**REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2016-00458

BETWEEN

TRADING COMPANY P.VAN ADRIGHEM B.V.

Claimant

AND

ANSAD SERVICES LIMITED

Defendant

**BEFORE THE HONOURABLE MADAM JUSTICE M. DEAN-ARMORER**

**APPEARANCES**
Mr. Kirk Bengochea instructed by Ms. Kaveeta Persad, Attorneys-at-law on behalf of the Claimant
Mr. Haresh Ramnath, Attorney-at-law on behalf of the Defendant

## REASONS

### *Introduction*

1. On the 6th July, 2017, I entered summary judgment for the Claimant pursuant to Part 15.2 ***Civil Proceedings Rules 1998*** and directed that there be enforcement of the judgment, which was delivered by the Supreme Court of the Hague on the 24th December, 2013. My reasons for so doing are set out below.

***Procedural History***

2. By claim form and statement of Case filed on the 19th February, 2016, the Claimant applied for the enforcement of a judgment which was delivered by the Superior Court in the Hague. The specific items of relief are set out below[1].

3. A Defence was filed on behalf of the Defendant on the 29th July, 2016. The Defendant contended that the judgment which had been obtained from the Superior Court of the Hague had been obtained by fraud.

4. By Notice of Application filed herein on the 7th December, 2016, the Claimant sought an order for summary judgment against the Defendant. In support of this Notice of Application was the affidavit of Kaveeta Persad[2].

5. In opposition, the Defendant filed and relied on the affidavit of Aleem Ali, managing director of the Defendant company[3].

6. Both parties filed Written Submissions on the 6th March, 2017.

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[1] *"1. Pursuant to the Judgment of the Superior Court in the Hague dated December 24, 2013 in the matter of Trading Company P. van Adrighem B.V. and ANSAD Services Limited, case number 200.105.606./01, the following sums due and owing by the Defendant to the Claimant under that Judgment:*
*a. the sum of 62, 442,19, together with accrued interest from February 13, 2006, to the date of issuance of these proceedings of 83, 424.37, with interest continuing to accrue at the commercial statutory rate applicable under the Civil Code of the Netherlands from the date of issuance of these proceedings to the date of the payment;*
*b. the sum 44,200.00, together with accrued interest from July 22, 2005 to the date of the issuance of these proceedings of US$64, 469.33 with interest continuing to accrue at the commercial rate applicable under the Civil Code of the Netherlands from the date of issuance of these proceedings to the date of full payment;*
*c. the sum of 220, 588.00, together with accrued interest from September 11, 2012 to the date of issuance of these proceedings of 68,104.07, with interest continuing to accrue at the commercial rate applicable under the Civil Code of the Netherlands from the date of issuance of these proceedings to the date of full payment;*
*d. costs in the aggregate amount of 8,508.80*
*2. Costs;*
*3. Such further and/or other relief as the nature of the case may require"*

[2] Affidavit of Kaveeta Persad filed herein on the 23rd November, 2016

[3] Affidavit of Aleem Ali filed herein on the 26th January, 2017

***Facts***

7. The facts upon which the Court decided this matter were gleaned from the two affidavits before the Court: the affidavit of Kaveeta Persad which was filed on behalf of the Claimant, and the affidavit of Aleem Ali which was filed on behalf of the Defendant.

8. The Claimant is a company incorporated under the Law of the Netherlands engaged in the business of trading and renting new and used cranes, while the Defendant was a company incorporated under the Laws of Trinidad and Tobago.

9. In October, 2008, the Claimant summoned the Defendant to appear before the District Court of Rotterdam claiming eight hundred and eighty-six thousand, six hundred and ninety-three and point nine zero euros (€886,693.90) in unpaid invoices.

10. Before the District Court of Rotterdam, the Defendant filed its defence and denied the Claim.

11. The Defendant Counterclaimed for eight hundred thousand US dollars ($800,000.00) in respect of the Claimant's sequestration of a boom section of a crawler crane owned by the Defendant. The Defendant also responded to the Claim by referring to an Agreement dated the 5th September, 2007 ("the Agreement"), by which Agreement, according to the Defendant, there was an amiable settlement by which the Claimant released the Defendant from all claims.

12. The Claim was heard at two tiers of the judicial system in the Netherlands. At the hearing before the District Magistrates Court on the 14th July, 2011, the Magistrate ordered the Claimant to file further documents to show that the Claimant's representative did not have the authority to sign the Agreement of the 5th September, 2007.

13. At the hearing, the Claimant called two (2) witnesses to show that the representative lacked authority. The Defendant brought no rebuttal witnesses.

14. On the 10th January, 2012, the Magistrate gave his decision and ruled against the Claimant holding that the Claimant had not succeeded in proving that his representative lacked the requisite authority.

15. The Claimant appealed on the 29th March, 2012. On the 24th December, 2013, the Superior Court of the Hague rendered its decision and overturned the decision of the District Magistrates Court and gave judgment for the Claimant. In this way the Superior Court adjudicated on the validity of the Agreement, holding that it was executed without the requisite authority. The Superior Court of the Hague also dismissed the Defendant's Counterclaim thereby adjudicating on the Defendant's complaint in respect of the missing section of the crane.

16. The Defendant for its part, canvassed the presence of fraud. Its managing Director, Mr. Ali, alleged that the Claimant's representative held regular communications with his principal while negotiating the Agreement, thus inferring that the representative was clothed with the requisite authority. However, Mr. Ali offered no explanation for the failure of the Defendant to call witnesses at the hearing before the District Magistrate in Rotterdam and did not deny that both foreign Courts considered the issue of the validity of the Agreement as well as the issue as to whether the Claimant's representative was clothed with the requisite authority. The Defendant did not deny that they were successful before the District Magistrate's Court but that that decision was overturned by the Superior Court of the Hague.

17. Additionally, the Defendant alleged that the boom section of the crane was sent to the Claimant for repair. The Defendant alleged that at the date of the hearing, the boom section had not been accounted for. The Defendant did not however deny the allegation contained

at paragraph 6 of the affidavit of Kaveeta Persad that the Counterclaim concerned the Claimant's sequestration of the boom section and that the Counterclaim was dismissed.

***Issues***

18. The principal issue which engaged my attention was whether the Claimant was entitled to summary judgment, as per Part 15.2 ***CPR***[4]. This would depend on whether the Claimant succeeded in establishing that the Defendant lacked a realistic prospect of success in defending the claim.

19. The resolution of the principal issue depended on the resolution of these questions:

    i. Whether the allegation of fraud prevented the Court from enforcing a foreign judgment;

    ii. If the allegation of fraud necessarily implied that the foreign judgment was unenforceable, it would follow that the application for Summary Judgment would be dismissed;

    iii. If, on the other hand, the allegation of fraud did not automatically vitiate the foreign judgment, the Court would be required to consider the circumstances in which the foreign judgment would survive the allegation of fraud and whether those circumstances were present in this claim.

[4] Civil Proceedings Rules 1998

***Law and Discussion***

20. In this section, the Court considered the law relating to each of the issues identified above and applied the law to the facts of this case.

*Summary Judgment*

21. The Court is empowered to enter judgment by virtue of part 15.2 ***Civil Proceedings Rules 1998***, which provides as follows:

> *"15.2 The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that—*
>
> *(a) on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue;or*
>
> *(b) on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of claim or issue."*

22. The principles which govern the grant of summary judgment were considered by Mohammed, J in ***Parks International Ltd. v. Juliana Webster*** CV 2010-1619. The learned Justice Mohammed expressed this view: *"The basic principles of summary judgment have been well-rehearsed in case law and are by now well-established*[5]*."* Mohammed, J quoted extensively from ***Western Union Credit Union Cooperative Society Limited v. Corrine Ammon*** Civil Appeal No. 103 of 2006 stating that:

> *"The authority of Western United Credit Union Co-operative Society Limited v Corrine Ammon which referred to the decisions of Toprise Fashions Ltd v Nik Nak*

[5] Parks International Ltd. v. Juliana Webster CV 2010-1619 (a decision referred to by the Defendant)

*Clothing Co Ltd and Ors, and Federal Republic of Nigeria v Santolina Investment Corp., is often cited for its comprehensive outline of the basic principles as follows:*

*"(i) the court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*

*(ii) A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable:* ***ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]****; (iii) In reaching its conclusion the court must not conduct a "mini-trial":* ***Swain v Hillman****;*

*(iv) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statement before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly, if contradicted by contemporaneous documents:* ***ED & F Man Liquid Products v Patel at [10****];*

*(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial:* ***Royal Brompton Hospital NHS Trust v Hammon (No.5) [2001] EWCA Civ 550****;*

*(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable*

*grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case*: ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63.*** *" [Emphasis added]"*[6]

23. In my view, the following principles may be extracted from the passage quoted by Mohammed J:

- The Claimant carries the burden of proving that the Defendant lacks a reasonable prospect of defending the claim. A reasonable prospect is one that is more that merely arguable.
- The Court is not required to conduct a mini trial. See ***Swain v. Hillman*** [2001] 2 All ER 91.
- The Court should hesitate to make a final decision without a trial *"...where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trail judge and so affect the outcome of the case…"* See ***Dancaster Pharmaceuticals Group Ltd. v. Bolton Pharmaceutical Co. Ltd.*** [2002] FSR 63.

*Allegations of Fraud*

24. In determining whether the Claimant discharged its obligation to prove that the defendant lacked a reasonable prospect of success, it was necessary to consider the principles relating to fraud in foreign judgments.

[6] Parks International Limited v. Webster CV 2010-01619 at paragraph 32

25. The principles relating to allegations of fraud in the enforcement of foreign judgments are to be found in decided authorities which were referred to by the parties in this case.

26. In ***Abouloff v Oppenheimer & Co*** (1882) 10 QBD 295[7], the Court of the King's Bench considered whether a judgment of the High Court of Tiflis should be enforced not withstanding an allegation that is had been obtained by fraud.

27. At page 300, Lord Coleridge had this to say:

> *"Many authorities…down to our own time…have been cited during the argument, but not one of them throws a doubt on the broad proposition that where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the courts of this country…"*

28. ***Abouloff*** was applied by the Court of Appeal of the United Kingdom in ***Jet Holdings Inc. v. Patel***[8]. In that case, Staughton LJ had this to say:

> *"If the rule is that a foreign judgment obtained by fraud is not enforceable, it cannot matter that in the view of the foreign court there was no fraud. But this doctrine makes a great inroad into the objective, which is generally desirable, of enforcing foreign judgments where in the eyes of English law the foreign court had jurisdiction. The defendant may have been served in the foreign country, entered an appearance, given evidence, been disbelieved and had judgment entered against him. If he asserts that the plaintiff`s claim and evidence were fraudulent that issue must be tried all over again in enforcement proceedings. The lesson for the plaintiff is that he should in the first place bring his action where he expects to be able to enforce a judgment. The doctrine has encountered criticism from academic writers:*

[7] Abouloff v. Oppenheimer & Co (1882) 10 QBD 295 (a decision referred to by the Defendant)
[8] Jet Holdings Inc. v. Patel [1989] 2 All ER 648 (a decision referred to by the Defendant)

*see Dicey and Morris The Conflict of Laws, A possible view which is taken by some is that the fraud relied on must be extraneous or collateral to the dispute which the foreign court determines. But, in my judgment, it is a hundred years too late for this court to take that view. The decisions in Abouloff v Oppenheimer & Co(1882) 10 QBD 295[1881-5] All ER Rep 307 and Vadala v Lawes (1890) 25 QBD 310[1886-90] All ER Rep 853 show that a foreign judgment cannot be enforced if it was obtained by fraud, even though the allegation of fraud was investigated and rejected by the foreign court."*[9]

29. The authority of ***Aboulouff***[10] was revisited by the Privy Council in ***Owens Bank Limited v. Etoile Commerciale SA*** [1994] UKPC 27 where their Lordships heard an appeal from the Court of Appeal of St. Vincent and the Grenadines and considered whether to enforce foreign judgment which was obtained by fraud.

30. Lord Templeman discussed the established principles. In the course of his judgment, his Lordship stated:

*"The rule has been subject to widespread and long standing academic criticism, summarised by Mr. Isaacs in his helpful argument on behalf of the respondents. In House of Spring Gardens Ltd. v. Waite [1991] 1 Q.B. 241, 251C Stuart-Smith L.J. observed that both Abouloff's case and Vadala v. Lawes "were decided at a time when our courts paid scant regard to the jurisprudence of other countries;" and it is to be noticed that they were both decided a few years before Boswell v. Coaks (No. 2), 86 L.T. 365n., in which the House of Lords laid down the more restricted rule for attacking English judgments. In Owens Bank Ltd. v.*

[9] Jet Holdings Inc v Patel [1989] 2 All ER 648 at page 652
[10] Abouloff v. Oppenheimer & Co (1882) 10 QBD 295

*Bracco [1992] 2 A.C. 443, 489 Lord Bridge of Harwich recognised that, as a matter of policy, there might be a very strong case to be made in the 1990s in favour of according to overseas judgments the same finality as is accorded to English judgments."*[11]

31. Lord Templeman went on to say:

*"There is nothing in the authorities which precludes a party from obtaining summary judgment or an order striking out a pleading on the grounds of abuse of process where a fraud is alleged. It is axiomatic that where fraud is alleged full particulars should be given. Where allegations of fraud have been made and determined abroad, summary judgment or striking out in subsequent proceedings are appropriate remedies in the absence of plausible evidence disclosing at least a prima facie case of fraud. No strict rule can be laid down; in every case the court must decide whether justice requires the further investigation of alleged fraud or requires that the plaintiff, having obtained a foreign judgment, shall no longer be frustrated in enforcing that judgment."*[12]

32. I considered myself bound by the pronouncement of Lord Templeman. From the ruling of His Lordship, it was clear that ***Abouloff***[13] is regarded as being outdated and that there was a trend to accord to overseas judgments the same finality accorded to English judgments.

33. The recent authorities have also shown a shift in thinking. In ***House of Spring Gardens Limited v. Waite*** [1990] 2 All ER 990, the Supreme Court of Ireland awarded damages against the defendant. In a subsequent judgment of the same court, it was held that the

[11] Owens Bank Limited v. Etoile Commerciale SA [1994] UKPC 27 at page 5 of the judgment.
[12] Ibid at page 8 of the judgment
[13] Abouloff v. Oppenheimer & Co (1882) 10 QBD 295

previous judgment had not been obtained by fraud. The question to be determined by the Court of Appeal was whether the Defendant was estopped from alleging, in English proceedings, that the judgment in question had been obtained by fraud and whether it was an abuse of process to re-litigate the issue of fraud.

34. Lord Justice Stuart- Smith of the Court of Appeal held:

> *"(1) Where proceedings were brought in the English courts to enforce a foreign judgment as a debt at common law, a defendant would be estopped from pleading that the judgment had been obtained by fraud and was therefore unenforceable if that issue had already been decided against him in a separate and second action in the foreign jurisdiction, since the decision in the foreign action, unless it was itself impeachable for fraud, was conclusive on the matters thereby adjudicated on, namely whether the prior judgment was obtained by fraud."*[14]

The appeal was dismissed.

35. In ***Beal v. Saldanha*** [2003] 3 S.C.R. 416[15] the Supreme Court of Canada held that, while fraud with regard to jurisdiction can always be raised before a domestic court to challenge the judgment, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication.

36. The Court also held that the Defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment.

[14] House of Spring Gardens Limited and others v. Waite and Others [1990] 2 All ER 990, see headnote (a decision referred to by the Claimant)
[15] Beal v. Saldanha [2003] 3 S.C.R. 416 (a decision referred to by the Claimant)

37. ***Hong Pian Tee v. Les Placements Germain Gauthier Inc*** [2002] SGCA 17 was an appeal by the defendant against a decision of the High Court of Singapore, and the award of summary judgment to the plaintiff in respect of the plaintiff's claim based on a judgment which was obtained in Canada. The appellant, Hong argued that the mere allegation that the Canadian judgment was obtained by fraud, should it itself suffice to preclude the judgment from being enforced in Singapore. Further, it was claimed that the action should be allowed proceed to trial, to enable the appellant to establish the alleged fraud. The Court of Appeal was not persuaded by the appellant's contention and was moved to dismiss the appeal.

38. In the course of the judgment, Chao Hick Tin JA, Tan Lee Meng J and Yong Pung How CJ, adopted the position taken by the Canadian Supreme Court and stated:

> *"In our judgment, the approach taken by the Canadian-Australian cases and* ***Ralli v Angullia*** *(supra) is more in line with principles of conflict of laws and treats foreign judgments in the same way as domestic judgments.* ***It is consonant with the doctrine of comity of nations. It avoids any appearance that this court is sitting in an appellate capacity over a final decision of a foreign court.*** *[Emphasis mine]. We, therefore, ruled that where an allegation of fraud had been considered and adjudicated upon by a competent foreign court, the foreign judgment may be challenged on the ground of fraud only where fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case.."*[16]

[16] Hong Pian Tee v. Les Placements Germain Gauthier Inc. [2002] SGCA 17 at page 5 of the judgment (a decision referred to by the Claimant)

39. It is significant that in ***Hong***[17] , the Court of Appeal specifically decided against the following ***Abouloff***[18]**,** and held the view that such an approach would encourage *"endless litigation".*

40. In ***Close and Another v. Arnot Matter*** No.10107/96 [1997] NSWSC 569, the Supreme Court of New South Wales considered the circumstances in which domestic proceedings can be set aside for fraud based on a judgment received in a foreign jurisdiction.

41. Justice Graham stated:

> *"2. It must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment."*[19]

***Reasoning and Decision***

42. Having regard to the forgoing authorities, it was my view that the law had moved away from the thinking expressed in ***Abouloff***[20]. The mere suggestion that a foreign judgment had been obtained by fraud would no longer be sufficient to have the issue re-considered by the local Courts. This thinking was based, in part on the principle of the comity of nations and the inclination to accord, to the decisions of foreign courts, the same finality accorded to domestic courts. The Defendant would be required to prove that the issue of fraud had not

[17] Hong Pian Tee v. Les Placements Germain Gauthier Inc. [2002] SGCA 17 at page 5 of the judgment
[18] Abouloff v Oppenheimer & Co (1882) 10 QBD 295
[19] Close and Another v. Arnot Matter No.10107/96 [1997] NSWSC 569 at page 12 of the judgment (a decision referred to by the Claimant)
[20] Abouloff v Oppenheimer & Co (1882) 10 QBD 295

been considered by the foreign Court and that the allegation of fraud related to new evidence which came to light, following the adjudication by the foreign Court.

43. In this jurisprudential context, I proceeded to consider whether the Claimant was entitled to an order for summary judgment.

44. It was, in my view, clear that, but for the allegation of fraud, the Defendant would have had no realistic prospect of success in defending the claim. The Claimant has adduced evidence of the judgment of a foreign Court of competent jurisdiction. This evidence has not been contradicted. The only defence offered by the Defendant was that the judgment of the Superior Court of the Hague was obtained by fraud. It was therefore, necessary to consider the particulars of fraud in order to determine whether they had been addressed by the foreign Court.

45. The first item which was pleaded by the Defendant under *"Particulars of Fraud"*, alleged that the Claimant falsely represented that the Agreement dated the 5th September, 2007, did not cover all liabilities[21].

46. The uncontroverted evidence before me, asserted that the Agreement of the 5th September, 2007 and the question of its execution with due authority, was fully considered by the foreign Court. The Defendant had ample opportunity to contradict the evidence of the Claimant at the hearing in the Hague. The uncontroverted evidence was that the Defendant opted to call no rebuttal evidence. If the Claimant was indeed perpetrating a fraud by misleading the courts of the Netherlands, the Defendant ought to have adduced evidence to contradict the fraudulent evidence.

[21] See paragraph (a) of the Defence

47. The Defendant has also failed to show that its allegation of fraud related to any new material that came to light after the hearing in the Hague. It was my view, that to allow this issue to be reopened before the Courts of Trinidad and Tobago, would essentially be allowing the issue to be re-litigated.

48. At paragraph (b) of its Defence, the Defendant asserted that the claim was based on the strength of the exchange rate difference between the Euro and the US Dollar. The Defendant alleged that it was improper and fraudulent to make a claim for two hundred and twenty thousand, five hundred and eighty-eight Euros (€220,588)[22].

49. In my view, it is not apparent why it would be fraudulent to make a claim in Euros, when this could easily be converted to US dollars, at the exchange rate of any date in question.

50. Moreover, the Defendant would have had a full opportunity to address the foreign Court on any exchange rate issues which were relevant.

51. I considered the large sums involved and the caveat that the Court should be hesitant to enter judgment without trial. It was my view however, that the Defendant fell short of pleading anything resembling fraud and contended instead that the Claimant falsely represented the terms of the Agreement of the 5th September. In my view, this has already been adjudicated and determined by the foreign court.

52. Accordingly, it was my view and I held that the Defendant had no realistic prospect of succeeding in its defence and that there ought to be summary judgment for the Claimant, in terms of the Claim Form filed on the 19th February, 2016, with costs as prescribed.

Dated this 16th day of November, 2017.

M. Dean-Armorer
Judge

[22] See paragraph b(ii) of the Defence