CV 05055

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Reciprocal Enforcement of Judgments Act*, R.S.N.W.T. 1988, c. R-1;

AND IN THE MATTER OF a Judgment of the Ontario Court (General Division) obtained by Central Guaranty Trust Company against Ramon Antonio Deluca and Nancy Deluca dated March 27th, 1992;

B E T W E E N:

CENTRAL GUARANTY TRUST COMPANY, now ADELAIDE CAPITAL CORPORATION

Plaintiff

- and -

RAMON ANTONIO DELUCA and NANCY DELUCA

Defendants

REASONS FOR JUDGMENT

1 The defendants apply to set aside the *ex parte* registration of an Ontario judgment in this court pursuant to the *Reciprocal Enforcement of Judgments Act* (the "Act"). This application raises the question of the extent to which a recent judgment of the Supreme Court of Canada dealing with recognition of "foreign" judgments has affected, if at all, proceedings under this statute. Since the Act is modelled on uniform legislation in force in most provinces, the question is not unique to this jurisdiction.

2 On March 27, 1992, the plaintiff obtained default judgment against the

defendants in Ontario. The action was based on foreclosure of a mortgage on property in Ontario. The defendant, Nancy Deluca, was served with process from the Ontario court in Ontario. The defendant, Ramon Antonio Deluca, was personally served in Iqaluit, Northwest Territories, where, he says, he has been living since 1983. The Ontario property which was the subject of the foreclosure action was apparently the former matrimonial home of the defendants.

3 On February 9, 1994, the plaintiff applied *ex parte* to register the Ontario judgment pursuant to the Act. The relevant statutory provisions are:

> 2. (1) Where a judgment has been given in a court in a reciprocating jurisdiction, the judgment creditor may apply to the Supreme Court within six years after the date of the judgment to have the judgment registered in the Supreme Court.
>
> (2) On an application under subsection (1), the Supreme Court may order the judgment to be registered in the Supreme Court.
>
> (3) An order for registration under this Act may be made *ex parte* in all cases in which the judgment debtor was personally served with process in the original action, or in which, though not personally served, the judgment debtor appeared or defended or otherwise submitted to the jurisdiction of the original court, but in all other cases reasonable notice of the application for the order must be given to the judgment debtor.
>
> (4) No order for registration shall be made if it is shown to the Supreme Court to which the application for registration is made that
>
> (a) the original court acted without jurisdiction;

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court;

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that the judgment debtor was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;

(d) the judgment was obtained by fraud;

(e) an appeal is pending or the time within which an appeal may be taken has not expired;

(f) the judgment was in respect of a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court; or

(g) the judgment debtor would have a good defence if an action were brought on the original judgment.

…

6. (1) Where a judgment is registered pursuant to an *ex parte* order,

(a) within one month after the registration or within a further period that the registering court may order, notice of the registration shall be served on the judgment debtor in the same manner as provided by the rules of the registering court for service of statements of claim; and

(b) the judgment debtor, within one month after the judgment debtor has had notice of the registration, may apply to the registering court to have the registration set aside.

(2) On an application referred to in paragraph (1)(b), the Supreme Court may set aside the registration on any of the grounds mentioned in subsection 2(4) and on any terms that the Supreme Court thinks fit.

…

> 9. Nothing in this Act deprives a judgment creditor of the right to bring an action on his or her judgment instead of proceeding under this Act.

4 The *ex parte* application was initially returned for further information. A subsequent *ex parte* application was filed on May 9, 1994, and the order registering the Ontario judgment was issued the same day.

5 A copy of the *ex parte* registration order was served on Mr. Deluca in Iqaluit on May 25, 1994. It was also served on Ms. Deluca in Ontario on August 29, 1994. This application to set aside the *ex parte* order was not filed until November 18, 1994, well beyond the one month time limit prescribed by s.6(1)(b) of the Act. It will be noted that service on Ms. Deluca was not effected within the one month period as required by s.6(1)(a) of the Act; but I find that to be of no consequence since Ms. Deluca was at all relevant times present in the jurisdiction of the original court where the judgment can be enforced against her and there is no indication that she has ever resided in this jurisdiction. As will be seen, the basis of the defendants' application is that Mr. Deluca, and only that defendant, was not within the jurisdiction of the original court. There are no arguments advanced specifically in respect of Ms. Deluca. As a formality therefore I hereby extend the time for service on Ms. Deluca *nunc pro tunc* in accordance with s.6(1)(a) of the Act.

6 One of the defendants' solicitors has sworn an affidavit explaining that no application was brought earlier because he was under the impression that the one month time limit to apply could be extended. No argument was advanced at the hearing before me that the time limit in s.6(1)(b) - unlike that in s.6(1)(a) - can be extended. Indeed, as

will also be seen, there is no power to do so. It seems to me that what may to some extent have prompted this application at this time was the service of a garnishee summons on Mr. Deluca.

7 The defendants' submission is that the basic statutory requirements for an application to be made *ex parte* have not been met. They say that the requirement in s.2(3) that "the judgment debtor was personally served with process in the original action" means personal service within the jurisdiction of the original court. If the defendant was served outside of the jurisdiction, and did not submit to the jurisdiction of the original court, then the judgment is a nullity (except in the original jurisdiction) and therefore cannot be registered. Further, they submit that since it is a nullity, and since the lack of personal service within the jurisdiction goes to the basic entitlement to proceed *ex parte*, the one month time limit does not apply to this application. For these propositions the defendants rely on long-standing authority: *Wedlay* v. *Quist* (1953), 10 W.W.R. (NS) 21 (Alta. S.C. App.Div.); *Traders Group Limited* v. *Hopkins et al.* (1968), 64 W.W.R. 698 (N.W.T. Terr.Ct.), affirmed (1968), 66 W.W.R. 573 (N.W.T.C.A.).

8 In addition, the defendants submit that the plaintiff's solicitors breached their duty to the court in the manner in which the *ex parte* order was obtained. They say that the interpretation given to s.2(3) noted above is of such significant authority that the relevant cases should have been brought to the attention of the chambers judge (in this case myself) who was asked to issue the order. In fact the two case authorities noted above are referred to for consideration by counsel in a practice direction issued in 1977 for *ex parte* applications under the Act.

9 It is to state the obvious when I say that judges cannot be expected to know or, if they did once know, to remember all the relevant law in a particular area. Judges depend on counsel to alert them to the relevant authorities. As stated by de Weerdt J. in *Harvey Fulton Whse. Carpet Sales Ltd.* v. *Pye*, [1990] N.W.T.R. 143 (S.C.), at page 145:

> Applicants seeking relief from the court on an *ex parte* basis are, however, under the duty of disclosing all facts material to their applications for relief, more particularly those facts which may reflect adversely on their applications. This duty is one to be zealously performed on their behalf by members of the legal profession (and students-at-law) representing such applicants. Likewise, members of the profession and their students have a duty to bring to the attention of the chambers judge any statutory or other authority which may reflect adversely on an *ex parte* application.

10 In the Rules of Court, on a general basis, there are requirements set out for the contents of the memorandum that accompanies an *ex parte* application. Rule 341(3) states:

> (3) An *ex parte* application shall be accompanied by a memorandum to the judge setting forth particulars of the material filed, a summary of the relevant facts, reference to the authorities, rules and enactments relied upon and the relief sought.

As noted above by de Weerdt J., any reference to the authorities relied upon should also make note of significant contrary authorities (especially ones that have received appellate court approval).

11 The *ex parte* applications in this case made no reference to any authorities except a blanket general reference to the Act and the Rules of Court relating specifically

to proceedings under the Act. Considering the fact that Mr. Deluca was "personally served with process", but not within the original jurisdiction, then the statutory interpretation of that phrase provided by the authorities noted above should have been brought to my attention in the *ex parte* memorandum.

12 While I think the plaintiff's solicitors may be faulted for not disclosing relevant authorities, I do not think that default should be decisive as to the merits of this application. Such default may, however, have a direct bearing on other incidental matters such as costs.

13 On the merits of the application, the plaintiff submits that the interpretation set forth in *Wedlay* v. *Quist* and *Traders Group Limited* v. *Hopkins* is no longer good law. The argument is that the requirement to interpret the phrase "personally served with process" so as to mean personal service within the jurisdiction of the original court is one that was based on the common law and the common law has now evolved, at least in Canada, to where there is now no need and indeed wrong to incorporate this additional qualification. For this, the plaintiff relies on the Supreme Court of Canada judgment of *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 76 D.L.R. (4th) 256.

14 Prior to *Morguard*, recognition of "foreign" judgments, including judgments of other jurisdictions within Canada, rested on the common law rule of private international law that a court will recognize the judgment of a foreign court only where either (a) the defendant was personally served within the territory of the foreign court, or (b) the defendant voluntarily submitted to the jurisdiction of the foreign court. This was

the law adopted in the *Wedlay* case and subsequently applied in the *Traders Group* case. The *Morguard* judgment, however, established a new test for recognition based on a "real and substantial connection" between the jurisdiction and the action. La Forest J., writing on behalf of the court, stated that "the courts in one province should give full faith and credit ... to the judgments given in another province or territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action" (p.237 W.W.R.).

15 Interestingly, the facts in *Morguard* parallel to some extent the facts in this case. Both actions deal with foreclosure actions over property in the original jurisdiction. Both actions are based on judgments obtained by default after service *ex juris* on the defendants. The significant difference in the two actions, however, is that *Morguard* was an action on the judgment while the case before me is an application to register under the Act.

16 Statutes for the reciprocal enforcement of judgments did not, as noted in *Morguard*, alter the rules of private international law. They simply provide a convenient procedure for the registration of judgments as opposed to bringing an action. This is made clear by s.9 of the Act which preserves the right to bring an action.

17 But what affect, if any, does *Morguard* have on the Act? The cases that have considered this question to date have concluded that when an application is brought to reciprocally register a judgment, as opposed to bringing an action, then the specific requirements of the statute must be complied with notwithstanding the dictates of *Morguard* and whatever changes to the common law it affected: *Acme Video Inc.* v. *Hedges et al.* (1993), 12 O.R. (3d) 160 (C.A.); *T.D.I. Hospitality Management Consultants*

Inc. v. *Browne*, [1994] 9 W.W.R. 153 (Man.C.A.); see also *Cardinal Couriers Ltd.* v. *Noyes* (1993), 13 C.P.C. (3d) 144 (Sask. C.A.).

18 Professor Peter W. Hogg, one of Canada's leading constitutional scholars, attaches a more far-reaching significance to the *Morguard* judgment. He suggests that the effect of *Morguard* is that there is now an implicit full faith and credit rule in the Constitution of Canada. While he points out that it is unclear from the reasons for judgment whether the *Morguard* rule of recognition is a new constitutional requirement or simply a new common law rule, he also refers to *Hunt* v. *T & N*, [1993] 4 S.C.R. 289, in which La Forest J., again for the unanimous court, explained the *Morguard* decision as establishing a constitutional requirement that was beyond the power of provincial or territorial legislatures to override. See Hogg, Constitutional Law of Canada (3rd ed., 1992), section 13.5(c) (1994 update).

19 Whether one regards *Morguard* as enacting a constitutional requirement or effecting a change in the common law, the result in this case is the same. There is now no room to add an implicit requirement for personal service "within the jurisdiction" to the explicit requirement of simply "personal service". One of the changes to the common law rules is that a "foreign" judgment may be enforced where the court of one jurisdiction renders judgment against a resident of another jurisdiction provided that the defendant was served in compliance with the original court's rules for service *ex juris* and has a substantial connection with the original court's jurisdiction. Therefore, in my opinion, the common law on which *Wedlay* and *Traders Group* are based has changed and it is now sufficient, for the purpose of bringing an *ex parte* application under s.2(3) of the Act, to

establish, in the plain words of the section, that "the judgment debtor was personally served with process in the original action". That is the case here and the *ex parte* application was properly brought.

20 My interpretation of the impact of the *Morguard* judgment on s.2(3) of the Act does not in any way alter the specific requirements of the Act in other ways. For example, if one chooses to reciprocally enforce a judgment under the Act and there is evidence establishing one of the criteria in s.2(4), then the judgment cannot be enforced. The alternative approach of an action on the judgment, however, is still available in such circumstances.

21 In this case the defendant Mr. Deluca has put forth an argument that he at least neither carried on business in, nor was a resident of, nor submitted to, the jurisdiction of the original court. There is affidavit evidence on behalf of the plaintiff arguing otherwise. It may be that this defendant has a good argument under s.2(4)(b) of the Act to oppose registration. But it is a matter of some dispute. This argument, however, cannot be entertained because it is brought out of time.

22 As noted previously, s.6(1)(b) of the Act requires that an application to set aside an *ex parte* registration be brought within one month after the judgment debtor had notice of the registration. Mr. Deluca was served over 6 months ago.

23 In the recent case of *Concord Mortgage Group Ltd.* v. *Northern Geophysics Ltd.* (N.W.T.S.C. No. 05225; October 3, 1994), Richard J. held that the one month time limit in s.6(1)(b) is mandatory and cannot be extended. I respectfully adopt his comments

(at page 7 of the unreported judgment):

> In my view when the legislature sets out the procedures for litigants to utilize in certain specific circumstances, a court ought to respect the parameters of the statutory regime enacted by the legislators. To do otherwise is to re-write the legislation.

See also *Yorkshire Trust Co.* v. *Mallett* (1986), 71 A.R. 23 (C.A.).

24 The application to set aside the *ex parte* order of May 9, 1994, is dismissed.

25 Having regard to my earlier comments regarding the failure of the plaintiff's solicitors to bring the relevant authorities to light on the *ex parte* application, and notwithstanding the plaintiff's success on this application, there will be no costs awarded.

John Z. Vertes

J.S.C.

Yellowknife, Northwest Territories
December 8, 1994

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