily appears in the foreign proceedings or otherwise defends the action on the merits will be taken to have submitted.

[56] In *Menendez v Sawyer*, unrep. No. 1383/1987 (cited in **Anderson,** *op. cit*. at para 10-008), the Supreme Court of the Bahamas held that where a defendant's attorney filed the pleadings before a court in Florida, that constituted voluntary submission by the defendant. The Mays fully defended the action in the Bahamas through counsel. So, apart from the service *ex juris* under Order 11, they must be taken to have submitted to the jurisdiction of the Court by their full participation in the litigation, notwithstanding the conclusion of *Longley J*. That they did not avail themselves of the opportunity to counterclaim against NHL, as they conceded before the Bahamian Court of Appeal is a self-inflicted injury, not the result of anything done by NHL.

[57] The Mays also claimed that they were not personally served with the Registrar's Orders. However, they conceded that the orders were served on their Bahamian attorneys. Those orders, as with orders in Barbados, constituted the conclusion of the litigation in which they had already fully participated. There was, therefore, no merit in nor effect to their claim that they learned of the orders only in the Barbadian enforcement proceedings. Even if true, the costs were awarded against them as a result of litigation in which they had engaged and had lost.

[58] For these reasons, the orders were properly registered in Barbados.

DISPOSAL

The appeal is allowed and the order of the trial judge discharging the order registering the foreign judgment is set aside; and the registration of the orders of the Courts of The Bahamas is restored. Each party shall bear its own costs.

Chief Justice

I concur.

Justice of Appeal

I concur.

Justice of Appeal