No Room for Implied Submission

U.O.B. v. *Tjong Tjui Njuk*[1]

ONE of the more interesting recent controversies in the law on enforcement of foreign judgments concerns the question whether a foreign judgment will be enforced when there has been an implied but not express agreement to submit to the foreign jurisdiction. It is accepted that an express agreement is a good ground for enforcement; as where there exists a choice of forum clause: see *Israel Discount Bank ofNew York* v. *Hadjipateras.*[2] But there is disagreement in case of an implied agreement. In *Blohn* v. *Desser*[3] Diplock J. thought that a contract to submit to the foreign jurisdiction may be express or implied. However, in *Vogel* v. *Kohnstamm*[4] Ashworth J. on a consideration *of Sirdar Gurdyal Singh* v. *The Rajah ofFaridkote*[5] and *Emanuel* v. *Symoif* took the view that "an implied agreement to assent to the jurisdiction of a foreign tribunal is not something which coutrs of this country have entertained as a legal possibility.

The issue whether an implied assent will do arose in *U.O.B.* v. *Tjong Tjui Mjuk* in the context of the Reciprocal Enforcement of Commonwealth Judgments Act.[8] The judgment debtor was a non-active director of a Hong Kong registered company at the time of service of writ in Hong Kong. Her address was given as a Hong Kong address and her nationality was stated as Singaporean in the company's annual return filed with the Hong Kong Registrar of Companies. On the basis that the judgment debtor was either ordinarily resident or carrying on business in Hong Kong, writ was served on her in accordance with Order 10 Rule l(2)(b) of the Rules of the Supreme Court of Hong Kong; *i.e.,* by enclosing a true copy of the writ of summons in a sealed envelope addressed to her at her address in Hong Kong and inserting the envelope in the letter box. However, the judgment debtor was not then present in Hong Kong. Nor did she at any time acquire knowledge of the proceedings which were brought in respect of a guarantee that she had given in consideration of bank facilities being accorded to the Company by the judgment creditor. The Hong Kong judgment was given in default and subsequently registered in the High Court of Singapore. In the present action, the judgment debtor moved to set aside the Singapore registration and succeeded before Chua J..

It was argued for the judgment debtor that she had not "otherwise submitted or agreed to submit" to the jurisdiction of the Hong Kong

1 [1987] 2 M.L.J. 295.
2 [1984] 1 W.L.R. 137. See also *Sun-Line (Management)* v. *Canpotex Shipping Services* [1986] 1 M.L.J. 348 where Rajah J. held that an agreement to arbitrate in London was not a submission to English jurisdiction.
3 [1962] 2 Q.B. 116.
4 [1971] 2 All E.R. 1428.
5 [1894]A.C. 670.
6 [1908] 1 K.B. 302.
7 *Id.,* at p. 1439.
8 Cap. 264, 1985 (Rev. Ed.).

Court. Her act of guaranteeing the Company's liability could not afford enforceability to the foreign judgment on the ground of implied agreement to submit because an agreement to submit could not be implied but must be made expressly. With this submission Chua J. agreed but what is interesting is the reasoning that led him so to do. An obviously important case is *Sfeir* v. *National Insurance Co. of New Zealand.*[9] The importance *of Sfeir* is that it deals with section 9(2)(b) of the English Administration of Justice Act 1920 which is *in pari materia* with the particular section 3(2)(b) in question and is a decision in which Mocatta J. declined to limit the words "or otherwise submit or agree to submit to the jurisdiction of that court" to an express agreement. Chua J. however preferred the view of Ashworth J. in *Vogel* v. *Kohnstamm.*

Certain points may be made regarding Chua J.'s refusal to be persuaded by *Sfeir.*

(i) It would seem at first blush odd that Chua J. would disregard the authority of a case interpreting a statute *in pari materia:* see *de Lasala* v. *de Lasala.*[10] Directly in issue was the scope and effect of the Reciprocal Enforcement of Commonwealth Judgments Act. But presumably there is implicit in Chua J.'s judgment a proposition that the difference between the common law and the Act is solely procedural so that there is no reason that a common law case, *Vogel* v. *Kohnstamm* cannot be preferred over a case on a statute *in pari materia.*

That underlying proposition is controversial. On the one hand, the singular objective of the Act was to provide for direct execution of Commonwealth judgments without needing first to seek a local judgment and being frustrated by an inability to satisfy local jurisdictional requirements. This would suggest that the singular difference between the Act and common law is procedural. Moreover, section 3(2) which spells out the grounds precluding registration seems at first blush to coincide with the common law. This appears more clearly when comparison is made with the grounds of jurisdiction contained in the Reciprocal Enforcement of Foreign Judgments Act" where the circumstances in which the foreign court is deemed to have jurisdiction go beyond those recognized by common law. It might be supposed for these reasons that section 3(2)(b) which is directly in question was intended neither to change nor modify but to embody the common law. This was the view of Sproule J. in *Ho Hong Bank* v. *Ho Kai Neo.*[12] He said:

> "Study shows, as logic demands, that the same principles which apply to a suit upon a foreign judgment... have been applied to applications under the Acts of 1800 and 1868 (the precursors of our Act); and that these principles are embodied in the Act of 1920 ... only the procedure and machinery of enforcement differ."[13]

[9] [1964] Lloyd's Rep. 330.
[10] [1979] 2 All E.R. 1146.
[11] Cap. 265, 1985 (Rev. Ed.).
[12] (1932)M.L.J. 76.
[13] *Id.,* at p. 77.

On the other hand, section 3(2)(b) requires that the defendant must have been ordinarily resident in the foreign country (when the action began, no doubt) and this is a clear departure from the common law under which mere presence will be enough.[14]

Another departure from the common law is discernible in the apparent requirement of domestic competence in the original court. Lord Chelmsford in *Castrique* v. *Imrie*[15] thought that no such requirement of local competence existed at common law. However, although the point remains to be decided, it is arguable that the original court must have had jurisdiction under its domestic law and if its own judgment would be a nullity for want of such jurisdiction,-it would not be registrable under the Act.[16] These departures need not however necessarily lead to the conclusion that "agree to submit" includes an implied agreement to submit. Jurisdiction based on mere presence has been heavily criticized as being an exorbitant jurisdiction. That would explain why section 3(2)(b) deliberately insisted on "ordinary residence". As for the requirement of domestic competence, the common law position is not very clear anyway. It could still be argued that permitting an implied agreement to submit would be to accord recognition to an exorbitant jurisdiction. Nevertheless, for reasons discussed below, it will be suggested that there is a case for the implied agreement to submit.

(ii) On the facts of the case, it would seem unnecessary to decide whether an implied agreement to submit is a valid ground of jurisdiction. The act from which it was sought to imply this agreement was the undertaking to guarantee the Company's liability. There can be little hope of success in such an argument. Suppose the judgment debtor had undertaken to guarantee the liability of a friend resident in Hong Kong. It is not implicit in such a one-off transaction that the parties have agreed to submit to a particular jurisdiction. Can the fact that it was the liability of a company of which the judgment debtor was a director make a difference? That the judgment debtor was a director would be a factor motivating the granting of bank facilities to the company. But apart from the economic motivation, it is hard to see that any legal significance attaches.

In *Blohn* v. *Desser* the judgment debtor was a sleeping partner in an Austrian firm and the plaintiff was seeking to enforce in England an Austrian judgment based on a bill of exchange against the firm. It is now quite clear that what Diplock J. did was to impute an agreement to submit to the parties. If an agreement to submit cannot be implied in a stronger case like *Blohn* v. *Desser,* how much more difficult it must be in the present case.

(iii) The third point concerns *Vogel* v. *Kohnstamm.* Chua J. would seem to endorse the view of Ashworth J. Nevertheless, that view has not escaped comment. Whilst Ashworth J.'s rejection *of Blohn* v. *Desser* answers extra-judicial criticisms of that case, Carter writes: "At the same time it is to be hoped that the learned judge's categoric

[14] *Carrick* v. *Hancock* (1895) 12 T.L.R. 59.
[15] See also *per* Blackburn J. at p. 429; but *cf. Vanquelin* v. *Bouard (*1863) 15 C.B.N.S. 341.
[16] See the analogous case of *S.A. Consortium General Textiles* v. *Sun & Sand Agencies* Lfrf.[1978]Q.B. 279.

insistence that an agreement to submit must be express will not be taken literally so as to exclude clear cases (perhaps few in number) in which an unexpressed agreement is manifest on the facts: to insist upon express words in such circumstances would smack of formalism."[17] Suppose the issue in a case like *Blohn* v. *Desser* had been as to the rights *inter se* of the partners. The sensible thing is to say that by agreeing to be a partner, whether active or non-active, the defendant impliedly agrees to submit to the foreign jurisdiction. In the present case, suppose a representative action had been brought by a Hong Kong shareholder against the non-active director resident abroad — for breach of director's duty of care. Suppose there was no possibility of implied agreement to submit. The director was not resident in Hong Kong. She was not carrying on business in Hong Kong; rather, the company was. Any judgment obtained in Hong Kong against her would be unenforceable in Singapore. Yet that would be an unjust result in relation to the particular issue behind the judgment. There is a case for implying an agreement to submit in relation to this particular issue. And the case seems even stronger when the company is incorporated in Hong Kong under the law of Hong Kong.

To obviate injustice in such cases, an alternative solution would be to employ the concept of constructive residence canvassed by Ashworth J. in *Vogel* v. *Kohnstamm.*[18] The director will be deemed to have been constructively resident in Hong Kong by virtue of her position of director in the Hong Kong company. Implying an agreement to submit would seem less fictional than deeming "residence".

(iv) Two final comments: Chua J. said: .

> "But is the Debtor in fact carrying on business in Hong Kong? True she is a director and shareholder of the said company. But she is a non-active director. She has no office or place of business in Hong Kong and she is not resident in Hong Kong. I find that she is not carrying on business in Hong Kong."[19]

These remarks are not intended to suggest that an active director would be regarded by virtue of directorship as carrying on business. It is the company which is carrying on business.

An alternative ground for setting aside the registration was that the debtor had not been duly served with the process of the original court, because she was not within the jurisdiction of the original court at the time the writ was purportedly served on her under Order 10 Rule l(2)(b). But in truth this is no true alternative ground. All it is saying is that the original court acted without jurisdiction. The relevance of being duly served, as a reading of section 2(c) will indicate, is predicated on the existence of jurisdiction. Thus where the debtor was ordinarily resident or was carrying on business within the jurisdiction of the original court or had agreed to submit to its

[17] (I970)B.Y.I.L., at p. 418.
[18] An idea traceable to *Becquet* v. *McCarthy* 2 B. & 4d. 951 as explained in *Don* v. *Lippman* 5 Cl. & F 1.
[19] [1987]2M.L.J. 295, at p. 298.

jurisdiction, and yet was not duly served with process and did not appear, the registration shall not be effected.[20]

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[20] *Ho Hong Bank* v. *Ho Kai Neo* (1932) M.L.J. 76.

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