Privy Council Appeal No. 6 of 1994

Owens Bank Limited *Appellants*

v.

Etoile Commerciale S.A. *Respondents*

FROM

THE COURT OF APPEAL OF SAINT VINCENT AND THE GRENADINES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH JULY 1994

Present at the hearing:-

LORD TEMPLEMAN
LORD JAUNCEY OF TULLICHETTLE
LORD MUSTILL
LORD LLOYD OF BERWICK
LORD NOLAN

*[Delivered by **Lord Templeman**]*

By proceedings begun on 10th May 1983 in the Commercial Court of Paris, the respondents, Etoile Commerciale S.A. ("Etoile"), a French finance house sought to enforce against the appellants, Owens Bank Limited ("Owens Bank"), a written guarantee dated 1st March 1983 whereby Owens Bank agreed to reimburse Etoile in respect of debts owed to French customs by Cogettri S.A. and guaranteed by Etoile. On the failure of Cogettri S.A. to pay the customs, Etoile was forced to pay the customs and sought to recover from Owens Bank FF10 million, the maximum amount payable under the guarantee by Owens Bank.

Owens Bank defended the proceedings in the Commercial Court of Paris and alleged that Etoile had obtained the guarantee from Owens Bank by concealing from Owens Bank the financial position of Cogettri S.A.

In a reasoned judgment dated 11th May 1984 the Commercial Court rejected this allegation and found that Etoile had not been guilty of any impropriety. In those proceedings Owens Bank did not dispute that the guarantee was dated 1st March 1983 and did not allege that the guarantee was subject to any conditions. The

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Commercial Court gave judgment for Etoile against Owens Bank in the sum of FF10 million and interest.

Owens Bank appealed to the Court of Appeal of Paris and alleged that the guarantee was subject to conditions precedent and that the date on the guarantee had been fraudulently altered from 7th March to 1st March. The court examined all the telex messages exchanged between Etoile and Owens Bank prior to the guarantee and thereafter and concluded in its judgment dated 3rd May 1985 that Etoile had consistently rejected the conditions proposed by Owens Bank and had insisted that the guarantee should be unconditional and in the form of the guarantee signed on behalf of Owens Bank and dated 1st March 1983. This guarantee "in respect of which the original was produced during the proceedings by ETOILE COMMERCIALE to be placed in the files of the Court ..." did not include any conditions on its face or "on the reverse side of the original document properly filed in the proceedings ...". The court also rejected the allegation that the date on the guarantee had been altered saying that:-

> "an examination of the original document does not reveal any word written over another, deletion, nor amendment to the date; that the figure 1 is very clearly type-written; that contrary to what is claimed by the appellant, it is of exactly the same size as the other figure 1 contained in the body of the document, whose authenticity is not contested ...
>
> The letter from OWENS BANK which the said document was attached, such letter also being produced in original and whose authenticity is not contested, is itself dated the 1st March 1983 ...
>
> In its pleadings filed in third party opposition proceedings against the judgment of legal winding up of COGETTRI, OWENS BANK itself states that its guarantee was entered into on 1st March 1983."

The Court of Appeal upheld the judgment of the Commercial Court and in addition said that:-

> "... the levity with which OWENS BANK has filed damaging accusations before the Court regarding ETOILE DU NORD, by stating that this Company, if it had not perpetrated a forgery, had at least knowingly employed a falsified document, constitutes a prejudice that should be compensated by damages, and a payment of 10,000 francs."

Owens Bank began proceedings in the High Court of Saint Vincent and the Grenadines claiming damages for fraud and alleged that Etoile had presented to the courts in Paris a guarantee with the effective date forged to read 1st instead of 7th March 1983. On 20th January 1986 Singh J., having read the pleadings and all the affidavits and having considered the arguments on both sides, struck out the statement of claim of Owens Bank as being an abuse of the

process of the court on the ground that Owens Bank had not shown *bone fides* in the plea of fraud. The reasons of Singh J. included the following:-

(1) "That Court of Appeal Judgment was delivered in Paris on May 3rd, 1985. On May 7th, 1985, Owens Bank instituted this action in St. Vincent the basis of which is the same contract of guarantee adjudicated upon by the French Courts. In its statement of claim herein the only allegation of fraud is the alleged alteration or forgery of the date from 7th to 1st March. The very same issue adjudicated upon by the French Courts."

(2) There was no affidavit from the signatory to the guarantee on behalf of Owens Bank.

(3) "When I consider the evidence as a whole on this issue of fraud I find it teeming with speculations, conjectures, hearsay, tenuous innuendos, and very little if any direct admissible evidence to show with even the slightest weight any bona fides in this plea of fraud. I therefore cannot find the bona fides required in this plea. I am aware of the authorities which say that all Owens Bank has to do is to shriek fraud to defeat this plea of *Res Judicata*. But, my view is that when Owens Bank does so, it ought not to be a simulated shriek but one which must, by admissible evidence, appear to have some bona fides in it."

Singh J. accordingly struck out the action as being an abuse of the process of the court. Owens Bank failed to appeal against the order of Singh J. in due time and their appeal out of time was struck out by the Court of Appeal and a further appeal to Her Majesty in Council was dismissed.

On 12th February 1987 the Court of Appeal of Paris struck out an application by Owens Bank for revision of its order dated 3rd May 1985 on the grounds of want of prosecution. On 30th June 1987 the Court of Cassation dismissed an appeal by Owens Bank against the order of the Court of Appeal of Paris dated 3rd May 1985. Meanwhile Owens Bank had commenced fresh proceedings before the Court of Appeal of Paris to set aside its judgment dated 3rd May 1985. On 17th November 1988 the Court of Appeal dismissed these proceedings as abusive and inadmissible, and ordered Owens Bank to pay a further FF20,000 damages by way of compensation.

On 29th March 1990 Etoile sought to enforce in Saint Vincent and the Grenadines the judgment obtained in the French courts. In their defence, Owens Bank pleaded that the judgment had been fraudulently obtained by the substitution of the date 1st March 1983 for the date 7th March 1983.

Owens Bank applied for an order requiring Etoile to produce the guarantee dated 1st March 1983 for inspection in Saint Vincent and the Grenadines. It is not disputed that this guarantee has been inspected by Owens Bank in Paris and remains available for inspection in Paris. Nevertheless Joseph J. on 13th May 1991 made the order sought and declined to deal with applications by Etoile for summary judgment under Order 14 and for the defence of Owens Bank to be struck out as an abuse of process. Etoile appealed to the Court of Appeal which on 6th April 1992 allowed an appeal against the order made by Joseph J. on 13th May 1991 for the production of the guarantee on the grounds that it would be an abuse of the process of the court to permit Owens Bank to continue to defend the proceedings, having regard to the history of the litigation in France and the action before Singh J. Owens Bank now appeal to Her Majesty in Council.

Owens Bank contend that they are entitled to challenge the judgments obtained in France on the grounds that the judgments were obtained by fraud. The fraud which is alleged is the alteration of the date of the guarantee from 7th March 1983 to 1st March 1983.

An English judgment is impeachable in an English court on the ground that the first judgment was obtained by fraud but only by the production and establishment of evidence newly discovered since the trial and not reasonably discoverable before the trial: *Boswell v. Coaks (No. 2)* (1894) 86 L.T. 365.

The position with regard to foreign judgments is different. It is governed by the so-called rule in *Abouloff v. Oppenheimer & Co.* (1882) 10 Q.B.D. 295. In that case the plaintiff brought an action for conversion of goods. The plaintiff relied on a judgment obtained in the District Court and affirmed in the High Court of Tiflis whereby the defendants had been ordered to return the goods or pay damages. The defendants pleaded in their defence in the English action that the foreign judgment had been obtained by the fraud of the plaintiff and her husband in concealing from the Russian court that the goods had already been returned to the plaintiff. The plaintiff demurred to this defence and for the purposes of the demurrer the court assumed that the fraud had been practised and the Russian courts had been deceived. Lord Coleridge C.J. decided the case on the broad grounds stated in the *Duchess of Kingston's Case* (1776) 2 Sm.L.C. 8th Ed. page 784. He said at page 300:-

> "... where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the courts of this country, when he seeks to enforce the judgment so obtained. The justice of that proposition is obvious: if it were not so, we should have to disregard a well-established rule of law that no man shall take advantage of his own wrong ..."

In *Vadala v. Lawes* (1890) 25 Q.B.D. 310 Lindley L.J. stated the rule in the following terms at pages 316-7:-

> "If the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can re-open the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign court."

Thus fresh evidence is necessary in order to mount an attack on an English judgment on the ground of fraud. But according to the rule in *Abouloff's* case this is not so in the case of a foreign judgment.

The rule has been subject to widespread and long standing academic criticism, summarised by Mr. Isaacs in his helpful argument on behalf of the respondents. In *House of Spring Gardens Limited v. Waite* [1991] 1 Q.B. 241 Stuart-Smith L.J. observed at page 251 that both *Abouloff's* case and *Vadala v. Lawes* "were decided at a time when our courts paid scant regard to the jurisprudence of other countries"; and it is to be noticed that they were both decided a few years before *Boswell v. Coaks (No. 2) (supra)*, in which the House of Lords laid down the more restricted rule for attacking English judgments. In *Owens Bank Limited v. Bracco* [1992] 2 A.C. 443 Lord Bridge of Harwich recognised that, as a matter of policy, there might be a very strong case to be made in the 1990's in favour of according to overseas judgments the same finality as is accorded to English judgments.

The facts of *House of Spring Gardens* were that the plaintiffs obtained judgment against the defendants in Ireland for some £3 million damages for misuse of confidential information. In subsequent proceedings in Ireland, two of the defendants sought to set aside the judgment in the first action on the ground of fraud. The second action was dismissed. The plaintiffs then brought an action in England to enforce the first judgment. They issued a summons under RSC Order 14. The defendants sought to defend the action on the ground that the first judgment had been obtained by fraud. The judge held that the issue had been decided against the defendants in the second action in Ireland, and could not be raised again in the English proceedings. The defendants were estopped *per rem judicatam*. The judge's decision was upheld in the Court of Appeal. Stuart-Smith L.J. was able to distinguish *Abouloff's* case on the ground that neither in that case nor in any of the subsequent cases had the issue of fraud been decided in a second and separate action in the foreign court.

In *Owens Bank Limited v. Bracco* the House of Lords had the opportunity to reconsider the rule in *Abouloff's* case. The facts were that the plaintiff bank obtained

judgment for 9 million Swiss Francs in the High Court of Saint Vincent. The defence was that the documents relied on by the bank were forgeries. Having succeeded in Saint Vincent, the bank sought to enforce their judgment by registration under section 9 of the Administration of Justice Act 1920. Section 9(2) provides:-

> "No judgment shall be ordered to be registered under this section if
>
> ...
>
> (d) the judgment was obtained by fraud."

The 1920 Act applies only to Commonwealth judgments. But there is a similar provision in section 4(1)(a)(iv) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, in respect of those foreign countries with which the United Kingdom has concluded reciprocal arrangements.

The defendants resisted the bank's application to register the Saint Vincent judgment on the ground that it had been obtained by fraud, and therefore fell outside section 9 of the 1920 Act. The plaintiffs invited the House of Lords to overrule *Abouloff's* case. But the House of Lords declined the invitation. It was held that section 9(2)(d) of the 1920 Act had given statutory force to the common law as it existed in 1920, including the rule in *Abouloff's* case, and that it could now only be altered by statute. Lord Bridge, who gave the only speech, concluded (at page 489F-G) that enforcement of overseas judgments is now primarily governed by the statutory codes of 1920 and 1933:-

> "Since these cannot be altered except by further legislation, it seems to me out of the question to alter the common law rule by overruling *Abouloff v. Oppenheimer & Co.* and *Vadala v. Lawes*. To do so would produce the absurd result that an overseas judgment creditor, denied statutory enforcement on the ground that he had obtained his judgment by fraud, could succeed in a common law action to enforce his judgment because the evidence on which the judgment debtor relied did not satisfy the English rule. Accordingly the whole field is effectively governed by statute and, if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it."

In an article in the Cambridge Law Journal (1992) page 441 Mr. J.G. Collier points out that the House must have been under a misapprehension in thinking that the whole field is effectively governed by statute. There are many countries including, for example, the United States with whom the United Kingdom has no reciprocal arrangements.

Be that as it may, Mr. Isaacs does not and cannot suggest that *Bracco* was wrongly decided, even though the result may be regretted. Their Lordships do not regard the decision in *Abouloff's* case with enthusiasm, especially in its application to countries whose judgments the United Kingdom has agreed to register and enforce. In these cases

the salutary rule which favours finality in litigation seems more appropriate.

But while Mr. Isaacs cannot ask the Board to depart from *Bracco*, he seeks to distinguish the case on the facts. He advances two main arguments. In the first place he invites the Board to follow the line taken by the Court of Appeal in *House of Spring Gardens*. In that case the plaintiffs succeeded because they were able to rely on the second Irish judgment as creating an issue estoppel, so that the question of fraud could not be raised again. By the same token, the plaintiffs can here, he says, rely on the judgment of Singh J. in the High Court of Saint Vincent, or indeed on the judgment of the Court of Appeal of Paris dated 17th November 1988, as creating an issue estoppel binding on the defendants.

Secondly, he points out that in *Bracco* the plaintiffs were applying to register a judgment under section 9 of the 1920 Act. In the present case the proceedings to enforce the Paris judgment in Saint Vincent are by action at common law. It is true that the legislature in Saint Vincent and the Grenadines has enacted the Commonwealth Countries (Enforcement) Act 1921 and the Foreign Judgments (Reciprocal Enforcement) Act 1958 which correspond with the United Kingdom Acts of 1920 and 1933, and which contain the same power to prevent registration and enforcement of judgments "obtained by fraud". But there is no reciprocal arrangement in force between Saint Vincent and France. So there could be no question of seeking to enforce the Paris judgments by registration. It was an action at common law or nothing. In those circumstances Mr. Isaacs submits that their Lordships are free to reconsider the rule in *Abouloff's* case. The common law is frozen where there is statutory procedure available, incorporating section 9(2)(d) of the 1920 Act or the equivalent. Where there is no statutory procedure, their Lordships are free to develop the common law, so as to suit present day requirements. In *Bracco* itself Lord Bridge said that if the issue had been governed by the common law alone, he would have thought it necessary to consider the relevant authorities prior to *Abouloff's* case, as well as the elaborate arguments deployed by counsel. Mr. Isaacs submits that he can steer his ship through the gap which the House of Lords has thus left open.

These are interesting and important arguments. Their Lordships do not, however, find it necessary to deal with them, because there is a much shorter answer to this appeal. Every court of justice has an inherent power to prevent misuse of its process, whether by a plaintiff or a defendant: see *Hunter v. Chief Constable of the West Midlands Police* [1982] A.C. 529 per Lord Diplock at page 536. This was the alternative ground on which the Court of Appeal decided in the plaintiffs' favour in *House of Spring Gardens*.

There is nothing in the authorities which precludes a party from obtaining summary judgment or an order striking out a pleading on the grounds of abuse of process where a fraud is alleged. It is axiomatic that where fraud is alleged full particulars should be given. Where allegations of fraud have been made and determined abroad, summary judgment or striking out in subsequent proceedings are appropriate remedies in the absence of plausible evidence disclosing at least a *prima facie* case of fraud. No strict rule can be laid down; in every case the court must decide whether justice requires the further investigation of alleged fraud or requires that the plaintiff, having obtained a foreign judgment, shall no longer be frustrated in enforcing that judgment.

In the present case Owens Bank should have been alive to the alleged fraud as soon as Etoile demanded payment under the guarantee on 10th May 1983. From the judgment of the Commercial Court handed down on 11th May 1984 it appears that Owens Bank did not then complain about the authenticity or contents of the guarantee dated 1st March 1983 upon which Etoile has consistently relied. The allegations of fraud made by Owens Bank from time to time after the judgment of the Commercial Court have never been consistent or easy to follow. The allegations were investigated and rejected by the Court of Appeal of Paris in their comprehensive judgment after a comprehensive hearing. When on 20th January 1986 Singh J. dismissed the defence of fraud raised by Owens Bank and found that the defence was an abuse of the process of the court, it appears from his judgment that there was no affidavit evidence in support of the allegation of fraud. No evidence has been produced since and their Lordships were not referred to any evidence in any of the numerous applications made since litigation was begun in 1984.

In these circumstances their Lordships are satisfied that the Court of Appeal were right to conclude that Owens Bank are not entitled to inspection of the guarantee dated 1st March 1983 because the defence of fraud which they put forward is an abuse of process and should be struck out. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. Owens Bank must pay the costs of Etoile before the Board.