[1988–90 Gib LR 311]

MARGETSON (trading as WORLDWIDE CARS) v. TOYOTA (GIBRALTAR) DISTRIBUTOR LIMITED and A. BASSADONE (1904) LIMITED

SUPREME COURT (Kneller, C.J.): October 11th, 1990

Civil Procedure—registration of foreign judgments—hearing of application—application to be served on defendant(s) and heard inter partes

Conflict of Laws—reciprocal enforcement of judgments—registration of foreign judgments—list in Judgments (Reciprocal Enforcement) Ordinance, s.6(2) of circumstances in which foreign judgment registrable as judgment of Supreme Court exhaustive, not indicative—not registrable if defendant not resident or trading in foreign jurisdiction and not submitting to foreign court's jurisdiction

Courts—jurisdiction—submission to jurisdiction of foreign court—defendant unwilling to submit to foreign court's jurisdiction to acknowledge service of writ, give notice of intention to defend proceedings, and apply for writ to be set aside

The defendants sought an order setting aside the registration of a judgment of the English High Court as a judgment of the Supreme Court.

The plaintiff, a motor trader in London, ordered a right-hand drive Toyota Crown saloon with air-conditioning, suitable for use in Europe, from the defendants, in order to sell it on to a customer who had ordered it for use in the United Kingdom. The order was confirmed by telex, and the plaintiff paid a deposit of £2,500. When the car arrived in Gibraltar, it was sent by sea to the United Kingdom; the plaintiff paid the second defendant £4,922 (the balance of the purchase price), and also paid a total of

£3,787.49 in tax and duty. The car was found to have no air-conditioning, no heater, no heated rear window, no rear fog-lights, and a speedometer that was calibrated in kilometers per hour. The plaintiff sent the car to Belgium, where Toyota Crown parts were readily available, for an air-conditioning unit to be fitted, but this was not possible because the car had no heater. The plaintiff's customer then rejected the car as being unsuitable for use in the United Kingdom, and the plaintiff returned his deposit. The plaintiff obtained judgment against the defendants for £14,340 loss and damages; damages for storage charges; interest on the damages and storage charges; and further interest until judgment or payment. The car was seized and sold to satisfy the judgment; after fees and expenses had been deducted, the plaintiff received £3,850.74. The plaintiff obtained an order from the Supreme Court registering the English judgment as a judgment of the court in order to enable its enforcement in Gibraltar.

The defendants submitted that (a) any judgment which could not be brought within the provisions of s.6(2) of the Judgments (Reciprocal Enforcement) Ordinance was not registrable as a judgment of the court, and the present case did not fit the criteria set out in that sub-section; (b) they had not submitted to the jurisdiction of the English courts by acknowledging service of the writ or giving notice of intention to defend the original proceedings, as they were bodies corporate with no place of business in England, and the contract had been concluded in Gibraltar, so their failure to acknowledge service was irrelevant; and (c) the registration of the judgment should therefore be set aside, as the English courts had had no jurisdiction in the matter.

The plaintiff submitted in reply that the registration of the judgment should not be set aside, as (a) its writ was brought to recover damages in respect of the breach of a contract, being a contract which was by its terms, or by implication, governed by English law, and so fell within the ambit of R.S.C. O.11, r.1(1)(d), with the result that service of the writ outside the jurisdiction was permissible; and (b) the defendants, by not acknowledging service of the writ and giving notice of intention to defend the original proceedings, or applying for service on them to be set aside, had submitted to the jurisdiction of the English court, and that the judgment was therefore registrable.

Held, setting aside the registration of the judgment:

(1) The defendants had not submitted to the jurisdiction of the English court by voluntarily appearing in it for any purpose, counterclaiming in the proceedings in the original court, or agreeing before the beginning of the proceedings to submit to the jurisdiction of the English courts. They were not resident in England, nor did either of them have any place of business there. The Judgments (Reciprocal Enforcement) Ordinance, s.6(2) contained an exhaustive list of the circumstances in which a judgment was registrable as a judgment of the court; the present case did not fall within any of the criteria set out in that sub-section. The

defendants were therefore entitled to have the registration of the judgment of the English court as a judgment of the Supreme Court set aside (para. 18; paras. 22–24).

(2) A plaintiff applying for an order of registration of a judgment of a foreign court as a judgment of the Supreme Court should serve the application on the defendant(s), and the matter should be heard *inter partes* (para. 23).

(3) A defendant who wished to contest the jurisdiction of a foreign court should both acknowledge service of the writ and give notice of intention to defend the proceedings and, within the time within which a defence would have to be served, apply for the writ to be set aside (para. 15).

Cases cited:

(1) *Astro Exito Navegacion SA* v. *Hsu* (*The Messiniaki Tolmi*), [1984] 1 Lloyd's Rep. 266; (1983), 128 Sol. Jo. 265, applied.
(2) *Carmel Exporters (Sales) Ltd.* v. *Sea-Land Servs. Inc.*, [1981] 1 W.L.R. 1068; [1981] 1 All E.R. 984; [1981] 1 Lloyd's Rep. 458; [1981] Com LR 5, observations of Goff, J. applied.
(3) *Sennar*, *The (No. 1)*, [1983] 1 Lloyd's Rep. 295, applied.
(4) *Société Cooperative Sidmetal* v. *Titan Intl. Ltd.*, [1966] 1 Q.B. 828; [1965] 3 W.L.R. 847; [1965] 3 All E.R. 494; [1965] 2 Lloyd's Rep. 313, *dicta* of Widgery, J. applied.

Legislation construed:

Judgments (Reciprocal Enforcement) Ordinance (1984 Edition), s.6(1): The relevant terms of this sub-section are set out at para. 16.
s.6(2): The relevant terms of this sub-section are set out at para. 17.

Rules of the Supreme Court, O.11, r.1(1)(d): The relevant terms of this sub-rule are set out at para. 14.
O.11, r.1(1)(e): The relevant terms of this sub-rule are set out at para. 21.

A.A. Trinidad for the plaintiff;
L.W.G.J. Culatto for the defendants.

1 **KNELLER, C.J.:** Toyota (Gibraltar) Distributor Ltd. and A. Bassadone (1904) Ltd. (the defendants) together apply by summons in chambers dated January 18th, 1990 for an order that the registration of the judgment dated March 2nd, 1988 of Her Majesty's High Court of Justice, Queen's Bench Division for a debt of £19,2930.30 with £265.50 accrued interest and £115 costs against the defendants as a judgment of this court be set aside, and that the costs of and occasioned by this application be paid by the plaintiff to the defendants.

2 The judgment was entered under the provisions of the Judgments (Reciprocal Enforcement) Ordinance on December 11th, 1989. It was in

favour of Margetson t/a Worldwide Cars (the plaintiff). The grounds for setting aside the registration are encapsulated in the affidavit of Mr. George Bassadone, a director of the second defendant, of January 17th, 1990. They are threefold. First, the defendants are not ordinarily resident in England. Secondly, they do not have a place of business there: they are companies registered in Gibraltar and carrying on business here. Thirdly, although they were served with the plaintiff's writ in Gibraltar, they did not submit to the jurisdiction of the High Court of Justice, Queen's Bench Division, by entering and filing an acknowledgment of service, or otherwise. The plaintiff opposes the application to set aside the registration here of its English judgment against the defendants.

3 The background to all this is as follows. The plaintiff is a motor trader in York Street, London. The defendants are motor traders here in Irish Town. The plaintiff dealt with Mr. George Bassadone in this manner. On March 29th, 1985, the plaintiff in London telephoned Mr. Bassadone in Gibraltar and ordered a right-hand drive Toyota Crown saloon with air-conditioning to re-sell to a customer (who had ordered it) to drive in the United Kingdom. It was to be suitable for use in Europe. The defendants accepted the order, and that constituted the parties' oral agreement.

4 The order was confirmed by telex later that day. The agreed price was ¥2,385,000 f.o.b. at Gibraltar; on the same day, the plaintiff sent off a cheque for £2,500 as a deposit. A Toyota Crown Saloon reached Gibraltar on July 3rd, 1985, and was then sent on to England by sea.

5 Toyota (Gibraltar) Distributor Ltd., the first defendant, told the plaintiff to pay £4,922 to the account of A. Bassadone (1904) Ltd., the second defendant, at Banque Indosuez at Bishopsgate, London, EC2, being the balance of the purchase price, and the plaintiff did this on August 2nd, 1985. The same Toyota Crown saloon reached Shoreham-by-Sea in Sussex in late August 1985, and the plaintiff paid the Inland Revenue £3,787.49, of which £794.93 was duty, £1,493 car tax, and £1,500 Value Added Tax.

6 Alas, the car did not have air-conditioning; the plaintiff maintains that that was a breach of an express term of the agreement. Furthermore, in breach of the agreement, it was unfit for its purpose and it was of unmerchantable quality because it was not "of European specification," and was unfit for use as a motor car in England by the plaintiff or its customer. And why was this so? It had no heater; no heated rear window; no rear fog lights or the associated wiring and switch; and its speedometer was calibrated in kilometers per hour, not miles per hour. Worse was to follow. The plaintiff sent the car to a workshop in Belgium where Toyota Crown parts are readily available. The cost of that journey was £400. An air-conditioning unit could not be fitted because there was no heater in the car.

7 On November 8th, 1985, the plaintiff's customer rejected the Toyota car, and the plaintiff returned the customer's deposit to him. In all, the plaintiff lost a profit of £2,730.51 on the anticipated sale. Meanwhile, according to the writ of summons, the plaintiff had a Toyota Crown saloon in Belgium which was unsellable in the United Kingdom or Europe (or so it thought), and its storage charges by January 11th, 1988 had come to about 54,000 Belgian francs.

8 The plaintiff claimed, therefore, against the defendants together, and against each of them separately: (a) £14,340 for loss and damages; (b) damages for storage charges together with interest on those storage charges; (c) interest of £4,953.20 on the £14,340; and (d) further interest at the daily rate of £5.89 until judgment or sooner payment.

9 Mr. Rees, a partner in the plaintiff's London solicitors, in his affidavit of December 18th, 1987 supporting an application to the Senior Master for leave to issue a writ to be served on the defendants out of the jurisdiction, deposed to this:

> "3. In my belief, the intending plaintiff has a good cause of action against the defendants.
>
> 4. The intended defendants are companies based at 28 Irish Town, Gibraltar outside the jurisdiction of this Honourable Court, and are not British subjects or companies.
>
> 5. I verily believe that the action is a case in which service of a writ out of the jurisdiction is permissible, as the claim is brought to cover damages in respect of a breach of contract which was by its terms governed by English law. . ."

The defendants are, of course, British companies.

10 Master Trench gave leave on December 27th, 1987; the writ was issued on January 11th, 1988 in London, and served on the defendants in Gibraltar on January 20th, 1989. The defendants did nothing about it. The plaintiff abandoned its claim for storage charges in Belgian francs, probably because it removed the car back to Kent.

11 The plaintiff applied to the Queen's Bench Division of the High Court for judgment against each defendant, which was granted by Master Grant on March 2nd, 1988. It was for £19,293.20 and £265.05 interest at the rate of 15% per annum (under the Supreme Court Act 1981, s.35A) from the date of issue of the writ to the date of judgment, making a total of £19,558.25 and £155 costs.

12 The plaintiff obtained a writ of *fieri facias*, and the Sheriff of Kent executed it on the Toyota Crown saloon and sold it for £5,200. He then deducted the auctioneer's fees and his own fees and expenses, and handed the plaintiff £3,850.74. So the plaintiff averred that its judgment against

the defendants had been satisfied in part only, and that a balance of £15,707.51 and costs was still owing. It could be enforced in England because it is the judgment of an English court.

13 The plaintiff's legal advisers in Gibraltar told its London solicitors that if that judgment were registered in Gibraltar (pursuant to the Judgments (Reciprocal Enforcement) Ordinance) it would not be liable to be set aside. So the plaintiff applied *ex parte* for—and succeeded in obtaining, on December 11th, 1989—an order from this court registering the English judgment for £19,293.30, along with £265.05 accrued interest and £115 for costs, against the defendants as one of its own judgments.

14 The relevant law is in my view difficult to apply. It is this. In England, provided that the writ does not contain any claim for damage, loss of life or personal injury arising out of a collision between ships (see the Rules of the Supreme Court, O.75, r.2(1)) and is not a writ for a claim within the terms of the Civil Jurisdiction and Judgments Act 1982, service of a writ out of the jurisdiction is permissible with the leave of the court, if in the action begun by the writ the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract being (in either case) a contract which—

> "(i) was made within the jurisdiction, or
>
> (ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
>
> (iii) is by its terms, or by implication, governed by English law, or
>
> (iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any action in respect to the contract . . ."

That is all in the Rules of the Supreme Court, O.11, r.1(1)(d).

15 What should a defendant do who is served and wishes to contest the jurisdiction of the English court? He must acknowledge service of the writ and give notice of intention to defend the proceedings and, within the time within which a defence would have to be served, apply for the writ or service on him to be set aside. If he does both, he will not have submitted to the jurisdiction of the English court. See R.S.C., O.12, r.7 and r.8(1)(b); *Carmel Exporters (Sales) Ltd.* v. *Sea-Land Servs. Inc.* (2), *per* Goff, J.; *The Sennar (No. 1)* (3); and *Astro Exito Navegacion SA* v. *Hsu* (*The Messiniaki Tolmi*) (1).

16 When it comes, however, to setting aside the registration here of an English judgment, s.6 of the Ordinance provides that any party against

whom a registered judgment may be enforced may apply to the Supreme Court to have it set aside, and that—

"(1) . . . the registration of the judgment—

(a) shall be set aside if the Supreme Court is satisfied—

(i) that the judgment is not a judgment to which [Part I of the Judgments (Reciprocal Enforcement) Ordinance] applies or was registered in contravention of the foregoing provisions of this Ordinance; or

(ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or

(iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or

(iv) that the judgment was obtained by fraud; or

(v) that the enforcement of the judgment would be contrary to public policy in Gibraltar; or

(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made . . ."

It is mandatory to set aside the registration if the application is successfully brought within one or more of those sub-paragraphs.

17 The English source of this Ordinance is the Foreign Judgments (Reciprocal Enforcement) Act 1933: s.6(1) of the Ordinance faithfully reflects s.4(1) of the Act. Thus English decisions on the latter will be persuasive for the former. Under s.6(2) of the Ordinance (and s.4(2) of the Act, which it mirrors almost word for word)—

"the courts of the country of the original court shall . . . be deemed to have had jurisdiction—

(a) in the case of a judgment in an action in personam—

(i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court; or

(ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court; or

(iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or

(iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or

(v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected either through or at that office or place;

(b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property, if the property in question was at the time of the proceedings in the original court situate in the country of that court;

(c) in the case of a judgment given in an action other than any such action as is mentioned in paragraph (a) or paragraph (b) of this subsection, if the jurisdiction of the original court is recognised by the law of Gibraltar."

18 Widgery, J., as he then was, in *Société Cooperative Sidmetal* v. *Titan Intl. Ltd.* (4), said ([1965] 3 All E.R. at 504):

> "It seems to me therefore, that, on a proper view of s.4, the provisions of sub-s. (2) do contain all the judgments which are properly registrable under the Act of 1933 and that no judgment which cannot be brought within the terms of sub-s. (2) is a judgment which ought to be registered because it is a judgment of a court which had no jurisdiction in the circumstances of the case for the purposes of this Act."

Translate that into terms appropriate to the Ordinance, and it reads thus:

> "It seems to me therefore, that, on a proper view of [s.6], the provisions of sub-s. (2) do contain all the judgments which are properly registrable under the [Ordinance] and that no judgment which cannot be brought within the terms of sub-s. (2) is a judgment which ought to be registered because it is a judgment of a court

> which had no jurisdiction in the circumstances of the case for the purposes of [the Ordinance]."

19 When it came to learned counsel's submissions on the facts and the law in this matter, Mr. Culatto for the defendants relied on the provisions of s.6(2) of the Ordinance, and Mr. Trinidad adumbrated the relevant provisions of Orders 11 and 12 of the Rules of the Supreme Court.

20 The findings of this court are that the plaintiff relied on the fact that its writ was brought to recover damages in respect of the breach of a contract being a contract which "is by its terms, or by implication, governed by English law" (R.S.C., O.11, r.1(1)(d)(iii)), and so falls within the ambit of R.S.C., O.11, r.1(1)(d), and Master Trench presumably gave leave to issue the writ and serve it out of the jurisdiction on that ground.

21 The plaintiff's solicitor, in my view, might have been on better ground if he had alleged, under R.S.C., O.11, r.1(1)(e), that the claim was—

> "brought in respect of a breach committed within the [English] jurisdiction of a contract made within or out of the jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the jurisdiction that rendered impossible the performance of so much of the contract as ought to have been performed within the jurisdiction."

22 The defendants, it is agreed, did not acknowledge service and give notice of intention to defend the proceedings, or apply for the writ or service on them to be set aside within the time within which a defence would have to be served. So Master Grant entered judgment for the plaintiff against the defendants on March 2nd, 1988. It has not been suggested that that was an error, and in my respectful view it was not so.

23 Then, on an *ex parte* application to this court by the plaintiff, an order for the registration here of that judgment was obtained. With hindsight, I think that I should have made the plaintiff serve the application on the defendants and had the matter heard *inter partes*. The registered judgment was given in an action *in personam* when the defendants were defendants in the original court but had not submitted to the jurisdiction of that court by voluntarily appearing in it for any purpose, counterclaimed in the proceedings in the original court, or agreed before the beginning of the proceedings to submit to the jurisdiction of the original court or the courts of the country of that court in respect of the contract for the sale of the Toyota Crown saloon. They are bodies corporate, but when the proceedings were commenced in England they did not have their principal place of business in England, and nor were they resident there. Those proceedings in respect of the transaction for the sale of the car were not effected through any office or place of business of either defendant in England, for neither has an office or place of business there.

24 For these reasons, in my judgment, the defendants are entitled to succeed, and the registration of the judgment in this case should be set aside: I so order. The application is granted, and the registration on December 11th, 1989 of the judgment of the High Court dated March 2nd, 1988 for a debt of £19,293.30 with £265.50 accrued interest and £115 costs against the defendants as a judgment of this court is set aside. The costs of and occasioned by the application are to be paid by the plaintiff to the defendants.

Application granted.