more digestible—and facilitate approaches sensitive to freedom of contract and practical justice in the future.

JONATHAN MANCE.*

THE GREAT CANADIAN COMITY EXPERIMENT CONTINUES

A majority of the Supreme Court of Canada has opted to continue an extraordinary 13-year experiment in enforcing foreign default judgments against unconsenting defendants served *ex juris.* In *Beals v Saldanha* 2003 SC 70; (2003) 234 D.L.R. (4th) 1 ("*Beals* SCC") six of the nine members of the court confirmed that the jurisdictional standard enunciated in *Morguard Investments Ltd v De Savoye* [1990] 3 S.C.R. 1077; (1990) 76 D.L.R. 4th 256 would apply not only to Canadian judgments from other provinces but also to foreign judgments and that this would not necessarily require any adjustment to the traditional defences for fraud, breach of natural justice, and public policy.

The experiment began innocently enough with the Supreme Court's 1990 reform in *Morguard*, above, of the rules for the interprovincial enforcement of judgments. The court found the traditional rules wanting: they were based on *Emanuel v Symon* [1908] 1 K.B. 302 and they called for the defendant's presence in the territory of the issuing court at the commencement of the claim or the defendant's consent to the assumption of jurisdiction by the issuing court. Continuing to apply these rules to the judgments of other provinces would "fly in the face of the obvious intention of the Constitution to create a single country" (*Morguard*, above, at 1099, 271). The court held that it was incumbent upon Canadian courts to recognise the judgments of courts exercising jurisdiction on the basis of a real and substantial connection to the matter. The court also said that this would benefit modern commerce by "accommodating the flow of wealth, skills and people across state lines" (*ibid.*, at 1098, 270).

Following this decision, Canadian courts began to apply the "real and substantial connection test" routinely to foreign judgments as well. Although the new test was adopted on the premise that "any concerns about differential quality of justice among the provinces can have no real foundation" (*ibid*., at p.271), Canadian courts readily embraced "the necessity and desirability, in a mobile global society, for governments and courts to respect the orders made by courts in foreign jurisdictions with comparable legal systems" (*Arrowmaster Inc. v Unique Forming Ltd* (1994) 17 O.R. (3d) 407 (Gen. Div.)). Canadian courts seemed unaware that applying this new jurisdictional standard absent a bilateral or multilateral convention showed far more deference to foreign judgments than the basic standards of international comity require. In the United States, the

* A Lord Justice of Appeal.

only other common law country to apply such a generous jurisdictional standard unilaterally, the standard is applied as part of legislation containing safeguards that is based on the Uniform Foreign Money-Judgments Recognition Act, and which has nevertheless been criticised as unduly generous to foreign judgments at the expense of local defendants. In fact, many years of earnest multilateral negotiations under the auspices of the Hague Conference on Private International Law failed to produce protocols to support the generous jurisdictional standard that the Supreme Court has since endorsed simply on the ground that "there does not appear to be any principled reason not to do so" (*Beals* S.C.C., above at para.[19]). Thus, in applying this new jurisdictional standard unilaterally and without regard to the need to recaliberate the defences to foreign judgments, Canadian courts embarked upon an experiment that probably seemed curious to all and alarming to those with assets in Canada that it might imperil.

On rare occasion, the courts would baulk at a particularly excessive instance of the exercise of jurisdiction by a foreign court. For example, the fact that a passive posting on a website hosted in Vancouver might have been viewed by persons in Texas was held not to constitute a real and substantial connection to Texas (*Braintech Inc. v Kostiuk* (1999) 171 D.L.R. (4th) 46 (BC CA), leave to appeal to SCC refused, SCC Bulletin 2000, 453). Also on rare occasion, the courts would baulk at a judgment that emanated from the foreign court. For example, a motions court refused to grant summary judgment to enforce a $15 million award, above and beyond compensatory damages, for mental distress in a claim by a plaintiff who "felt horrible" when a business venture went sour. The judge held that the quantum of the award could raise issues of public policy warranting a trial (*Kidron v Grean* (1996) 48 O.R. (3d) 775 (Gen. Div.); additional reasons at (May 13, 1996) Doc.94–CQ–59194 (Ont. Gen. Div.); leave to appeal refused 48 O.R. (3d) 784 (Div. Ct.)). On the whole, though, when judgment debtors complained of the unfairness of particular default judgments against them, Canadian courts overwhelmingly preferred to come down on the side of deference to the foreign court rather than that of sympathy for the plight of the judgment debtor. Time and again, leave to appeal to the Supreme Court was denied so that, despite the repeated expressions of concern by practising lawyers and academics, the comity experiment continued.

Then, in 2001, the Supreme Court granted leave to appeal in an action to enforce a Florida judgment in a matter that would later be described in the Supreme Court judgments as based on a claim that was "dubious in the extreme" (*Beals* SCC, above, at para.[132]); and that produced a "Kafkaesque judgment" (*ibid.*, at para.[88]) for an "astronomical amount" (*ibid.*, at para.[263]). Since the matter seemed to be one involving defendants who were ordinary citizens acting reasonably and in good faith in the course of a fairly common transaction, and since they seemed to have taken

reasonable steps to defend what appeared to be a relatively small claim, many hoped that the Supreme Court would see fit to wind up the experiment. Surely, they thought, the time had come to make the necessary observations about the practical implications of applying this new jurisdictional standard to foreign judgments. Surely it was time to resolve either to confine the new jurisdictional standard to Canadian judgments or to revisit the safeguards available to persons in this situation with exigible assets in Canada. This was not to happen. A majority of the court elected to endorse the enforcement of foreign default judgments against unconsenting defendants served *ex juris* without any amendment to the defences available to them.

The case itself provides a good illustration of the mischief that this can foster. Although the merits of the underlying claims are ostensibly beyond review in enforcement proceedings, each of the six judgments (one at first instance, two on appeal, and three at the Supreme Court) described the procedural history of the case at some length in support of the various conclusions reached about the fairness of the proceeding. In sum, this is what happened. Four Canadian residents who had purchased a vacant Florida lot for US$4,000 were approached in Canada on behalf of a buyer, who eventually bought the lot for $8,000. Later, the buyer alleged that he had intended to buy a different lot and that the mistake was the fault of the vendors, the agent and his title insurer. He sued for "over $5,000." The vendors telephoned the court for instructions. They wrote a defence and sent it to the court. The claim was withdrawn. Then it was re-issued. Then it was amended several times in respect of the co-defendants with whom the buyer eventually settled. The Canadian defendants did not continue to reiterate with each new amendment the defence that they had initially submitted. They thereby unwittingly defaulted and were deemed to have admitted the allegations that they thought they had denied. A default judgment was issued. Then, at a brief damages hearing, which the plaintiff chose not to have reported, a jury granted treble damages in compensation and punitive damages in relation to lost business opportunities. These were losses of a defunct corporation that was not mentioned in the pleadings, that had ceased construction for reasons unrelated to the dispute, and that did not have title to the property. Upon receiving notice of the award of some US$260,000, the Canadian defendants were advised by a Canadian lawyer that the judgment was not enforceable in Canada. By the time the judgment was brought for enforcement, it had increased at the rate of 12 per cent per annum to more than C$800,000.

The trial judge found the lawyer negligent for giving his clients false comfort that the judgment would not be enforced by a Canadian court and for causing them not to seek to have the judgment set aside in the Florida courts. However, the trial judge did not enforce the judgment. He said that the plaintiffs' counsel had misled the jury in the damages hearing. He held

that the case fell within the fraud exception to the enforcement of judgments, but he also suggested that it might be necessary to develop some sort of judicial sniff test for cases in which the totality of the circumstances argue against enforcement (*Beals v Saldanha* (1998) 42 O.R. (3d) 127 at 144). A majority of the Court of Appeal reversed this decision saying that it could not save the defendants "from the dire consequences of the course of action they chose to follow" (*Beals v Saldanha* (2001) 54 O.R. (3d) 641, at para.[75]), but one judge in dissent held that the judgment was rendered in breach of natural justice because "the vast majority of the damages related to damages for which the Ontario defendants had no notice and that were assessed beyond the pleading" (*ibid*., at para.[155]). The dissenting judge added that while there were no directly applicable safeguards in the Canadian Constitution, enforcing such a judgment would be so fundamentally unfair as to engage *Charter* values.

The majority of the Supreme Court upheld the decision of the Court of Appeal by applying the new jurisdictional test and the traditional defences. On the question of jurisdiction in this case, there was never much doubt that the appropriate forum for the resolution of a dispute over title to land was the court where the land was situated (although the title to this land was not actually in dispute). However, one dissenting judgment observed that if the development of a new jurisdictional standard was intended to respond to "the unfairness of forcing a plaintiff to bring an action in the place where the defendant now resides, 'whatever the inconvenience and costs this may bring'" (*Beals* SCC, above, para.[176]) then similar consideration should be shown to defendants where the choice of forum raised concerns about access to justice.

Although the Florida court's exercise of jurisdiction was never really put in issue in this case, the court's recommendations for the many situations in which it is less clear which forum is the natural forum, were themselves unclear. The sanguine reliance of the majority on the availability of *forum non conveniens* relief from foreign courts seemed to overlook the fact that such relief is unknown to the majority of legal systems and that it is unavailable, either as a matter of law or as a matter of fact, to foreigners in many American jurisdictions. Equally troubling is the implicit suggestion that the lot of Canadians would be improved by receiving competent advice from Canadian lawyers—presumably advice to go and defend in the foreign court. It is troubling because the simplistic assurance that the interests of defendants will be well served by rules that require them to participate in foreign proceedings fails to account for the disastrous consequences of doing so that have been experienced in recent cases such as *Loewen Group Inc. v U.S.A.* (June 26, 2003) Case No.ARB(AF)/98/3 (ICSID), which was mentioned in the *Beals* decision. In that case, the judge condoned irrelevant and prejudicial references to matters of race and class

in a jury address that preceded an award by the jury that included $400 million in punitive damages and that could be appealed only by posting a bond for 125 per cent of the value of the judgment (*Beals* SCC, above, para.[228]).

The lengthy but inconclusive discussions in the Supreme Court judgments in *Beals* over the formulation and the application of the traditional defences to foreign judgments are unlikely to be of more than local interest. The majority held that under the circumstances the defendants could not avail themselves of the traditional defences; and the dissenting judgments proposed various reformulations of those defences to address the perceived inadequacies on the facts of the case.

Of more interest to common lawyers generally will be the seemingly inevitable consequences of the Supreme Court's own endorsement of the current standards for the recognition and enforcement of foreign judgments. These include the concern that "Canadian residents may become attractive targets for opportunistic plaintiff's lawyers in other jurisdictions" (*Beals* SCC, above, para.[216]), and the concern that despite the intention to facilitate cross-border transactions, the ruling may actually discourage persons with assets in Canada from entering into such transactions (*ibid*., para.[173]). Indeed, the decision may also cause concern about the advice to be given to foreign investors considering placing exigible assets in Canada (Walker "Applying *Morguard* to Foreign Judgments" (September, 1995, Int. Comm. Lit. 37).

Perhaps of singular concern, however, is the court's suggestion that further reforms should be sought in legislation—the prospects of which seem dim in view of the history of leaving the law in Canada in this area to develop through the accretion of judicial decisions, and in view of the reduction—and in some provinces elimination—of Government support for Law Reform Commissions. Still, statutory reform even in the form of the most rudimentary safeguards, such as that against multiple damages awards found in the Protection of Trading Interests Act 1980, would provide welcome assistance under the circumstances. Until that time, it seems that little can be done but to watch on as this extraordinary experiment in comity enters a new phase.

JANET WALKER.*

MISTAKE AS TO IDENTITY CLARIFIED?

THE effect of a mistake as to identity upon contractual formation has long been uncertain. Does it render the contract void (*Cundy v Lindsay* (1878) 3 App. Cas. 459) or voidable (*Phillips v Brooks Ltd* [1919] 2 K.B. 243)?

* Osgoode Hall Law School, Toronto.