[2008] CCJ 8 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 9 of 2007
BB Civil Appeal No 2 of 2002

BETWEEN

YOLANDE REID **APPELLANT**

AND

JEROME REID **RESPONDENT**

Before The Right Honourable	**Mr Justice de la Bastide, President**
and the Honourables	**Mr Justice Saunders**
	Madame Justice Bernard
	Mr Justice Wit
	Mr Justice Hayton

Appearances

Ms Beverley J Walrond QC and Ms Marvalee Franklyn for the Appellant

Mr Leslie F Haynes QC for the Respondent

JUDGMENT
of
The President and Justices Saunders, Bernard, Wit and Hayton
Delivered by
The Honourable Mr Justice Adrian Saunders
on the 24th day of November, 2008

JUDGMENT

Introduction

[1] The parties to these proceedings were married to each other for 28 years before Mrs Reid filed for divorce in the USA. The couple had been resident there for a considerable length of time. Judge Sweeney, a judge of the Probate and Family Court of the Commonwealth of Massachusetts, heard the spouses and their legal representatives over a four day trial. He granted the divorce and made an order dividing the marital assets.

[2] Both sides were dissatisfied with the order. Mr Reid appealed to the Appeals Court of the Commonwealth. Mrs Reid cross-appealed. In a judgment to which we shall return, the judges of the Appeals Court substantially reversed Judge Sweeney and remanded the case back to him for further proceedings consistent with directions given by them in their judgment.

[3] Judge Sweeney conducted further hearings, this time in the absence of Mr Reid and his legal representatives. The judge then made a second order dividing the assets. It is this second order that is in issue in these proceedings. Mrs Reid was satisfied with it. She filed an action in Barbados to have it enforced against Mr Reid who was then resident in Barbados. Having so filed, she applied for

summary judgment. Mr Reid resisted that application. He filed a defence to the action for enforcement of Judge Sweeney's second order.

[4] The application for summary judgment came first before Justice Moore in the High Court. Mrs Reid prevailed. Mr Reid appealed. The Court of Appeal of Barbados overturned Justice Moore's decision and remitted the case for trial. Mrs Reid appealed the judgment of the Court of Appeal to this court. We are of the view that her appeal to us should succeed and, for the reasons that follow, we have ordered the restoration of the orders made by Justice Moore.

The Massachusetts proceedings

[5] The spouses owned assets in the USA and in Barbados. At his first hearing, where both spouses were represented, Judge Sweeney found these assets to have a net value of US$615,781. (All money amounts throughout this judgment are stated in United States dollars). The assets included: the matrimonial home in the USA and, in Barbados, two lots of land and a property ("the Mount Standfast property") that Mr Reid had inherited from his father and which was said then, in 1993, to be worth $300,000.

[6] In his initial division of the assets, Judge Sweeney effectively awarded to Mr Reid assets that were then valued at $391,000 net. That sum included an amount representing 70% of the value of the Mount Standfast property. The judge

awarded to Mrs Reid assets with a net worth of $224,000 which sum included the two lots of land in Barbados, the marital home in Massachusetts and 30% of the value of the Mount Standfast property. The judge made a few other orders including one requiring each party to be responsible for his or her own attorney's fees and for his or her own liabilities.

[7] On appeal, each spouse again being legally represented, the Massachusetts Appeals Court concluded that Judge Sweeney's order had failed adequately to take into account Mrs Reid's substantial debts and liabilities and the financial position in which she would be left upon payment of those liabilities. The Appeals Court noted that Mrs Reid's liabilities (which were said to include her attorney's fees of $81,846) amounted to $153,517 while Mr Reid's, including his attorney's fees, amounted only to $74,979. The Appeals Court saw "no sound reason why [Mrs Reid] should leave the marriage with assets net of debt worth approximately $71,000 while [Mr Reid] leaves the marriage with assets net of debt worth well in excess of $300,000". Accordingly, the court set aside those aspects of Judge Sweeney's order pertaining to "property division and debt allocation" and remanded the case. Judge Sweeney was directed to hold such hearings and take such evidence as he deemed necessary to effectuate their order. In all other respects, the Appeals Court stated, the judgment of Judge Sweeney was affirmed.

[8] Prior to the Appeals Court delivering its judgment Mr Reid had sold the two lots of land in Barbados that had been awarded to Mrs Reid by Judge Sweeney's

original order. This was a violation of that order. As a result, Mrs Reid successfully pursued contempt proceedings in the USA against Mr Reid. The Mount Standfast property was also sold by Mr Reid some time before Judge Sweeney's second hearing. In determining Mrs Reid's application for summary judgment in Barbados nothing turns on either of those matters and we mention them only for the sake of completeness.

[9] On 29th August 1996, in the course of the second round of proceedings before him, Judge Sweeney issued a "Temporary Order" pending a hearing on the merits. The Temporary Order addressed itself principally to a distribution of the spouses' real estate and other property located in the USA. The Order concluded with a notification that:

> "There will be an evidentiary hearing on November 14, 1996, to determine what … [it seems that this last word should really be "whether"]… Jerome L. Reid has sold any marital assets located in Barbados since the divorce decree was entered on December 20, 1993 and also the sales price received by Jerome L. Reid from those sales".

[10] Although the Temporary Order was personally served on Mr Reid in Barbados on the 18th September, 1996 he declined to participate in or be present at the November 1996 hearing. He had earlier sworn an affidavit, on 25th July, 1996, stating that he did not have sufficient funds available to him in the USA to retain lawyers to act for him in any further proceedings before Judge Sweeney.

[11] Mrs Reid participated fully in the November 1996 proceedings. She filed a Memorandum regarding the change in value of marital assets. In this document

she disclosed that she had information to the effect that Mr Reid had sold the Mount Standfast property in Barbados for US$1.5 million. She urged the court to take full account of that updated valuation when dividing the assets. She argued that she should be awarded a one half share of the proceeds of the sale of that property. She did not in her Memorandum indicate whether the Massachusetts property that originally had been awarded to her had similarly appreciated in value and, if so, to what extent. Her lawyers submitted for the consideration of Judge Sweeney a proposed Judgment in which was set out how, in their view, the matrimonial assets should be distributed.

[12] Judge Sweeney held his November 1996 evidentiary hearing as promised. We do not know what precise form the hearing took and precisely what evidence was placed before or considered by the judge. But we do have the judgment that resulted from the evidentiary hearing. The judgment is dated 21st November, 1996. It affirms that an evidentiary hearing was indeed held on November 14, 1996, and the content of the judgment is said to be issued "in consideration of the parties' submissions".

[13] In his second judgment Judge Sweeney awarded to Mrs Reid the real estate in Massachusetts including the former matrimonial home. The judge found that Mr Reid had on 15th December, 1995 sold the Mount Standfast property for US$1,260,000. Mr Reid was ordered forthwith to pay to Mrs Reid $415,800.00 representing a one third share of the gross proceeds of that sale. Mr Reid was also

ordered "to pay the sum of $148,690.00 to the law firm of Atwood & Cherny … as contribution towards the Wife's costs and counsel fees in this action, including the costs of appeal and post-trial proceedings …"

[14] Atwood & Cherny is the law firm that represented Mrs Reid throughout the Massachusetts proceedings. As security for the legal fees owed to them by her, Mrs Reid had granted a mortgage for $150,000.00 over the Massachusetts property in favour of that firm. The firm had earlier filed a real estate lien against the said property for those legal fees.

Mrs Reid's action in Barbados to enforce the judgment

[15] Mrs Reid wished to obtain the fruits of Judge Sweeney's second order from Mr Reid in Barbados. It is settled law however that at common law a judgment creditor seeking to take advantage of a final and conclusive money judgment obtained abroad cannot directly execute on that judgment in Barbados. The judgment creditor must bring an action on the foreign judgment in the local court. If the creditor brings such an action and the judgment debtor gives notice of an intention to defend, the Rules of the Supreme Court allow the judgment creditor the possibility of averting a trial of the action. The judgment creditor may apply for summary judgment pursuant to Order 14 of the rules. If the judgment creditor's application is successful then a full-blown trial of the action becomes unnecessary. The substance of the foreign judgment is then embodied in an order

of the local court which is enforceable in the usual way in which such orders are enforced.

[16] The relevant provisions of Order 14 state:

> 1. (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defence to a claim included in a writ … apply to the Court for judgment against that defendant.
>
> 2. … [not relevant] …
>
> 3. (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim … to which the application relates that there is an issue or question in dispute that ought to be tried or that there ought for some other reason to be a trial of that claim … the Court may give such judgment for the plaintiff against that defendant on that claim … as may be just having regard to the nature of the remedy or relief claimed. …
>
> 4. (1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.
>
> 5. (3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim … to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit.

[17] In support of the application for summary judgment Mrs Reid relied substantially on two affidavits sworn by her and one sworn by Mr Jacob Atwood, a partner in the firm of Atwood & Cherny. In her affidavits she affirmed the existence of Judge Sweeney's second order as a final and conclusive judgment and she deposed that she was unaware of any Defence that was open to Mr Reid in respect

of the attempt to enforce it in Barbados. She also disclosed that she was contractually responsible to Messrs Atwood & Cherny for her legal costs and that the effect of the relevant part of Judge Sweeney's second order was also to make Mr Reid directly liable to Atwood & Cherny for those costs. That law firm, she noted, had placed a lien on her property and when she sold the property she had no option but to satisfy that debt. In her first affidavit Mrs Reid also exhibited the judgments and orders that had been handed down in Massachusetts. Mr Atwood's affidavit was brief. It confirmed the contents of Mrs Reid's first affidavit and in particular the validity, efficacy and finality of Judge Sweeney's second order.

[18] Mr Reid swore a total of three affidavits. Among other things, he alleged that Judge Sweeney's second order "was not determined according to the principles of family law that would be acceptable to a court in [Barbados], but was arbitrary". He reminded the court that he was not present at the November, 1996 hearing and he reiterated that this was because he did not have sufficient funds available to him in the USA to represent himself. He sought to impeach Judge Sweeney's second order on the ground that no account had been taken of the updated value of the US properties. Since the first order of Judge Sweeney, these properties had been sold by Mrs Reid for sums considerably in excess of their value earlier presented to the court. He complained that Judge Sweeney "for the most part accepted and followed" the judgment proposed by Mrs Reid and her legal representatives.

[19] With respect to that part of the judgment ordering him to pay the sum of $148,690.09 to Messrs. Atwood & Cherny, Mr Reid asserted that this too was an arbitrary exercise of judicial discretion. The Massachusetts Appeals Court had made no order as to costs but, said Mr Reid, Judge Sweeney purported to give Mrs Reid legal costs incurred by her covering the period prior to Judge Sweeney's first order right up to and including the time of the making of the second order.

[20] In his judgment granting Mrs Reid's application for summary judgment, Mr Justice Moore deemed the re-hearing by Judge Sweeney as part and parcel of the proceedings in which Mr Reid had originally participated. This circumstance, the judge intimated, gave the Massachusetts court jurisdiction over Mr Reid when the second order was made. This remained the case notwithstanding the fact that Mr Reid was resident in Barbados at the time of the making of the second order and the evidentiary hearing that preceded the order. Justice Moore was unimpressed with Mr Reid's protestations that he did not have sufficient funds available to him in the USA to allow him to defend or be present at the second set of Massachusetts proceedings. To the contrary, the judge found that Mr Reid had considerable funds in Barbados having recently sold the Mount Standfast property. Justice Moore stated that it had not been demonstrated either on affidavit or by argument that any attempt was ever made by Mr Reid to obtain permission from the Central Bank to send money out of Barbados. The judge further refused to accept the inference that Judge Sweeney had violated the procedural rules of the

Massachusetts court because, in his opinion, no evidence of any such breach had been produced.

[21] The Court of Appeal of Barbados heard Mr Reid's appeal in June, 2002. In a judgment delivered on 5th April, 2007 reversing Justice Moore, the Court of Appeal took the view that Judge Sweeney had disregarded the directions of his own Appeals Court by awarding Mrs Reid a substantial sum for costs. The "cavalier manner" in which this was done, it was said, raised "serious concerns as to the *bona fides*" of Judge Sweeney's second order. The Court of Appeal considered that this aspect of Judge Sweeney's decision was diametrically opposed to its views of fundamental justice and was sufficient in itself to taint the whole of Judge Sweeney's judgment. The Court of Appeal offered no specific reason for impugning that part of Judge Sweeney's order that awarded Mrs Reid a one third share of the gross sale proceeds of the Mount Standfast property.

The appeal to the CCJ

[22] Before addressing the arguments of counsel made to us, it would be remiss of this Court not to advert to the length of time taken by the Court of Appeal to deliver its judgment in this case. This was an astonishing period of almost five years. In the first appeal we heard from Barbados, *Mirchandani (No. 1)*[1], de la Bastide, P. expressed this Court's strong disapproval of judicial delays. Such delays, the President stated, "deny parties the access to justice to which they are entitled and

[1] (2005) 69 WIR 35 at 50

undermine public confidence in the administration of justice". The effectiveness of a judiciary is seriously compromised if it fails to monitor itself in respect of the time taken to deliver judgments and to arrest promptly any tendency to lapse in this aspect of its performance. This is the second time we have had occasion to call attention to inordinate delay in the delivery of judgments in Barbados. We trust that effective remedial action, if not already taken, will now be taken to ensure that judgments are delivered within a reasonable time as required by the Constitution of Barbados[2]. What is a reasonable time? In our view, as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most.

Summary Judgment

[23] In order to obtain summary judgment a claimant must establish that the defendant has no realistic prospect of successfully defending the action. If, on the other hand, the defendant satisfies the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial, then the court would be wrong to grant summary judgment. In *Williams v. Williams*[3], Peterkin, CJ put the matter in this fashion:

> "The procedure for summary judgment requires that leave to defend ought to be given whenever there is an issue to be tried, even though the judge or master may think the defendant will fail, provided of course, that there is no good ground for believing that the so-called defence is a sham. In short,

[2] See Barbados Constitution section 18(8)
[3] (1982) 30 WIR 77 at 80

> the defendant is not bound to show a good defence on the merits. He must, however, satisfy the judge or master that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the claim".

[24] In determining whether there is an issue to be tried, the court must not seek to conduct a mini-trial or to weigh the opposing affidavits. Unless the assertions made are "shown to be manifestly false either because of their inherent implausibility or because of their inconsistency with the contemporary documents or other compelling evidence", the court should accept the facts stated by the defendant. *See*: *Bhogal v Punjab National Bank, Basna v Punjab National Bank*[4]. But the court should be wary of baseless opinion dressed up as fact and of attempts to encourage what can best be regarded as useless fishing expeditions. A defendant is not entitled, without more, merely to say that in the course of time something may turn up that would render the claimant's case vulnerable to attack. To proceed in that vein is to indulge in speculation. In order to avoid summary judgment and profit from access to the mechanisms of discovery, interrogatories and cross-examination, the defendant must put forward facts that establish the existence of a triable issue. As Ackner LJ observed in *Banque de Paris v. Costa de Naray* [5]

> "… the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the Court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants' having a real or *bona fide* defence".

[4] [1988] 2 All ER 296 at 303 per Bingham LJ
[5] [1984] 1 Lloyd's Rep. 21 @ 23

[25] Where in proceedings for summary judgment a defendant has not made out an arguable defence to the claim, the court nonetheless retains a residual discretion to order a trial if "the defendant satisfies the court with respect to the claim … to which the application relates that there … ought for some other reason to be a trial of that claim" (*See*: Order 14 Rule 3). If therefore, for example, facts and circumstances are established which on their face do not disclose an arguable defence but which when taken together bear the appearance of some unjust stratagem that the defendant cannot unravel without the tools of discovery, interrogatories and cross-examination, then in the interest of justice the court may order a trial so that the circumstances may properly be investigated. *See: Miles v. Bull*[6].

[26] A judgment creditor seeking to enforce a foreign judgment by an action at common law often has recourse to Order 14. This is because it is settled law that courts narrowly circumscribe the range of defences available to a defendant to such a claim. Assuming that the foreign court had jurisdiction over the defendant according to our rules of private international law, the action to enforce the *in personam* obligation established by the foreign court will succeed unless the foreign judgment was obtained in breach of natural justice or in circumstances that do not comport with substantial justice; or if it is tainted with fraud, or if the enforcement of it is contrary to public policy[7]. It is appropriate therefore to consider the issue of jurisdiction so far as Judge Sweeney's second order is

[6] [1969] 1 Q.B. 258
[7] *See: Pattni v Ali* [2007] 2 AC 85 at [39]

concerned and then examine the Massachusetts proceedings and the submissions of counsel under the broad heads of substantial justice, fraud and public policy.

Jurisdiction

[27] 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. Mr Haynes QC, who appeared for Mr Reid, submitted that Judge Sweeney's court lacked jurisdiction to make the second order. In *Emanuel v. Symon*[8], Buckley LJ listed a number of matters that would ordinarily ground jurisdiction. The list includes the following: where the defendant was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where the defendant has voluntarily appeared, and where the defendant has contracted to submit himself to the forum in which the judgment was obtained.

[28] Mr Reid was present and resident in Massachusetts when the proceedings were originally commenced. He had voluntarily and fully participated in the initial stages. It was he who had appealed to the Massachusetts Appeals Court whose judgment had triggered the re-hearing and he had been specifically served with notice of the second hearing before Judge Sweeney. In light of all these circumstances it is our view that Justice Moore was right to find that Judge Sweeney's court had jurisdiction over Mr. Reid when the second order was made.

[8] [1908] 1 K.B. 302 at 309

Substantial Justice

[29] Mr Reid's absence from the proceedings that culminated in Judge Sweeney's second order might be relevant in determining whether a triable issue was raised with regard to the alleged breach of natural or substantial justice. Mr Haynes submitted that Justice Moore's treatment of Mr Reid's absence (summarised above at [20]) amounted to the drawing of an inference which was an exercise that should be carried out at a trial and not at a summary judgment hearing. Counsel contended that Justice Moore, in Order 14 proceedings, was duty bound to accept Mr Reid's bald assertion that the latter did not have sufficient funds available to him in the USA to enable him to participate in the continuation of the proceedings before Judge Sweeney. First of all it must be said that even if what Mr Reid said was true, then that circumstance, without more, could not suffice to establish the triable issue in question. Mr. Reid would at least have had to demonstrate that he was precluded by forces beyond his control from effectively participating in the re-hearing. Even in the context of the observation by the Massachusetts Appeals Court that "there are substantial restrictions on the release of funds from Barbados", Mr Reid needed to provide some evidence that an application by him for permission to remit funds to the United States to pay his legal costs had been frustrated. Secondly, the unchallenged evidence in this case was that Mr Reid had recently received $1.2 million from the sale of the Mount Standfast property. In all the circumstances Justice Moore was right to infer from this and from Mr Reid's failure to mention any application by him for permission to remit funds, that no

such application was ever made. As was stated by Ackner LJ, the court must look at the whole situation. The material before Justice Moore clearly indicated that Mr Reid did ***not*** have a funding problem and that he had decided to absent himself from the re-hearing.

[30] Mr Haynes further argued that Judge Sweeney's second order was unjust because of a number of specific alleged irregularities. These included the following:

a) Misrepresentation and non-disclosure on the part of Mrs Reid;

b) The unfair manner in which the assets were divided;

c) Procedural irregularities on the part of Judge Sweeney during the conduct of the second hearing, and

d) The inappropriateness of the order for payment of Mrs Reid's legal fees.

Misrepresentation and non-disclosure/Unfair division of the assets

[31] In 1993, when Judge Sweeney issued his first order, the marital home in Massachusetts which was awarded to Mrs Reid was valued at $370,000. It does not seem as if any updated valuation of it was done prior to the making of Judge Sweeney's second order – at least, none was brought to the attention of the judge so far as we are aware. However, the house must have appreciated considerably since the making of the first order. We have seen a Deed showing that Mrs Reid sold it in September, 1997 for $651,000. Mr Haynes attacks the second order on two grounds. Firstly, it is said that Mrs Reid, in not producing an updated

valuation of the Massachusetts property while doing so in respect of the Mount Standfast property, was guilty of non-disclosure and/or misrepresentation. Secondly, in not seeking an updated valuation and in not alluding to or factoring into his second order the enhanced value, Judge Sweeney had committed a serious error. In either case, Mr Haynes submits, there is here sufficient evidence of substantial injustice to warrant a trial.

[32] Mr Haynes also submits that his client should have received a larger share of the pie when the marital assets were divided. Not surprisingly however, this contention was not pressed before us.

[33] The above complaints can be disposed of together. If indeed Judge Sweeney entirely disregarded the enhanced value of the Massachusetts property, as appears to have been the case, the judge thereby deprived himself of useful evidence that might have enabled him to have regard to the Appeals Court's concern over the net amount that would be available to Mrs Reid after payment of her debts. In this respect, it may be said that the judge was not adhering scrupulously to the directions of his Appeals Court. However, the short answer to Mr. Haynes' submissions is that these complaints could and should have been taken on appeal in Massachusetts. These are not points which can now properly be taken in the courts of Barbados. The Barbados courts cannot be used as a forum for correcting errors, real or perceived, of the foreign court, when there was every possibility that the defendant may have had any such errors corrected through the utilisation

of processes that exist in the foreign court system. In the publication by **Dicey, Morris and Collins** on *The Conflict of Laws*[9] the matter is put in this way:

> Rule 41 - A foreign judgment which is final and conclusive on the merits and not impeachable under any of Rules 42 to 45 is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either of fact or of law.

Rules 42 to 45 address respectively questions of jurisdiction, fraud, public policy and natural justice.

[34] In *Pemberton v Hughes*[10] Lindley MR stated in a passage which has equal relevance to Barbados and with which we completely agree:

> "If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent – namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed".

Later in this judgment we shall comment further on the matter of substantial justice but it suffices to state now that in our view there is nothing in these complaints that amounts to a breach of it.

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[9] Sweet & Maxwell, 14th Edn., 2006 at 616
[10] [1899] 1 Ch 781 @ 790-791; See also *Jacobson v. Frachon (1928) 138 L.T. 386*

Procedural irregularities

[35] Mr Haynes also cites the following as evidence of irregularity rising to the level of a lack of natural or substantial justice -

a) the failure to hold a "proper judicial hearing" and in particular the allegation that the proposed judgment submitted by Mrs Reid's lawyers was "largely adopted by Judge Sweeney", and

b) the "considerable gap" between Barbados notions of substantial justice and what took place in Massachusetts in the absence of Mr Reid and his legal representatives.

[36] In support of these submissions, reliance was placed on *Adams v Cape Industries plc*[11] and *Masters v. Leaver*[12]. In *Adams v Cape* a Texan court had given a default judgment in favour of 206 plaintiffs for damages for personal injuries. The award made to individual plaintiffs fell into four different bands. Without hearing any oral, or considering any affidavit, evidence, the judge directed that the total judgment should represent an average award of $75,000.00 per plaintiff. The judge then left it to the plaintiffs' counsel to select the level of the bands and to identify the particular plaintiffs to be placed in each band in order to produce the directed average award. When an action was brought to enforce this judgment in England it was held that the method by which the Texan court had come to a decision as to the amount of the default judgment was contrary to the requirements of substantial justice contained in English law. This method was highly unusual. It was not in keeping with the system of justice evidenced by the Federal Rules which were binding on the Texan court and significantly, no prior notice had been

[11] [1990] Ch. 433 C.A
[12] Times Law Reports, August 5, 1999 (CA)

given to the defendants that the plaintiffs intended to pursue such an unusual course.

[37] *Masters v. Leaver* was also concerned with a Texan judgment. Here too the judgment had been obtained by default. Damages were to be assessed. There was a wide variation in the expert evidence on matters relative to the quantification of the damages. The claimants elected to have the quantum assessed by the jury. The defendant was led to believe that the jury had assessed the damages in the normal way as they should have. Long after the time had elapsed for lodging any appeal in Texas, the defendants discovered that, contrary to the repeated assertions of the claimants on oath, the damages were not in fact assessed by the jury but instead were given on the direction of the judge. When proceedings were brought to enforce the judgment in England it was held that there was here a breach of substantial justice.

[38] There is no evidence to suggest that in the instant case anything occurred that can be compared with what transpired in the two cases cited above. There is no doubt whatsoever that Judge Sweeney carried out his own independent judicial assessment of the manner in which the Reids' marital assets should be divided. A cursory comparison of his second order with Mrs Reid's proposed judgment bears this out. In the proposed judgment, it was stated that the Mount Standfast property had been sold for US$1.5 million and that Mrs Reid should be awarded a payment of one half of that sum i.e. $750,000, with interest thereon at 12% per annum from

the date of judgment until the amount was paid in full. By contrast, Judge Sweeney in his judgment found that the property was sold for $1.26 million and Mrs Reid was awarded a payment of one third, or $415,800.00, with no mention being made of interest.

[39] Mr Haynes spent much time on that part of Judge Sweeney's award that ordered Mr Reid to contribute to Mrs Reid's legal costs to the amount of $148,690. The submissions on this point so impressed the Court of Appeal that it made them the entire basis of its decision. Counsel's argument was to this effect. In his first judgment Judge Sweeney had made no order as to costs. The Massachusetts Appeals Court reversed that judgment in so far as it pertained to "property division and debt allocation" but in all other respects affirmed the judgment of Judge Sweeney. The Appeals Court therefore implicitly affirmed the decree that there should be no order as to costs. In making the order that he did in his second judgment Judge Sweeney was, at least in so far as the costs of the first hearing and the appeal were concerned, disregarding the direction of his own Appeals Court. Moreover, he had carried out no independent assessment of the costs before he ordered that such a large sum be paid.

[40] We cannot agree that Judge Sweeney disregarded the directions of the Appeals Court. The thrust of the Massachusetts Appeals Court judgment was that Judge Sweeney had concentrated his mind only on the assets of the spouses while entirely neglecting to take into account their liabilities which included their

respective attorneys' fees. This error, the Appeals Court stated, had the effect of leaving Mrs Reid after payment of her debts with a much smaller amount of money than Mr. Reid would be left with after payment of his debts. When the Appeals Court concluded that "[I]n all other respects, the judgment is affirmed", this did not preclude Judge Sweeney from "allocating debts" by requiring Mr Reid to pay Mrs Reid's attorneys' bill. It is not as though the Appeals Court's confirmation of Judge Sweeney's judgment "in all other respects" could only have been intended to deal with the issue of costs. One of the things which it served to preserve was Judge Sweeney's order "that neither party pay spousal support to the other".

[41] Mr Haynes also attacks from another angle Judge Sweeney's order that Mr Reid contribute to Mrs Reid's legal costs in the amount of $148,690.09. The precise wording of that aspect of the judgment is given above at [13]. It is said that Mrs Reid is not entitled to summary judgment in respect of an order to pay money to a third party. The evidence is clear however that at the time Judge Sweeney made this order Mrs Reid owed these sums to her attorneys. The latter had placed a lien against her property. Some time *after* the making of Judge Sweeney's second order that property was sold and Mrs Reid was under compulsion to satisfy the attorneys fully from the proceeds of sale. In our view all the elements of subrogation have been sufficiently pleaded and proved and we do not agree that Mrs Reid is incapable of being awarded summary judgment on this basis.

[42] Finally, it was submitted that Judge Sweeney ought not to have stated in his second judgment that he had held an evidentiary hearing and considered then *the parties'* submissions since only one party, Mrs Reid, was present and participated at whatever occurred on 14th November, 1996.

[43] As previously indicated the available evidence suggests that Judge Sweeney did hold a hearing on 14th November, 1996. We have a judgment emanating from that hearing. We also know that Judge Sweeney exercised his independent mind in determining the outcome of that hearing because we know that the party who participated did not have things all her own way. We know too that the proceedings were a re-hearing of previous proceedings in which Mr Reid by his legal representatives would have made submissions. It is therefore entirely conceivable that those latter submissions would have again been considered by Judge Sweeney the second time around. Absent some positive evidence to the contrary we cannot share Mr Haynes' doubts about the *bona fides* of Judge Sweeney's declaration that he had held an evidentiary hearing and that he had considered the parties' submissions. Certainly the judge could not have hoped by that declaration to deceive anyone, least of all Mr Reid.

Fraud

[44] A foreign judgment may be impeached for fraud if an attempt is made to have it enforced in Barbados. Such fraud may be either the fraud of the party in whose favour the judgment was given or the fraud of the court pronouncing the judgment. In so far as the fraud alleged here relates to the acts of Mrs Reid, the submission is that her alleged misrepresentations and non-disclosures with respect to the valuation on the marital home were sufficient to constitute fraud.

[45] We would refrain at this time from entering into the debate as to whether it is necessary that the fraud in question should be newly discovered since the trial or whether such fraud properly may include matters raised during the course of the foreign proceedings. The courts in Canada take a different view from those in England on this question[13] and at some point this Court will be called upon to give its opinion on this issue. It is sufficient for us to say now that we reject the notion that fraud can be attributed to Mrs Reid when in direct response to Judge Sweeney's request she submitted a Memorandum indicating what marital assets located in Barbados had been sold since the divorce decree was entered on December 20, 1993 and also the sales price received by Mr Reid from those sales. Nor do we consider that Mrs Reid's omission to obtain and proffer to the court an updated valuation of the property awarded to her, could possibly be held to constitute fraud on her part.

[13] See Dicey, op. cit. page 623

No fraud was alleged against Judge Sweeney and indeed we would not accept that there was a valid basis for any such allegation. Indeed, nothing in the record suggests that Judge Sweeney was anything but an independent and impartial adjudicator.

Public Policy

[46] No arguments were raised to suggest that there was some public policy ground on which Judge Sweeney's second order should not be enforced in Barbados. This head of Defence therefore does not arise.

Conclusion

[47] Mr Reid's untenable position is that he seeks to impeach the foreign judgment on the ground that the proceedings giving rise to it did not comply with substantial justice or were tainted with fraud while simultaneously he professes an ignorance of precisely what transpired in the very proceedings he seeks to impugn. While we agree with Mr Haynes that the issue of substantial justice must be determined by standards accepted by the courts of Barbados this cannot mean that the system of justice or the course of the proceedings in the foreign court will be acceptable only if it resembles or approximates what obtains in Barbados. A failure to meet the threshold of incompatibility with substantial justice connotes some aberration,

some procedural or other deviation that is so fundamental that we regard it and the result it produces as not being in accord with our basic notions of what is fair and just. Bearing in mind in particular that Mr Reid had the options of appearing in the second hearing before Judge Sweeney and then, if appropriate, of lodging a second appeal in Massachusetts we can find nothing of the sort here. Justice Moore was right to order summary judgment in this matter. We therefore allow the appeal with costs. Mrs Reid will have her costs in the courts below. The orders of Justice Moore are restored.

/s/ M.A. de la Bastide

The Rt. Hon. Mr Justice Michael de la Bastide (President)

/s/ A. Saunders

The Hon. Mr Justice A. Saunders

/s/ D.P. Bernard

The Hon. Mme Justice D. Bernard

/s/ J. Wit

The Hon. Mr Justice J. Wit

/s/ D. Hayton

The Hon. Mr Justice D. Hayton