IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-5827

IN THE MATTER OF	IN THE MATTER of the Reciprocal of Judgments Act 1934
AND	
IN THE MATTER OF	of a Judgment of the HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
BETWEEN	QUESTNET LIMITED Applicant
AND	WILFRED ROYCE LANE Respondent

Hearing: 30 April 2008

Appearances: A Hayes for Plaintiff
L Gerrard for Defendant

Judgment: 16 May 2008 at 12:00 midday

JUDGMENT OF ASHER J

This judgment was delivered by me on 16 May 2008 at 12:00 midday pursuant to Rule 540(4) of the High Court Rules

……..
Registrar/Deputy Registrar

……..
Date

Solicitors:
Hucker & Associates, PO Box 3843 Shortland Street, Auckland
Holmes Dangen & Associates, Level 6, West Plaze, 3 Albert Street, Auckland

[1] Questnet Limited ("Questnet") is a designer, producer and seller of products in Hong Kong. On 21 September 2007 it registered a judgment of the High Court of Hong Kong in New Zealand for US$737,600.31 together with interest and costs against Wilfred Royce Lane ("Mr Lane"), a Hong Kong resident. Mr Lane now applies to this Court to set aside the registration of that judgment.

[2] The proceedings have a considerable history which I will not set out in detail. The relationship between Questnet and Mr Lane commenced in 1999 when Mr Lane became Questnet's chief legal officer. Mr Lane describes himself as a professional sportsman, but he has a New Zealand law degree, and was connected to various legal and consultancy firms in Asia as a consultant or legal executive from 1989 to 1999. On 13 September 1999 he was promoted to the position of director for legal affairs for Questnet. In this role he headed the company's legal department with about five or six in-house counsel reporting to him. He continued in that position until June 2005.

[3] After retiring from Questnet he worked as a business consultant for a former senior executive of Questnet, Mr Furt Rinck, whom Mr Lane describes as Questnet's original founder. It was this relationship which led to the present proceedings. Questnet alleges that Mr Rinck wrongly took for his own use significant trust funds that belonged to Questnet. Questnet issued proceedings against Mr Rinck in 2006, and obtained Mareva orders against him. Those Mareva orders required Mr Rinck to file affidavit evidence as to what had happened to the funds that he was alleged to have taken. In the affidavits filed in compliance with that order Mr Rinck disclosed that the funds in question were deposited in bank accounts belonging to Mr Lane, and thereafter disbursed by Mr Lane on Mr Rinck's instructions.

[4] Mr Lane was then joined to the proceedings. It was alleged against him that he had knowingly received funds and was party to a conspiracy to obtain Questnet moneys by unlawful means. Those proceedings were pursued through to a default judgment that was entered against Mr Lane on 4 September 2007. It is that judgment which has been registered in New Zealand, the registration of which Mr Lane now seeks to have set aside.

[5] Mr Lane's defence as summarised by his counsel, Ms Gerrard, is that he acted in accordance with the instructions of Mr Rinck and was misled by him as to the origin and nature of the funds placed with him. Mr Lane asserts that Mr Rinck was his employer, and he was unaware that the funds were subject to a Mareva order.

[6] The exact funds transferred by Mr Lane according to an affidavit sworn by him in the Hong Kong High Court were as follows:

a) US$105,000 on or about 27 July 2006, transferred on by Mr Lane to a company in Austria;

b) US$100,000 on or about 21 August 2006, transferred on by Mr Lane to a company in Austria;

c) US$535,477.50 on or about 28 August 2006, transferred on to Mr Rinck's wife's bank account.

[7] Mr Lane puts forward three grounds for setting aside the registration:

a) The first ground is that in terms of s 6(1) of the Reciprocal Enforcement of Judgments Act 1934 ("the Act") he did not receive sufficient notice of the default judgment fixture.

b) The second is that in terms of s 6(1) of the Act the enforcement of the judgment would be contrary to public policy in New Zealand.

c) The third ground is that in terms of s 7 of the Act, an appeal is pending, or Mr Lane is entitled to and intends to appeal, and that this Court in its discretion should set aside the registration to enable the appeal to be disposed of.

Setting aside registration under the Act

[8] Section 6(1)(c) and (e) read:

> **6 Cases in which registered judgments must, or may, be set aside**
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> (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment shall be set aside if [the High Court] is satisfied—
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> …
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> (c) 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
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> …
>
> (e) That the enforcement of the judgment[, not being a judgment of a superior Court or an inferior Court of Australia under which Australian tax is payable,] would be contrary to public policy in New Zealand; or

[9] The various provisions of s 6(1) are linked by the word "or". If any of those individual grounds are established to the Court's satisfaction, the registration must be set aside: *March Engineering Ltd v Murray Taylor* HC AK M169/90 6 September 1990, Wylie J at p 2. There is no discretion.

Was there adequate notice under s 6(1)(c)?

[10] Ms Gerrard for Mr Lane argues that Mr Lane did not receive adequate notice. It is necessary first to consider the facts that relate to this submission in greater detail.

[11] Mr Lane was joined as a party to the Hong Kong proceedings on 23 August 2006. He was ordered to be served with the proceedings on 26 October 2006. He was served by way of substituted service. On 16 February 2007 following a written request, and having provided identification, he personally conducted a search of the High Court file in Hong Kong. On 25 April 2007 the law firm Au-Yeung Cheng Ho & Tin filed a notice to act for Mr

Lane, and they became solicitors on record, and received copies of the papers. Mr Lane did not file a notice of intention to defend the claim. He attended at least one Court conference with a barrister instructed on his behalf.

[12] On 15 June 2007 Mr Lane was found guilty of contempt for non-compliance with a disclosure order under the Mareva injunction by Madam Justice Chu in the Hong Kong High Court. Committal proceedings followed, and Mr Lane was found guilty of contempt of Court.

[13] On 29 June 2007 Mr Lane wrote to the solicitors for Questnet advising that he had dismissed his previous lawyers. His former lawyers in turn confirmed this. Mr Lane stated in his letter that he would confer with counsel and speak to a new solicitor. The address he showed in that letter, and in other correspondence, was the New Zealand address where his wife and family resided. That was C/- Lane'sview Heights, 18 Kilsyth Way, Howick, Auckland 2016, New Zealand.

[14] An order prohibiting Mr Lane from leaving Hong Kong was made against him, and he continued to reside in Hong Kong. He gave no Hong Kong address and stated to the Hong Kong Courts that he could not do so because he "moved around periodically". He has stated in his affidavit filed in this Court that he maintained close contact with his wife and children in New Zealand, who regularly checked correspondence sent to his New Zealand address and would scan and email any material to him on the day it was received.

[15] On 6 August 2007 Questnet obtained a summons from the High Court of Hong Kong requiring all parties concerned to attend before the Court on 14 August 2007 at 9:30 am at a hearing on behalf of Questnet for an application for default judgment against Mr Lane. This summons was not a new proceeding, but an application for default judgment against Mr Lane on the existing longstanding proceedings involving Mr Rinck and Mr Lane.

[16] On 17 August 2007 the High Court of Hong Kong ordered that service on Mr Lane in respect of the summons and the affidavit in support be substituted by advertising the documents in an English newspaper published and widely circulated

in Hong Kong, and by posting the documents to Lane'sview Heights, 18 Kilsyth Way, Howick, Auckland 2016, New Zealand. It was stated that this would be good and sufficient service of the documents.

[17] Mr Shamus Donegan, a partner in the firm of Barlow Lyde & Gilbert, Solicitors of Hong Kong, has sworn two affidavits in this New Zealand proceeding. He deposed that the order for substituted service and the summons were posted to Mr Lane at his New Zealand address on 22 August 2007, and advertised in "The Standard" in Hong Kong on 24 August 2007.

[18] There is no evidence as to when the documents arrived in New Zealand at the stated address. Mr Lane in his affidavit in this proceeding states that he received scanned and emailed copies of some of the documents. He does not state the exact day on which he received them but states that on 3 September 2007, the day before the date when the summons was to be heard, he wrote a letter which was faxed to the Court. He stated in his affidavit in support that because there was a warrant for his arrest at large in relation to the contempt proceedings, he decided not to appear on 12 September 2007 as this "would have had detrimental conclusions regarding my liberty".

[19] This letter, which is annexed to Mr Donegan's first affidavit, was addressed to The Masters' Division of the High Court in Hong Kong, for the Clerk of Practice Master KH Hui. Mr Lane states in it that he had just learned of the summons, which was served at what he described as "my permanent address for service". He appears to assume that the summons relates to a default judgment entered against him, with which he has not been served. He seeks time "by which to take out summons under r 9, order 13, to set aside this judgment".

[20] The matter came before Master De Souza in the High Court of Hong Kong on 4 September 2007, and judgment by default was entered against Mr Lane for the full amount sought. It is this judgment which has now been registered in New Zealand.

[21] It is against this outlined background that Mr Lane's claim that he has not been given adequate notice in accordance with s 6(1)(c) must be considered. It is clear that Mr Lane was aware of both the proceedings, and then the hearing date of 4 September 2007. He had been aware of the proceedings for at least a number of months, and must be regarded as having been properly served with the proceedings. As to the hearing date, it is his case in this Court that he had only had a day, from the time he received copies of the documents from New Zealand, and chose to respond by the letter rather than to appear on the date of hearing. It is because of this that Ms Gerrard submits that he did not receive notice of the proceedings "in sufficient time" to enable him to defend them.

[22] The question directly arises whether s 6(1)(c) requires notice to the judgment debtor of the proceedings generally, or rather notice of the particular step in the proceeding which gives rise to the judgment. Ms Gerrard for Mr Lane relies on *James Meikle Pty Ltd v Noakes* HC AK A823/80 28 July 1983, Prichard J. She submits that the learned Judge held in that case that particular notice of the date of hearing of an application for judgment was required. Prichard J stated at p 4:

> What is required is actual notice of the proceedings in sufficient time to enable them to be defended. This I think, must mean, not simply notice that the proceedings are pending but notice of the time and place of hearing affording enough time to enable the defendant to appear and defend …

And at p 8:

> The onus being on Mr Noakes to show on balance of probabilities that he did not receive adequate notice of the date of hearing, I must hold that this application cannot succeed under s 6(1)(c).

In fact, in that case the application to set aside was dismissed.

[23] Prichard J does not appear to have been referred to the earlier decision of *Marine Services Limited v Bolton* (1992) 6 PRNZ 173, where Barker J held that the words "notice of the proceeding" in s 6(1)(c) referred to notice of the commencement of the action as opposed to any interlocutory steps. Barker J followed *Brockley Cabinet Co. Ltd v Pears* (1972) 20 FLR 333, which adopted this approach, despite the fact that His Honour thought that the time given to respond to the motion seeking judgment in the circumstances was unrealistically short, a notice

having been given after 5:00 pm on Friday, 29 June 1990, and the hearing being on the morning of Wednesday 4 July 1990. The debtor in that case was in New Zealand at the time, and the case was being heard in the Solomon Islands.

[24] A similar approach was adopted in *Pickett v Pulman* HC AK CIV 2003-404-5263 11 June 2004 Lang J, where it was held that a defendant who elects to take no steps to defend a proceeding does not have the luxury of receiving any further warning that judgment is about to be entered. After service, judgment can be entered without further notice either by default or upon formal proof, even if the specific motion for default judgement is not served.

[25] I am by no means certain that Prichard J in the remarks relied on by Ms Gerrard in *James Meikle Pty Ltd v Noakes* was indicating an approach any different from that adopted in these other decisions. He may have been just adding the view that the defendant should be given initial notice of the place and time of hearing for the initial call of the proceeding itself, but not necessarily suggesting that this was necessary for subsequent interlocutory applications. Whether that was so or not, the approach in *Marine Services Limited v Bolton* is supported by the actual words of s 6(1)(c), which refer to receiving notice of "the proceeding" in sufficient time to defend "the proceedings". While "the proceedings" are not defined in the Act, a natural reading would indicate the proceedings as a whole, and not any particular application or motion in those proceedings. This construction is supported by the definition of "proceeding" in r 3 of the High Court Rules as "any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory application". I conclude that s 6(1)(c) does not require sufficient notice of the particular interlocutory step taken when judgment is entered, if the judgment debtor has had proper notice of the proceedings, and the opportunity to take the usual procedural steps to protect its position.

[26] It should also be observed that given that Mr Lane resided in Hong Kong, and had extensive legal experience and access to lawyers and counsel, his failure to arrange for a proper appearance on 4 September 2008 evokes no sympathy. He chose not to file a statement of defence, or actively contest the proceedings. The papers had been drawn to his attention at the latest on the day before. He had actual

notice. He chose to write a letter to the Court rather than to appear or instruct counsel. His fear of what appears to have been justifiable arrest was no excuse. He had an opportunity to take proper steps or to get counsel to seek an adjournment on properly articulated grounds, but chose not to. He has only himself to blame for the position that he is in.

[27] Thus, despite Ms Gerrard's vigorous submissions to the contrary, I am not satisfied that there was inadequate notice in terms of s 6(1)(c).

Would it be contrary to public policy to enforce the judgment?

[28] Ms Gerrard for Mr Lane submitted that enforcement of the judgment which was obtained by default, given the absence of adequate notice and the date of fixture, was contrary to public policy in New Zealand. As a consequence the judgment should be set aside. She relied on the English Court of Appeal decision of *Maronier v Lama* [2003] 1 QB 620 where the judgment debtor had been unaware that proceedings in the Netherlands against him had been reactivated, and was not made aware of that fact until the time for an appeal had passed. It was held that he had manifestly not received a fair trial, and on that basis it was contrary to public policy to enforce the judgment. That case did not relate to the interpretation of a reciprocity statute. However, it was held in *Reeves v One World Challenge LLC* [2006] 2 NZLR 184 at [52] that there is no basis for distinguishing between cases relating to public policy which involve reciprocity statutes, and those cases which do not.

[29] It was made clear in *Maronier v Lama* that there had been a failure to give the judgment debtor a fair trial, but that was hardly surprising given the fact that the proceedings in the Netherlands had been stayed for 12 years, and reactivated without notice to him. In *Reeves v One World Challenge LLC* it was held that the defence of public policy in relation to challenges to the enforcement of a foreign judgment is not a remedy to be used lightly. The Court of Appeal held that perceived injustices which do not offend a reasonable New Zealander's sense of morality are not a basis for interference (at [50] and [56]) and applied the decision of the Supreme Court of Canada in *Beals v Saldanha* [2003] 3 SCR 416 at [75] that the defence of public policy should have a narrow application. It was stated at [56]:

> Simply because a case could have been decided differently under New Zealand law is not a weighty enough factor to invoke the exception.

Undoubtedly enforcement which would shock the conscience of a reasonable New Zealander, or be contrary to New Zealand's views of basic morality, or a violation of essential principles of justice or moral interests, could be sufficient to invoke the public policy ground (at [67]).

[30] Mr Lane had had Hong Kong solicitors acting for him in the Hong Kong proceedings. Those solicitors had taken steps, and Mr Lane had personally inspected the file. Despite giving an indication when his previous lawyers ceased to act that he would instruct new lawyers, he did not do so. He provided an address for service, and the relevant papers relating to the judgment were served on that address for service. He had notice of the fixture at the latest the day before, and had sufficient time to write a letter to the Court. He could have appeared himself or briefed counsel.

[31] In such circumstances there is nothing in the entry of a default judgment and the Hong Kong Court's rejection of his plea for an adjournment in his letter, that shocks the conscience. To the contrary, in these circumstances the same result may well have occurred in this Court under the New Zealand High Court Rules, although I have not had detailed submissions on the topic and I do not express a final view on this.

[32] Following the entry of the default judgment Mr Lane had a right to seek a stay, and indeed he indicated to the High Court of Hong Kong that he would seek such a stay. However, he did nothing for three months until he applied to set aside the judgment on 28 December 2007. His application was dismissed with costs on 16 April 2008. He has now appealed that decision.

[33] Thus, he has sought relief from the decision just as he would have been able to in New Zealand. The fact that he has not been successful to date is not a basis for intervention. There has been no breach of natural justice in the conduct of this proceeding.

[34] I am not satisfied that the enforcement of the judgment would be contrary to public policy in New Zealand. This ground fails.

The discretion in s 7of the Act

[35] Section 7(1) of the Act provides:

> **7 Powers of High Court on application to set aside registration**
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> (1) If, on an application to set aside the registration of a judgment, the applicant satisfies [the High Court] either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment, the Court, if it thinks fit, may, on such terms as it may think just, either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period as appears to [the High Court] to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by a competent tribunal.
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> …

[36] Section 2 of the Act provides that an appeal includes any proceeding by way of application to set aside a judgment or an application for a new trial or a stay of execution. There is an appeal pending against the refusal to set aside the judgment. There is therefore jurisdiction to invoke the discretion.

[37] In *Hunt v BP Exploration Company (Libya) Ltd* [1980] 1 NZLR 104 at 114, it was held that this jurisdiction was very wide. In that case the appeal against the registered judgment was going to feature complex points of law and fact, and the appellant's argument alone was expected to last for six weeks. The Judge decided to exercise his discretion to adjourn the application to set aside the registration for a reasonable period, which was until after the determination by the English Court of Appeal of the appeal. Leave was reserved to apply.

[38] Here it can be observed that Mr Lane's application for a stay of the default judgment has already failed. He has now appealed that decision. His reliance on this ground is weakened by the fact that his initial attempt to stay the enforcement of the judgment did not succeed.

[39] There is nothing to impugn the conduct of the High Court of Hong Kong in refusing that application for a stay. From the judgments that have been made available of the Hong Kong Courts in matters relating to Mr Lane to date, a certain lack of sympathy for the various excuses he has offered both in relation to substantive and procedural issues is evident, and a basis for this lack of sympathy can be discerned. It might also have been evident here, if New Zealand Courts had been considering the same matters. Mr Lane has not provided convincing explanations either on the substantive issue of why he received and past on Mr Rinck's moneys, or on the procedural issues, in particular the cavalier attitude he took to the default judgment summons by not attending, and instead sending a letter to the Court.

[40] This is not a situation where there is an appeal of obvious substance pending, or where there have been misjudgments by the debtor as to procedure, which might evoke sympathy. While, of course, any of the appeals or further applications on Mr Lane's behalf may succeed, the procedural steps still open to him are not obviously likely to give him relief in Hong Kong. Clearly Mr Lane is not having a great deal of success in the Hong Kong Courts. The judgments that have been made available, with respect, indicate a careful and proper consideration of his position by the Hong Kong Courts, and there is no reason why this Court should do that which they have refused to do, and effectively grant Mr Lane a stay.

[41] In the circumstances, I conclude that the registration should not be set aside or adjourned under s 7 of the Act.

Conclusion

[42] Mr Lane's application to set aside registration of the judgment of the High Court of Hong Kong of 4 September 2007 is declined.

Costs

[43] Questnet as the successful party is entitled to costs, which are payable on a 2B basis.

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Asher J