Bank Of Credit And Commerce International SA (In Liquidation v Berlouis
(2001) SLR 284

Bernard GEORGES for the Plaintiff
Pesi PARDIWALLA for the Defendant

Judgment delivered on 22 February 2001 by:

ALLEEAR CJ: At all material times the Plaintiff was a commercial bank in compulsory liquidation. The Defendant was a customer of the Plaintiff at its branch at Regent Street, London, England.

It is averred in the plaint that the Defendant borrowed money from the said bank in order to purchase properties in the United Kingdom. He defaulted in repaying the said loan and interest thereon and on 4 August 1993, the Plaintiff obtained judgment against the Defendant in the High Court of Justice in England in the sum of £195,591.88.

It is the contention of the Plaintiff that all the rights of the Defendant were respected and the Defendant chose not to enter an appearance before the High Court of Justice and has not appealed against the said judgment.

Finally, the Plaintiff avers that the said judgment which is capable of execution in the United Kingdom is not contrary to public policy and was not obtained through fraudulent means.

In the present action, the Plaintiff prays this Court:

> to be pleased to make an order that the order dated 4th August 1993 made in case CH1993 C1579 in the High Court of Justice of England by Master Moncaster between Bank of Credit and Commerce International S.A. and Ogilvy Berlouis and Helda May Berlouis be rendered executory in Seychelles.

In the case of *Privatbanken Aktieselskab v Bantele* (1978) SLR 52, it was held that the correct procedure in Seychelles

to obtain a judgment rendering a foreign judgment executory was, as in England, by means of an ordinary action.

It is to be noted that foreign judgments can only be enforced in Seychelles if declared executory by the Supreme Court of Seychelles, without prejudice to contrary provisions contained in an enactment or treaty. The conditions for a foreign judgment to be declared executory in Seychelles are that:

(a) It must be capable of execution in the country where it was delivered;

(b) The foreign Court must have had jurisdiction to deal with the matter submitted to it;

(c) The foreign Court must have applied the correct law, in accordance with the rules of the Seychelles private international law;

(d) The rights of the defence must have been respected;

(e) The foreign judgment must not be contrary to any fundamental rules of public policy; and

(f) There must be absence of fraud.

While in the present case the Plaintiff contends that all the above conditions that have been complied with, the contention of the Defendant, however, is that his rights have not been respected.

On Plaintiff’s counsel motion, this Court allowed the Plaintiff to prove its case by way of affidavit evidence in terms of Section 168 of the Seychelles Code of Civil Procedure, Cap 213 in spite of strong objection from Defendant's counsel to the said procedure being adopted by the Court.

The affidavit was sworn to by one Esther Caroline Rawlings, a Senior Solicitor in the employment of Denton Wilde Sapte of Five Chancery Lane, Clifford's Inn, London. As per the aforesaid affidavit, it is averred that since 1983 the Defendant had been a customer of the said bank with average credit

balances of US$30,000 and £25,000. In 1987 the Defendant approached the Plaintiffs bank for loan facilities to purchase two properties in England, namely:

(a) 11 Princess Court, Queensway, London W2;

(b) 276 The Collonades, 34 Porchester Square, London.

The Head Office of the Plaintiffs bank sanctioned the loan of £195,000 for the purpose of purchasing the said two properties.

As per the said affidavit:

> after the Defendant allegedly defaulted on the loan repayments, the Defendant visited the branch of the Plaintiff bank and advised them that he was returning to the Seychelles and would remit £50,000 by 15.12.89.

The remainder of the loan liability according to the Defendant was to be adjusted from the net proceeds of Flat 6, Arundel Court, W14, and 23 Queensgate Terrace, London SE7 which were both for sale on the market.

On 8 May 1990 the Defendant who had by then returned to the Seychelles sent a fax to the branch of the Plaintiff bank in which he stated that "he was planning to be in London to finalise the sale of certain properties and would get in touch on arrival. It does not appear, however, that Mr. Berlouis ever came back to London."

On 24 July 1990 the bank received a letter from Mrs. Berlouis on headed paper stating that "Mr. Berlouis was still in the Seychelles, his telephone number has been disconnected and that she herself was separated from Mr. Berlouis and had not been in contact with him for over a year."

The note goes on to state that the author had made investigations of a manager of the Bank of Credit and Commerce International SA in the Seychelles who, the author

believed, might be in contact with Mr Berlouis and that manager had confirmed that he would be willing to assist. The note goes on to record that the author intended to address a letter to Mr Berlouis through the manager in the Seychelles.

The Bank of Credit and Commerce International SA went into provisional liquidation on 5 July 1991. On 18 November 1992 the joint liquidators sent a formal demand to Mr. Berlouis demanding the immediate repayment of the amount outstanding on the Loan Account and the Current Account as at that date, being £86,564.80 and £88,220.56 respectively. That demand was sent to Mr. Berlouis at PO Box 649, Victoria, Mahe, Seychelles.

The originating summons seeking possession of 267 The Collonades was issued on 2 March 1993 against the Defendant giving his address as 267 The Collonades. The originating summons was sent to the same address together with the requisite form of "Acknowledgement of Service" under cover of letter addressed to Mr. Berlouis dated 4 March 1993.

The Plaintiff in serving the originating summons on 267 The Collonades rather than seeking leave to serve the originating summons out of the jurisdiction, was relying on a clause contained in Order 10 rule 3 RSC which provided as follows:

> 3(1) Where –
>
> (a) a contract contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect of contract or, apart from any such term, the High Court has jurisdiction to hear and determine any such action; and
>
> (b) the contract provides that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the Defendant, or on such other person on his behalf as may be

> specified in the contract, in such manner, or at such place (whether within or out of the jurisdiction) as may be so specified,
>
> then, if an action in respect of the contract is begun in the High Court and the Writ by which it is begun is served in accordance with the contract, the Writ shall, subject to paragraph (12) be deemed to have been duly served on the Defendant.

The Mortgage agreement at paragraph 10(f) provided:

> It is a term of this Legal Charge that it is to be subject to and interpreted in accordance with English Law and that it is to be subject to the exclusive jurisdiction of the English Courts ... The Mortgagor [Mr. Berlouis] agrees that 267 The Collonades (sic) Porchester Square Bayswater London W2 shall be an effective address for service in respect of any proceedings commenced in the English Courts as hereinbefore defined.

On or around 12 March 1993, Mr Alder received a copy of a letter sent by a Mr Anoop Vidyarthi to the Chancery Division of the High Court marked for the attention of a Mrs Woodroffe. The letter stated:

> Mr. Berlouise (sic) has not lived in the premises for some years as he has business in Seychelles. His wife lives in the flat with their 9 year old daughter.
>
> No previous demands or correspondence has been received at 267 Colonnades previous to this Writ last Saturday.
>
> Mrs. Berlouise (sic) has managed to get in touch with her husband who wishes to defend the action, she is not familiar with the intricacy

> of English Law and has only today posted the documents to him at his home in the Seychelles.
>
> As the acknowledgement of service indicating his desire to defend cannot reach the Court within the required 14 days, he requests the Court's indulgence to enable him to revert and arrange to attend the Court.
>
> Please advice (sic) the possible new date for the return of the acknowledgement of service to me at the above address.

It appears that the Court replied to Mr. Vidyarthi's letter on 16 March 1993. The Court's response was copied to Wilde Sapte. It stated:

> Your letter dated 12th March 1993 was placed before the Master on 15th March 1993.
> He has made the following directions:-
>
> The Master has directed me to inform you that if the Defendant is resident in the Seychelles, the Plaintiff will need leave to serve the proceedings out of the jurisdiction, and no order will be made against him on the present Originating Summons. I am today sending a copy of this letter together with a copy of your letter, to Messrs. Wilde Sapte.

I should stress however, that at that stage of the proceedings, the Master did not have before him any copy of the Mortgage. If the Mortgage had not contained clause 10(f) specifically permitting service at 267 The Collonades, the Master would have been perfectly correct. As the Mortgage did contain that clause, there did not appear to be any need to make the application for leave to serve out of the jurisdiction and no such application was made.

A copy of the summons was sent to Mr Berlouis at 267 The Collonades under cover of a letter dated 31 March 1993. A copy of the summons was also sent to Mrs Berlouis at 267

The Colonnades, also under cover of a letter dated 31 March 1993.

Wilde Sapte did not receive any response from Mr Berlouis but did, on 13 April 1993, receive a fax from Barda & Co, a firm of solicitors which Mrs Berlouis had apparently instructed. The fax again referred to the fact that Mr. Berlouis was resident in the Seychelles and asserted that the Joint Liquidators required leave to serve out of the jurisdiction. Again however, Barda & Co do not appear to have seen a copy of the Mortgage (and in particular, clause 10(f) of the Mortgage when they sent that fax). Again, had it not been for the clause they would have been correct. It seems that Mr Barda of Barda & Co also telephoned Mr Dodd.

At the hearing on 14 April 1993, Mr Dodd appeared on behalf of the Joint Liquidators. The Court did not, however, make either of the orders sought. Instead, Deputy Master Powell raised a query as to the service of the Originating Summons on Mr Berlouis. It appears that Mr. Dodd did not at that hearing refer the Deputy Master to Order 10 rule 3 RSC and that the Deputy Master was unaware of that provision enabling the parties to a contract to make provision for service in a manner not otherwise provided for by the RSC. The Deputy Master adjourned the matter generally, with 'liberty to restore', i.e. to apply for a further hearing date:

The hearing was restored for 18 May 1993. A further copy of the Summons, endorsed with the new hearing date, was sent to Mr. Berlouis under cover of a letter dated 16 April 1993 addressed to him at 267 The Colonnades. A copy was sent to Mrs. Berlouis's solicitors on the same day. Again, no response was received from Mr. Berlouis. Mrs. Berlouis' solicitors subsequently agreed to the orders sought.

Mr. Alder attended the hearing on 4 August 1993 (which was before Master Moncaster) on behalf of the Joint Liquidators. The Master evidently accepted that the Originating Summons had been validly served and made the possession order which states:

> "he Master ordered possession within 24 days of personal service upon Mr. Berlouis in the

> Seychelles. I objected to this, on the grounds that we did not need to serve him personally, but the Master insisted on the basis that otherwise he may not know what was happening.
>
> Judgment was granted in the sum of £195,591.88, with costs.

Having considered very carefully all the evidence led in this action for an order that judgment of the English High Court be made executory in Seychelles, I have come to the conclusion that the Plaintiffs prayer cannot be acceded to in view of the fact that there was no personal service effected on the Defendant. The Plaintiff knew very well prior to instituting legal proceedings for the recovery of the debt owed to the bank by the Defendant that the latter was no longer residing in England. They were alive to the fact that if service would be effected at 267 The Collonades, it would not come to the notice of the Defendant. The Plaintiff ignored the advice of the Deputy Master and relying on the aforesaid term of the mortgage contract did not seek leave to serve the Defendant out of the jurisdiction. In my considered view they did this at their peril. Had the Defendant been served in Seychelles, he could have exercised any of the rights available to him in the said action. By the Plaintiffs action the Defendant was thus precluded from exercising his constitutional rights.

It is worth reproducing the following excerpts from the White Book - "Subject to certain exceptions an originating notice of process must be served personally on a Defendant unless such service is accepted under any particular rule or statutory enactment or alternative method of service is authorised. As per Order 10/1/12, if the Defendant is within the jurisdiction, he may be served by post, that is by sending a copy of the Writ by ordinary first class post to him at his usual or last known address instead of being served personally on him.. The words `last known' means last known to the Plaintiff, per May LJ in *Austin Rover Group Limited v Crouch Buttersavage Associates* [1986] 1 WLR 102.

If the Defendant had still been living at the address that he had given in the Mortgage Agreement (the Contract), and the

Plaintiff was unaware that he was no longer residing in the United Kingdom, then service at that address would have been deemed to be proper.

In the peculiar circumstances of the present case, I find that one of the conditions laid down in the case of *Privatbanken Aktieselskab v Bantele* (supra) has not been met and for that reason I refuse to make the judgment given on 4 August 1993 in the High Court of England executory in the Seychelles.

Record: Civil Side No 118 of 1998