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COURT OF APPEAL FOR ONTARIO

CATZMAN, DOHERTY and WEILER JJ.A.

B E T W E E N :	)	
	)	**L. Levine, Q.C. and**
FREDERICK H. BEALS, III and	)	**M. Boussidan**
PATRICIA A. BEALS	)	**for the appellants**
	)	
Plaintiffs/Appellants	)	
	)	
- and -	)	**P. Lukasiewicz and**
	)	**S. Stamm**
GEOFFREY SALDANHA,	)	**for the respondents,**
LEUEEN SALDANHA, DOMINIC	)	**Saldanhas**
THIVY and ROSE THIVY	)	
	)	**N. Roth**
Defendants/Respondents	)	**for the respondents,**
	)	**Thivys**
- and -	)	
	)	
WILLIAM KELLY	)	
	)	
Third Party	)	
	)	**Heard: May 8-9, 2000**
	)	

On appeal from the judgment of Justice John R. Jennings dated January 12, 1999.

DOHERTY J.A.:

I

[1] What began as a dispute in a Florida court over an $8,000 (U.S.) land transaction has now come to this court as an appeal from the dismissal of an action to enforce a Florida judgment worth some $800,000 (Can.).

[2] The appellants (the "Beals") sued the respondents (the "Saldanhas" and "Thivys") seeking to enforce a judgment obtained in Florida (the "Florida judgment"). The Beals, along with Mr. William Foody and his wife, Barbara, were plaintiffs in the Florida action. They alleged that they had been induced by fraudulent misrepresentations made by the respondents and their Florida real estate agent to purchase a lot in a Florida subdivision. The respondents owned the lot. The Beals and Foodys obtained default judgment and, after an assessment of damages by a jury in December 1991, were awarded damages in the total amount of $260,000 (U.S.) plus post-judgment interest at 12% per year.

[3] The Foodys assigned their interest in the judgment to the Beals who commenced this action in Ontario in 1993. By the time the action reached trial in 1998, the Florida judgment was worth approximately $800,000 (Can.).

[4] The Saldanhas and Thivys defended the action in Ontario on several grounds, including claims that:

- the Florida court did not have jurisdiction;
- they were denied natural justice in the Florida proceedings;
- the enforcement of the Florida judgment in Ontario was contrary to public policy; and
- the Florida judgment was obtained by fraud in the Florida court.

[5] The respondent, Rose Thivy, also contended that she had made an assignment in bankruptcy in 1994 after the Ontario action had been commenced and that she had subsequently been granted an absolute discharge. She alleged that the discharge relieved her of any liability she may have had to the Beals.

[6] The Saldanhas made a third party claim against their Ontario solicitor, William Kelly. They claimed full contribution and indemnity for any amount owing on the Florida judgment and for the costs associated with the Ontario action. The Saldanhas alleged that they had not challenged the Florida judgment in Florida after it was made because Mr. Kelly told them that the judgment was not enforceable in Ontario. They contended that the advice was wrong and that Mr. Kelly acted negligently and in breach of his contract with them in giving that negligent advice. The Saldanhas took the position that had they contested the Florida judgment in Florida, it would have been set aside.

[7] The trial judge dismissed the main action, holding that the Florida judgment had been obtained by fraud and that public policy precluded enforcement of the Florida judgment in Ontario. He went on to hold that had he found in favour of the Beals on the main action, he would have held that Mr. Kelly was negligent in the advice he gave to the Saldanhas and was required to indemnify them for any amount they owed to the Beals.

However, having concluded that the main action should fail, the trial judge dismissed the third party claim.

[8] The Saldanhas and Thivys also cross-claimed against each other. The trial judge did not reach the cross-claims given his findings on the main action.

[9] The Beals appeal and seek judgment in the amount of the Florida judgment against the Saldanhas and Thivys.

[10] The Saldanhas appealed from the order dismissing the third party claim. Obviously, this appeal would become relevant only if the Beals were successful in their appeal in the main action. During oral argument, the court was advised that the Saldanhas' appeal in the third party claim had been settled and that the court need not address that appeal.

II

[11] The respondents reside in Ontario and had been friends for many years. In 1981, they purchased a lot in a Florida subdivision, site unseen for $4,000 (U.S.). They thought that they might build a vacation home on the property one day. Over the years, they had little to do with the property. Mrs. Thivy, who worked as a real estate conveyor in a lawyer's office in Ontario, took care of anything that needed to be done concerning the property.

[12] In the summer of 1984, Mrs. Thivy was contacted by James O'Neil, a Florida real estate agent, who told her that he had a prospective purchaser for the respondents' lot. After discussion with the Saldanhas and her husband, Mrs. Thivy told Mr. O'Neil that the respondents would sell the lot for $8,000 (U.S.). Subsequently, Mrs. Thivy received an Agreement of Purchase and Sale signed by Mr. William Foody and witnessed by Mr. O'Neil. In the description of the property on the agreement, the lot was referred to as "Lot #1". The respondents owned Lot #2 and not Lot #1. After discussions with Mr. O'Neil, Mrs. Thivy changed the reference on the Agreement of Purchase and Sale from Lot #1 to Lot #2. At the trial of the Ontario action, she testified that she told Mr. O'Neil that she owned Lot #2, and he told her to change the lot number on the offer. Mrs. Thivy did not initial the change and she did not delete the rest of the description of the property. That description was of Lot #1. The respondents executed the revised Agreement of Purchase and Sale and returned it to Mr. O'Neil. Mrs. Thivy was later advised that the sale had closed and the respondents received a cheque for $8,000 (U.S.).

[13] In January 1985, about three months after the transaction closed, Mr. Beals telephoned Mrs. Thivy and told her that he was one of the purchasers. He said that he had been sold the wrong lot and that he had intended to purchase Lot #1. After discussing the matter with Mr. Beals, Mrs. Thivy suggested that he speak to Mr. O'Neil. Mr. Beals commenced the Florida action in February 1985.

[14] In the Florida action, the Beals and Foodys sued the Saldanhas, Thivys, Mr. O'Neil, his real estate company, and two Florida companies involved in the closing of the transaction and the transfer of the property. The Beals eventually settled with Mr. O'Neil, his company and one of the Florida companies for a total of $10,750 (U.S.).

[15] In the Florida action, the Beals and Foodys sought rescission of the contract for the purchase of the lot and damages "in excess of $5,000". The damages claim was styled so as to give the Circuit Court of Florida monetary jurisdiction. This is a customary way of pleading in Florida.

[16] In their complaint, the Beals alleged that:

- they had informed the respondents' agent, Mr. O'Neil, that they were interested in purchasing Lot #1 for the construction of a model home to be used by them to attract clientele for their construction business;
- the respondents fraudulently represented, through their agent, O'Neil, that they owned Lot #1 when in fact they owned Lot #2;
- in reliance on the false representation made by the respondents, the Beals and the Foodys agreed to purchase Lot #1 from the respondents. They executed an Agreement of Purchase and Sale referable to Lot #1;
- after receiving the Agreement of Purchase and Sale, the respondents fraudulently, and without notice to the Beals or the Foodys, changed the reference in the Agreement from Lot #1 to Lot #2, signed the Agreement, and returned it to their agent;
- the transaction closed on September 28, 1994. The Beals and Foodys paid the purchase price and believed that they had purchased Lot #1; and
- construction of the model home commenced but was not completed because the Beals and Foodys found out that they did not own the lot on which the home was being constructed.

[17] In the complaint, the alleged damages included the sale price ($8,000 U.S.), expenses associated with the construction of the model home, and lost profits as a result of the inability to complete construction of the model home and use it to attract business for the construction operation. The complaint sought treble damages but that claim was not pursued at trial.

[18] The complaint in the initial Florida action was served on the respondents in or about February 1985. The respondents delivered a defence in that action. The initial Florida action was dismissed without prejudice in February 1996 and the respondents received notice of that dismissal.

[19] In September 1986, the Beals and Foodys commenced a second Florida action arising out the sale price of the lot. They subsequently delivered an amended complaint in that second action. The amended complaint was served on the respondents. A defence to that action purporting to be made on behalf of all of the respondents was filed with the Florida Court.[2]

[2] In their cross-claim, the Saldanhas allege that they did not sign this defence and that their signatures were forged on the defence without their knowledge by the Thivys.

[20] In May 1987, the Beals served and filed a second amended complaint. The respondents did not respond to this complaint. A third amended complaint was served and filed in May 1990. Once again, the respondents did not respond to this complaint. The evidence adduced at the trial of the Ontario action demonstrated that the respondents made a considered decision to take no further part in the Florida proceedings.

[21] Under the Florida rules of civil procedure, failure to respond to the amended complaints entitled the Beals and Foodys to move for an order finding the respondents in default. A finding of default constitutes an admission of the facts essential to a finding of liability. In June 1990, the Beals served the respondents with a motion to find them in default for their failure to plead in response to the second and third amended complaints. The respondents chose not to appear on the motion or to contest that motion in any way. The respondents were found in default.

[22] Under the Florida rules, damages are assessed by a jury even after a finding of default. In December 1991, the Beals and Foodys had their damages assessed by a jury. The respondents received notice of the damage assessment and despite their default, were entitled to appear and challenge the claims made by the Beals and Foodys. Once again, the respondents chose not to take part in the Florida proceedings.

[23] At the trial before the jury, the judge directed a verdict in favour of the Beals and Foodys on liability based on the respondents' default. The jury was then required to assess damages. Mr. Beals, Mr. Foody and an expert witness testified in support of the damages claims. The expert gave evidence concerning the lost profits claim. Documents to support the damage claims were also placed before the jury. Counsel for the Beals and Foodys provided the trial judge with written argument outlining the legal basis for the lost profits claim. After a pre-charge conference, the trial judge instructed the jury as to the applicable principles. In doing so, he followed the established procedure for such cases in Florida.

[24] The jury awarded compensatory damages in the amount of $210,000 (U.S.). Although the jury's verdict does not refer to the various heads under which compensatory damages were claimed, it is evident from the material placed before the jury that almost $200,000 of that award was attributable to lost profits, and about $14,000 was attributable to expenses, including the purchase price of the property. The jury also awarded $50,000 (U.S.) in punitive damages.

[25] The trial proceedings were not recorded and consequently there is no transcript available. According to Florida practice, civil jury trials are not recorded unless a party to the trial requests that the proceedings be recorded and pays the associated costs. It is quite common that trials in commercial matters are not recorded.

[26] The jury's verdict is reflected in the final order of the Florida court dated December 13, 1991. That judgment, which is the basis for the Ontario action, refers only to damages and not to any claim for rescission of the contract or possession of the land.

[27] A copy of the Florida judgment was sent to the respondents by the Florida court on December 16, 1991. Under the Florida rules, the respondents had 10 days to commence an appeal. If an appeal was to be taken, it had to be based on the trial record.

[28] The Florida rules also provided that the respondents could move before the trial court to set aside the judgment. That motion had to be brought within a reasonable time and in any event within one year. Under that rule, a party may move to set aside a judgment based on its own "excusable neglect", or on "fraud whether heretofore denominated as intrinsic or extrinsic" or on "other misconduct of an adverse party". On a motion to set aside the judgment, a moving party may address the merits of the claim, available defences and allegations of misconduct by the other party.

[29] The respondents decided not to take any steps to contest the Florida judgment after they received a copy of the final order.[3]

[30] The respondents did not argue in this court that the Beals failed to follow any of the procedural requirements of Florida law in the course of the Florida proceedings. The respondents also conceded that they had notice of all relevant steps taken in the Florida action. It cannot be argued that the respondents did not have a full opportunity to contest the claim in Florida had they chosen to do so. Nor can it be contended that the Florida procedure contravenes Ontario's notions of natural justice. The Florida procedure followed in default proceedings is not unlike the Ontario procedure, although there are differences. In some ways, the Florida procedure is more favourable to defendants than the comparable Ontario procedure.

III

[31] By the end of the trial, the respondents had abandoned their challenge to the jurisdiction of the Florida court. As the trial judge said:

> It is conceded that because of the real and substantial connection test, the Florida judgment would be recognized in

[3] In their third party claim, the Saldanhas contend that they did not contest the Florida judgment in Florida because of advice they received from their solicitor, Mr. Kelly. In the Thivys' cross-claim, they contend that Mr. Kelly was retained by the Saldanhas pursuant to an agreement between the Saldanhas and the Thivys. The Thivys contend that if Mr. Kelly gave negligent advice, the Saldanhas are responsible to the Thivys for any damages which flowed to the Thivys as a result of that negligent advice.

> the Courts of Ontario and would *prima facie* be enforceable.
> …

[32] The outcome of the action turned on whether the respondents could establish grounds on which the Ontario court should refuse to enforce the judgment of the Florida court, despite the fact that the Florida court had jurisdiction to entertain the action and render the judgment. The respondents' primary submission was that the Beals had deliberately misled the Florida court in obtaining the Florida judgment. Much of the trial was occupied with submissions as to the meaning of "fraud" in the context of an action to enforce a foreign judgment and with attempts to distinguish allegations of fraud from efforts to retry the merits of the Florida action in Ontario. All parties agreed that the Ontario court could not simply retry the merits of the Florida action.

[33] After a review of the relevant authorities, the trial judge concluded that he could not consider allegations of fraud as they related to the merits of the factual allegations on which liability was based, but that he could consider allegations of fraud as they related to the assessment of damages. He held:

> Accordingly I conclude that it is possible to apply the defence of fraud to the facts of this case. Liability of the defendants is accepted, because of the domestic policy on default judgments. However, on the question of the assessment of damages, the plaintiff gave at the very least, misleading evidence. That evidence was not considered by the Florida court in the context of fraud and so it is open to the Ontario Court to adjudicate upon it. Having considered it, I have found it to be fraudulent. In my opinion, the defence of fraud in the context that I have described, must succeed. The Florida judgment will not be enforced by this Court.

[34] The trial judge then turned his attention to the "public policy" defence to the enforcement of foreign judgments. He observed that the defence had traditionally been a very narrow one, reaching only situations in which the enforcement of the foreign judgment would violate some fundamental principle of justice deeply rooted in our legal tradition. The trial judge noted that the mere fact that the damages awarded by the foreign court were much larger than would have been awarded in Ontario was no basis upon which to refuse to enforce the foreign judgment. He went on to opine that the broadened basis for the recognition of foreign judgments adopted in *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (S.C.C.), called for the development of "some sort of judicial sniff test in considering foreign judgments." In the trial judge's view, the enforcement of some foreign judgments, even where the fraud

exception was not available, worked an injustice. He concluded his analysis of the public policy defence with these words:

> To give effect to this thinking, the parameters of the public policy defence must be broadened to cover a situation where conduct which triggers neither the traditional defence of public policy nor the defence of natural justice is yet so egregious as to raise a negative impression sufficient to stay the enforcing hand of the domestic court.
>
> I recognize the inherent danger of importing palm tree justice into an arena properly designed to recognize the reality of global commercial transactions, and accordingly I would expect the widened defence to be rarely available and only in very limited circumstances. I find however, that those circumstances are present in this case. If required to do so, I would have found enforcement of the Florida judgment would contravene the public policy of Ontario and accordingly I would have declined to enforce it.

[35] I cannot agree with the trial judge's analysis of either the fraud or the public policy defences to the enforcement of foreign judgments. Neither defence had application on the facts of this case. In addition, even if the trial judge properly fixed the scope of the fraud defence, there was no evidence to support his finding that the Florida judgment was obtained by fraud. The Beals were entitled to succeed in the main action.

IV

[36] The correctness in fact or in law of a foreign judgment is irrelevant in an action to enforce that judgment in Ontario. This is so regardless of whether the foreign judgment followed a trial of the merits or a default: *United States of America v. Ivey* (1996), 30 O.R. (3d) 370 (C.A.), aff'g. (1995), 26 O.R. (3d) 533 (Gen. Div.); *Four Embarcadero Center Venture v. Kalen* (1988), 65 O.R. (2d) 551 at 563 (H.C.J.). As the correctness of the decision of the foreign court is irrelevant, it follows that the merits of the claim or the merits of defences to the claim are equally irrelevant.

[37] A foreign judgment which is otherwise enforceable will not be enforced if it was obtained by fraud: *Powell v. Cockburn* (1976), 68 D.L.R. (3d) 700 at 708-13 (S.C.C.); *Morguard Investments Ltd. v. De Savoye, supra*, at 278.

[38] There is a potential tension between the admonition against retrying the merits of a foreign action in a proceeding to enforce that judgment in Ontario and the recognition that fraud in the obtaining of the foreign judgment is a defence to its enforcement in Ontario. The wider the scope of the fraud defence, the more likely it is that the Ontario court will be drawn into a re-examination of the merits of the claim adjudicated upon in the foreign court. If a defendant can resist enforcement of the foreign judgment by demonstrating that the foreign court was misled on facts relevant to the merits of the claim, then the merits of the claim must be examined by the court which is asked to enforce the foreign judgment. As I understand it, this is the English position: *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295 at 300-301; *Owens Bank Ltd. v. Bracco*, [1992] 2 All E.R. 193 (H.L.).

[39] In Canada, fraud going to the basis upon which the foreign court took jurisdiction, or fraud which undermines the integrity of the foreign proceedings, may be proved in defence to an action for the enforcement of that foreign judgment: *Roglass Consultants Inc. v. Kennedy* (1984), 65 B.C.L.R. 393 at 396-7 (C.A.); *Powell v. Cockburn, supra*.

[40] Some Canadian authorities permit a defendant to rely on allegations of fraud which go to the merits of the claim determined by the foreign judgment, but only where the defendant relies on facts to support the allegation of fraud which were not before the foreign court: *Jacobs v. Beaver* (1908), 17 O.L.R. 496 at 506 (C.A.); *India (Union of) v. Bumper Development Corp.*, [1995] 7 W.W.R. 80 at 92-97 (Q.B.), aff'd. December 4, 1995 (Alta. C.A.), leave to appeal to S.C.C. refused, [1996] 3 S.C.R. vi.

[41] In *Jacobs v. Beaver, supra*, Garrow J.A. described the scope of the fraud defence to an action to enforce foreign judgments in these terms:

> … The fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the Court and so passed on into the limbo of estoppel by the judgment. <u>This estoppel cannot, in my opinion, be disturbed except upon the allegation and proof of new and material facts, or newly discovered and material facts which were not before the former Court and from which are to be deduced the new proposition that the former judgment was obtained by fraud.</u> The burden on that issue is upon the defendant, and until he at least gives *prima facie* evidence in support of it, the estoppel stands. … [Emphasis added.]

[42] "New facts" refers to facts which have come into existence after the foreign judgment was obtained. "Newly discovered facts" refers to facts which existed at the time the foreign judgment was obtained but were not known to the defendant. In my view, "newly discovered facts" must be limited to those facts which could not have been discovered prior to the granting of the foreign judgment through the exercise of reasonable diligence. If reasonable diligence is not required, defendants can choose to ignore the proceedings in the foreign court, remain blissfully ignorant of all relevant facts, and then advance their version of the facts under the guise of a fraud defence to the enforcement of foreign judgments when the plaintiff attempts to enforce that judgment in Ontario. Unless "newly discovered facts" means facts that the defendant could not have discovered by the exercise of reasonable diligence prior to the obtaining of the foreign judgment, defendants who choose not to participate in the foreign proceedings, unlike those who do participate, will be able to relitigate the merits of the foreign proceedings in the action to enforce the foreign judgment.

[43] A due diligence requirement is consistent with the policy underlying the recognition and enforcement of foreign judgments. In the modern global village, decisions made by foreign courts acting within Canadian concepts of jurisdiction and in accordance with fundamental principles of fairness should be respected and enforced. That policy does not, however, extend to protect decisions which are based on fraud that could not, through the exercise of reasonable diligence, have been brought to the attention of the foreign court. Respect for the foreign court does not diminish when a refusal to enforce its judgment is based on material that could not, through the exercise of reasonable diligence, have been placed before that court.

[44] Those who attempt to set aside Ontario judgments based on newly discovered facts must demonstrate that those facts could not have been discovered by the exercise of due diligence prior to the obtaining of the judgment which the litigant seeks to set aside: *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 66 O.R. (2d) 610 at 622-23 (H.C.J.); *Whitehall Development Corp. Ltd. v. Walker* (1977), 17 O.R. (2d) 241 (C.A.). In my view, defendants who resist the enforcement of foreign judgments are in a similar situation and the due diligence requirement is equally appropriate.

[45] The trial judge purported to apply *Jacobs v. Beaver, supra*. In doing so, however, he treated any fact which was not before the jury on the damage assessment as a newly discovered fact which could be relied on in support of the fraud defence to the action for the enforcement of a judgment. He said:

> … So, the only facts that have been adjudicated on the damages assessment are those facts that were before the trier. It follows then, that if the facts going to fraud have not been

> placed before the trier, then the issue of fraud in relation to damages has not been assessed. …

[46] The trial judge's approach gave the respondents, who chose to ignore the Florida proceedings, *carte blanche* to produce evidence of any fact in the Ontario proceedings that could contradict the award made by the jury. Those facts became evidence of fraud. The trial judge erred in failing to limit "newly discovered facts" to those facts which could not have been discovered prior to the Florida judgment by the exercise of reasonable diligence.

[47] The trial judge's conclusion that the Florida proceedings were tainted by fraud was based on the following five findings:

- Any claim for lost profits did not belong to the Beals personally, but to the company, which was owned by the Beals and Foodys. It was that company that was to engage in the construction business. The company was not a party to the Florida proceedings and had been dissolved before the Florida trial and, therefore, could not recover damages.

- Construction on the model home ceased before the Beals and Foodys learned that they were building on the wrong lot and ceased because Mr. Beals and Mr. Foody had a "falling out" when Mr. Foody decided to pursue other employment.

- The factual allegations in the complaint made out a case for rescission of the contract, but were not sufficient to establish fraud.

- There could be no justifiable reliance on the representations made by the respondents as to ownership of the lot since ownership of the lot was a matter of readily accessible public record.

- The original offer submitted by the Beals and Foodys to the respondents through Mr. O'Neil and attached to the amended complaint was not the "amended offer" accepted by the respondents and returned to Mr. O'Neil.

[48] Assuming for the moment that there was an evidentiary basis for these findings, they could only be advanced by the respondents in support of their fraud claim if they could not have been known to the defendants by the exercise of reasonable diligence.

There can be no doubt that all of these facts would have been easily ascertainable by the respondents had they chosen to participate in the Florida proceeding. Indeed, some of the findings made by the trial judge are based entirely on the documents filed in the Florida action. A perusal of those documents would have revealed those facts.

[49] Those facts which are not discoverable by reference to the court documents could certainly have been discovered through the pre-trial discovery process in Florida. I do not understand the respondents to suggest otherwise. Rather, it is their position that due diligence is irrelevant. For the reasons set out above, I cannot accept that position. None of the facts relied on by the trial judge qualifies as a "newly discovered fact". He erred in law in relying on those facts to find that the respondents had established fraud.

V

[50] Although I would hold that even in the facts as found by the trial judge, the fraud defence was not established by the respondents, I will address those findings of fact on the assumption that the trial judge has correctly stated the law. In my opinion, there is no evidence that the Florida jury was deliberately misled on the damage assessment. The trial judge's finding that the jury was misled is unreasonable and cannot stand.

[51] The respondents had the onus of establishing fraud in the proceedings before the Florida jury. The exhibits filed at that proceeding and the legal submissions made in support of the lost profits claim were before the Ontario court. Mr. Groener, the Florida lawyer who acted for the Beals and Foodys at trial, testified in the Ontario proceedings. He was the only person present at the Florida trial who gave evidence in the Ontario proceedings.[4] Mr. Groener described the Florida damage assessment trial in some detail during his examination-in-chief. He was not asked one question in cross-examination that hinted that anything had been done in the Florida proceedings which could have misled the jury in their assessment of the damages, much less deliberately misled them. I find it very difficult to see how the respondents could establish fraud in the Florida proceedings when they declined to even broach that issue with the one witness who could speak directly to what had occurred in those proceedings.

[52] Instead of producing direct evidence going to the question of fraud or cross-examining Mr. Groener, the respondents attempted to establish their fraud claim by reading parts of Mr. Beals' discovery into the trial record. They also relied on the opinion evidence of Mr. Muloch, a Florida lawyer. As I understand the respondents' position, they contend that Mr. Beals' evidence on his discovery was true and because

[4] Mr. Beals did not testify in the Ontario proceedings, although counsel offered to make him available for cross-examination.

that evidence was inconsistent with the claims made in Florida, the Beals and Foodys must have deliberately put different and false material before the jury in Florida so as to obtain the damage award given by the jury. This very indirect approach to the question of whether the Florida jury was misled carried the day with the trial judge.

[53] I have outlined the five factual findings relied on by the trial judge above (see para. 47). I will address each of those findings.

[54] The trial judge concluded that any claim for lost profits rested with the corporation that would have built the homes it was hoped would have been generated by the viewing of the model home. That corporation was owned equally by Mr. Beals and Mr. Foody. The trial judge reasoned that as the jury awarded lost profits, they must have been misled into believing that the Beals and Foodys were entitled to those lost profits.

[55] I cannot accept the trial judge's reasoning. First, it is premised on certain conclusions as to the right of an individual under Florida law to recoup lost corporate profits. This was not an issue to be decided by the Ontario court under the guise of an allegation of fraud. Even if the trial judge was entitled to decide as a matter of Florida law whether the Beals and Foodys could recover lost profits suffered by their corporation, the scant evidence adduced by the parties on that issue would not permit any conclusion as to the applicable Florida law.

[56] Second, whatever the state of Florida law, there is no evidence that the jury was misled on the question of the Beals' and Foodys' entitlement to claim damages for lost profits. Mr. Groener was not asked what position he took on that issue, or what instructions, if any, the trial judge gave the jury as to personal entitlement to lost profits. There is no evidence from Mr. Groener or anyone else that the jury was misled as to the existence of the company, its status at the time of trial, its connection to the transaction, its connection to the Beals and Foodys, or the entitlement of the Beals and Foodys to damages based on anticipated lost profits. The exhibits filed in the Florida proceedings clearly identified the corporation as the payor of certain expenses claimed by the Beals and Foodys. Those documents hardly suggest an attempt to mislead the jury as to the role of the corporation in the transaction or the claim advanced by the Beals and Foodys. At most, it could be said that if the trial judge's view of Florida law is correct, then the jury erred in awarding damages for lost profits. Errors in the Florida proceedings are no bar to the enforcement of the Florida judgment in Ontario.

[57] Lastly, and I hesitate to make this point in that it does lead one into an assessment of the merits of the Florida claim, there was evidence before the trial judge which offers a valid explanation for the entitlement of the Beals and Foodys to damages based on the lost profits of the corporation. On the evidence before the trial judge, the Beals and

Foodys intended to rent the model home to the corporation. As the corporation was owned entirely by the Beals and Foodys, they could charge the corporation whatever rent they deemed appropriate. There was nothing to stop the Beals and Foodys from charging the corporation rent for the use of the model home equal to the corporation's profits from its construction operations. A claim for lost rents properly brought by the Beals and Foodys would be equal to the corporation's lost profits.

[58] The trial judge's second finding, that construction of the model home ceased before the Beals and Foodys were aware that they were building on the wrong lot and because the Beals and Foodys had decided to abandon their joint venture, did not assist the respondents in establishing fraud. There is no evidence as to what the jury was told about these matters. Neither finding precluded the damage award made by the jury. Even if construction stopped before the Beals and Foodys knew they were building on the wrong lot, the costs associated with the purchase of the lot and the construction of the home were properly recoverable in the action for fraudulent misrepresentation. Further, as the trial judge himself observed, when Mr. Beals and Mr. Foody decided not to proceed together, Mr. Beals still intended to proceed with the project on his own. There is no suggestion that he had abandoned the project before he learned that he had purchased the wrong lot. Consequently, a claim for lost profits could still be advanced, at least by Mr. Beals, despite the termination of the joint venture with Mr. Foody.

[59] The trial judge's third conclusion, that the factual allegations in the Florida complaint were insufficient to establish fraud, appears to have been based on the opinion evidence of Mr. Muloch, the Florida lawyer called by the respondents. There are several difficulties with this finding as a basis for concluding that the Florida judgment was obtained by fraud. First and foremost, the conclusion that the Florida pleadings did not properly allege fraud is surely a matter for the Florida court to decide. It was not for the trial judge to question the adequacy of those pleadings. Secondly, even assuming the pleadings were inadequate, that inadequacy could hardly support a finding that the Florida judgment was obtained by fraud. There is no suggestion that the Florida court was somehow misled as to the contents of the pleadings. The pleadings were before that court and were presumably read by it. If that court made a legal mistake in proceeding on the basis of those pleadings, that error did not constitute a fraud on the court and had no relevance to the Ontario action.

[60] Lastly, the trial judge's conclusion that the allegations in the complaint were insufficient to support a fraud claim flows from a misapprehension of Mr. Muloch's evidence. Mr. Muloch explained that the respondents could have appealed after receiving the Florida judgment. In that appeal, they could have raised the sufficiency of the allegations of fraud in the complaint as a ground of appeal. Mr. Muloch said:

> … I think there was a basis to appeal from the judgment after default, based on insufficient allegations of all of the elements of fraud.

[61] Having indicated that an appeal based on the pleadings was possible, Mr. Muloch went on to say, however, that he did not think the appeal would succeed:

> … I think it is a less likely than not that the Saldanhas could have taken a successful appeal from the judgment after default.

[62] Mr. Muloch's conclusion that the respondents could have challenged the pleadings on appeal but probably would have failed tells me that whatever deficiencies there may have been in the pleadings, they were not sufficient to invalidate the finding of fraud.

[63] Mr. Muloch also referred to the merits of the fraud allegation in the Florida complaint in his evidence concerning the respondents' opportunity to bring a motion before the trial judge to set aside the judgment. He testified that if the respondents had moved with reasonable speed after receiving notice of the judgment, they likely could have had it set aside. His opinion was based in part on his view that the respondents had a good defence on the merits to the Florida action. He said:

> … They could have beaten the fraud claim, they could have beaten the treble damages claim and they would have, had rescission been requested, I think that probably would have been awarded.

[64] I do not read Mr. Muloch's evidence as a suggestion that the allegations in the complaint could not support a finding of fraud by misrepresentation. I understand Mr. Muloch to be saying that the defence which the respondents could have advanced had they chosen to do so was a valid defence to the fraud allegation but not to a rescission claim.

[65] The fourth finding made by the trial judge in support of his conclusion that the Florida judgment had been obtained by fraud was the finding that no justifiable reliance on any representation made by the respondents as to ownership of the land could be made out. This finding involves a direct assessment of the merits of the claim made in the Florida proceedings.

[66] Mr. Muloch testified that the claim made by the Beals and Foodys that they were deceived by the respondents' misrepresentation as to ownership of the lot was "a very

weak and curious one". Mr. Muloch explained that ownership of land was a matter of easily ascertainable public record and that as a matter of course, purchasers or their agents determined title based on a search of those public records and not by relying on representations as to ownership made by vendors. Mr. Muloch found it absurd that the Beals and Foodys would simply act on the respondents' representation that they owned the land.

[67] I can accept that the Beals and Foodys would have had a very difficult time convincing anyone that they relied on the respondents' representations as to ownership. Had the respondents chosen to take part in the Florida proceedings, they could have advanced the position put forward by Mr. Muloch in the Ontario proceedings. They may well have been successful. Unfortunately, they chose not to take part in the Florida proceedings. The Beals and Foodys were spared the need to convince a jury that they relied on the respondents' representation. The respondents cannot now advance a defence through the evidence of Mr. Muloch that they could have advanced in the Florida proceedings.

[68] There is also no basis upon which to assume that the Beals and Foodys misled the jury on the question of whether they relied on the representation made by the respondents. Indeed, there was no need to mislead the jury, as they were concerned only with the assessment of damages. Reliance goes to liability. That issue was not before the jury.

[69] The trial judge's conclusion that there could be no justifiable reliance on the representation made by the respondents as to ownership was a reassessment of the merits of the liability finding made in the Florida court. His further conclusion that the Florida jury was misled on that issue is not supported by the evidence, and is untenable given that the jury was not concerned with liability.

[70] The fifth fact which led the trial judge to conclude that the Florida jury was "deliberately misled" relates to the document that was attached to the complaint in the Florida proceedings. According to paragraph 8 of the complaint, the offer to purchase sent to the respondents and signed by Mr. Foody was attached to the complaint. The complaint referred to that document as the "contract". This allegation was consistent with the other paragraphs in the complaint which alleged that an agreement had been made to purchase Lot #1 before the agreement was sent to the respondents.

[71] The trial judge concluded that the Florida jury had been misled because the document attached to the complaint was not "the amended offer (or counter-offer) returned by the Defendants [respondents] and accepted by the Plaintiffs".

[72] There are three difficulties with this finding as a basis for concluding that the Florida jury was misled. First, like some of the other findings I have discussed above, the question of which document constituted the agreement between the parties was a matter going to liability and not to damages. It was not something that would have concerned the jury.

[73] The trial judge's description of the documents signed by the respondents as "the amended offer (or counter-offer)" is another indication that he retried the merits of the allegation made in the Florida proceedings. By describing the document returned to Mr. O'Neil by the respondents as an "amended offer" or a "counter-offer", the trial judge effectively accepted Mrs. Thivy's version of the relevant events. She gave that version only in the Ontario proceedings. The trial judge was wrong to characterize the documents based on evidence adduced before him and to conclude that the failure to so characterize the documents in Florida proceedings, constituted a fraud on that court.

[74] The fifth finding by the trial judge also implies that the document signed by the respondents and returned to Mr. O'Neil was somehow kept from the Florida court. This is not so. Both the initial offer signed by Mr. Foody and sent to the respondents by Mr. O'Neil and the document as altered by Mrs. Thivy, signed by the respondents and returned to Mr. O'Neil were before the jury. There is nothing in the evidence adduced before the trial judge upon which one could conclude that the Beals and Foodys withheld relevant documents from the Florida court. The Foodys and Beals characterized the various documents in a manner that supported their allegation. The respondents chose not to put their characterization of the documents before the Florida court.

[75] None of the findings relied on by the trial judge in support of his conclusion that the Florida judgment was obtained by fraud is supported by the evidence. The evidence comes down to this: the Beals and Foodys made a claim based on fraudulent misrepresentation; that claim may well have failed on its merits had the respondents defended the action in Florida, but they chose not to defend the claim. Furthermore, once judgment was obtained, the respondents may well have been able to set aside that judgment in part because of the dubious merits of the claim. Acting on legal advice, they chose not to follow that course. An Ontario court cannot come to the rescue of these respondents and save them from the dire consequences of the course of action they chose to follow by allowing the respondents to relitigate the merits of the claim decided by the Florida court under the guise of allegations of fraud on the Florida court.

[76] In addition to the findings I have reviewed above, the trial judge seems to have come to his conclusion that the Florida judgment was obtained by fraud in part because of the amount of the award made by the Florida jury. He quoted Mr. Muloch as describing the award as "bizarre".

[77] Mr. Muloch did not say that the award was "bizarre". When asked whether he thought the Florida judgment was "bizarre", Mr. Muloch said:

> … The judgment itself, the procedure is not bizarre, but the facts out of which it arose, in my judgment, are strange and wonderful.

[78] I take this to be a reference to Mr. Muloch's often repeated assertion that no reasonable purchaser would ever rely on a vendor's representation as to title, but would instead retain competent assistance to search the title through the readily available public records. While I can easily agree with Mr. Muloch's observation, it has no relevance to either the question of fraud or the quantum of damages. The fact of the matter is the respondents chose not to go to court in Florida and demonstrate just how "strange and wonderful" the allegations in the complaint were.

[79] I could find only two observations by Mr. Muloch concerning the quantum of damages awarded by the jury. He testified that treble damages were not available under the Florida law quoted in the complaint. This evidence goes to the merits of the claim and does not suggest fraud. In any event, treble damages were not requested before the jury.

[80] Mr. Muloch also testified that the quantum of the award for lost profits (about $200,000 (U.S.)) seemed "extraordinary, based on the fact that I was asked to assume that this was a brand new startup corporation". Mr. Muloch acknowledged that he knew nothing about the construction or sales experience of the two principals of the company, Mr. Beals and Mr. Foody. In my view, their experience would be more relevant to the quantum for a claim for lost profits than the age of the particular corporate vehicle being used by them.

[81] Even if there is merit to Mr. Muloch's somewhat uninformed opinion as to the quantum of the award for lost profits, that opinion provides no basis for a finding that the jury was misled. Certainly there is no evidence that anything was placed before the jury that misstated the background of the corporation or any other fact relevant to the lost profits claim. The legal memorandum filed in support of that claim relies on legal principles which are not dissimilar to those that would apply to such claims in Ontario.

[82] An award in the amount of some $800,000 arising out of what was initially an $8,000 (U.S.) land transaction seems disproportionate. Most of that $800,000, however, is accounted for by the exchange rate applicable when American funds are converted to Canadian funds and by the post-judgment interest which has accumulated at the rate of 12% a year for almost 10 years. Apart from the exchange rate and pre-judgment interest,

the bulk of the award is for lost profits (about $200,000 (U.S.)). There is no evidence as to the factual material placed before the jury in support of the lost profit claim. Without any evidence of what material was before the jury, I cannot come to the conclusion that they were somehow misled or that the award was determined in a manner that offends principles of fairness and fundamental justice. Depending on what information the jury had, the award may or may not have been inordinately high. Even if it was excessive, that is no basis upon which to refuse to enforce it in Ontario.

VI

[83] The trial judge's finding that the enforcement of the Florida judgment would contravene public policy cannot be upheld. I do not share his conclusion that the substantial connection approach to jurisdiction compels a broader public policy defence to the enforcement of foreign judgments. To the contrary, the rationale underlying *Morguard*, *supra*, is entirely consistent with the narrow application of the public policy defence as set out in *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 (C.A.).

[84] Even if what the trial judge described as "some sort of judicial sniff test" should be applied in considering whether public policy precludes enforcement of a foreign judgment, I can see no reason not to enforce this judgment. The Beals and Foodys launched a lawsuit in Florida. Florida was an entirely proper court for the determination of the allegations in that lawsuit. The Beals and Foodys complied with the procedures dictated by the Florida rules. There is no evidence that they misled the Florida court on any matter. Rather, it would seem they won what might be regarded as a very weak case because the respondents chose not to defend the action. I find nothing in the record to support the trial judge's characterization of the conduct of the Beals and Foodys in Florida as "egregious". They brought their allegations in the proper forum, followed the proper procedures, and were immensely successful in no small measure because the respondents chose not to participate in the proceedings.

[85] In my opinion, the Florida judgment is enforceable in Ontario and, subject to a defence applicable only to Mrs. Thivy, the Beals should have succeeded in the main action.

VII

[86] Mrs. Thivy resists enforcement of the Florida judgment against her on an additional ground that applies only to her. She submits that even if the Florida judgment is enforceable in Ontario and the Beals are entitled to a judgment to that effect, judgment should not be granted against her by reason of her bankruptcy and subsequent discharge.

[87] The Florida judgment was issued in December 1991. The Beals commenced their action in Ontario to enforce that judgment in 1993. Mrs. Thivy made an assignment in bankruptcy in 1994. She was granted an absolute discharge in 1995 and her trustee in bankruptcy was discharged in 1996. There was no dividend paid to the creditors.

[88] The Beals were not listed as creditors in Mrs. Thivy's bankruptcy. It is not suggested that their names were omitted intentionally or fraudulently. In their amended statement of defence, the Thivys specifically pleaded Mrs. Thivy's assignment in bankruptcy and her subsequent discharge. Despite this pleading, no leave was sought to continue the Ontario action against her and the Beals did not seek to prove any claim in the bankruptcy.

[89] The judgment rendered in Florida made no finding of fraud, false pretence, fraudulent misrepresentation or breach of fiduciary duty as against Mrs. Thivy specifically.

[90] Mr. Roth, counsel for Mrs. Thivy, argued that despite the failure to list the Beals as creditors in the bankruptcy, Mrs. Thivy's discharge released her from the debt represented by the Florida judgment. I think Mr. Roth is correct.

[91] Under s. 178(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in the bankruptcy. The onus is on the creditor who alleges that his or her claim comes within the exceptions in subsection (1) to prove that such is the case: Houlden and Morawetz, *Bankruptcy and Insolvency Law in Canada*, 3rd ed. revised (Scarborough: Carswell, 1998) at p. 6-120. None of the exceptions in subsection (1) applies in this case.

[92] An order of discharge operates to release all provable claims made against the bankrupt, even though a creditor has been omitted from the list provided to the trustee by the bankrupt: *Re Smyth* (1965), 8 C.B.R. (N.S.) 202 (Ont. Sup. Ct.). While a bankrupt is under a duty to give the trustee the names of all of his or her creditors, the failure to do so will not prevent the bankrupt from obtaining a discharge if that failure was not intentional or fraudulent: Houlden and Morawetz, *supra*, at p. 6-140.1, 6-1.41. There is no

suggestion that Mrs. Thivy intentionally or fraudulently omitted the Beals' names from her list of creditors.

[93] As the Beals cannot bring themselves within any of the exceptions in s. 178(1) and as the failure to include the Beals in the list of creditors was not fraudulent, the discharge of Mrs. Thivy from bankruptcy released her from the claim which the Beals have based on the Florida judgment.

[94] The action was properly dismissed against Mrs. Thivy.

VIII

[95] The cross-claims made by the Saldanhas and Thivys against each other remain outstanding and are not the subject of any appeal. I do not propose to make any order with respect to the cross-claims. I would observe, however, that the Saldanhas' cross-claim was relevant only to whether they attorned to the jurisdiction of the Florida court. That argument is irrelevant given the acknowledgement that the Florida court had jurisdiction. The Thivys' cross-claim has no relevance to Mrs. Thivy, as I would dismiss the main action against her. It may or may not have continued significance to Mr. Thivy.

IX

[96] Since preparing a draft of my reasons, I have read a draft of the reasons of Weiler J.A. She would hold that the respondents were denied natural justice in the Florida proceedings. In her view, the Florida complaint did not alert the respondents to "the extent of their jeopardy". As I understand her reasons, there are two fatal flaws in the complaint: it claimed damages of "over $5,000" rather than claiming a specific amount; and the complaint failed to advise the respondents that Mr. Beals and Mr. Foody "would be seeking damages for loss of opportunity by a company owned by them".

[97] My colleague reasons that as Canadian pleading rules require that plaintiffs specify the amount of damages claimed, a failure to so plead in a foreign jurisdiction where the rules do not require that the amount claimed be specified, denies defendants the right to know the case against them and the full extent of their jeopardy. I disagree.

[98] Specific pleading rules cannot be confused with the rules of natural justice, and a particular pleading rule cannot be viewed in isolation. While rule 25.06(9) requires *that* damage claims specify "the amount claimed for each claimant in respect of each claim", the wide powers of amendment found in rule 26.01 demonstrate that the failure to comply with rule 25.06(9) does not mean that a defendant has been denied the opportunity to

know the extent of its jeopardy or the case it has to meet. Under rule 26.01, a court can refuse to make amendments, including amendments increasing the amount of the damages claimed, only where the defendant can demonstrate on the balance of probabilities that the amendment would cause prejudice that could not be compensated for by costs or adjournment. The mere fact that an amendment substantially increases the quantum of the plaintiff's damages claim and therefore the defendant's potential liability is not a basis upon which to deny the amendment. The amending power in rule 26.01 has been invoked to substantially increase the quantum of damages claimed after judgment is granted, and even on appeal: see *Hill v. Church of Scientology of Toronto* (1992), 7 O.R. (3d) 489 at 496 (Gen. Div.), aff'd. without reference to this point (1994), 114 D.L.R. (4th) 1 (Ont. C.A.), aff'd. without reference to this point (1995), 126 D.L.R. (4th) 129 (S.C.C.).

[99] The approach dictated by rule 26.01 to motions that seek to amend pleadings to substantially increase the damages claimed no matter when in the proceeding that motion is brought, is inconsistent with the argument that knowledge of the amount claimed by the plaintiff at the time the defendant is called upon to reply to the statement of claim is essential to the defendant's ability to know the extent of its jeopardy and to make an informed decision as to how to respond to the claim. If knowledge of the amount claimed was essential to the defendant's ability to effectively respond to the claim, motions to significantly increase the amount of the claim as late as the appellate stage would be rejected out of hand. Rule 26.01 takes the opposite approach. It requires the court to make those amendments unless the defendant can show prejudice that cannot be cured by costs or an adjournment.

[100] The respondents did not plead prejudice arising from the way the complaint was framed in the Florida proceedings, and did not lead any evidence of prejudice flowing from the way the complaint was framed. Indeed, they had earlier responded to a similarly framed complaint.

[101] The Florida complaint made it clear that the damages claimed were potentially significant. The heads of damages were set out and a claim for treble damages under three of the heads of damages was advanced. It was also well known to the respondents that any amount awarded would be in American funds and subject to a substantial increase if converted to Canadian funds for the purpose of enforcing the judgment in Ontario.

[102] It is also significant that the respondents took no steps to set aside the Florida judgment even when they knew the exact amount awarded against them. Once the respondents had notice of the Florida judgment, they knew precisely "the nature of their jeopardy". And yet, they still did nothing. My colleague suggests that the respondents' ability to move to set aside the Florida judgment was tied to their knowledge of "the

circumstances of the damage assessment". However, that was not the evidence of the defence expert, Mr. Muloch. He testified that the respondents could have set aside the Florida judgment by demonstrating "excusable neglect" and a meritorious defence on the issues going to liability. Neither factor turned on anything that happened at the damage assessment.

[103] The second alleged deficiency in the pleadings identified by my colleague assumes that the "loss profits" claim refers to corporate profits and not profits properly recoverable by Mr. Beals or Mr. Foody. I do not think that this has anything to do with the adequacy of the notice in the Florida complaint relating to the nature of the claim made against the respondents or the extent of their jeopardy. The complaint is clear. It is a claim for damages suffered by Mr. Beals and Mr. Foody. If the damages alleged were not in law damages suffered by Mr. Beals and Mr. Foody, they were not entitled to recover those damages. Their claim would have failed on the merits.

[104] Had the respondents defended the Florida action, they may have been able to show that some entity other than Mr. Beals or Mr. Foody suffered whatever loss may have flowed from the alleged misrepresentation. The respondents chose not to participate in the Florida proceedings. The jury awarded damages to Mr. Beals and Mr. Foody for the lost profits. It was not for the trial judge or this court to sit in appeal on that decision and decide whether those damages were properly awarded.

[105] As tempting as it might be to recast what happened in order to save the respondents from the consequences of the choice they made, I would not do so. The evidence is clear. The only misapprehension that the respondents were under was the belief that any Florida judgment obtained against them could not be enforced in Ontario. This belief, and not any denial of natural justice, caused the respondents to ignore the Florida proceedings even after judgment had been obtained against them.

[106] I remain convinced that nothing in the Florida proceedings contravened our notions of natural justice.

X

[107] In summary, I would dispose of the appeals as follows:

- I would allow the Beals' appeal as against the Saldanhas and Mr. Thivy. They are entitled to judgment in the Canadian equivalent of the present value of the Florida judgment.
- I would dismiss the Beals' appeal as it relates to Mrs. Thivy and affirm the dismissal of the action against her.

- As the Beals were largely successful, and Mrs. Thivy was not independently represented, I would grant the Beals their costs as against the respondents except Mrs. Thivy both at trial and on appeal. I would make no costs order with respect to Mrs. Thivy.

Released: "MAC – JUNE 29 2001"

"Doherty J.A."
"I agree: M.A. Catzman J.A."

WEILER J.A. (Dissenting):

I. Overview

[108] In *Morguard Investments Ltd. v. De Savoye* (1990), 76 D.L.R. (4th) 256 (SCC), the Supreme Court provided the framework for deciding whether a foreign judgment should be enforced in a domestic court. Throughout the decision, the Supreme Court was conscious of the need to strike a balance between the plaintiffs' interest in having a foreign judgment in their favour recognized and enforced and the local defendants' interest in fair process and to defend themselves from a judgment that operates unfairly. This case requires us to strike that balance. I have had the benefit of reading the reasons of Doherty J.A. and I respectfully disagree with his conclusion. In my opinion, two of the defences raised by the Ontario defendants, namely, denial of natural justice and fraud, make it inappropriate for this court to enforce the judgment.

[109] Insofar as the natural justice portion of my reasons is concerned, I disagree with Doherty J.A.'s characterization of an earlier draft of my reasons. My reasons set out below speak for themselves.

[110] In the Ontario action, the Ontario defendants pleaded prejudice arising from the way in which the judgment was obtained in Florida. Apart from alleging that there had been a denial of natural justice, the Ontario defendants pleaded reliance upon s. 7 of the *Charter of Rights and Freedoms* in their amended statement of defence. They pleaded that, "the acceptance of the process employed by the Florida Court and permitted recognition and enforcement of the judgment therein contravenes said section."

[111] I say that the defence of denial of natural justice is applicable because the Ontario defendants were never given notice that the Florida plaintiffs were claiming loss of profit for the loss of their company's opportunity to build an undefined number of homes in the future. The purpose of notice is to enable defendants to appreciate the extent of their jeopardy. The cumulative effect of the Florida plaintiffs' conduct is that the Ontario defendants were not in a position to appreciate the extent of their jeopardy prior to the judgment for damages against them. Several factors contributed to this. The amount claimed was not stated in the claim. The pleadings only claimed "loss of revenue from the inability to construct a model home". Although the Florida plaintiffs' counsel possessed information concerning the nature and extent of the damages claim in the form of Mr. Beals' deposition prior to the assessment of damages, this information was never given to the Ontario defendants. The Ontario defendants were not notified that an expert witness as to loss of future profit was being called nor given his name as required by the Florida rules. At the hearing to assess damages, damages were assessed beyond the

pleadings. In addition, the Florida plaintiffs did not order a copy of the transcript of the proceedings before the jury to assess the damages. As a result of the lack of transparency with respect to the damages, the Ontario defendants were unaware that the major portion of the jury's assessment of damages related to the Florida plaintiffs' company's loss of opportunity to build an undefined number of homes in the future until the Florida plaintiffs sought to enforce the judgment in Ontario.

[112] I would uphold the trial judge's finding of fraud because, as the trial judge found, the Florida plaintiffs concealed from the jury the fact that the reason they discontinued building the model home had nothing to do with their purchase of the wrong lot. The Florida plaintiffs stopped building because Mr. Beals' partner, Mr. Foody, took a job with another company and Mr. Beals decided not to continue the business alone in that area. Consequently the jury were misled into assessing damages for loss of profit for lost opportunity to build an indefinite number of homes.

[113] My reasons also differ from those of Doherty J.A. as to the effect to be given to the failure of the Ontario defendants to take proceedings before the Florida courts once they knew the amount of the award against them. While their failure to move before the Florida courts to set aside the judgment is an important factor to consider, it is not, in my opinion, the only consideration. A more flexible approach that takes into account other factors is required. The reasons why no proceedings were taken are an equally important consideration. One reason is that upon receiving the Florida judgment for damages, the Ontario defendants sought legal advice and were told that the Florida judgment could not be enforced in Ontario. Another reason is that the Ontario defendants had no reason to make further inquiries until the Florida judgment was sought to be enforced in Ontario. It was at this time that the Ontario defendants learned that damages had been assessed beyond the pleading and of the circumstances relating to the Florida plaintiffs' fraud. By this time it was too late to move before the Florida courts to set aside the default judgment. The Ontario defendants would likely have been successful in setting aside the judgment both as to liability and damages had they moved to do so. These considerations lead me to the conclusion that the failure of the Ontario defendants to move to set aside the proceedings before the courts in Florida should not prevent them from successfully raising the defences of denial of natural justice and fraud before the enforcing court in Ontario. In the result, I would dismiss the appeal.

[114] In view of my conclusion, it is unnecessary to deal with the third defence that has been raised, namely, that enforcement should be denied on grounds of public policy. My reasons begin by briefly outlining the principles in *Morguard*.

II. The *Morguard* Principles

[115] *Morguard* sets out four considerations for a court to consider when deciding whether to enforce a foreign judgment: 1) whether comity applies; 2) whether the foreign court's jurisdiction was reasonable based on a real and substantial connection; 3) whether the foreign court's exercise of jurisdiction was fair to the defendant; and 4) whether there are reasons such as fraud, public policy, or conflict with the law of the foreign state, for refusing to enforce the foreign judgment.

1) *The principle of comity*

[116] It is accepted that the principle of comity applies to decisions of U.S. federal and state courts: see, for example, *Moses v. Shore Boat Builders Ltd*. (1993), 106 D.L.R. (4th) 654 (B.C.C.A.), leave to appeal to S.C.C. refused (1994), 109 D.L.R. (4th) vii; *Arrowmaster Inc. v. Unique Forming Ltd.* (1993), 17 O.R. (3d) 407 (Ont. Ct. (Gen. Div.)); *United States of America v. Ivey* (1995), 26 O.R. (3d) 533 (Ont. Ct. (Gen. Div.)), aff'd (1996), 30 O.R. (3d) 370 (C.A.), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 582 (Q.L.). Comity is, however, not a matter of absolute obligation. It includes due regard for the rights of foreign defendants. (See the definition of comity in *Hilton v. Guyot*, 159 U.S. 113 (1895) accepted by Estey J. in *R. v. Spencer* (1985), 21 D.L.R. (4th), 756 at 759 and adopted by La Forest J. in *Morguard*, *supra*, at 269 for a unanimous court.)

2) *The real and substantial connection test*

[117] If a real and substantial connection with the foreign state exists, the foreign court's assumption of jurisdiction will be considered reasonable. If, in similar circumstances, the enforcing court would assume jurisdiction, it will be reasonable for the enforcing court to recognize the assumption of jurisdiction by the foreign court. In *Hunt v. T & N plc*., [1993] 4 S.C.R. 289 at 325-26, the Supreme Court emphasized, however, that the decision in *Morguard* does not propose a rigid test for the recognition of the assumption of jurisdiction by a foreign court. Rather, recognition of the foreign court's assumption of jurisdiction, "must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections" (p. 326). The concern of La Forest J. for the rights of the defendant faced with a foreign judgment is also illustrated by his comment that the requirement of a real and substantial connection to the originating jurisdiction affords some protection to the defendant. He then states at p. 279:

> Whether the Canadian counterpart to the due process clause [of the United States Constitution], s. 7 of the *Charter*, though not made expressly applicable to property, might at

> least in certain circumstances, play a role is also unnecessary to determine.
>
> There are as well other discretionary techniques that have been used by courts for refusing to grant jurisdiction to plaintiffs whose contact with the jurisdiction is tenuous or where entertaining the proceedings would create injustice, notably the doctrine of *forum non conveniens* and the power of a court to prevent an abuse of its process.

3) *Whether the way in which the judgment was obtained was fair to the defendants*

[118] La Forest J. holds that concerns for the security of transactions, and the unfairness in forcing a plaintiff to go through the expense and inconvenience of bringing an action all over again where the defendant resides must, however, be weighed against fairness to the defendant. Justice La Forest explains at p. 274: "Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction."

[119] I understand the comment of La Forest J. concerning fair process to be a reference to the rules of natural justice.

4) *Other defences*

[120] La Forest J. notes that, besides the question of the proper assumption of jurisdiction and fair process, there will still be some defences available to a defendant which might preclude recognition and enforcement. He proposes the following at p. 279:

> There may also be remedies available to the recognizing court that may afford redress to the defendant in certain cases such as fraud or conflict with the law or public policy of the recognizing jurisdiction. Here, too, there may be room for the operation of s. 7 of the *Charter* [principles of fundamental justice].

Because the question of available defences to preclude enforcement was not relevant to the case before him, La Forest J. did not give the issue further consideration.

[121] The considerations enunciated by La Forest J. in *Morguard* demonstrate a concern at each stage for fairness to the defendant. He also raises the question of the extent to which the principles of fundamental justice contained in s. 7 of the *Charter of Rights and Freedoms* should inform the enforcing court's decision to enforce a foreign judgment. With these considerations in mind I now turn to my analysis of this case.

III. Analysis

A. *Natural Justice*

i) Considerations as to what natural justice includes and when it can be raised

[122] Before a foreign judgment will be recognized and enforced, the enforcing court must ask itself whether the judgment meets the basic requirements of natural justice. To ask whether a foreign judgment has been obtained in accordance with natural justice is to ask whether the way in which the judgment was obtained was procedurally fair to the defendant. The defence of natural justice is limited to the procedure by which the foreign court arrived at its judgment: see J. O'Brien, *Conflict of Laws*, 2nd ed. (London: Cavendish, 1999) at 275-277.

[123] The defence of natural justice is commonly understood to mean that the defendants must be given notice of the claim made against them and an opportunity to present their defence. It is not, however, to the letter of the procedural requirements that a court will look in deciding whether there has been a breach of natural justice. For example, procedural irregularity with respect to service of the claim will not be considered a denial of natural justice if the defendant had actual notice of the claim: see *Pemberton v. Hughes*, [1899] 1 Ch. 781; *Minister of State of the Principality of Monaco v. Project Planning Associates (International) Ltd.* (1980), 32 O.R. (2d) 438 (Div. Ct.). Natural justice requires that there be substantial justice.

[124] In *Morguard*, La Forest J. makes reference to s. 7 of the *Charter* recognizing that the section is not concerned with property but with life, liberty and security of the person. The reference suggests the underlying principles of fundamental justice contained in s. 7 may be a consideration for the enforcing court. It is important to note that natural justice is a subset of these principles: *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486. Courts are required to decide cases in a manner consistent with *Charter* principles although the *Charter* does not directly apply: see *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at para. 95. Principles of fundamental justice encompass more than notice and an opportunity to be heard. The comment of

La Forest J. that the foreign judgment must have been obtained through "fair process" is also indicative that more than notice and an opportunity to be heard is at stake.

[125] The question of what natural justice embodies was more explicitly answered in *Adams v. Cape Industries plc.* (1990), [1991] 1 All E.R. 929 (C.A.) leave to appeal to the House of Lords refused [1991] 1 All E.R. 1054. In *Adams*, the English Court of Appeal specifically held that natural justice is not limited to notice and an opportunity to defend the action. Rather, because procedure is but the formal manifestation of commonly held fundamental principles of justice, the Court of Appeal held at pp. 1042-43 that it is to these underlying fundamental principles that regard must be had in deciding what is encompassed by natural justice. The Court of Appeal held that there had not been a hearing to determine the damages in the real sense of that word and that damages had not been determined in a judicial manner.

[126] In *Adams*, a Texas State court had given a default judgment in a class action by seventy-six plaintiffs injured from exposure to asbestos. The trial judge facilitated the amount the plaintiffs agreed to settle for in conferences with their lawyers but he did not assess damages on the evidence. At the invitation of plaintiffs' counsel, the judge indicated, based on his knowledge of the case and of national average settlement figures, that the recovery for each plaintiff should be an average of $75,000 U.S. The trial judge left it to the lawyers to work out the actual figure each plaintiff should receive. There was no "judicial" assessment of damages because the judge did not hear evidence in respect of the injuries of the individual plaintiffs. The plaintiffs submitted that natural justice was limited to notice and an opportunity to be heard and the court rejected that argument.

[127] The plaintiffs also submitted that the defendants were not entitled to raise the defence of natural justice to remedy the alleged procedural defect. It was the plaintiffs' position that the defendants were required to resort to the jurisdiction of the originating court, either by applying to set aside the judgment or by way of appeal, before they could raise the defence of natural justice – but they had not done so. The Court of Appeal recognized that the enforcing court should not sit on appeal from the originating court. However it refused to give effect to the plaintiffs' argument and adopted a more flexible approach instead. The court held at 1052-53:

> The court must, in our judgment, have regard to the availability of a remedy in deciding whether in the circumstances of any particular case substantial injustice has been proved. However, the relevance of the existence of the remedy and the weight to be attached to it must depend on factors which include the nature of the procedural defect

> itself, the point in the proceedings at which it occurred and the knowledge and means of knowledge of the defendants of the defect and the reasonableness in the circumstances of requiring or expecting that they make use of the remedy in all the particular circumstances.

[128] Having regard to the factors it had mentioned, the Court of Appeal considered that the defendants were served with notice of the proceedings but chose not to defend them. They were also given notice of the application for the default judgment and, after judgment was granted, they were served with the default judgment. Upon being served, the defendants knew the amount of the award against them. They could have obtained access to the plaintiffs' medical records referred to in the judgment and legal advice as to whether the foreign court's award for each plaintiff appeared to be excessive. By not attending the application for the default judgment the defendants deprived themselves of information as to what occurred before the foreign court. It would have been open to the defendants to apply to set aside the foreign judgment and it was probable that the application would have succeeded if it had been brought promptly.

[129] When the judgment was served on the defendants, they could not and did not know the method by which damages had been assessed from reading the judgment. The facts as to what happened in the Texas court appear to have become known at the time when a claim to enforce the judgment was made on the defendants and they investigated the circumstances. The Court of Appeal was critical of the foreign plaintiffs' counsel for not advising the defendants that they intended to invite the judge to make an average award from his knowledge of the case and national average settlement figures as opposed to an assessment of actual damages. Counsel induced the judge to depart from the standard method for assessing damages. Counsel then drafted a judgment for the judge's signature that contained false and misleading recitals, implying that a hearing had been held. While the Court of Appeal was critical of plaintiffs' counsel's conduct , the Court of Appeal stated there was no dishonest purpose to the conduct.

[130] The Court of Appeal found that the effect of the actions by plaintiffs' counsel on the defendants was that the defendants had no knowledge of any basis for seeking relief from the Texas court in respect of the procedural defect when the judgment for damages was served on them. The court refused to impute constructive knowledge of the procedural defect to the defendants simply because they had not attended the proceedings. In the Court of Appeal's opinion at p. 1054, "[the fact the defendants did not attend the proceedings] is not an acceptable basis for considering proof of procedural injustice. Plaintiffs can, we think, fairly be left to avoid such procedural errors as will prevent enforcement of a judgment in this country." The court further held that the defendants were not to be treated as having information concerning the procedural defect

since, if they had made an application to set aside the default judgment (that they had no reason to make), they could then have obtained information as to the procedural irregularity. In other words, upon being served with the judgment, the defendants had no reason to exercise due diligence and therefore no duty to do so.

[131] The decision in *Adams* is consistent with the approach suggested in *Morguard*: the ultimate guidepost in deciding whether the defence of natural justice may be raised is procedural fairness based on underlying fundamental principles of justice. Although defendants ignore the proceedings in the foreign court at their peril, they still have a right to expect fair process in the making of the decision. A rule that objection to procedure must always be taken before the originating court would subordinate the premise of fairness where it was no longer possible or practicable to go before the originating court. What the Supreme Court had in mind in *Morguard* was not a rule, but a flexible approach requiring a judge in the enforcing jurisdiction to balance competing considerations. These considerations include the nature of the procedural defect, the stage of the proceedings when the procedure complained of occurred; when the defendants became aware of the procedural difficulty; and the practicality of seeking a remedy in the originating court.

ii) The method by which the foreign judgment was obtained in the present case

[132] The understanding that natural justice requires notice to be given to the defendants of the claim rests on the underlying fundamental principle of justice that defendants have a right to know the case against them and to make an informed decision as to whether or not to present a defence. Making an informed decision respecting whether, and to what extent to defend an action, requires an appreciation of the extent of one's jeopardy. For example, depending upon the amount claimed, a defendant would make a conscious choice as to whether the amount in issue justifies the expense of defending the action. Thus, notice of the amount claimed is part of the disclosure required in a pleading in order for defendants to make an informed decision to answer and defend a claim. Another aspect of notice is that any hearing that is held must conform to the pleadings. This is because pleadings are the formal allegations by the parties to a lawsuit of their respective claims. The intended purpose of pleadings is to provide notice of what is to be expected at trial: *Black's Law Dictionary*, 6th ed., s.v. "pleadings". If the assessment of damages takes place beyond the pleadings, notice in the true sense of the word will not have been given. The right of the defendants to make an informed decision whether or not to defend the proceedings will have been undermined. Depending upon the circumstances, the defendants may not have been able to appreciate the extent of their jeopardy. There will be a denial of natural justice to the defendants.

[133] My examination of whether the Ontario defendants were able to appreciate the extent of their jeopardy and to make an informed decision whether or not to defend the proceedings begins with the Florida Complaint. The Florida Complaint against the Ontario defendants claims "damages in excess of $5000". The claim does not set forth the amount claimed as unliquidated damages. As Doherty J.A. notes in his reasons, this manner of pleading is not unusual in Florida. The simple purpose of this type of pleading is to establish the jurisdiction of the court in which the action is to be brought.

[134] In Canada, the amount claimed must be stated: see Federal Court Rules, 1998, SOR/98-106, r. 182; Rules of Court, Alta. Reg. 390/68, r. 606; Rules of Court, B.C. Reg. 221/90, r. 19 (11); Queen's Bench Rules, Man. Reg. 553/88, r. 25.06 (13); Rules of Court, N.B. Reg. 82-73, r. 27.06 (10); Rules of the Supreme Court, 1986 (Nfld.) r. 14.12; Civil Procedure Rules (Nova Scotia), r. 14.13; Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 25.06 (9); Rules of Civil Procedure (P.E.I.), r. 25.06 (9); Queen's Bench Rules (Sask.), r. 162. (For Québec see the *Code of Civil Procedure*, R.S.Q. 1977, c. C-25, arts. 76 - 77: The *Code* is interpreted as requiring that the amount claimed be stated.) In some circumstances, no prejudice will result from the fact that the amount claimed is not stated, or even from an amendment to increase the amount of the claim after a trial. The circumstances of the case dictate whether there has been substantial due process in the sense that the defendants have been sufficiently alerted to the extent of their jeopardy. For this reason, I shall examine all of the circumstances leading up to the award of damages and consider the cumulative effect of these circumstances.

[135] Although no notice of the amount claimed was included in the Complaint, substantial notice would have been given had the lawyers for the Florida plaintiffs informally advised the Ontario defendants of the amount being claimed. This was not done.

[136] The Ontario residents filed a defence to the second action by the Florida plaintiffs which was commenced in September 1986. The Florida plaintiffs amended their pleading in May 1987 and again in May 1990. The Florida rules of civil procedure provide that if no response is made to a complaint each time it is amended a defendant is deemed not to have defended the action at all. Although the amended pleadings were served on the Ontario defendants, there is no suggestion that the amended pleadings contained any notice of this consequence or that the Florida plaintiffs' lawyers advised the Ontario defendants of this important fact. Because the Ontario residents had filed an initial response, the Florida rules required that the Ontario defendants be served with a copy of the Florida plaintiffs' motion for default for failure to answer the third amended complaint and a notice of hearing of the motion for default. This notice was given.

[137] The Ontario defendants did not respond to the notice of hearing for default. They were given notice of the judgment respecting liability and notice of a hearing to assess the damages. They did nothing. At that time, however, they were not in a position to appreciate the extent of their jeopardy relating to damages.

[138] At the time the Florida plaintiffs' lawyer sent the Ontario defendants notice of the damages hearing, Mr. Beals had given a deposition. In his deposition, Mr. Beals deposed that he, and Mr. Foody, planned to build a model home and to rent it to their company Fox Chase Homes. Fox Chase Homes hoped to use the model home to obtain contracts to build other houses in the same subdivision. The profit on another house built in the same subdivision on Regina Crescent was $10,000. Had the Florida plaintiffs' provided this information in their amended pleading or had their attorney given Mr. Beals' deposition to the Ontario defendants they would have had some idea of the extent of their jeopardy with respect to damages. The Florida plaintiffs' attorney could easily have provided Mr. Beals' deposition to the Ontario defendants but chose not to do so. The Ontario defendants lack of knowledge as to the extent of their jeopardy continued through to the jury hearing to assess the damages.

[139] Apart from damages being claimed "in excess of $5,000", the allegations in the Florida pleadings relating to the issue of damages are contained in the following paragraphs of the complaint. Paragraph 6 states:

> The Plaintiffs informed Defendant's agent at the office of O'Neill's Realty, Inc. in Sarasota County, Florida that they were interested in purchasing [Lot 1] for the construction of a model home to be used in Plaintiffs' construction business.

[140] Paragraph 10 of the Complaint goes on to state that the Ontario defendants fraudulently "changed the lot number on the contract to Lot 2 without informing the Plaintiffs." Paragraph 16 of the Complaint indicates that the defendants' failure to advise the plaintiffs of the change, "induced them to deliver" to the defendants a cheque in the amount of $7,877.39. Paragraph 17 then states:

> As a result of Defendants' wilfully false and fraudulent misrepresentation that they owned Lot 1 and would be conveying title to Lot 1 to the Plaintiffs, Plaintiffs have not only been damaged to the extent of the purchase price but have also been damaged as a result of the expenses incurred in preparing the lot for construction and lost revenue as a result of an inability to construct a model home on the corner lot.

[141] The Florida jury trial with respect to the assessment of damages took place on December 11, 1991. The Ontario defendants did not attend nor file any material for that hearing. Under the Florida rules of procedure, either the plaintiff or the defendant may order a transcript prior to the hearing. The Florida plaintiffs' attorney did not order a transcript and did not advise the Ontario defendants, when they served them, that unless they ordered a transcript there would not be one. There is no transcript of the proceedings.

[142] It appears from the record sheet that the trial lasted about an hour and included the testimony of the Florida plaintiffs and an expert witness on business losses. The name of this expert witness was not given to the defendants as was required by the Florida rules of practice. Had the fact that an expert witness would be called with respect to future loss of profit, and the name of the witness been provided to the Ontario defendants in accordance with the Florida rules they may have been alerted to the nature and extent of the damages being claimed.

[143] The jury's award was $210,000 U.S. plus punitive damages in the amount of $50,000. The costs of purchasing Lot 2 and preparing Lot 1, the wrong lot, for building come to approximately $13,000 in total. Doherty J.A. states there is no evidence as to the factual material placed before the jury in support of the lost profit claim. He concludes that, without any evidence of what material was before the jury, he cannot come to the conclusion that the Florida plaintiffs misled the jury or that the award was determined in a manner that offends principles of natural justice. I disagree.

[144] There is evidence as to some of the material at the damages hearing. Documentary evidence was filed regarding the Florida plaintiffs' cost of purchasing Lot 2 and the costs in preparing Lot 1, the wrong lot, for building. Apart from the purchase price of Lot 2, all bills were paid by cheques from the Florida plaintiffs' company, Fox Chase Homes. In addition, documentation relating to the cost of building another house on Regina Crescent in the same Charlotte subdivision was filed. Mr. Beals testified at the damages hearing. It is a reasonable inference that Mr. Beals testimony was in accordance with his earlier deposition. In his deposition, Mr. Beals stated that the profit derived from building this other house was $10,000.

[145] Although the judge's instructions to the jury are unknown, the memorandum of lost profit respecting damages was filed. At the trial before Jennings J., the Florida plaintiffs' attorney, Mr. Groener, testified that this memorandum was given to the Florida judge at the damages assessment hearing in support of his request for instructions to be given to the jury in assessing damages. The memorandum states in part that, "A business can recover loss (of) prospective profits regardless of whether it is established or has any 'track record'." Loss of revenue from the inability to build a home and rent it to one's

company is one thing – the implication is that damages relate to that house – loss of future profit by one's company from the inability to build an undefined number of homes is another. While it can certainly be argued that the damages flow through the corporate veil, knowledge that these damages are being claimed is required.

[146] The claim by the Florida plaintiffs gave no indication that they would be seeking damages for the loss of opportunity to build and sell an undefined number of model homes. The evidence before Jennings J., the exhibits respecting the construction of the house on Regina Crescent, the lost profit memorandum, and the size of the award indicate that this is what happened. The vast majority of the damages awarded by the jury related to lost profit for loss of opportunity to build an undefined number of homes.

[147] The Ontario defendants were at fault for not defending the action in Florida when they could have done so on the many occasions they were given notice as is so clearly set out by Doherty J.A. The cumulative effect of the actions of the Florida plaintiffs and their attorney, however, deprived the Ontario defendants of notice of the claim for lost profit for the loss of the Florida plaintiffs' opportunity to build an undefined number of homes in the same subdivision. Their actions also led to the jury to assess damages beyond the pleading. The actions of the Florida plaintiffs and their attorney amounted to a denial of natural justice with respect to the bulk of the damages.

iii) Should the fact that the Ontario defendants took no steps in Florida to appeal or to set aside the judgment prevent them from setting up the defence of natural justice in the circumstances?

[148] The Ontario defendants were aware of the fact that the pleadings did not state the amount claimed at the outset of the action. The omission was apparent on the face of the pleading. However, because the pleading is valid in Florida, they could not look to the Florida courts for a remedy. The only way in which the Ontario defendants could perhaps have ascertained the amount in issue would have been if they had chosen to proceed with discovery or if they had attended at the damages assessment. Having to incur the costs of a discovery or trial before being able to make an informed decision as to whether and to what extent to defend an action is an infringement of the right to make an informed choice as to whether or not to defend. The Ontario defendants did, however, defend the action. While they were probably not aware that the effect of not responding to each amendment of the Complaint meant that their defence would not be considered, they were given notice of the application for default judgment. After judgment for liability was granted, they were served with the default judgment and a notice of the damages hearing. By not attending the damages hearing, they deprived themselves of information as to what occurred before the Florida jury. Following the assessment of damages hearing, they were served with the final judgment for damages. They knew the

amount of the award against them. Under Florida rules, the Ontario defendants had ten days within which to appeal, and up to one year to bring a motion to set aside the default judgment. They did nothing.

[149] In deciding whether the fact the Ontario defendants took no steps to set aside the judgment should prevent them from setting up the defence of natural justice here, one consideration is the likelihood of success had steps been taken in Florida. If the Ontario defendants would likely have succeeded before the foreign court, they will have suffered prejudice from the denial of natural justice. The reasons why no steps were taken before the foreign court must also be considered.

[150] The proceeding in Florida was a bifurcated one. First, there was a finding of liability. Mr. Muloch, the experienced Florida litigator and practitioner, testified that an appeal could have been taken on the basis that the Florida plaintiffs' allegations of the elements of fraud in the claim were insufficient but he did not think that the Ontario residents would have succeeded on that basis. He thought, however, that had the Ontario residents brought a motion before the trial judge to set aside the judgment they likely would have succeeded. The Florida plaintiffs were only entitled to judgment against the Ontario defendants if the plaintiffs relied on the representation that the Ontario residents owned Lot 1. Mr. Muloch testified that the claim of reliance made by the Florida plaintiffs was "a very weak and curious one." At trial, Jennings J., found that the plaintiffs were given closing documents referring to Lot 2. The deed and statement of adjustments on the closing of the sale of the land, which were filed as exhibits, all referred to Lot 2, which the Ontario defendants owned, not Lot 1. Furthermore, as explained by Mr. Muloch, ownership of land in Florida is a matter of public record and purchasers or their agents determine title based on those records, not on the representations by the defendants that they own the land. His opinion, which the trial judge accepted, was that the Ontario defendants had a good defence to the action for damages on the merits.[1] The Ontario defendants would likely have succeeded if they had moved to set aside the default judgment for liability.

[151] Secondly, there was an assessment of damages. If, having regard to the size of the award, the Ontario defendants had decided to appeal, any appeal would have been on the record. As there was no transcript, the right of appeal was rather illusory. They could, however, have moved to set aside the judgment in Florida.

[152] When served with the judgment for damages, the Saldanhas acted diligently in seeking legal advice in Ontario as to whether the judgment was enforceable against them here. They were told that the judgment was not enforceable in Ontario. This advice was

[1] They may have been subject to a claim for recission which they were prepared to submit to.

given subsequent to the Supreme Court's decision in *Morguard*. The failure of the Ontario defendants to move to set aside the Florida judgment for damages must be assessed from the point of view of the person who has to bear the consequences. Generally, a party will not be penalized for the fault of counsel: *Pont Viau (Cité) v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516.

[153] Another reason the Ontario defendants did not move to set aside the judgment for damages is that, apart from the size of the award, they had no reason to expect that damages had been assessed beyond the pleading. The Ontario defendants' ability to move to set aside this vital part of the proceedings was tied to their lack of knowledge of the circumstances of what took place at the hearing to assess the damages. (This was also the case in *Adams*, *supra*.) It was only when the plaintiffs tried to enforce the judgment in Ontario that the defendants found out the circumstances of the damage assessment. By then it was too late to move to set aside the judgment in Florida.

[154] Having regard to the stage of the proceedings when the Ontario defendants were in a position to appreciate the extent of their jeopardy, the likelihood of success had they moved before the Florida courts for a remedy and the cumulative effect of the reasons why they did not move before the Florida courts, I would allow the Ontario defendants to raise the defence of denial of natural justice although it was not raised before the Florida court.

[155] It would be inappropriate to enforce this foreign judgment 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.

B. *Fraud*

[156] Doherty J.A. allows the appeal of the Florida plaintiffs respecting the trial judge's finding that they committed a fraud on the Ontario defendants at the Florida hearing to assess damages for two reasons. The first reason is based on a policy decision he makes concerning the manner in which *Jacobs v. Beaver* (1908), 17 O.L.R. 496 (C.A.), should be interpreted. The second is that the trial judge's finding that the Florida jury was misled is unreasonable and cannot stand. I disagree with both these reasons.

i) Policy Reasons for Denying Enforcement of the Foreign Judgment

[157] In *Jacobs v. Beaver*, the Ontario defendants defended the action brought against them in the "foreign" province of Québec and lost. They then sought to resist enforcement of the judgment in Ontario on the basis of fraud. Garrow J.A. stated at p. 506 that fraud cannot be raised after trial, "except upon … proof of new and material

facts or newly discovered and material facts…". Garrow J.A.'s reference to "new and material facts" refers to facts that did not exist at the time of trial. "Newly discovered and material facts" refers to facts that were available at the time of trial but were only discovered after the trial. In *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 66 O.R. (2d) 610 (H.C.J.), the defendants also sought to raise the issue of fraud after there had been a fully defended trial of the action. In *Whitehall Development Corp. Ltd. v. Walker et al.* (1977), 15 O.R. (2d) 130 (H.C.) appeal dismissed at (1977), 17 O.R. (2d) 241 (C.A.), the defendant sought to set aside a summary judgment that had been obtained against him following cross-examination on his affidavit of merits. The rule proposed by Doherty J.A. with respect to foreign judgments is the same as that for locally obtained judgments *where the defendant has defended the action*. In effect the policy is that the lack of due diligence by the defendants in ascertaining the relevant facts is blameworthy conduct which is penalized by refusing to allow the defendants to raise these facts as their defence after judgment has been obtained.

[158] The policy rule articulated by Doherty J.A. has no application to a local judgment obtained by default. The basis for moving to set aside a locally obtained default judgment is contained in Rule 19.08. This rule provides that a default judgment, "may be set aside or varied by the court on such terms as are just." There is no time limit for moving to set aside a default judgment in Ontario. Under rule 19.08 the court exercises a broad discretion. The factors to be considered in deciding whether to set aside a judgment obtained by default are not, however, rigid rules: *Chitel v. Rothbart* (1988), 29 C.P.C. (2d) 136 (Ont. C.A.); leave to appeal to S.C.C. refused (1989), 98 N.R. 132, 34 O.A.C. 399a. When moving to set aside a default judgment, one of the factors the court will consider is the defendants' explanation as to why they did not initially defend the action. The test is not whether the defendants' failure to contest the proceedings was purposeful but whether it was blameworthy: *Anderson v. Toronto-Dominion Bank* (1986), 9 C.P.C. (2d) 179 (B.C.C.A.). If the decision not to defend was not blameworthy and the court is satisfied that the defendants' have a valid explanation for any delay in moving to set aside the default judgment, the court will consider whether the defendants have a good defence to the action on the merits. Any prejudice to the plaintiffs in allowing the defendants to defend the action that cannot be compensated for by costs will also be considered. After balancing the competing interests of the plaintiffs and the defendants the court will exercise its discretion as to whether or not to set aside the default judgment and allow the defendants to defend the action.

[159] The problem that arises in this case is whether to apply the local policy rule pertaining to actions that have been defended to a foreign judgment that was obtained by default. If the decision not to defend was not blameworthy and the defendants have no remedy in the foreign jurisdiction then it seems to me that they should not automatically be precluded from defending the action here on the basis of the "newly discovered facts"

relating to fraud. The policy of treating Ontario defendants the same whether the judgment is a local judgment or a foreign judgment has a disparate effect on the Ontario defendants because they do not have the local remedy of moving to set aside the judgment obtained by default.

[160] It could be argued that inasmuch as the Ontario defendants had a hearing on the issue of damages, and the fraud raised by the Ontario defendants relates to those damages, the policy respecting fraud in relation to a local judgment after trial should apply. This argument ignores two considerations. The first is the fact that the if the original decision not to defend was not blameworthy, the hearing respecting damages was but the continuation of that decision. Secondly, the fraud is alleged to have been committed at the damages hearing itself. While the Ontario defendants may have been able to discover the facts prior to the damages hearing they would not have known the use that the Florida plaintiffs would make of those facts until the damages hearing.

[161] The position adopted by Doherty J.A. imputes constructive knowledge to a defendant of information that existed prior to trial but that was misused at a trial in a foreign jurisdiction where no transcript of the proceedings is available. A fraud committed at trial is not an ordinary fraud. It affects the fairness of the trial.

[162] In deciding whether to allow the defence of fraud to be raised in relation to a foreign default judgment, a flexible approach should be adopted. This approach would require the enforcing court to consider the following factors:

i) the reason why the defendants did not defend the action;

ii) whether it is now possible or practicable to seek a remedy before the foreign court;

iii) any explanation as to why no steps were taken to seek a remedy before the foreign court;

iv) the likelihood of success had steps been taken before the foreign court;

v) the stage of the proceedings at which the circumstances of the fraud should have become or were known to the defendants;

vi) any delay in raising the defence once the circumstances became known; and

vii) whether there is any prejudice to the foreign plaintiffs that cannot be compensated by an order as to costs and strict terms if the defence is allowed to be raised.

[163] In this case,

i) the defendants did not appreciate the extent of their jeopardy as a result of the plaintiffs' pleading. They were not in a position to make an informed decision to defend the action;

ii) it is no longer possible to seek a remedy before the Florida court;

iii) the Ontario defendants were advised that the Florida judgment could not be enforced against them in Ontario.

iv) had they taken steps to set aside the Florida judgment respecting liability, they would likely have been successful;

v) the fraud was not apparent on the face of the judgment. The Ontario defendants became aware of the circumstances only when enforcement of the judgment was sought in Ontario;

vi) once the circumstances became known, there was no delay in raising the defence; and

vii) I am not aware of any prejudice to the Florida plaintiffs that could not be compensated by an order that their costs in obtaining the Florida judgment be paid by the Ontario defendants.

[164] Having regard to the above considerations, the Ontario defendants were entitled to raise the defence of fraud before Jennings J. in response to the Florida plaintiffs' attempt to enforce the default judgment.

ii) Whether the trial judge's conclusion is reasonable and supported by the evidence

[165] Foreign law is deemed to be the same as local law unless the foreign law is specifically proved: *Canadian Fire Insurance Co. v. Robinson* (1901), 31 S.C.R. 488; J-G. Castel, *Canadian Conflict of Laws* 4th ed. (Toronto, Butterworths, 1997) at 161-62. Apart from certain procedural aspects, the law of Florida was not specifically proved. Jennings J. was therefore entitled to consider the law relating to the assessment of damages as being the same as Ontario law. On an assessment of damages in Ontario, a judge is not entitled to enter into an inquiry of the facts underpinning the action that a

defendant is deemed to admit by default: *Umlauf v. Umlauf*, [2001] O.J. No. 1054 at para. 13 (Ont. C.A.) (QL). However, although facts going to liability are deemed to be true, the facts going to damages must be proven: *Umlauf, supra*, at para. 9 (adopting *Family Trust Corporation v. Harrison* (1986), 7 C.P.C. (2d) 1 at 6 (Ont. Dist. Ct.)).[2] A plaintiff claiming unliquidated damages must present evidence of a causal nexus between the breach and the claimant's alleged damages. If the admitted facts do not establish a causal nexus to the damages claimed, the plaintiff will not be entitled to judgment for damages. With this background in mind I will now address the five findings by the trial judge.

[166] First, the trial judge found that any claim for lost profits belonged to Fox Chase Homes because Fox Chase would have built the homes. Doherty J.A. states the trial judge was not entitled to decide whether the Beals and Foodys could recover lost profits suffered by their corporation because the evidence does not permit any conclusion as to the applicable Florida law. The trial judge was entitled to assume that Florida law was the same as Ontario's in the absence of proof respecting the applicable Florida law.

[167] Second, the trial judge found that construction on the model home ceased before the Florida plaintiffs learned that they were building on the wrong lot and ceased because they had a "falling out" when Mr. Foody decided to pursue other employment. The trial judge found in effect that the causal nexus to damages had not been proven. The following question and answer read in from Mr. Beals discovery indicates that the reason he stopped building was not because he learned he was building on the wrong lot but because Mr. Foody left and he decided not to carry on alone.

> Q. All right. And so when Mr. Foody, who was related to you by —
>
> A. Marriage.
>
> Q. Marriage, took the job at Honeywell, you decided that you weren't going to pursue this venture in Charlotte County?
>
> A. Yes.

[168] At another point in his discovery, Mr. Beals indicated that Mr. Foody left in the fall of 1984 to work for a large company. But it was in January of 1985 that Mr. Beals discovered he was building on the wrong lot.

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[2] To the same effect in Florida see *Bowman v. Kingsland Development, Inc.*, 432 So. 2d 660 at 662-63 (Fla. 5th D.C.A. 1983).

[169] Four days prior to the commencement of the trial before Jennings J., in 1997, counsel for Mr. Beals sent a letter "correcting" his client's evidence. That letter stated that Mr. Foody started working in late April 1985 as a salesperson for a large company and not in the fall of 1984. The deposition by Mr. Beals at the time of the Florida action in 1985 was filed at the trial of the Ontario action. It was evidence under oath that Jennings J. could consider with respect to the credibility of Mr. Beals regarding the 1997 version of events. The deposition was consistent with the uncorrected earlier evidence given by Mr. Beals and it was open to Jennings J. to accept the original version of Mr. Beals evidence read in on discovery.

[170] Doherty J.A. is of the opinion that there is no evidence "that the jury was misled as to the existence of the company, its status at the time of trial, its connection to the transaction, its connection to the Beals and Foodys or the entitlement of the Beals and Foodys to damages based on anticipated lost profits." The fact that the company is not mentioned in the pleadings and that the pleadings make no mention of damages for lost profits by the company is a consideration. While the exhibits filed at trial identified the company as the payor of certain expenses, those expenses did not all relate to the lot in issue here. Many of the expenses, such as for air conditioning, appliances, etc., related to another house built by Fox Chase Homes in the same subdivision on Regina Drive. Those documents would have been irrelevant unless a claim for proof of damages for anticipated lost profits by Fox Chase Homes was being advanced.

[171] Furthermore, the record of exhibits filed does not show that any certificate of dissolution of the company was filed. The memorandum of lost profit submitted by Mr. Groener in support of his request as to how the jury should be instructed would be irrelevant if a claim for future loss of profit by the company was not being advanced. The memorandum states the prior experience of a party seeking lost profits may aid in proving the likelihood of *achieving profits in the newer venture*; the parties do not have to contemplate the precise injuries so long as they could reasonably have been expected to flow from the breach; when there is evidence of lost profits but the amount cannot be precisely and mathematically determined, the trier of fact can determine the amount; and a business can recover *lost prospective profits regardless of whether it is established or has a track record*.

[172] Mr. Beals was an experienced builder in another part of Florida. Fox Chase Homes was a relatively new company he formed with Mr. Foody in order to build homes in Charlotte County. Irrespective of whether the corporate veil can be pierced, the tenor of the memorandum indicates that a claim for future loss of profit was being advanced. The very fact that some $200,000 U.S. was awarded for loss of profit, when Mr. Beals admitted on discovery he ceased building because his partner took a job with another company and he decided not to carry on the business alone, speaks for itself. There was

evidence that the Florida jury was not told Mr. Beals decided to discontinue business because Mr. Foody left the company and he decided not to carry on the business alone. This omission led the jury into error in assessing the damages and was a fraud on the jury.

[173] The other three findings of the trial judge are: 1) that the factual allegations in the complaint make out a case for recission of the contract but were not sufficient to establish fraud on the part of the Ontario defendants; 2) that there could be no justifiable reliance on the representations made by the Ontario defendants as to ownership of the lot since ownership was a matter of readily accessible public record; and 3) that the offer attached to the complaint did not show the amendment to Lot 2. These three findings all go to the issue of liability. It was not open to Jennings J., on the issue of damages, to make these findings. They underpin the default judgment that was entered. The last three findings of Jennings J. are not, however, an essential component to his findings on the question of whether the Florida plaintiffs committed a fraud on the Ontario defendants in relation to damages by withholding information. I would uphold the conclusion of Jennings J. in this regard.

[174] In my opinion, the Ontario defendants should be allowed to raise the defence of fraud in respect of the damages as a defence to the enforcement of the Florida judgment. It was open to Jennings J. to come to the conclusion that the Florida plaintiffs had committed a fraud on the Ontario defendants with respect to damages and that consequently the Florida judgment is not enforceable.

IV. Disposition

[175] For the reasons I have given, I would dismiss the appeal with costs.

"Karen M. Weiler J.A."