

QORTI TA' L-APPELL

IMHALLFIN

**S.T.O. JOSEPH SAID PULLICINO, B.A.(HONS), LL.D. - PRESIDENT
ONOR. CARMEL A. AGIUS, B.A., LL.D.
ONOR. JOSEPH D. CAMILLERI, B.A., LL.D.**

Seduta ta' nhar it-Tnejn 9 ta' April, 2001

Numru

Cit. numru 10/2000

Fl-atti ta' l-Appell fl-ismijiet:

**Dr. Joseph Fenech bhala
mandatarju ta' David John
Balding**

vs

Bernard Elliott Smith.

Din il-Qorti ghandha quddiemha rikors ta' ritrattazzjoni ta' l-intimat Bernard Elliott Smith kontra decizjoni minnha moghtija fil-11 ta' Awissu, 2000, li biha laqghet talba ta' l-Avukat Dr. Joseph Fenech nomine biex s-sentenza tal-*High Court of Justice tar-Renju Unit, Chancery Division* tal-25 ta' Novembru, 1997, kontra l-istess Bernard Elliott Smith tigi registrata u reza ezegwibbli f'Malta. Dan hu t-test ta' dik id-decizjoni:-

“The Court,

Having seen the application of Dr. Joseph Fenech as mandatory of David John Balding residing in the United Kingdom dated 21st January, 2000, by which he requests this court to register in the Registry of the Superior Courts of Malta a judgment of the High Court of Justice of the United Kingdom, Chancery Division, dated 25th November, 1997, together with its taxed bill of costs with a view to enforcing the said judgment in Malta, and this in terms of the British Judgments (Reciprocal Enforcement) Act, Chapter 52 of the Laws of Malta.

Having seen the defendant’s reply to the application filed in the sitting of February 23rd, 2000;

Having examined the records of the case including the documents filed by both parties;

Having heard submissions on the merits of the application by Counsel to the parties;

Having taken note of its preliminary decision of April 11th, 2000, wherein it was decreed that the Court withholds its decision on the request for the extension on the time limit within which a request for registration of a British Judgment had to be made, pending a decision on the merits of the main application and on the objections of defendant to plaintiff’s request, for the registration of the judgment, it being understood that such objections had to fall within the parameters of subsection (2) of clause 3 of Chapter 52;

Having seen subsection (2) of clause 3 of the said Chapter 52 which specifies the cases in which an application for the registration in Malta of a judgment obtained in the United Kingdom and in the British Dominions should not be entertained, and this in absolute terms;

Having seen that the defendant’s objections on the merits of the case as set out in his reply fall within the parameters of paragraphs (c) (d) and (f) of the said subsection;

Consider further:

(1) Subsection (c) lays down that no judgment shall be ordered to be registered under section 3 of Chapter 52 if “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 he was ordinarily resident or was carrying on business within the jurisdiction of that court, or agreed to submit to the jurisdiction of that court". From the records of the case, and in particular from the documentation filed by defendant himself before this Court, it is more than evident that this sub-clause can in no way be invoked by defendant as an obstacle to registration. There is absolutely no doubt that defendant was duly served with the process of the original court, even though sometimes with some difficulty. Any defect of service, alleged but not proved by defendant, was undoubtedly rectified by the fact that defendant submitted himself to the jurisdiction of the British Court, was actually present in person during the proceedings when he was ordinarily resident in the United Kingdom or was carrying out business within that jurisdiction.

It is in fact established that defendant's solicitors entered a defence and a counter-claim on his behalf in reply to the summons served on him. Even after defendant decided to move permanently to Malta, he was for sometime duly represented by his solicitors, and when these decided to come off the case, he opted to defend himself. In fact he himself stated that "between 1994 and 1997 I made several trips to the United Kingdom for hearings in Chambers, attending at the Royal Courts of Justice in the Strand three or four times, making special journeys each time". The merits of the case between the parties was definitely therefore duly seized by the United Kingdom Courts and defendant had voluntarily submitted himself to their jurisdiction. He could not, therefore, at this late stage contest the jurisdiction of the Court, to which jurisdiction he had submitted himself, nor could he contest a defect of service of the process of that original court.

2) Sub-section (d) of clause 3 (2) provides further that no judgment shall be ordered to be registered under that section if "the judgment was obtained by fraud". Defendant submits in his reply that in his opinion the judgment against him was obtained through fraud and that he was prepared to prove before this Court that evidence given by applicant was not truthful. This matter however, does not, concern this Court in so far as it was only requested to verify whether fraud vitiates the procedures before the original court. This Court has only to establish whether the alleged fraud vitiated the judgment rather than the merits of the case. Defendant seems to be labouring under the

false impression that this Court could function as a Court of Revision of the proceedings before the original Court that it could in any way verify the correctness of those procedures or the judgment of that Court in respect of the veracity and/ or credibility of witnesses.

This is clear from the submissions made by defendant in his statement to this Court. A statement which is in effect a note of submissions on the merits of the case in which defendant tries to convince this Court that his objections to the claims of plaintiff were justified and valid and that his counter-claim merited to be entertained. Submissions regarding the credibility of witnesses that were made with the precise intention to prove improper behaviour, dubious conduct or fraud by plaintiff and/or his solicitors. Submissions which should have been made, however, to the original court with jurisdiction to hear the case and that in no way relate to the correctness of the procedures that led to the judgment, registration of which was being requested. This ground is also, therefore, being discarded.

3) Sub-section (f) of clause 3 (2), also invoked by defendant, provides that no judgment shall be ordered to be registered under that section if “the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court”. In this respect defendant submits that the judgment in question went against public order in Malta because he had not been given a fair hearing in proceedings before United Kingdom Courts. He states that notwithstanding that he had attended for a number of sittings in front of the Master there were occasions where neither applicants nor their lawyers attended, but when he had failed to attend for one sitting the other party had requested the Master to appoint case for hearing. Defendant says that at that time he was residing in Malta and he could not attend for the trial hearing and, therefore, the Court did not hear evidence on his part.

The Court examined the records and the documents submitted by defendant himself and is more than satisfied that the proceedings before the original Court provided defendant with adequate opportunity to state and defend his case. Having established that that Court had jurisdiction and that defendant had in any case submitted himself to that jurisdiction, it was no defence to state that he was not in a position to provide evidence during the trial hearing. Not only did defendant have procedural means under British Law to request and obtain the

necessary facilities to prove his case, even without his actual presence in the United Kingdom, he had also adequate means under British Law to appeal to a higher Court if he felt aggravated by any procedural decisions that placed him in the impossibility of producing evidence in his defence while residing abroad. There is no tangible proof that defendant availed himself of these procedural remedies and he could not, therefore, at this stage, claim that the judgment in question went against public order in Malta because he had not been given a just hearing before the British Courts.

In his written reply defendant correctly limited his claim under this sub-section to the procedural aspects of the proceedings before the British Courts. In his oral submissions and further note of submissions defendant attempts to expand the concept of public order allegedly vitiating the judgment to the merits of the case stating that the amount claimed by applicant and sanctioned by the judgment of the High Court though purportedly representing a reimbursement of a loan, was in effect fictitious to avoid U.K. tax and N.I. liability. Apart from the fact that this issue was debated in the proceedings before the original Court and in the procedures leading up to those proceedings, it is more than clear that the matter was one of substance that the original Court had and did decide. This Court cannot but fail to note that defendant, for reasons best known to him, chose not to avail himself of all remedies available to him under British Law to exhaust his avenues of defence. He could not and should not be allowed to take advantage of the fact that he is residing in a foreign jurisdiction to attempt to have his case reviewed as to its merits by a Court that was not only not competent to do so, but was also being invited to review proceedings regulated by laws and legal custom which were essentially foreign to it. A case in point is the completely inadequate motivation of the judgment, the registration of which is being requested; the fact that it failed to indicate with precision the reasons for plaintiff's claim or the contents of defendant's counter-claim. All elements, which in the eyes of this Court and Maltese procedural laws render the judgment up to a point unsatisfactory. It is noted that the defendant raised no objection to this effect. This Court recognises, moreover, that the judgment satisfies procedural requirements of British Law, as established in a system that has withstood the test of time, that substantially reflects the basic tenets of natural justice and the right to a proper hearing.

It is not therefore for this Court to question the correctness of procedures before the original Court in which defendant was a party and which effectively provided him with the means of having his case reviewed in that forum. Means that defendant chose not to avail himself of.

For these reasons the Court concludes that there is no justification why it should not entertain applicant's request for an extension of the time limit of one year in terms of sub-clause I of clause 3 of Chapter 52, also because defendant has not produced a cogent, sufficient and plausible reason why such a request should not be acceded to. This Court has also reached the conclusion that, in the circumstances of the case, it thinks it is just and convenient that the judgment delivered by the High Court of Justice of the United Kingdom, Chancery Division, on November 25th, 1997, be enforced in Malta. Consequently it is ordering that that judgment be registered accordingly, in terms of law, in the Registry of this Court.

Costs are to be borne by defendant".

Rikors ta' ritrattazzjoni

Il-konvenut appellat, Bernard Elliott Smith, fl-10 ta' Novembru, 2000, ipprezenta rikors ghar-ritrattazzjoni ta' dik id-decizjoni. Jinghad qabel xejn li r-rikors ghar-ritrattazzjoni gie redatt u prezentat bil-lingwa Maltija u b'dik il-lingwa wkoll saret ir-risposta ta' l-avukat Dr. Joseph Fenech nomine. Il-partijiet ukoll ipprezentaw noti ta' sottomissjonijiet bil-lingwa Maltija. Dan kollu nonostante li din il-Qorti kienet, fuq talba ta' l-istess Bernard Elliott Smith fil-kors tas-smiegh tar-rikors originali, ipprezentat mill-avukat Dr. Fenech nomine, fl-interess ta' l-istess ritrattand, iddekretat illi l-proceduri kellhom jitkomplew bil-lingwa Ingliza (ara verbal tat-23 ta' Frar, 2000).

Konsidrati dawn l-izviluppi in materja tal-lingwa u tal-proceduri din il-Qorti tqis illi l-istess Bernard Elliott Smith kien qieghed jirrinunzja ghat-talba tieghu li l-proceduri jkomplu jinstemghu bil-lingwa Ingliza u din il-Qorti qeghda tirrevoka d-digriet taghha tat-23 ta' Frar, 2000, a skans tan-necessita' li tordna t-traduzzjoni ta' l-atti kollha ipprezentati mill-kontendenti mill-malti ghal-lingwa ingliza. Din il-Qorti tinnota wkoll illi t-trattazzjoni quddiemha, anke fuq ir-rikors ghat-talba ghar-ritrattazzjoni, gie permess li ssir bil-lingwa ingliza, u dana fl-interess tar-ritrattand.

Dan premiss din il-Qorti jehtigilha qabel xejn tittratta u tiddeciedi l-eccezzjoni ta' l-Avukat Dr. Joseph Fenech ghat-talba ghas-smiegh mill-gdid kif proposta mir-ritrattand "illi t-talba ta' l-intimat ghar-ritrattazzjoni hija vessatorja, dilatorja u illegali billi dawn il-proceduri saru that il-ligi specjali (Kap 52 tal-Ligijiet ta' Malta) u ma jippermettux ritrattazzjoni billi l-materja ma tirrigwardax il-mertu imma s-semplici registrazzjoni f'Malta tal-gudikat tal-Qorti ingliza li jkun jikkonforma ma' l-artikolu 2 ta' l-istess Kap 52 tal-Ligijiet ta' Malta".

Ghal din l-eccezzjoni r-ritrattand jirribatti li d-dritt li jintalab smiegh mill-gdid ai termini ta' l-artiklu 811 tal-Kodici ta' Organizzazzjoni u Procedura Civili kien applikabbli "ghas-sentenzi kollha bl-ebda distinzjoni". Il-ligi ma kienetx teskludi kazi bhal dak taht ezami. Mill-banda l-ohra r-ritrattat

jsostni illi l-procedura taht ezami kienet intiza biex tiffacilita l-ezekuzzjoni tal-gudizzju tal-Qrati Inglizi f'Malta, u dawk tal-Qrati Maltin fl-Ingilterra. F'dawn il-kazijiet il-Qorti Maltija mhix Qorti ta' Appell u ma tistax tidhol fil-propju mertu tal-kawza. Il-mertu tal-kawza huma fil-gurisdizzjoni tal-Qrati Inglizi, inkluza fil-Qorti ta' l-Appell ingliza, kif ukoll fil-Qorti Ewropeja tad-Drittijiet tal-Bniedem f'kaz ta' vjolazzjoni ta' xi wiehed minn dawk id-drittijiet.

F'talba ta' dan it-tip il-Qorti ma taghtix sentenza imma tilqa' u tirrigetta t-talba kontenuta fir-rikors ghar-registrazzjoni b'digriet taghha. Fid-decizjoni taghha l-Qorti ma tikkundannax xi parti biex taghmel jew ma taghmilx xi haga, imma semplicement tilqa' t-talba ghar-registrazzjoni tas-sentenza. Tant hu hekk li ma kien hemm l-ebda forma ta' appell minn decizjoni ta' din il-Qorti.

Din l-eccezzjoni, fil-fehma ta' din il-Qorti, tirrizulta fondata u ghandha tigi milqugha. L-artiklu 811 infatti jipprovdi illi "kawza deciza b'sentenza moghtija fi grad ta' appell, tista', fuq talba minn wahda mill-partijiet li jkollha interess, tigi ritrattata wara li qabel xejn tigi mhassra dik is-sentenza". Isegwu ghal dik il-premessa 12 il sub-inciz li jelenkaw il-kazijiet li fihom seta' jintalab it-thassir ta' sentenza u s-smiegh mill-gdid tal-kawza. Dawn is-subincizi kollha jirreferu ghac-cirkostanzi partikolari negattivi li fihom tkun giet ottenuta "is-sentenza" fi grad ta' appell.

Ezami ta' disposizzjonijiet ohra fl-istess titlu IV tat-tielet ktieb "fuq ir-ritrattazzjoni" juri b'mod mill-aktar car illi kull dispozizzjoni kienet applikabbli biss fil-kaz ta' sentenza "moghtija mill-Qorti sew fil-grad ta' appell, kif ukoll fl-ewwel grad". Mill-banda l-ohra il-kapitlu 52 tal-Ligijiet ta' Malta li jittratta dwar l-ezekuzzjoni reciproka ta' sentenzi ta' Tribunal Inglizi, jipprovdi "ghal ezekuzzjoni f'Malta ta' sentenzi moghtija fir-Renju Unit u fid-dominji Brittanici". Is-subinciz 1 ta' l-artiklu 3 ta' dak il-Kapitolu jipprovdi li "meta tkun giet moghtija sentenza mill-Qorti Superjuri fir-Renju Unit, il-kreditur kanonizzat jista' jaghmel talba lill-Qorti ta' l-Appellghar-registrazzjoni tas-sentenza f'wahda mill-Qrati Superjuri ta' Malta, u fuq din it-talba il-Qorti (ta' l-Appell) tista', jekk mic-cirkostanzi kollha tal-kaz ikun jidhrilha sewwa u konvenjenti, illi s-sentenza ghandha tigi esegwita f'Maltatordna li s-sentenza tigi hekk registrata" (sottolinejar ta' din il-Qorti). L-artikolu mbaghad jipprovdi f'liema cirkostanzi ma kellhiex tigi ordnata r-registrazzjoni ta' sentenza taht dan l-artikolu.

Essenzjalment allura ghandu jkun car illi ordni moghti taht dan l-artiklu ma jistax jitqies li kien sentenza moghtija f'din il-Qorti fil-kontradittorju bejn zewg partijiet. Tali ordni jirrizulta li hu stricto iure ezercizzju ta' diskrezzjoni da parti ta' din il-Qorti li "tista'" – terminu li jhalli d-decizjoni fil-gudizzju u l-arbitriju suprem ta' din il-Qorti – "jekk fic-cirkostanzi kollha tal-kaz ikun jidhrilha sewwa u konvenjenti" illi s-sentenza tigi esegwita

f'Malta, hekk tordna li jsir. Il-Qorti allura ma kienetx marbuta li bilfors tilqa' talba ghar-registrazzjoni da parti ta' kreditur li kien ottjena sentenza minn Qorti superjuri tar-Renju Unit u dan l-Att ma kienx jaghti lil tali kreditur id-dritt li jesigi tali registrazzjoni. Il-ligi thalli kompletament f'idejn din il-Qorti biex tara jekk ic-cirkostanzi kollha tal-kaz kienux tali li jkun sewwa u konvenjenti li s-sentenza tigi ezegwita f'Malta.

L-ezercizzju li taghmel din il-Qorti – kif fil-fatt ghamlet ukoll fil-kaz taht ezami – biex tistabilixxi li ma kienetx tokkorri xi wahda mic-cirkostanzi li kienet timpediha ex lege li tohrog ordni ta' registrazzjoni tas-sentenza estera, kien intiz biex din il-Qorti tassigura li c-cirkostanzi tal-kaz kienu tali li ma kien hemm xejn proceduralment ingust li kien josta ghat-talba tar-registrazzjoni inkwantu din tkun manifestament pregudizzjevoli lid-debitur ezekutat. F'dak l-ezercizzju pero' l-istess debitur ezekutat ma kienx strettament qiegħed jopponi għal xi dritt pretiz u exercitat da parti tal-kreditur ezekutant. Kien biss qiegħed jallarma lil din il-Qorti għall-ezistenza ta' cirkostanzi, li, skond il-ligi, setghu jimpedixxu r-registrazzjoni mitluba. Mill-banda l-ohra, anke kieku kellu jirrizulta, kif irrizulta mill-kaz that ezami, li l-ebda wahda mir-ragunijiet fis-subinciz 2 ta' l-artiklu 3 ma kienu jezistu biex jimpedixxu registrazzjoni, dan ma kienx ifisser li din il-Qorti kienet awtomatikament marbuta li takkorda t-talba ghar-registrazzjoni tas-sentenza estera f'Malta.

Din il-Qorti kellha xorta tkun konvinta li, ciononostante, ic-cirkostanzi kollha tal-kaz kienu tali li kien jidhrilha sewwa u konvenjenti li s-sentenza tigi ezegwita f'Malta.

L-ordni taht dan l-Att allura m'ghandux min-natura ta' sentenza jiddefinixxi d-drittijiet u l-obbligi bejn il-kontendenti, ghandu min-natura tad-digriet procedurali, taht ligi specjali intiz biex jassigura l-esekuzzjoni f'Malta ta' sentenza ta' tribunal esteru. Inoltre, imma bl-istess spirtu, jinghad illi d-decizjoni tal-Qorti dwar jekk kienux jew le jokkorru xi cirkostanzi li jimpedixxu li tinghata ordni ghar-registrazzjoni ta' sentenza taht dak l-Att ghar-ragunijiet previsti fis-subinciz 2 ta' l-artiklu 3, bl-ebda mod ma kienet tiddefinixxi xi dritt tal-kreditur kanonizzat, ghax l-uniku jedd li dan kellu that dan l-Att kien li jitlob minn din il-Qorti li tirregistralu f'Malta s-sentenza tal-Qorti Superjuri tar-Renju Unit. Ma kellux id-dritt li jesigi li din il-Qorti tilqaghlu tali talba. Tali decizjoni kienet ghal kollox kif inghad tiddependi mill-ezercizzjoni tad-diskrezzjoni lilha moghtija bil-ligi u li bl-ezercizzju taghha, kellha tarbitra jekk ic-cirkostanzi kollha tal-kaz kienux tali li kellu jidhrilha sewwa u konvenjenti li s-sentenza tigi moghtija f'Malta.

Din il-Qorti waslet allura ghall-konvinciment li d-decizjoni taghha tal-11 ta' Awissu, 2000, ma setghetx titqies li kienet sentenza li tiddetermina d-drittijiet u l-obbligi tal-kontendenti quddiemha. Ma kienx ghalhekk

konsentit mill-kontendenti li jitolbu s-smiegh mill-gdid ta' dik "il-kawza" propju ghaliex kawza fis-sens preciz tal-kelma bejn il-kontendenti ma kienx hemm u wisq anqas kien hemm kawza deciza b'sentenza". Ir-rimedju ta' ritrattazzjoni ai termini ta' l-artiklu 811 et seq tal-Kap 12 ma kienx allura accessibbli ghar-rikorrent ritrattand.

Ghal dawn il-motivi din il-Qorti tiddisponi mir-rikors ghar-ritrattazzjoni tal-konvenut appellat Bernard Elliott Smith ta' l-10 Novembu, 2000, billi tiddikjarah irritwali u bla effett fil-ligi u konsegwentement tastjeni milli tiehu konjizzjoni ulterjuri tieghu. Spejjez ta' dawn il-proceduri ghandhom ikunu a karigu tar-ritrattand.

Dep/Reg

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