

KEVIN RAYMOND MIEKLE

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v.

DAVID HOUSTON STEWART

[HIGH COURT, 1994 (Pathik J), 9 December]

Civil Jurisdiction

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Courts-foreign judgment-whether a New Zealand District Court is a "superior" court within the meaning of the Foreign Judgments (Reciprocal Enforcement) Act (Cap 40).

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A judgment issued out of the Auckland Registry of the New Zealand District Court was registered in the High Court of Fiji. On application being made to set aside the registration HELD: District Courts in New Zealand are not covered by Cap. 40 of the Laws of Fiji.

Cases cited:

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Clement James Brown and Donald William Joseph Stewart

Action No. 190/89

Levoune v Bacoulis (1935) A.R. (NSW) 126

Application to set aside registration of foreign judgment.

P. Knight for Plaintiff

R. Matebalavu for Defendant

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Pathik J:

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This summons is filed by Kevin Raymond Mickle (hereafter referred to as the Applicant) seeking an order to set aside judgment registered against him in the High Court of Fiji on 19 February 1993 under the Foreign Judgments (Reciprocal Enforcement) Act (Cap. 40) and a further order that the said judgment be stayed until the determination of this application on the grounds set out in his Affidavit in support of the Summons.

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The Applicant states that pursuant to the registration of the foreign judgment (a judgment of the District Court at Auckland, New Zealand NP 2114/92 between the parties herein) by the High Court of Fiji (hereafter referred to as the judgment), the Plaintiff David Houston Stewart (hereafter referred to as the Respondent) obtained a Receiving Order against him in the Bankruptcy Action No. 507/93 in the Magistrate's Court at Suva. An application to rescind the said order is pending in that Court.

The applicant says that the claim in the District Court at Auckland in Plaintiff No. 2114/92 has taken him "by surprise" as he says that he neither owes the

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Plaintiff any money nor was he served with any papers in regard to the claim pursuant to which the judgment was obtained in New Zealand except that he was served with a Bankruptcy Notice and Petition. He says in paragraphs 12 & 13 of his said Affidavit that

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“12. I am advised and verily believe that it would seem that the Judgment of the District Court of New Zealand, Auckland Registry, registered herein on 19 February 1993 had been irregularly obtained by the Plaintiff David Houston Stewart, further that the said Judgment is not a final judgment for the purposes of the Reciprocal Enforcement of Judgments Act Cap. 39.

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13. I am aware that steps had been taken by Mr. Kitione Vuataki solicitor of Lautoka, to have application filed to set aside the Judgment entered against me as aforesaid. However, I am not aware whether any such application had been taken out by the said solicitor.”

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He says that in the circumstances he has “never been afforded a fair opportunity” to defend himself against the alleged claims.

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For these reasons he is asking the Court to set aside the Judgment registered against him in this Court on the said 19 February 1993.

In reply to the Applicant’s allegations, two affidavits have been filed on the Respondent’s behalf. The affidavit of Moses Khan, a law clerk employed by Messrs. Cromptons has attached to it a copy of Affidavit of Service of Statement of Claim and Notice of Proceedings in Plaintiff No. 2114 of 1992 issued out of the District Court at Auckland. The service was effected by one Jamuna Prasad on the applicant on 21 September 1992 at 11 Honson Street, Flagstaff, Suva. On 19 November 1992 judgment in default was obtained against the Applicant in these proceedings in New Zealand. A copy of the Default judgment is also attached to the said affidavit. The affidavit of Jamuna Prasad sworn 12 August 1994 confirms what has been stated hereabove about service of documents by him.

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The Judgment was registered in the High Court of Fiji on 19 February 1993 on an application ex parte under Foreign Judgments (Reciprocal Enforcement) Act (Cap. 40) when Kupa J ordered

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“that the Judgement of the High Court of New Zealand dated the 19th day of November, 1992 whereby it was adjudged that the above-named David Houston Stewart do recover against the above-named Kevin Raymond Mickle the sum of

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A NZD11, 862:00 (ELEVEN THOUSAND EIGHT HUNDRED AND SIXTY TWO NZ DOLLARS) which is equivalent in Fiji Dollars to FJD9, 828:49 (NINE THOUSAND EIGHT HUNDRED AND TWENTY-EIGHT FJDOLLARS AND FORTY-NINE CENTS) be registered as a judgement in the High Court of Fiji pursuant to the Statute”.

B Before I proceed any further in dealing with the Summons before me in regard to setting aside of the judgment, I wish to point out that the file record shows that Mr. Vuataki a solicitor did apply to set aside the judgment on 1 October 1993 but the application was struck out for want of prosecution on 22 October 1993. As stated earlier there is pending before the Magistrate’s Court an application to rescind the Receiving Order made against the Applicant.

C It appears that the fate of that application will depend on the outcome of the application before me.

I have given careful consideration to the affidavits and written submissions filed by both counsel.

D Briefly, Mr. Knight submits that all references to bankruptcy proceedings are irrelevant as, if the Applicant is successful, all subsequent proceedings to enforce the judgment will be invalid. Mr. Knight says that the judgment was registered in accordance with the requirements of Foreign Judgments (Reciprocal Enforcement) Act and Reciprocal Enforcement of Judgments Act (Cap. 39). He says that there was service of the Claim on the Applicant as evidenced by the Affidavit of Service filed. He says that if Court accepts that the New Zealand proceedings were properly served then it must follow that registration of the judgment in Fiji is effective and valid. Mr. Knight admits that Notice of the Judgment was not served on the applicant immediately but served on his solicitors about 14 April 1994 which he says is not prejudicial to the Applicant.

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F Briefly, Mr. Matebalavu’s argument is that the applicant has not had an opportunity to defend the claim and that the “judgment registered as aforesaid under the Act has not been duly entered”. He submits that the default judgment before the “New Zealand County Court may have been obtained irregularly”. His further submission is that “New Zealand County Court” (he meant ‘District Court’) is not a “Superior Court” for the purposes of the Act. Hence the application to register this judgment “in Fiji was ill-conceived”.

G The issue boils down to this, namely, whether the District Court judgment was capable of being registered under the Act or not.

I have no doubt in my mind on the issue and I hold that Mr. Matebalavu has hit the nail on the head when he said to the effect that this judgment could not

possibly have been registered as it is not a judgment of a "superior court" as required under the Act.

I shall now deal with the issue that is for my determination.

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The laws governing the enforcement of foreign judgments are contained in the Foreign Judgments (Reciprocal Enforcement) Act (under which the judgment was registered) (hereafter referred to as "Cap 40") and the Reciprocal Enforcement of Judgments Act (hereafter referred to as "CAP 39").

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Under Cap 40 there is provision for enforcement of foreign judgments as it is titled:

"An Act to make provisions for the enforcement in Fiji of judgments - given in foreign countries which accord reciprocal treatment to judgments given in Fiji, for facilitating the enforcement in foreign countries of judgments given in Fiji and for other purposes in connection with the matters aforesaid."

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Where as Cap 39 is titled:

"An Act to facilitate the reciprocal enforcement of judgments and awards in the United Kingdom and Fiji".

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It is pertinent to note that there is no subsidiary legislation under Cap. 40 except in one respect, namely, that it sets out the application of Part 11 of the Act to various countries and the Courts to which it applies. Whereas there are rules governing CAP. 39.

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To complete the picture of the law and the rules applicable it is important that I mention here Order 71 of our High Court Rules which is particularly applicable to the application before the Court and is as follows:

"1 The Reciprocal Enforcement of Judgments Rules made under the Reciprocal Enforcement of Judgments Act (Cap. 39) shall apply with necessary modifications, to proceedings under the Foreign Judgments (Reciprocal Enforcement) Act (Cap. 40)".

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So much for the law and the rules that are applicable, now I shall consider their relevance to this application.

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In Cap. 40 in Part 11 under the caption "Registration of Foreign Judgments" under s.9 there is power to extend Part 11 to foreign countries giving reciprocal treatment; and s.9(1) which provides as follows makes provision for the application of Part 11 to Commonwealth territories:

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- A “9. - (1) The Governor-General may by proclamation direct that this Part shall apply to any country or territory of the Commonwealth outside Fiji and to judgments obtained in the courts of such countries or territories as it applies to foreign countries and judgments obtained in the courts of foreign countries, and, in the event of the Governor-General so directing, this Act shall have effect accordingly and the Reciprocal Enforcement of Judgments Act shall cease to have effect except in relation to those parts of such countries and territories to which it extends at the date of the proclamation.”
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C As far as this case is concerned, although the judgment is registered under Cap. 40 and New Zealand is not listed at all under Part 11 of Cap. 40, nevertheless, in my view, since the provisions of section 7 of Cap. 39 can be applied and New Zealand is listed therein as a country to which Cap. 39 extends, a judgment of the Superior Court of that country could be registered. The relevant section (s.7) of Cap. 39 is as follows:

- D “7. - (1) Where the Governor-General is satisfied that reciprocal provisions have been made by the legislature of any other country or territory of the Commonwealth outside the United Kingdom for the enforcement within such country or territory of judgments obtained in the Supreme Court of Fiji the Governor-General may by order declare that this Act shall extend to judgments obtained in a superior court in that country or territory in like manner as it extends to judgments obtained in a superior court in the United Kingdom and on any such order being made this Act shall extend accordingly.”
- E (underlining mine for emphasis)

The application to set aside this registered judgment is made under s.6 of Cap.40 which in so far as it is relevant provides, inter alia, that.

- F “6. - (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 -
- (a) shall be set aside if the registering court is satisfied -
- G (i) that the judgment is not a judgment to which this Part applies was registered in contravention of the foregoing provisions of this Act or
....”

To be registrable under Cap. 40 the judgment has to be one of a “superior

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court” for it is provided in section 3 of Cap. 40 that (with underlining mine for emphasis)

“3. - (1) The Governor-General, if he is satisfied that, in the event of the benefits conferred by this Part being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the Supreme Court, may by proclamation direct -

(a) that this Part shall extend to that foreign country; and

(b) that such courts of that foreign country as are specified in the proclamation shall be deemed superior courts of that country for the purposes of this Part.

(2) Any judgment of a superior court of a foreign country to which this Part extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part applies if -

(a) it is final and conclusive as between the parties thereto; and

(b)

In fact in the said item 12 of his affidavit the Applicant said that “the said judgment is not a final judgment” for the purposes of Cap. 40. He does raise, although not clearly in my view, for consideration whether the registered judgment is a judgment of superior Court or not. The Applicant as well as his counsel have as I consider, raised this very vital point which certainly will turn the table in the applicant’s favour. On this subject I have derived considerable assistance from the judgment of Byrne J in Action No. 190/89 (High Court at Suva) between Clement James Brown and Donald William Joseph Stewart where his Lordship dealt with the identical point which involved the registration of judgment of District Court of New South Wales. He held that it was not a ‘superior court’ and hence the registration of the judgment was set aside.

I have drawn heavily on Byrne J’s judgment and I agree with him when he says at page 4 of his said judgment:

“...that the clear intention of both the Acts in question is, except where specially stated, to apply only to superior courts. It should be noted that Section 3 of the Reciprocal Enforcement

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A of Foreign Judgments Act mentions only the High Court of England or Ireland and the Court of Session of Scotland, and Section 7, which extends the operation of the Act to any other countries named in an Order in Council, refers to "A Superior Court in that country or territory" (my emphasis). Section 3 of the Foreign Judgments (Reciprocal Enforcement) Act refers to the "Superior Courts" of foreign countries (again my emphasis).

B In the schedule to this Act the only country in which District Courts are mentioned is the Republic of India but the term "District Court of India" is not defined in the Act nor could Counsel give me any assistance on this. To my knowledge all the other courts mentioned in the schedule in respect of which proclamations have been made are courts of unlimited jurisdiction."

C Now to round up my consideration of what is a 'superior court' as compared to 'inferior court' I refer to the following definitions of these terms taken from Stroud's Judicial Dictionary 4th Ed. at p. 2685:

D "Superior Court (1) It is submitted that "Superior Court" is to be construed historically and that, in its primary meaning, it connotes a court having an inherent jurisdiction, in England, to administer justice according to law, as and being a part of, or descended from, and as exercising part of the power of, the Aula Regis, established by William the First, which had universal jurisdiction in all matters of right and wrong throughout the kingdom, and over which, in its early days, the King presided in person (3 Bl. Com. 37-60). An Inferior Court is one, limited as to its area and also limited, as to its jurisdiction and powers, to those matters and things which are expressly deputed to it by its document of foundation or by a legal custom (London v. Cox L.R. 2 H.L. 239)"

E His Lordship referred to the case of Levoune v Bacoulis (1935) A.R. (NSW) 126 where in the Industrial Commission of New South Wales Cantor J said:

F "There is ample authority for the proposition that an inferior court such, for example, as the District Court or a Court of Summary Jurisdiction, has no power to do anything beyond what it is authorised to do by the statute creating it."

G Before, I conclude, having come to the conclusion that the judgment is not registrable under the Act, I need not consider other matters raised by counsel suffice it to say that I have no hesitation in accepting that the applicant was served on 21 September 1992 with the notice of proceedings and Statement of

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Claim in the proceedings in the District Court of Auckland but he failed to take any necessary steps to protect his interests; I also accept that the judgment was also served on him but I do notice that in the Affidavit of Service of it the process server states evidently inadvertently that "Judgment duly sealed with the seal of the High Court" instead of "District Court". Similarly, also an error appears in Kapa J's order referred to hereabove when it refers to "Judgment of the High Court" instead of "District Court". These errors are not fatal in view of my findings on the registration of the judgment.

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In the outcome, for the above reason the applicant succeeds on his summons and I therefore set aside the registration of the Judgment of the District Court at Auckland dated 19 November 1992 and registered in Fiji on 19 February 1993

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with costs against the respondent which are to be taxed unless agreed upon.

(Application allowed.)

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