MEDIUM PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND CA 251/93

IN THE MATTER of the Reciprocal Enforcement of Judgments Act 1934

AND

IN THE MATTER of a Judgment of the High Court of the Solomon Islands in its Admiralty jurisdiction

BETWEEN MELVILLE JOHN BOLTON

Appellant

A N D MARINE SERVICES LIMITED

Respondent

Coram: Henry J
Thomas J
Temm J

Hearing: 5 February 1996

Counsel: P A D Davies for Appellant
R J Connell for Respondent

Judgment: 5 February 1996

ORAL JUDGMENT OF THE COURT DELIVERED BY THOMAS J

The issue

This appeal raises the question whether an irregularly obtained judgment against the appellant in the Solomon Islands should be enforced by the Courts in this country

under the Reciprocal Enforcement of Judgments Act 1934 when the judgment has not been set aside in the Solomon Islands because the appellant is in contempt of Court.

A brief outline of the facts

The appellant, Mr Bolton, owns a yacht called "Classique". The yacht went aground 60 miles off the coast of the Solomon Islands on 29 March 1990. Mr Bolton sent out a "mayday" call. The respondent, Marine Services Ltd., which operates a marine service and salvage business, at once rendered assistance. Mr Bolton signed a "no cure-no pay" salvage agreement in Lloyd's standard form. Marine Services thereupon carried out a successful salvage and towing operation and it was not long before the "Classique" was lying safely in a harbour in the Solomon Islands.

On 1 April Marine Services delivered an account for $A85,000 for the salvage. The account was not paid, and Marine Services issued a writ in rem claiming salvage at the amount in the account, that is, $A85,000, together with interest at 18 per cent per annum and costs. Mr Bolton duly entered an appearance. Almost immediately, however, he sailed the "Classique" from the Solomon Islands. No security had been fixed or given. In fleeing the jurisdiction in defiance of a writ of arrest Mr Bolton committed a blatant contempt. He has never returned to the jurisdiction and still refuses to do so. He has done nothing to purge his contempt.

On 4 July, Marine Services obtained judgment by default in the High Court of the Solomon Islands for $A85,000, together with interest at 18 per cent against Mr Bolton. The company then registered this judgment in New Zealand under the Reciprocal Enforcement of Judgments Act on 26 November 1990. I will not traverse in detail the legal proceedings which then ensued in both the Solomon

Islands and in this country. Suffice to say that, when an application to set aside the registration of the judgment in New Zealand was first heard, Barker J, who heard the application, expressed concern that the damages had not been calculated in accordance with the normal common law principles for assessing salvage. He gave Mr Bolton an opportunity to apply to the High Court of the Solomon Islands for a rehearing as to quantum. Eventually the issue came before the Solomon Islands Court of Appeal. Its members were Mr Justice Connelly, a retired Judge of the Supreme Court of Queensland, and Williams JA, currently a Judge of that Court.

In a comprehensive reserved decision delivered on 30 June 1995, the Court of Appeal found that the judgment in issue had been irregularly obtained and that, although the amount claimed might ultimately be justified by proper evidence, the sum of $A85,000 appeared excessive. But although it accepted that the usual consequence of a default judgment which has been irregularly obtained is that it will be set aside ex debito justitiae without the defendant being required to establish a defence on the merits, the Court of Appeal declined to set the judgment aside. It based its decision on Mr Bolton's unpurged contempt. Williams JA said (at p 21):

> "In my view the defendant's contempt here is impeding the course of justice because whilst the vessel remains out of the jurisdiction the court is not able to make an appropriate order enforcing a judgment for salvage. That is the direct result of the very act constituting the contempt.
>
> It follows, in my view, that no order should be made setting aside the default judgment of 4th July 1990 on the ground that it was irregularly obtained unless and until the "Classique" is surrendered into the custody of the Admiralty Marshall of the Solomon Islands. In the meantime that judgment should stand as a final judgment of the Court and be enforceable as such."

The Court reserved liberty for Mr Bolton to apply to restore the application to set aside the judgment on the Court list after the "Classique" had been returned to the jurisdiction.

Mr Bolton did not, however, return the vessel to the Solomon Islands. Rather, through counsel, he again applied to set aside the registration of the judgment in New Zealand. Barker J also declined this application. Hence, the appeal to this Court.

Mr Davies, appearing for Mr Bolton, argued that the fact his client is in contempt in the Solomon Islands need not inhibit the Courts in New Zealand from deciding in his favour. He is not in contempt in this country. Mr Davies therefore submitted that, as a matter of justice between the parties and because the enforcement of the judgment would be contrary to public policy in New Zealand in terms of s 6(1)(e) of the Act, the registration of the judgment should be set aside.

We did not need to call upon Mr Connell for Marine Services. In our view, Mr Davies' submission cannot be upheld.

Public policy

We are adamant that it would not be contrary to public policy to enforce the judgment of the High Court of the Solomon Islands in this country for a number of reasons.

In the first place, we do not consider that it is appropriate in the circumstances of this case for the New Zealand Courts to, in effect, seek to review the decision of the Solomon Islands Court of Appeal. Reciprocity requires full recognition of that Court's judgment. Mr Davies constantly referred in argument to the Court of

Appeal's finding that the judgment in issue had been irregularly obtained. But the Court of Appeal's decision went further than that. It held that, notwithstanding the irregularity, Mr Bolton's application to set aside the judgment should not be heard until he had purged his contempt. It placed no conditions or time limit on that requirement. At the present time, therefore, the judgment stands as an enforceable judgment in the Solomon Islands. It is not, we consider, for the Courts of this country to examine the merits of the Court of Appeal's decision. The concept of reciprocity behind the Reciprocal Enforcement of Judgments Act would be undermined if this Court were to seek to substitute its opinion for that of the Solomon Islands Court of Appeal.

Secondly, it is impossible to contend that the enforcement of the judgment in this country would be contrary to public policy so long as Mr Bolton fails to purge his contempt. Mr Davies conceded that, if an equivalent irregular judgment in an action in rem had been entered in this country and the defendant had subsequently committed a similar contempt, the Courts here, in accordance with well-established law, would decline to set aside the judgment until the defendant had rectified his contempt. We fail to see how it can be said that the registration of the judgment in issue is contrary to public policy when the Courts of the Solomon Islands are doing precisely what would, in similar circumstances, be done in this country.

It is, of course, to be acknowledged that it appears repugnant to justice to enforce a judgment which has been irregularly obtained. Other considerations, however, must be taken into account. This point was made by Wiley J in **Banque Indosuez** v **Bourgogne** (Unreported, Auckland High Court, 12 January 1990, M662/89). The learned Judge stated (at p 9):

> "While it may seem repugnant to our sense of justice to permit to be enforced a judgment which this Court thinks is wrong, there are other

> considerations to be taken into account especially if the judgment debtor has not exercised and exhausted his rights of appeal or other procedures open to him in the Court of origin. Important also is the issue of judicial comity, and, from a national point of view, the need not to endanger existing reciprocity arrangements."

In the present case, Mr Bolton's blatant contempt in fleeing the Solomon Islands jurisdiction when his yacht had been validly arrested and thereby depriving Marine Services of security pending the resolution of its claim for salvage negatives any injustice in enforcing an irregular judgment, at least, failing any genuine attempt by Mr Bolton to purge his contempt.

In this regard, it is claimed that Mr Bolton has not returned his yacht to the Solomon Islands because he has no confidence in the legal system of that country. Mr Davies acknowledged that this lack of confidence could not be extended to the competence of the Courts. The judgment of the Courts, particularly the judgment of the Court of Appeal, preclude such a claim. Ultimately, Mr Bolton's complaint is about the difficulties which he alleges are experienced in obtaining effective legal representation in the Solomon Islands. We suspect that these difficulties are overstated. It is possible for New Zealand counsel to appear in the Courts of the Solomon Islands, and we do not doubt that appropriate notice of any hearing date for an application to set aside the judgment could be arranged or insisted upon. Ultimately the Courts of that country would ensure a fair hearing of any application which Mr Bolton might choose to make.

In the third place, we are also satisfied that the registration of the judgment in New Zealand will achieve justice as between the parties. Mr Davies stressed in argument that this objective is the underlying principle in this area of conflict of laws. He referred to the passage in Dicey and Morris, **The Conflict of Laws** (12th Ed - 1993) at pp 5-6 to the effect that, while it was at one time supposed that the doctrine

of comity was a sufficient basis for the conflict of laws, and references to comity continue to be found in English judgments today, it is clear that English Courts apply the foreign law in order "to do justice between the parties".

It would not, in our view, do justice between the parties to refuse to register the judgment of the Solomon Islands in the circumstances of this case. By fleeing the jurisdiction Mr Bolton deprived Marine Services of security in that jurisdiction rendering any judgment, or the resolution of the correct amount of salvage, academic. Mr Bolton has no other assets in that country against which any judgment could be enforced. It is therefore undeniably fair that the present judgment should stand until such time as Mr Bolton has returned the yacht to the Solomon Islands. No more nor less is being done in this country than could be done in the Solomon Islands in enforcing the judgment, notwithstanding the irregularity involved, pending the expurgation of the contempt. Again, if it would do justice as between the parties to decline to allow an application by Mr Bolton to set aside a judgment because of his contempt if that judgment had been obtained in New Zealand and the contempt directed at the New Zealand Courts, as effectively conceded by Mr Davies, it is difficult to see why it is any less just to permit the judgment in issue to be enforced in this country.

For these reasons the appeal is dismissed.

The respondent will be allowed costs in the sum of $3,500, together with all reasonable travelling and accommodation expenses to be fixed by the Registrar failing agreement.

One other matter may be mentioned. Mr Davies drew our attention to the fact that the judgment sealed by the respondent did not accurately reflect the judgment given

by Barker J. This irregularity is not a matter this Court can rectify in the present proceeding. We record, however, that Mr Connell undertook to refer the matter back to Barker J.

Solicitors:
Jordan Smith & Davies, Auckland for Appellant
Connell & Connell, Auckland for Respondent