COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law And Equity Division

2010/CLE/gen/01319

BETWEEN

MARLA J. CRAMIN
(as Personal Representative of the Estate of Jeffery D. Cramin, dece ased)

Plaintiff

-AND-

BAHAMA DIVERS (1976) COMPANY LIMITED

Defendant

-AND-

SUMMIT INSURANCE COMPANY LIMITED

Third Party

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Vann Gaitor with him Ms. Lashay Thompson of Higgs & Johnson for the Plaintiff
Mr. Darrell E. Rolle of Messrs. Rolle, Newton & Co. for the Defendant
Ms. Viola Barnett h/p for Ms. Camille Cleare of Harry B. Sands for the Insurance Company

Hearing Date: 27 July 2018

Practice – Judgment of foreign court – United States not a prescribed country for registration of foreign judgment - Personal representative filed Writ of Summons under common law - Defendant filed Defence raising three challenges to foreign judgment – Foreign court lacked jurisdiction – No submission to jurisdiction – No trial on merit – During hearing, Defendant raises additional grounds not pleaded
Enforcement of Foreign Judgment – Grounds upon which foreign award could be challenged – Foreign court lacked jurisdiction - Breach of rules of natural justice –

Foreign judgment obtained by fraud – Foreign judgment not final – Foreign judgment contrary to public policy in the Bahamas – Reciprocal Enforcement of Judgments Act, 1999

Summary Judgment – No defence to claim - Order 14 Rules 1 and 5 of the Rules of the Supreme Court, 1978

The Plaintiff, as Personal Representative of the Estate of her deceased husband, commenced an action in the Supreme Court to enforce a Final Judgment of the Circuit Court in Broward County in Florida whereby she was awarded a judgment sum in excess of US$6 million dollars plus interest. At that hearing, the Defendant failed to serve or file any papers as required by the law in Florida. The Plaintiff received a final Default Judgment on liability. Damages were assessed by a Jury and on 6 August 2009, the Circuit Court Judge pronounced judgment against the Defendant in the sum of US$6,313,813.00 together with interest at the applicable statutory rate up to the date of judgment.

In this Court, the Defendant raised three defences namely (1) it did not submit to the jurisdiction of the Circuit Court; the Circuit Court lacked competent jurisdiction to try the matter and (iii) there was no proper trial on the merits in that Court.

At the hearing, the Defendant raised a number of additional defences which were not pleaded.

HELD:

1. Foreign judgments are routinely enforced in the Bahamas, either by statute under the Reciprocal Enforcement of Judgments Act, 1999 or by an action at common law based on the jurisdiction in which the foreign judgment was obtained.

2. At common law, a foreign judgment constitutes a cause of action which can only be opposed on limited grounds. **Cablevision Systems Development Co. v Shoupe No.** 1093 of 1984; [1986] BHS J. No. 41, **Irwin Vosko v The Chase Manhattan Bank (National Association)** (Civil Appeal No. 29 of 1991); **Premier Cruise Lines Ltd. v Treasure Cay Ltd.** [1998] BHS J No. 86 applied.

3. In this action, the grounds pleaded in the Defendant's Defence were all matters which would have been canvassed before the Circuit Court in Broward County, Florida, or which could have been addressed with an application to set aside or appeal the decision of the Circuit Court. This Court cannot be used to appeal the decision of the Circuit Court.

4. The Defendant cannot rely on additional grounds not pleaded in its Defence.

5. If a plaintiff's application for summary judgment is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial, the Court may give summary judgment for the plaintiff.

6. The Plaintiff has satisfied the requirements for the enforcement of the Final Judgment of the Circuit Court.

   Obiter Dictum: An affidavit should contain only facts, not submissions: O. 41, rr 5,6.

JUDGMENT

Charles J:

Introduction

[1] On 31 October 2011, Marla J. Cramin, as Personal Representative of the Estate of Jeffery D. Cramin, deceased, ("the Plaintiff") filed a Summons seeking summary judgment against Bahama Divers (1976) Company Limited ("the Defendant") pursuant to Order 14 Rule 1 of the Rules of the Supreme Court, 1978 ("RSC") or, in the alternative, a striking out of the Defence pursuant to Order 18 Rule 19 of the said Rules. The application was supported by the affidavits of Guy W. Harrison, Attorney-at-Law filed on 2 November 2011 and 12 February 2015 respectively. Mr. Harrison was Counsel in the action which was commenced by the Plaintiff in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, in the United States of America ("the Circuit Court") in Case No. 04-07480 CACE 11 intituled, *"MARLA J. CRAMIN,* as Personal Representative of the Estate of Jeffery D. Cramin, Deceased, Plaintiff vs. *BAHAMA DIVERS (1976) COMPANY LIMITED,* a Bahamian company, and *RESERVATION SERVICES INTERNATIONAL, INC,* a Florida Corporation d/b/a *BAHAMA DIVERS,* Defendants.

[2] Having heard the application on 27 July 2018, I determined that final judgment be entered against the Defendant for the sum of US$6,778,832.91 together with statutory interest awarded by the Circuit Court from 6 August 2009, being the sum of US$465,019.91 calculated up to 10 September 2010 and continuing thereafter at such statutory rate until the date of judgment; interest on the judgment in these proceedings at the rate of 6.25% pursuant to the Civil Procedure (Rate of Interest) Rules, 2008 until payment and costs to be taxed if not agreed. My reasons are set out below.

Chronology of events in the Circuit Court

[3] Approximately 16 years ago, a young American scuba diver lost his life whilst diving in Bahamian waters. His wife, the Plaintiff sued the Defendant and Co-

Defendant, Reservation Services International Inc., a Florida Corporation d/b/a Bahama Divers in the Circuit Court for wrongful death of her husband due to the negligence of the Defendants.

[4] A Default was entered against the Defendant on 22 December 2004 pursuant to a Motion for default in the proceedings in the Circuit Court after the Defendant failed to serve or file any paper as required by law. In other words, the Plaintiff received a final default judgment on liability since the Defendant failed to enter any defence to it.

[5] On 24 April 2009, the law firm of Becker & Pollakoff, P.A. filed a Notice of Appearance on behalf of the Defendant, Bahama Divers (1976) Co. Limited, in the legal proceedings commenced by the Plaintiff against the Defendants in the Circuit Court. In that Notice of Appearance, the law firm requests that "all pleadings and correspondence pertaining to the matter be hereafter directed to them at their address at 625 N. Flagler Drive, 7th Floor, West Palm Beach, Fl 33401."

[6] Prior to trial, the Defendant filed a Motion to apply Bahamian Law, asserting that Bahamian law should apply to the facts of the case as the Defendant was a Bahamian Company and the incident took place in The Bahamas. The Defendant's Motion to apply Bahamian Law was denied. No appeal from this decision was filed.

[7] On 5 June 2009, a jury entered a damages verdict for the Plaintiff including $1,913,813.00 in past and future economic damages, and $4,400,000.00 for damages sustained for loss of companionship and pain and suffering, i.e. emotional damages.

[8] On 17 June 2009, Counsel for the Defendant filed "Post-Judgment Motion for Reduction of the Verdict based on Application of Bahamian Law."

[9] On 22 June 2009, the Plaintiff filed a “Notice of Hearing” to be heard on 25 June 2009.

[10] On 24 June 2009, Counsel for the Defendant served a “Notice of Withdrawal of Defendant’s Post-Judgment Motion for Reduction of the Verdict based on Application of Bahamian Law.

[11] On 6 August 2009, Final Judgment was pronounced by Hon. Ana Gardiner, the Circuit Court Judge, against the Defendant for a total amount of $6,313,813.00 together with interest at the applicable statutory rate up to the date of judgment.

Chronology of events in the Bahamas Supreme Court

[12] As the United States is not a prescribed country for the registration of foreign judgments in the Supreme Court of the Bahamas under the Reciprocal Enforcement of Judgments Act, 1999, the Plaintiff commenced Action 2010/CLE/gen/01319 (“the present action”) in the Supreme Court by issuing a Specially Indorsed Writ of Summons on 15 September 2010.

[13] At first blush, one would expect this to be a relatively simple matter but, eight years later, it still languishes in this Court for reasons which will become obvious momentarily.

[14] A review of the court’s records demonstrates that the action was met was many challenges. For convenience, I shall only refer to the more important applications.

[15] On 16 March 2012, the Defendant filed a Summons to strike out the Plaintiff’s Writ of Summons pursuant to Order 18, Rule 19 (1) (a), (b) and (d) and/or the inherent jurisdiction of the Court.

[16] Then, on 9 August 2013, the Defendant issued a Third Party Notice to Summit Insurance Company Limited (“the Third Party”) alleging that, in the event the Defendant is found liable to the Plaintiff, the Defendant claims that it is entitled to an indemnity or to a contribution.

[17] On 28 June 2014, the Third Party filed a Summons to strike out all subsequent third party proceedings under Order 18 Rule 19 (1) (a), (b), (c) and (d) of the RSC.

[18] On 12 February 2015, Evans J (as he then was) ordered that (i) the Summons for Summary Judgment filed on 31 October 2011 on behalf of the Plaintiff and (ii) the Summons filed on 16 March 2012 on behalf of the Defendant be heard on 16 April 2015. The learned judge gave some further directions in preparation for this hearing.

[19] On 16 April 2015, the Defendant's basic challenge, according to the learned judge, was to the capacity of the Plaintiff to bring the present action and they assert that the action itself is a nullity due to the Plaintiff's lack of capacity.

[20] In a written ruling delivered on 8 May 2015, the learned judge dismissed the Summons brought by the Defendant.

[21] It appears that an appeal was filed which was subsequently withdrawn and dismissed.

[22] Subsequently, the matter came before me on 18 January 2018 when I gave some directions and fixed a hearing date.

The Pleadings

[23] In order to have a better understanding of this case, I set out fully the Statement of Claim and the Defence. This is because, in my view, learned Counsel for the Defendant, Mr. Rolle raised further defences which were not pleaded. It also appears that facts which ought to have been properly admitted were not and the Plaintiff was put to strict proof of her assertions.

[24] At paragraph 1 of the Statement of Claim, it is alleged that, on or about 6 May 2004, the Plaintiff commenced an action claiming negligence resulting in the wrongful death of her deceased husband against Bahama Divers (1976)

Company Limited, (the "Defendant"), a company incorporated under the laws of the Commonwealth of The Bahamas and Reservation Services International, Inc. ("Reservation Services") a company incorporated in the State of Florida as Defendants in Case No. 04-07480 CACE 11 in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida (the "Circuit Court") in the United States of America. Instead of simply admitting straightforward facts, the Defendant makes no admissions and puts the Plaintiff to proof thereof: paragraph 1 of the Defence.

[25] At paragraph 2 of the Statement of Claim, the Plaintiff pleaded that the case against Reservation Services International was subsequently dismissed and the action proceeded against the Defendant. Once again, instead of admitting these simple facts, the Defendant makes no admissions and puts the Plaintiff to proof thereof: paragraph 2 of the Defence.

[26] The Plaintiff averred, at paragraph 3 of the Statement of Claim, that pursuant to a Motion for Default filed in the Circuit Court a Default was entered against the Defendant on 22 December 2004 for failure to serve or file any paper as required by law the effect of which under Florida law was an admission by the Defendant as to liability in respect of the claim by the Plaintiff for damages resulting from the death of the deceased. At paragraph 3 of its Defence, the Defendant again makes no admissions and puts the Plaintiff to strict proof. This assertion is supported by documentary evidence which the Defendant ought to have had in its possession and ought to properly admit it. The Defendant also denies that it admitted to liability with respect of the Plaintiff's claim for damages resulting from the death of her husband.

[27] At paragraph 4, the Plaintiff stated that, notwithstanding the Defendant's default and pursuant to Florida law, a jury trial in the Circuit Court ensued on 4th and 5th June 2009 to determine the quantum of the Plaintiff's damages. The Defendant makes no admissions and puts the Plaintiff to strict proof; facts which were evidently clear from their own Post Judgment Motion filed on 15 June 2009. The

Defendant then raises the Defence that it had no obligation to appear before a Court in the State of Florida and denied that it ever submitted to the jurisdiction of the Circuit Court although it is plain from the Final Judgment as well as Exhibit GWH-1 that, on 27 April 2009, the law firm of Becker & Pollakoff, P.A. filed a Notice of Appearance on behalf of the Defendant, Bahama Divers (1976) Co. Limited, in the legal proceedings commenced by the Plaintiff against the Defendants in the Circuit Court. In spite of documentary evidence to substantiate this assertion, the Defendant still did not admit this fact and puts the Plaintiff to proof thereof.

[28] At paragraph 5, the Plaintiff states that the Circuit Court was duly constituted and held in accordance with the laws of the State of Florida and has jurisdiction to determine this matter. The Defendant makes no admissions to the Plaintiff's assertions and denies that the said Court had jurisdiction to determine the matter.

[29] At paragraph 6, the Plaintiff sets out the Final Judgment of the Circuit Court for a total sum of US$6,313, 813.00 together with interest at the applicable statutory rate under the law of Florida. The Defendant makes no admission to this paragraph and puts the Plaintiff to strict proof thereof despite a written Final Judgment which is not difficult to comprehend. The Defendant expressly denies liability and repeats its assertion that the State of Florida had no jurisdiction to hear the matter and further, or in the alternative, it did not submit to the jurisdiction of that Court. The Defendant further avers that, in the alternative, there had not been a proper trial on the merits and that any judgment obtained by the Plaintiff in Florida did not make the Defendant liable.

[30] At paragraph 7, the Plaintiff avers that the Defendant has failed to pay the Judgment sum or any sum at all. The Defendant makes no admissions to this and puts the Plaintiff to strict proof. It is a fact that the Defendant has not paid the judgment sum; not even a dime so it is passing strange that this is not admitted.

[31] At paragraph 8, the Plaintiff states that she is entitled to the judgment sum and then particularized the sum which is claimed against the Defendant. The Defendant expressly denies that the Plaintiff is entitled to the sums claimed and puts her to strict proof.

[32] Notwithstanding its bare disagreements, the Defendant then turns around and pleads, at paragraph 9, that the deceased wholly caused or contributed to his demise by his own negligence. The Defendant particularized the negligence as:

1. The deceased failed to take care of his own safety in a sufficient and proper manner and was reckless in this regard;

2. The deceased failed to use any or all reasonable care and conduct so as to ensure his safety;

3. The deceased refused the assistance of a dive guide which the Defendant could have provided and instead chose to dive with a group of persons who were certified divers as was the deceased. The deceased left the group with which he was diving by himself in contravention of diving protocol and attempted to reach the surface alone and without assistance of the persons in his group and;

4. The deceased failed to alert any person in his dive group that he was about to swim to the surface or in the alternative that he was in any danger immediate or otherwise as is the protocol in such circumstances.

[33] The corollary is that, in its Defence, the Defendant sets up a claim of negligence as if by Counterclaim. As can be seen from the Final Judgment of the Circuit Court, the Defendant had every opportunity to make a counterclaim for negligence or contributory negligence in that Court but failed or refused to advance such a claim or defence. The Defendant cannot now make such arguments in enforcement proceedings because defences are limited to certain grounds which will be dealt with later on in this judgment.

Defences raised in Defence

[34] As properly identified by the Plaintiff, the Defence raises three discrete defences namely:

1. Whether the Defendant submitted to the jurisdiction of the Circuit Court;

2. Whether the Circuit Court had jurisdiction to hear this action; and

3. Whether there had not been a proper trial on the merits in the Circuit Court.

[35] In my opinion, the findings of the Circuit Court, which are set out below, are a complete answer to all of the defences advanced by the Defendant.

Judgment of the Circuit Court

[36] The Circuit Court, in its judgment delivered on 6 August 2009, made a number of findings. The following passages reflect those findings:

> "**2. The Court finds that the Defendant BAHAMA DIVERS (1976) LTD., was properly served the Complaint in this action pursuant to The Hague convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial matters.**
>
> **3. The Court finds that the Defendant BAHAMA DIVERS (1976) LTD., conducts significant business activities in Florida, including maintaining a telephone number in the State of Florida, accepting reservations in the state of Florida for diving trips, and maintaining an e-commerce website in the State of Florida, such that the exercise of jurisdiction over BAHAMA DIVERS is consistent with principles of due process of law.**
>
> **4. The Court finds that Defendant BAHAMA DIVERS (1976) LTD., failed to plead or otherwise defend itself as to liability in this action, notwithstanding being provided copies of all papers and proceedings in this action. The Court also finds that Defendant did not exercise its right to request that this action be transferred to the Bahamas.**
>
> **5. The Court finds that Defendant BAHAMA DIVERS (1976) LTD., voluntarily appeared and defended itself as to the amount of damages due to the plaintiffs, and was provided a trial by jury with the right to present evidence, witnesses and argument of counsel.**
>
> **Wherefore, the Court enters its Final Judgment as set forth herein."**

Defences not raised in Defence

[37] In the affidavit of Leroy Lowe filed on 16 March 2012, the Defendant attempts to raise additional defences which were not pleaded. Furthermore, Mr. Lowe's affidavit contains submissions. As Mr. Gaitor correctly pointed out, an affidavit

should only contain facts - Order 41 Rules 5 and 6. For example, at paragraph 7, Mr. Lowe deposed that "*I am advised by my Attorneys Messrs. Rolle, Newton & Co. that on general considerations of natural justice our courts do not attach any legal rights or obligations whatsoever to the judgment of the Circuit Court.*" I will order that that portion of his affidavit evidence be struck out. It is also premised on a wrong reflection of our courts which treat with great respect the decisions of the courts of friendly nations like the United States of America whose legal system, like ours, is derived from English common law.

[38] Mr. Lowe's affidavit raises, belatedly, two new defences namely:

(i) damages awarded by the Circuit Court to Marla J. Cramin independently of and in addition to damages awarded to the Estate of Jeffery D. Cramin, deceased, are unsustainable and unknown to Bahamian law; and;

(ii) on general considerations of natural justice, our courts do not attach any legal rights or obligations whatsoever to the judgment of the Circuit Court.

[39] On the latter defence, Learned Counsel Mr. Gaitor correctly pointed out that our courts assist friendly foreign nations on a regular basis. Foreign judgments are routinely enforced in the Bahamas. So are Letters Rogatory from a foreign court which are given effect in the Bahamas.

[40] I also agree with Mr. Gaitor that both of the defences in Mr. Lowe's affidavit ought properly to have been pleaded by the Defendant in its Defence. Since they were not pleaded, the Defendant cannot rely on those defences and I so find.

[41] Learned Counsel Mr. Rolle also raised some additional defences both orally and in his written submissions. The first is that the Plaintiff is not a proper party before the Court. This defence was not pleaded and therefore, like the other unpleaded defences, it is too late in the day to raise it. I should add that learned Counsel Mr. Rolle was not the Counsel on record who crafted the Defence. However, he fought hard to cure the ills of a woefully-deficient Defence.

Enforcement of Foreign Judgments

[42] Two channels exist for the enforcement of foreign judgments in the Bahamas namely: (1) by statute under the Reciprocal Enforcement of Judgments Act, 1999 ("the Act"), and (2) by an action at common law based on the foreign judgment itself.

[43] The Act allows registration of foreign judgments in the Supreme Court of the Bahamas but only if the judgment is from a prescribed country and relates to a sum of money payable. Non-money judgments and judgments from non-prescribed countries cannot be registered under the Act.

[44] Section 3(1) of the Act lays down some criteria before the foreign judgment can be enforced namely:

- The judgment must be for a sum of money;
- An application must be made at any time within 12 months after the date of the judgment, although the Bahamian Court has the discretion to extend that time;
- The judgment (and this includes awards in arbitration proceedings) must be from a superior court in one of the following countries:

  (1) Barbados; (2) Bermuda; (3) Jamaica; (4) Leeward Islands; (5) St. Lucia; (6) Trinidad; (7) Guyana; (8) Honduras; (9) Australia and (10) United Kingdom and,

- It must be "just and convenient" that the judgment be enforced in The Bahamas.

[45] Judgment from any country to which the Act has not been extended can and must be enforced at common law, as in the present case. The method of such enforcement is the commencement of an action in the Supreme Court by which a party may seek to have recognized or domesticated the order of the foreign court by an order of the Bahamian court. The foreign judgment constitutes a cause of action which can only be opposed on limited grounds.

[46] In **Cablevision Systems Development Co. v. Shoupe**, No. 1093 of 1984; [1986] BHS J. No. 41, Georges CJ stated at paragraph 7 of his judgment –

> **"The law in England is stated in Dicey and Morris, 10th Edition, Rule 180 at p. 1035:-**
>
> > **"the judgment of the court of a foreign country (hereinafter referred to as a foreign judgment) has no direct operation in England but may**
> >
> > **(1) be enforceable by action or counterclaim at common law, or**
> >
> > **(2) be enforceable by statute…"**
>
> **The law of this Commonwealth is the same."**

Grounds on which a foreign award could be challenged

[47] In an action to enforce a foreign judgment in the Bahamas, six possible defences are available to the Defendant namely:

1. the foreign court lacked competent jurisdiction;
2. the rules of natural justice had not been complied with in the foreign proceedings;
3. the foreign judgment was not final and conclusive;
4. the judgment debt was not definite or ascertainable;
5. the foreign judgment was obtained by fraud; and
6. recognition of the foreign judgment would be contrary to public policy in The Bahamas.

[48] The above principles have been recognized in the Bahamas; for example, (1) in a unanimous decision by the Court of Appeal in **Irwin Vosko v. The Chase Manhattan Bank (National Association)** Civil Appeal No. 29 of 1991, a matter in which Henry P., Melville and Campbell JJA each wrote a judgment and (2) by Allen J (as she then was) in **Premier Cruise Lines Ltd. v Treasure Cay Ltd.** No. 526 of 1994; [1998] BHS J. No. 86. The latter case concerned the enforcement of an arbitration award. Concerning the grounds available as defences on an enforcement of judgment action, at page 6, paragraph 52 of her judgment, Allen J, said:

> **"These follow closely the grounds on which a foreign judgment can be impeached at common law and the authorities relative to the impeachment of foreign judgments on these grounds, it is submitted, would be applicable in this case as well."**

[49] In **Irwin Vosko** [supra], Counsel for the Appellant (Defendant at First Instance) argued twenty-six grounds of defences which included the accepted grounds of defence. Each limb of the Defence was struck down by Hall J whose decision was upheld by the Court of Appeal. **Irvin Vosko** is instructive because it addresses a plethora of submissions which are similar to those raised by the Defendant in the present case.

Natural Justice

[50] The Defendant indirectly raises this defence since it was not pleaded. Learned Counsel Mr. Gaitor quite correctly submitted that a contravention of the principles of natural justice can be a defence in enforcement of foreign judgment proceedings. Allen J in **Premier Cruise Line Ltd.** addressed the issue of natural justice at paragraphs 71-74 of her judgment. In doing so, Allen J referred to the leading authority on the principles of natural justice and how they are to be applied in enforcement of judgments proceedings. She stated:

> **"71 The principles governing the requirements of natural justice vis a vis the enforcement of foreign judgments and the defence of breach of natural justice were set out in *Pemberton v. Hughes [1891] 1 CH. 781* and confirmed by the English Court of Appeal in *Adams v. Cape Industries plc. [1990] 1 Ch. 433.***
>
> **72 At page 566 of the Adams case, the Court said, "In our view, no significant assistance is derived from this case, (speaking of the case of *Local Government Board v Arlidge [1915] A.C. 120*) or other decisions upon the requirements of natural justice in administrative law cases, where the requirements of substantial fairness depend upon the subject matter and the context. It is sufficient, in our view, to derive the requirements of natural justice for the purposes of enforcement of a foreign judgment and the special defence thereto of breach of natural justice from the principles stated in *Pemberton v Hughes [1891] 1 Ch. 781* and relied upon by Scott J., namely: did the proceedings in this foreign court offend against our views of substantial justice?**

> **73 The notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration."**
>
> **74 It would appear then that in the case of the enforcement of foreign judgments and by extension, foreign awards, for the defence of breach of natural justice to succeed, the question extends beyond whether there had been a fair hearing, to the question whether the foreign proceedings offended the Court's idea of substantial justice."**

[51] Learned Counsel Mr. Gaitor correctly submitted that there is no evidence before the court that the foreign proceedings in the instant matter offended the Bahamian court's view of substantial justice. If a litigant is before the court and fails or refuses to present evidence in its defence, the court has a right to rule on the matter as it appears before the court. The Bahamian court would do no different from the Circuit Court in similar circumstances as those faced by the Circuit Court.

[52] In **Irwin Vosko**, Campbell JA in dealing with the issue of public policy, stated that page 11 of his judgment that if a person deliberately refrained from raising a defence in a foreign court, he is ordinarily not entitled to raise those defences in an action on the enforcement of the foreign judgment.

[53] Mr. Gaitor urged this court to take a similar stance in the present action and make the order which will enable the Plaintiff to enforce the judgment of the Circuit Court by (a) acceding to the plaintiff's application for summary judgment; and/or (b) striking out the Defence and giving judgment for the Plaintiff as prayed in the summons filed by the Plaintiff.

Other matters raised by the Defendant

[54] As I earlier indicated, learned Counsel Mr. Rolle fought hard to put things right. He submitted that there was a waiver/exemption and that the Plaintiff's action to enforce the Final Judgment is barred by section 5(3) of the Limitation Act. Regrettably, neither of these matters was pleaded and it is just too late to do so. In any event, the Defendant, having submitted to the jurisdiction of the Circuit Court, should have raised these matters in that Court.

The summary judgment test

[55] Order 14 sets out the procedure by which the Court may decide a claim or a particular issue without a trial. O 14 r 1 provides as follows:

> **"Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant."**

[56] Under O 14 r 5, the test to be applied by the Court is whether there is any "*triable issue or question*" or whether *"for some other reason there ought to be a trial"*. If a plaintiff's application is properly constituted and there is no triable issue or question nor any other reason why there ought to be a trial the Court may give summary judgment for the plaintiff.

[57] Put another way, O 14 rr 1 and 5 mean that the Court may give summary judgment on a claim or an issue if it considers that the defendant has no real prospect of successfully defending a claim or issue. This is the applicable test under the new Civil Procedure Rules ("CPR") (UK). Indeed, it is the modern test. But generally speaking, they mean the same thing whether it is under the current RSC or CPR (UK).

[58] In addition, under O.14, the Court has a very salutary power, to be exercised in a plaintiff's favour or, where appropriate, in a defendant's favour. It enables the Court to dispose summarily of both claims and defences for which there ought not to be a trial.

[59] Undoubtedly, the power of summary judgment should be approached as a serious step which should be used cautiously and sparingly. This point was accentuated by Judge LJ in **Swain v Hillman and another** [2001] 1 All ER 91 when he said (at page 96(a) – (c)):

> **"To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence, the discretion to the court to give summary judgment…if there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court."**

[60] Therefore, the Court should be cautious since it is a serious step to give summary judgment. Nonetheless, a plaintiff is entitled to summary judgment if the defendant does not have a good or viable defence to his claim. This is also in keeping with the overriding objective of Order 31A to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.

Analysis and Conclusion

[61] Having comprehensively set out the summary judgment test, I now turn to the evidence, of course, very conscious that I should not apply the standard which would be applicable at trial, namely the balance of probabilities on the evidence presented. In other words, I am cautioned that I should not conduct a mini trial.

[62] Learned Counsel Mr. Rolle attacked the Plaintiff's case on a litany of grounds, many of which were not pleaded. Those which were pleaded were answered in the Final Judgment of the Circuit Court and could have been canvassed before that Court. In my opinion, the Defendant sat on its rights. The Defendant could have been more proactive in those proceedings. Even though, the judgment on liability was obtained by default, there was nothing precluding the Defendant from setting it aside or appealing it. The Defendant's Defence in the present action seems to be an appeal from the Circuit Court. Unfortunately, this Court is not clothed with that power.

[63] In my considered opinion, the Final Judgment of the Circuit Court is a good judgment and cannot be impeached on any of the grounds referred to at paragraph 47 of this judgment. The Plaintiff has satisfied the requirements for the enforcement of the Final Judgment of the Circuit Court. I find no good reason to deny her the relief which she seeks.

[64] In the circumstances, I will enter final judgment for the Plaintiff against the Defendant for the sum of US$6,778,832.91 together with statutory interest awarded by the Circuit Court from 6 August 2009, being the sum of US$465,019.91 calculated up to 10 September 2010 and continuing thereafter at such statutory rate until the date of judgment; interest on the judgment in these proceedings at the rate of 6.25% pursuant to the Civil Procedure (Rate of Interest) Rules, 2008 until payment and costs to be taxed if not agreed.

Dated this 2nd day of October, A.D., 2018

Indra H. Charles
Justice