5/6/08

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 86 OF 2008

IN THE MATTER of Section 46 of the Companies Law (2007 Revision)
AND IN THE MATTER of the Grand Court Rules 1995, Order 102(2) (1) (b)

BETWEEN:

(1) BANDONE Sdn Bhd
(2) THE BRUNEI INVESTMENT AGENCY

Plaintiffs

- and -

(1) SOL PROPERTIES INC.
(2) DULI YANG TERAMAT MULIA PADUKA SERI PENGIRAN DIGADONG SAHIBUL MAL PENGIRAN MUDA HAJI JEFRI BOLKIAH

Defendants

Appearances: Mr. Martin Pascoe, Q.C. instructed by Mr. Christopher Russell and Mr. William Jones of Ogier for the Plaintiffs
Mr. Jeremy Walton of Appleby for the Defendants

Before: Hon. Justice Henderson

Heard: May 13 & 14, 2008

GRAND COURT - CAYMAN ISLANDS

JUDGMENT

This application for rectification of the register of members of the first defendant Sol Properties Inc. ("Sol") by the Brunei Investment Agency ("BIA") and its wholly owned subsidiary, Bandone Sdn Bhd ("Bandone"), raises issues concerning the enforcement of foreign non-money judgments. The second defendant, referred to in these proceedings as

"Prince Jefri", is the youngest brother of His Majesty the Sultan of Brunei Darussalam. Two of Prince Jefri's sons are directors of Sol, a Cayman Islands exempt company.

Facts

In February, 2000 proceedings were instituted in the High Court of Brunei Darussalam against Prince Jefri and others by the Government of His Majesty the Sultan claiming the restoration of in excess of US $15 billion on the ground that it had been misappropriated by Prince Jefri at a time when he was Minister of Finance of Brunei and chairman of the BIA. Eventually, the litigation was compromised by a settlement agreement which, among other things, required Prince Jefri to transfer his shares in Sol to the BIA or its nominee, Bandone. Sol owns, indirectly, the Hotel Bel-Air in Los Angeles, an asset said to be worth approximately US $100,000,000.

Although Prince Jefri did perform some of his obligations under the settlement agreement, he has never transferred the Sol shares. By October, 2004 Prince Jefri was claiming that he was no longer bound by its terms. The BIA brought an application in the High Court of Brunei Darussalam to enforce the terms of the agreement against Prince Jefri.

This application, which was resisted, resulted in an order in favour of the BIA. The order, in its material parts, reads as follows:

> "IN THE HIGH COURT OF BRUNEI DRUSSALAM
> HOLDEN AT BANDAR SERI BEGAWAN

SUIT NO 31 OF 2000

CHIEF JUSTICE DATO SERI PADUKA MOHAMMED SIED
SATURDAY 25 MARCH 2006

BETWEEN

(1) THE STATE OF BRUNEI DARUSSALAM
(2) BRUNEI INVESTMENT AGENCY

Plaintiffs

- and -

HRH PRINCE JEFRI BOLKIAH
AND OTHERS

Defendants

ORDER FOR THE TRANSFER OF ASSETS BY THE FIRST DEFENDANT TO THE SECOND PLAINTIFF

UPON THE APPLICATION of the Second Plaintiff (the ***BIA***) by summons in Chambers No 381 of 2004 issued on 11 October 2004

...

AND IT IS BEING DECLARED by this Court that the BIA is entitled to have the First Defendant specifically perform each of the First Defendant's obligations under the Settlement Agreement dated 12 May 2000 (*the Settlement Agreement*)

IT IS ORDERED THAT:

1. The First Defendant do within 45 days of the First and Second Undertakings ceasing to have effect transfer to the BIA or as the BIA may in writing direct the following assets:-

...

(c) the shares of or any interest in or rights over Sol Properties Inc"

Prince Jefri appealed to the Court of Appeal of Brunei Darussalam against this order. His appeal was dismissed.

Prince Jefri asked the Privy Council for special leave to appeal. Meanwhile, since no stay of execution had been granted, the BIA sought and obtained an order of the High Court of Brunei Darussalam appointing the Registrar of that Court to execute the documentation required to effect the transfer of the shares of Sol to Bandone. This order, in its material parts, reads:

IN THE HIGH COURT OF BRUNEI DARUSSALAM
HOLDEN AT BANDAR SERI BEGAWAN
SUIT No 31 of 2000

CHIEF JUSTICE DATO SERI PADUKA MOHAMMED SAIED
19 SEPTEMBER 2006

BETWEEN

(1) THE STATE OF BRUNEI DARUSSALAM
(2) BRUNEI INVESTMENT AGENCY

Plaintiffs

- and -

HIS ROYAL HIGHNESS PRINCE JEFRI BOLKIAH
AND OTHERS

Defendants

ORDER PURSUANT TO ORDER 45 RULE 8 OF THE RULES OF THE SUPREME COURT THAT ACTS REQUIRED TO BE DONE BY THE FIRST DEFENDANT BE DONE BY THE REGISTRAR OF THE HIGHT COURT OF BRUNEI DARUSSALAM

UPON THE APPLICATION of the Second Plaintiff (the ***BIA***) by Summons in Chambers No 299 for 2006 issued by the BIA on 11 July 2006 (the *Summons*)

...

AND UPON Counsel for the BIA undertaking on behalf of each of the BIA and Bandone Sdn Bhd that it will not dispose of any of the assets that are the subject of this Order until final determination of Prince Jefri's application for special leave to appeal to the United Kingdom Privy Council against the orders of the Court of Appeal made on 20 May 2006, which application is due to be heard on 30 November 2006

IT IS ORDERED AND DIRECTED THAT pursuant to Order 45 Rule 8 of the Rules of the Supreme Court:-

1. The Registrar of the High Court of Brunei Darussalam be appointed to and do execute as soon as reasonably practicable the following documents, namely:

...

(3) Instruments (in the forms attached to this Order at Schedule 3) transferring all the shares of Sol Properties Inc, Clifton House, 75 Port Street, PO Box 1350 GT, George Town, Cayman Islands and any and all of Prince Jefri's interests in or rights over the shares of Sol Properties Inc to Bandone Sdn Bhd ..."

On September 19, 2006 the Registrar executed on behalf of Prince Jefri a deed of transfer and related documentation in respect of the Sol shares. BIA's solicitors have asked Sol to record the name of Bandone in its Register of Members in place of that of Prince Jefri. The directors of Sol have refused.

On November 8, 2007 the Privy Council handed down two judgments dismissing Prince Jefri's appeal. One dealt with what has been described as "the procedural issue" and rejected Prince Jefri's claim that he could not obtain a fair hearing in Brunei Darussalam.

The other, which dealt with the "substantive issue", confirmed that the lower courts were correct in deciding that the BIA was entitled to an order upon summary application requiring specific performance of the settlement agreement by Prince Jefri.

Sol has continued to refuse to amend its Register of Members.

Issues

This application for rectification of the register of Sol is resisted on these grounds.

First, the respondents say that the second order of the High Court of Brunei Darussalam (directing the Registrar to execute documents) is an order *in rem* relating to property of which the *lex situs* is the Cayman Islands and is therefore an order of which this court should take no notice. The respondents also say that the earlier order of the High Court for specific performance is an order *in personam* and cannot be enforced directly in the Cayman Islands because it is not a judgment for a debt or for a definite sum of money.

Second, Sol and Prince Jefri say that should this court "decide to amend the common law rule which currently prohibits the enforcement of a foreign non-money judgment", I should find that the court retains a discretion and should exercise that discretion in their favour.

Third, the respondents emphasize that their case is complex and cannot be dealt with appropriately on a summary basis. They say the plaintiffs should have commenced a Writ action.

First Issue: Jurisdiction to Enforce the Order

The distinction between judgments *in rem* and *in personam* in connection with company shares has been the subject of a recent judgment of the Privy Council in *Pattni v. Ali et al* [2006] U.K. P.C. 51. The appeal arose from a petition brought by Mr. Pattni in the Chancery Division of the Isle of Man seeking rectification of the Register of Members of World Duty, an Isle of Man company. Mr. Pattni had obtained a judgment of the High Court of Kenya ordering Mssrs. Ali and Dinky to "transfer all the 100% shares in the third defendant to the plaintiff as per the said sale and purchase agreement." The court found that Mr. Pattni had paid for certain shares but that Mssrs. Ali and Dinky had failed to transfer the shares to him in breach of their agreement. Both of the lower courts had accepted an argument that this was a judgment *in rem* and therefore incapable of enforcement or recognition in the Isle of Man. The rule relied upon is set out in *Dicey, Morris & Collins, The Conflict of Laws*, 14th Edition (2006) in these terms:

> "Rule 40 – (1) A court of a foreign country has jurisdiction to give a judgment in rem capable of enforcement or recognition in England if the subject matter of the proceedings wherein that judgment was given is immovable or movable property which was at the time of the proceedings situate in that country.
>
> (2) A court of a foreign country has no jurisdiction to adjudicate upon the title to, or the right to possession of, any immovable situate outside that country."

Their Lordships quoted from the judgment of Blackburn, J. in *Castrique v. Imrie* (1870) LR 4 HL 414 which described a decision *in rem* as one by a tribunal with "jurisdiction to determine not merely on the rights of the parties, but also on the disposition of the thing." Their Lordships commented (at page 97):

> "21 For present purposes, a judgment in rem in the sense of rule 40 is thus a judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it)."

The contrast with an order or judgment made *in personam* was described in these words (at page 99):

> "25 An order purporting actually to transfer or dispose of property is, however, to be distinguished from a judgment determining the contractual rights of parties to property. Courts frequently adjudicate on the rights to property and otherwise of parties before them arising from contractual transactions relating to movables or intangibles situate in other states; in doing so, common law courts apply the governing law of the relevant contract and the lex situs of the relevant movable or intangible to the contractual and proprietary aspects of the transaction as appropriate in accordance with principles discussed in the text to rules 120 and 124 in *Dicey, Morris & Collins*."

In the result, the Privy Council found that the Kenyan order was a "classic order *in personam* for specific performance in terms reflecting and predicating the Judge's findings of an agreement for sale and of its breach by Mssrs. Ali and Dinky which are findings central to Mr. Pattni's claim in the Isle of Man to rectify [the register]" (at page 101). The order of the Kenyan Court did not purport to pass legal title to the shares from defendant to plaintiff; that could only take place in the Isle of Man upon alteration of the register of members. Beneficial ownership of the shares, on the other hand, was

transferred to Mr. Pattni under the share transfer agreement well before the Kenyan Court took cognisance of the claim.

Similarly, I conclude without difficulty that the first order of the High Court of Brunei Darussalam, for specific performance, was a judgment *in personam*. The judgment is final and conclusive and was pronounced by a court with jurisdiction to give it. The judgment imposed an obligation of a personal nature upon Prince Jefri - the obligation to take the necessary steps to transfer the shares to Bandone. He did not do so.

The Registrar of the High Court was then appointed to act in Prince Jefri's stead. In doing so, he was simply carrying into effect obligations of a personal nature which Prince Jefri should have, but did not, carry out. The order appointing the Registrar was entirely ancillary to the earlier order and made only for the purpose of perfecting it. The later order can assume no greater significance than the earlier one. It, also, is an order made *in personam*.

In the course of reaching their decision in *Pattni v. Ali* that the Kenyan order was made *in personam*, the Privy Council said this:

> "27 Their Lordships are not however concerned with immovables, which represent as stated an exceptional case in private international law. For present purposes, it is the converse of the above propositions relating to movables or intangibles that is important. As presently advised, though the arguments did not address the point "(or it may be need to under the terms of the two preliminary issues presently in issue)", their Lordships would think it clear that, where a court in state A makes, as against persons who have submitted to its jurisdiction, an in personam judgment regarding contractual rights to either movables or intangible property (whether in the form of a simple chose in action or shares) situate in state B, the courts of state B can and should recognise the foreign court's in

personam determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such rights in state B. The extent to which this is possible might be limited by the law of state B, as the situs or in the case of shares as in the place of incorporation of the relevant company (in this case, as both). For example, if a person to whom a court in state A held that shares had been contractually agreed to be transferred was not eligible under the company's constitution to be registered as their legal owner, there could be no actual registration in state B – but no such suggestion appears in this case.

28 Their Lordships turn to the relevance and application of these principles to the present circumstances. Whatever else might be in doubt about the course of the Kenyan proceedings, it is clear that they involved contractual issues between parties to the proceedings who are also the parties to the Isle of Man proceedings – Mr. Pattni on the one side and Mr. Ali and Dinky on the other." (underlining added)

There is a clear, but not always sufficiently recognized, distinction between recognition and enforcement of a foreign court order or judgment. The general rule concerning recognition of an *in personam* judgment is given in *Dicey, Morris & Collins* as rule 35(2):

"(2) A foreign judgment given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 36 to 39, which is not impeachable under any of Rules 42 to 45 and which is final and conclusive on the merits, [67] is entitled to recognition at common law and may be relied on in proceedings in England. [68]"

The right to enforce directly a foreign judgment *in personam* is described in *Dicey and Morris*, Rule 35(1):

"A. *Enforcement and Recognition*

14R-018 RULE 35 – (1) Subject to the exceptions hereinafter mentioned and to Rule 55 (international conventions), a foreign judgment [61] *in personam* given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in rules 36 to 39, and which is not impeachable under any of Rules 42 to 45, may be enforced by a claim or counterclaim for the amount due under it if the judgment is

(a) for a debt, or definite sum of money [62] (not being a sum payable in respect of taxes or other charges of a like nature [63] or in respect of a fine or other penalty [64]); and

(b) final and conclusive, [65]

but not otherwise."

The underlined words in the quotation from *Pattni* set out above appear to alter the traditional rule that a foreign judgement *in personam* can be enforced directly in England (and, by extension, in the Cayman Islands) only if it is for a debt or definite sum of money. The judgment of a foreign court to the effect that a plaintiff is entitled to specific performance of an agreement for the purchase and sale of shares would not fall within Rule 35(1) in *Dicey and Morris*.

The BIA argues that the passage in *Pattni* at paragraph 27 (quoted above) was a step in the reasoning adopted by the Privy Council in its resolution of the first issue before it (the characterization of the Kenyan judgment as *in rem* or *in personam*) and must be regarded as part of the ratio. Prince Jefri says that the passage was unnecessary to the decision, is mere *obiter*, and contains opinion on matters which were not argued.

This question itself has been considered and resolved in a recent decision of the Chief Justice of this court in *Miller v. Gianne and Redwood Hotel Investment Corporation* 2007 CILR 18. The Chief Justice said (at paragraph 62):

> 62. "The Privy Council, in allowing Mr. Pattni's appeal, declared that the courts of the Isle of Man had jurisdiction and the right to recognise and enforce the Kenyan judgment by way of *in personam* orders directing Mr. Ali (as a shareholder of World Duty Free and director of Dinky S.A. and Dinky S.A. itself as the majority shareholder) to grant specific performance, among other things, by the rectification of the share register of World Duty Free.

...

64. While the prefatory words of Lord Mance above suggest that that pronouncement of principle was not the subject of arguments directly on point, the principle cannot be regarded as mere *obiter dictum*; it was central to the decision taken by which the appeal was allowed and the Kenyan judgment declared to be enforceable. The fact therefore that the longstanding rule derived from *Sadler v Robins* (29) (itself described by *Dicey, Morris and Collins, op cit.*, vol. 1, at 574, note 62, as a limitation worthy of being reconsidered) appears not to have been the subject of arguments before their Lordships, is no basis for doubting that it has been disapproved.

65. Further, clear indication by way of high judicial authority that *Sadler v Robins* should no longer represent the law on enforcement of foreign judgments *in personam* at common law, is to be found in the judgment of the Supreme Court of Canada in *Pro Swing Inc. v Elta Golf Inc* (27). There the majority of the Court held (in the context of an application to enforce a trademark judgment) that the traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments should be changed. Further, that the appropriate modern conditions for recognition and enforcement can be expressed generally as follows. The judgment must have been rendered by a court of competent jurisdiction and must be final and conclusive, and it must be of a nature that the principles of comity require the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether to enforce one.

66. This invocation by the Canadian Supreme Court of equitable principles is derived from an examination of the history of the traditional common law limitations set now against the realities of modern day commerce and the global mobility of people and assets. Those are realities which exist, no less so, for our jurisdiction.

67. Moreover, the jurisdiction in the courts to provide relief by way of recognition and enforcement of foreign non-monetary judgments may well have existed in equity even before the emergence of the rule in *Sadler v Robins* (29) in 1808. See, for instance *Morgan's Case* (21). The inclination in the modern jurisprudence now to

grant recognition and enforcement by way of equitable remedies such as specific performance, injunctive or declaratory relief and pleas of *res judicata*, may well be regarded as a re-emergence of that jurisdiction which has always existed in equity, even if rendered dormant over the years in deference to the limitations of the traditional common law rule. For an elucidatory discussion on the subject see White, *Enforcement of Foreign Judgments in Equity*, (1980-82) 9 *Sydney Law Review* at 630-648.

68. The consequence of all this is, in my view, the appropriate conclusion that Ms. Miller should be allowed to seek the recognition and enforcement of the stipulated judgment itself in this jurisdiction, notwithstanding that it is not a judgment for a debt by way of a definite sum of money."

This recent, considered judgment in a case whose facts are not as close to those in *Pattni v Ali* as the present case is conclusive of the point. The ability to enforce directly foreign judgments and orders made *in personam* is no longer confined in the Cayman Islands to judgments for a debt or a definite sum of money.

Of course, enforcement of a foreign *in personam* non-money judgment requires that the judgment be final and conclusive and of such a nature that the principles of comity require this court to enforce it: *Miller v. Gianne et al*, *supra*, paragraph 65. Subject to what I will say below on aspects of comity, those criteria are met here.

Second Issue: Discretion to Refuse to Enforce

In *Miller*, the Chief Justice followed the judgment of the Supreme Court of Canada in *Pro Swing Inc. v. Elta Golf Inc.* 2006 SCC 52. The majority in *Pro Swing* found a "compelling" case for altering the common law to permit the direct enforcement of foreign non-money judgments but warned that this change must be accompanied by a

judicial discretion to ensure that enforcement does not "disturb the structure and integrity of the domestic legal system" (per Deschamps, J. at paragraph 15). There is a need for balance and restraint and a careful and nuanced approach. The majority said (at paragraph 31):

> "For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one."

The minority judgment added that "general fairness considerations" are relevant and emphasized that the foreign judgment must be final, clear in its terms and free of ambiguity. I accept these comments on discretion as applicable in the present case.

Section 84B (2) of the Brunei Constitution grants an immunity from civil and criminal proceedings to any person "acting on behalf, or under the authority, of" His Majesty the Sultan "in respect of anything done or admitted to have been done by him in his official capacity …". Prince Jefri says that the BIA is acting on behalf of the Sultan and is therefore immune from any order for specific performance the High Court of Brunei Darussalam might otherwise decide to pronounce against it. This is relevant because the BIA still has undischarged obligations under the settlement agreement.

When Prince Jefri transferred assets to the BIA and Bandone as required by the settlement agreement, he transferred two residences named Assana and Arrifa which he had been using as his official and private residences respectively. There is reason to believe that this was a simple mistake capable of rectification in Brunei: see *His Royal Highness Prince Jefri Bolkiah et al v. the State of Brunei Darussalem and BIA* [2007] U.K. PC 63 at paragraph 29 ff (the judgment of the Privy Council on the "substantive issue"). Much was made in argument before me of the possible inability of the High Court of Brunei Darussalem to compel the BIA to transfer these, or any other, two residences back to Prince Jefri in accordance with its assumed contractual obligation.

The orders of the Brunei court which the plaintiffs seek to enforce in this jurisdiction are for specific performance. Where there is a lack of mutuality in the sense that the party seeking to enforce a contractual obligation cannot itself be ordered to perform its own obligations under the contract, specific performance will ordinarily be refused: *Flight v. Bolland* (1828) 4 Russ. 296 and *Lumley v. Ravenscroft* [1895] 1 QB 683 (CA).

Mr. Pascoe for the plaintiffs says that the Court of Appeal of Brunei entertained this very argument regarding immunity and lack of mutuality and rejected it. (The Privy Council did not rule on the immunity question as it is precluded from doing so by the terms of the Brunei (Appeals) Order No. 2396, the statutory instrument giving the Privy Council jurisdiction to consider appeals from Brunei.)

The unanimous judgment of the Court of Appeal contains this passage (at page 26):

> "Submitting that His Majesty, the government and the BIA are all one and the same Mr. Lewis says that the BIA's obligations under the agreement cannot be enforced and that the absence of mutuality and provisions of the Act to the same effect prevent the court ordering specific performance in its favour. It would be manifestly unjust.
>
> In answer, Mr. Pascoe for the BIA, contends that his client is a statutory corporation and amenable to suit. Therefore the principle of mutuality and similar provisions in the Act do not bite. He further submits that the absence of mutuality is in any event not an absolute bar but only a circumstance to be taken into account in the exercise of the court's discretion.
>
> We accept Mr. Pascoe's submission that the BIA is amenable to suit. The Brunei Investment Agency Act Cap 13 draws a clear distinction between the BIA and the Government. Note for example section 19(1) which provides that the agency shall act as financial agent of the Government and section 26 which provides that the Government shall be responsible for the payment of all monies due by the agency but that nothing in the section authorises a person who has a claim against the agency to sue the Government in respect of that claim. Also, the transitional provision draws the same distinction by preserving any legal proceedings by or against the Government before the commencement of the Act to be continued by or against the Agency.
>
> In these circumstances it is unnecessary for this Court to investigate whether mutuality provides an absolute bar, although we have little doubt that it does not, as the principle and provisions of the Act to similar effect, have no application against the BIA. Mr. Lewis' argument on this point falls to the ground."

It is true, as Mr. Walton points out, that the express finding of the Court of Appeal is simply that the "BIA is amenable to suit." This terse observation considered in isolation might suggest that the BIA is amenable to suit on certain occasions – those where it is not acting for on or behalf of the Sultan – but not in circumstances of the sort arising from enforcement of the settlement agreement. In the context, however,

this submission is bound to fail. The Court of Appeal was considering the BIA's possible immunity from suit specifically in connection with obligations imposed upon it by the settlement agreement. The court had no reason to consider the BIA's liability to suit in any other context. Immediately after its finding (on page 27), the Court of Appeal provides two examples in the BIA's founding legislation which imply that the BIA can be sued when acting as a financial agent of the Government. Moreover, the Court of Appeal said (at page 25), when dealing with the question of mistake, that "if it was a mistake, one would expect separate proceedings would have been taken to put matters right." This suggestion that Prince Jefri could take separate proceedings against the BIA for the rectification of a mutual mistake is another indication that the Court of Appeal of Brunei considers that the BIA's obligations under the settlement agreement can be enforced by legal action.

My conclusion is that the BIA is not immune from proceedings taken against it to enforce the settlement agreement and that the Court of Appeal of Brunei has so decided.

Prince Jefri's second point concerning discretion is that he did not receive a fair trial in Brunei. Many of his complaints about a lack of trial fairness have already been considered and decided against him by the Privy Council in *His Royal Highness Prince Jefri Bolkiah et al v. the State of Brunei Darussalam and BIA* [2007] U.K. PC 62 (the Privy Council's decision on the "procedural issue"). Prince Jefri's complaints about the lack of availability of judicial review, that the proceedings were heard *in camera*, and that judgments in the case may not be published, have been dealt with

conclusively by the Privy Council. He is estopped from raising those same issues before me.

The one complaint of Prince Jefri's upon which the Privy Council felt unable to comment was the fact that constitutional amendments granting immunity to agents of the Sultan were made in Brunei shortly before the BIA issued its summons to enforce the judgment in its favour. Prince Jefri says that the only reasonable inference is that these amendments were aimed at the present litigation. The BIA disputes this and has adduced evidence that the amendments had been under consideration for many years.

This argument is disposed of effectively by my conclusion immediately above. Given my decision that the Court of Appeal of Brunei has decided that the BIA can be ordered by the High Court there to perform its remaining settlement agreement obligations, neither the timing of the constitutional amendments nor their substance (immunity) can support an assertion that Prince Jefri has not had and cannot have a fair trial in Brunei.

Prince Jefri also argues that he has at present no security for his counterclaim in New York, which is said to be worth at least $100 million US. He contends that the Sol shares and its underlying asset, the Hotel Bel-Air, are the only assets of substance available to satisfy any judgment he might get and says they should be preserved to secure his counterclaim.

Prince Jefri applied recently to the Supreme Court of the State of New York for a temporary restraining order and preliminary injunction restraining Bandone from (among other things) acquiring ownership of the Hotel Bel-Air. The application was refused. In her reasons for judgment dated March 6th, 2008, Her Honour Judge Freedman made the following findings against Prince Jefri:

1. "Prince Jefri has not shown that he will suffer irreparable harm in absence of a preliminary injunction" (page 7);
2. "Prince Jefri has not shown likelihood of success on the merits" (page 7);
3. "the balance of equities do not weigh in Prince Jefri's favour" (page 8).

I find it curious that I should be asked to refuse rectification of the register in order to secure Prince Jefri in a counterclaim pending in New York where the New York judge has recently concluded that Prince Jefri has not demonstrated a likelihood of success on the merits and not shown that he will suffer irreparable harm if the shares are transferred. If I were to accept his assertions before me on the need for security, I would be undermining a considered judgment of the court to which Prince Jefri has submitted his counterclaim for adjudication. I cannot view the supposed need for security as a basis for refusing rectification.

A final argument in favour of my exercising my discretion against rectification has consisted of references to the "authoritarian nature of the Brunei regime." It is said that the Sultan retains supreme and exclusive executive power and that Brunei is ruled under a

state of emergency allowing him to rule by decree. Prince Jefri argues that there is no legitimate justification for the state of emergency.

In reality, this argument is subsumed in the other arguments disposed of above. What is important for my consideration is not the nature of the regime generally or the nature and extent of the Sultan's power, but the availability of a fair trial for Prince Jefri in Brunei. That question has been disposed of by the judgment of the Privy Council and my conclusion on the immunity question. Nothing additional to those points has been advanced in argument and I am left, therefore, with an absence of evidence exposing any unfairness in the Brunei judicial system which has or may prejudice Prince Jefri in litigation relating to this settlement agreement.

In *Miller*, the Chief Justice echoed the conclusion of the Supreme Court of Canada in *Pro Swing* that one discretionary consideration is whether the foreign judgment is "of a nature that the principle of comity requires the domestic court to enforce." Prince Jefri argues that the principle of comity militates against enforcement because of the authoritarian nature of the Brunei regime, and because the plaintiffs are "for all intents and purposes" an agent of the Sultan. However, comity has never been a basis upon which English courts recognize or enforce foreign judgments: *Indyka v. Indyka* [1969] 1 AC 33, 58, per Lord Reid, citing *Schibsby v. Westenholz* (1870) LR 6 QB 155, 159; quoted in *Dicey, Morris & Collins* at paragraph 14 – 082. In light of that position, considerations of comity will not ordinarily assume any central importance on this question of discretion, although I accept that comity (or a lack thereof) may be relevant.

Moreover, the nature of the Bruneian regime and the relationship between the Sultan and the BIA have little to do with comity at all. Comity involves questions of reciprocity, a consideration of which usually requires answering the question: "would we expect this foreign court to enforce a judgment of our own if the situation were to be reversed?" It is true that a foreign judgment may be impeached on the ground that its enforcement or recognition would be contrary to public policy: Rule 44, *Dicey, Morris & Collins*. However, any facile conclusion that the governmental or judicial structure in a foreign jurisdiction is such that a judgment of its courts must be ignored on the ground of domestic public policy would itself be an egregious violation of the principle of comity. *Dicey, Morris & Collins*, quoting Scrutton, LJ in *Luther v. Sagor* [1921] 3 KB 532, 558 (CA), put it this way: "it would be a serious breach of international comity to postulate that the legislation of a foreign sovereign state was contrary to essential principles of justice and morality" (14th edition, at paragraph 1 – 014). There is no merit in the suggestion that the principles of comity militate against enforcement of this foreign order.

Third Issue: Summary Procedure

The application for rectification of the register is brought under section 46 of the *Companies Law* (2007 Revision). That section contemplates a summary procedure. For obvious reasons, it is undesirable that a corporate register, if it needs rectification, be left in a state of error for long. The section does leave it open to the court to direct that an issue be tried in the usual manner; I recognize that I have jurisdiction to convert this

summary application into what is, in effect, a Writ action, complete with pleadings, document disclosure, and cross-examination of witnesses. I am satisfied that nothing but delay would result from such a course. Mr. Walton has said all that can be said against the application, and has done so with his usual skill. There is no justification for any additional proceeding.

For these reasons, I order that the Register of Members of Sol be rectified by substituting the name of Bandone for the name of Prince Jefri as the holder of the shares.

Dated this 5th day of June, 2008

Henderson, J.

Henderson, J.
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS