Supreme Court of New South Wales Decisions

Yoon v Song [2000] NSWSC 1147 (8 December 2000)

Last Updated: 12 December 2000

NEW SOUTH WALES SUPREME COURT

CITATION: Yoon v Song [2000] NSWSC 1147

CURRENT JURISDICTION: Common Law Division

FILE NUMBER(S): 10737/98

HEARING DATE{S): 7 - 9 March 2000 & 14 - 18 August 2000

JUDGMENT DATE: 08/12/2000

PARTIES:

Ki Won Yoon (Plaintiff)

Young Dung Song (Defendant)

JUDGMENT OF: Dunford J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:

Mr J Black QC / Ms D Black (Plaintiff)

Mr F McAlary QC / Mr P Dodson (Defendant)

SOLICITORS:

Dammholz & Co (Plaintiff)

ID Elvy & Associates (Defendant)

CATCHWORDS:

Action at Common Law on Foreign Judgment

whether prohibited by Foreign Judgments Act 1991 (Cth)

moneys paid

ownership of moneys

factual issues

ACTS CITED:

Foreign Judgments Act 1991 (Cth)

Foreign Judgments Regulations 1992 No. 321

Foreign Judgments Act 1973 (NSW)

Constitution

DECISION:

Judgment for the defendant.

JUDGMENT:

THE SUPREME COURT

OF NEW SOUTH WALES

COMMON LAW DIVISION

DUNFORD J

Friday, 8 DECEMBER 2000

10737/98 - KI WON YOON v YOUNG DUNG SONG

JUDGMENT

1 **HIS HONOUR:** These are proceedings at Common Law on a judgment recovered by the plaintiff against the defendant in the District Court of the Republic of Korea (Western Branch) dated 18 February 1995, in the sum of 200,000,000 Korean Won (approximately $A302,503) together with interest at the rate of 25% per annum. Following an appeal by the defendant, the said judgment was affirmed by the Seoul Appellate Court, Civil Division 2 on 7 April 1995. The defences are twofold: firstly that the foreign judgment is unenforceable because it was obtained by fraud, and secondly that no action lies on a judgment of the courts of the Republic of Korea (South Korea) because of the operation of the ***Foreign Judgments Act 1991*** ***(Cth) No. 112 ("the Act")*** and the Regulations made thereunder. There is a further subsidiary defence that the interest rate of 25% p.a. is penal.

2 The plaintiff is a resident of South Korea and the defendant a resident of Australia. Although the defendant was not present at the hearings in the South Korean courts, and himself gave no evidence

therein, he was represented at first instance and on appeal by an experienced lawyer who presented evidence, made submissions and took an active part in the proceedings on his behalf, thereby submitting to the jurisdiction, and in fact it was the defendant who appealed against the decision of the court of first instance.

3 The plaintiff's case before the South Korean courts was that in 1989 he was trying to promote a joint venture company between a company partially owned and controlled by him, namely the Dong Bang Ocean Fisheries Company Ltd ("Dong Bang") and the North Korean Fisheries Authority through the intermediary of the defendant, it being agreed that if the negotiations were successful and the joint venture eventuated, the defendant would receive 10% of the profits. He further claimed that towards the end of the negotiations the defendant told him that before the North Koreans would finalise the joint venture they required the plaintiff to supply a styrofoam manufacturing machine for refrigeration purposes, and he thereupon paid the money to the defendant for him to use to purchase the machine. The negotiations came to nothing, the styrofoam manufacturing machine was never bought, the plaintiff sought the return of the money, but the defendant failed to return it.

4 The defendant on the other hand claims that the judgment was obtained by fraud by way of misrepresentations to the South Korean courts. He claims that the moneys were not paid by the plaintiff but by Dong Bang, that it was not paid to the defendant, but to Lobana Company Limited ("Lobana SK") which was a South Korean company owned by his brother, a South Korean resident, which was doing the negotiations on behalf of Dong Bang and which employed the defendant as a consultant; and that the money was not paid for the purchase of a styrofoam manufacturing machine but as recompense for services rendered and expenses incurred by the defendant on behalf of Lobana SK in the course of the negotiations.

5 During the hearing I admitted copies of the judgments of the Seoul District Court Western Branch and of the Seoul Appellate Court each with notarial certificates attached (Exs. A and B) and said I would give my reasons at a later stage. In each case there is a document apparently in the Korean language with what appear to be seals thereon and I note also that the documents contain perforations at their feet, which other evidence in the case describes, is a feature of South Korean court documents. Attached to these documents is an affidavit of Yim Kwang-Kyu in which he identifies the document as the Sentence (i.e. judgment) of the court and annexes a translation, and also attached is a notarial certificate relating to the affidavit. Having regard to s 150(1)(f) ***Evidence Act 1995*** I am satisfied that the documents purport to contain an imprint of the seal (which includes a stamp - see Dictionary) of a body established under the law of a foreign country and it is therefore to be presumed, unless the contrary is shown, that the documents were duly sealed as they purport. In addition Mr Yim's affidavit satisfies me that he examined the originals, and s 157 accordingly makes them admissible.

6 Before dealing with the merits of the plaintiff's case it is necessary to consider the defendant's submission that the present action is not maintainable because of the operation of ***the Act*** which, except for s 21, commenced on the date it received the Royal Assent (s 2) i.e. 27 June 1991, and provides in Part 2 (ss 5-10) for the reciprocal enforcement of judgments by way of registration.

7 By virtue of s 5(1), the Regulations may provide for Part 2 to extend to a particular foreign country in which case a judgment of that foreign country may be registered in the Federal Court or a State or Territory Supreme Court, as the case may be, and enforced as if it had originally been given in the court in which it is registered (s 6); and no proceedings for the recovery of an amount payable under such a judgment other than proceedings by way of registration of the judgment are to be entertained by an Australian court (s 10).

8 Section 5(8) is as follows:

"This Part does not apply to:

(a) a money judgment given by a superior court of a country before the day on which the regulations

extend this Part in relation to that country; or

(b) a money judgment given by an inferior court before the day on which the regulations extend this Part in relation to that court; or

(c) a non-money judgment of a particular kind given in a court in proceedings of a particular kind before the day on which the regulations apply this Part to non-money judgments of that kind given in that court in proceedings of that kind;

unless:

(d) the judgment was given by a court of New Zealand or the United Kingdom; or

(e) the judgment was, immediately before that day, registrable in the Supreme Court of a State or Territory under a law of that State or Territory."

9 The ***Foreign Judgments Regulations 1992*** ***No. 321*** were notified in the Commonwealth Gazette and commenced on 16 October 1992 and provide for the countries and courts to which Part 2 of the Act is to apply. They have been amended a number of times, most recently by Statutory Rules No. 334 of 22 December 1999, which for the first time included the courts of the Republic of Korea.

10 The Statement of Claim in these proceedings was filed on 20 March 1999, that is after the commencement of the Act, but before Korea was proclaimed by the Regulations as a country within Part 2.

11 Having regard to the tortuous language of the Act, the path to determining whether Part 2 applies to a particular judgment is equally tortuous. Section 5(1) provides that the Part applies to judgments if the Regulations extend the Part to such country, but s 5(8) provides that Part 2 does not apply to a money judgment given before the Regulations apply Part 2 to that country, unless the judgment was immediately prior to that day registrable under the law of a State or Territory (in which case Part 2 does apply). But if prior to that day (that is the day on which the Regulations apply Part 2 to the foreign country) it was not registrable, Part 2 does not apply to such judgment.

12 The Act is clearly intended to cover the field in relation to the enforcement and registration of foreign judgments, and accordingly there is no scope for the continued operation of State legislation such as the ***Foreign Judgments Act 1973*** ***(NSW)*** because of the operation of the ***Constitution***, s 109. It follows that the New South Wales Act ceased to have any force or effect after the date that the federal Act commenced (26 June 1991) except insofar as its operation was continued by virtue of the federal Act.

13 The transitional provisions are contained in Part 4 (ss 18 and 19). The effect of those sections is that, except in respect of countries to which Part 2 is made applicable, State laws concerning the registration and enforcement of foreign judgments continue to apply until 2 years after the day on which s 18 commences: see s 18(3). Section 18 commenced on the same day as the rest of the Act (27 June 1991) and so these transitional provisions permitting continued registration under State law ceased to apply on 26 June 1993. What is relevant is 2 years from the date on which s 18 commences, not 2 years from the date on which the Regulations extend the operation of Part 2 to the particular foreign country: see generally ***Morf-Zinggeler v Morf*** [1999] WASC 96 at paras [16] - [23].

14 After that date, Korean or any other foreign judgments could not be registered under State law; and therefore immediately prior to Part 2 being made applicable to Korean judgments by the Regulation of 22 December 1999, this judgment was not registrable under a law of a State or Territory. Therefore it does not come within s 5(8)(e) and so it comes within s 5(8)(a) and Part 2 does not apply to it, it being a judgment given by the Korean Court before the date of the Regulation

extending Part 2 to that country. There is accordingly no prohibition on suing on the foreign judgment, as s 10, which is in Part 2, like the rest of the Part does not apply to it.

15 One of the grounds on which an action at common law on a foreign judgment may be defended is that the foreign judgment was obtained by fraud: ***Nygh: Conflict of Laws in Australia***, 6th ed. at 154, but the decisions are not all consistent as to what constitutes fraud in this context. In relation to domestic judgments a party asserting that a judgment has been procured by fraud must show that there has been a new discovery of something material, in the sense that fresh facts have been found since the original judgment, which by themselves or in combination with previously known facts would provide a reason for setting aside the judgment: ***Wentworth v Rogers (No. 5)*** (1986) 6 NSWLR 534 at 538 and the cases there cited.

16 But a different rule has been applied in England in respect of foreign judgments and it has been held that it is not necessary to show that fresh facts have been found since the original judgment; but it is sufficient to show that the foreign court was misled into coming to a wrong decision by evidence which was false: ***Abouloff v Oppenheimer & Co.*** (1882) 10 QBD 295, followed in ***Vadala v Lawes*** (1890) 25 QBD 310 where Lindley LJ at 316-17 stated the rule in the following terms:

" . . . if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court."

These cases have been applied in the English courts a number of times since, e.g. ***Syal v Heyward*** [1948] 2 KB 443, ***Jet Holdings Inc. v Patel*** ***[1966] UKHL 1;*** [1990] 1 QB 335, and distinguished in ***House of Spring Gardens Ltd v Waite*** [1991] 1 QB 241 where there had already been an application in the foreign court to set aside the judgment on the ground of fraud.

17 The principle has been criticised by text writers, e.g. ***Cheshire & North: Private International Law*** 13th ed. at 444, and in ***Wentworth v Rogers (No. 5)*** Kirby P at 541 said that, *"the reasoning might be no more than a reflection of the attitudes of the English judiciary at the apogee of the British Empire"*. See generally ***Nygh: Conflict of Laws in Australia*** 6th ed. at 154-156.

18 In ***Owens Bank Ltd v Bracco*** [1992] 2 AC 443, the House of Lords was invited to overrule ***Abouloff v Oppenheimer & Co.*** and ***Vadala v Lawes***, either as having been wrongly decided in the first place, or alternatively on the ground that, even if the original decisions could have been justified 100 years ago, that they rest on a principle which is unacceptable today and out of accord with the approach of the court to other issues arising in the field of private international law, but the House having regard particularly to English statutory provisions similar to s 7(2)(vi), declined to do so.

19 ***Abouloff v Oppenheimer & Co.*** was treated as the law by Fox J in ***Norman v Norman (No. 2)*** (1968) 12 FLR 39 at 47 while in ***Res Nova Inc. v Edelsten*** (unreported - Common Law Division - 7 May 1985 - BC 8500840) Foster J, after expressing considerable doubt as to whether it was open to him to differ from the English Court of Appeal decisions, found it unnecessary to decide as he was satisfied that the issue of fraud upon the court was not raised or adjudicated upon in any of the proceedings in the foreign courts, and therefore, although the trial court in this State would be called upon to consider evidence called before the foreign courts, it would not be asked to merely retry an issue already tried there.

20 However, in ***Keele v Findley*** (1990) 21 NSWLR 444, Rogers CJ Comm D held that the English decisions no longer represented the law of Australia and should not be applied. His Honour held that the same rule should apply to impugning foreign judgments on the ground of fraud as apply to impugning domestic judgments on that ground. In reaching that position his Honour placed reliance on Canadian authorities such as ***Jacobs v Beaver*** (1908) 17 OLR 496 and referred to the obiter remarks of Kirby P in ***Wentworth v Rogers (No. 5)***, although as Kirby P had pointed out at 457, there

may be reasons of principle for applying a different rule to the judgments of foreign courts to that applied to domestic courts, given the great variety of judicial systems which operate and the entitlement of domestic courts to reserve to themselves an assessment of the integrity of the process upon which the judgment was based. His Honour referred to ***Norman v Norman (No. 2)*** and noted that the remarks were obiter, but was not referred to ***Res Nova Inc. v Edelston***.

21 The matter was again considered by Graham AJ in ***Close v Arnott*** (unreported - Common Law Division - 21 November 1997 - BC 9706194) and his Honour pointed out that the Canadian decisions had been referred to by Lord Bridge in ***Owens Bank v Bracco*** at 487, along with the criticism by text writers, but that his Lordship made no reference to ***Keele v Findley*** (In this regard I note that it was cited in argument in ***Owens Bank Ltd v Etoile Commerciale*** SA [1995] 1 WLR 44 in the Privy Council, but was not referred to in the judgment.). Graham AJ said that if it were necessary, he would distinguish ***Keele v Findley*** and find that the English rule continued to apply in New South Wales in respect of actions to enforce judgments obtained in undefended proceedings in a foreign court where the defendant has, for good reason, been unable to meet the plaintiff's case in that court, but went on to say:-

"In my opinion, the very circumstances of this case demonstrate the need for a rule which treats the deception of a foreign court as more serious than an Australian one. If it had been necessary for the defendant to rely upon his own intrinsic evidence, which in theory he could have presented to the court in New York, to establish the first plaintiff's fraud, I consider that, in a case such as this, he ought to be permitted to do so."

22 Notwithstanding the various criticisms that have been made of the ***Abouloff*** rule, I am satisfied that it correctly states the law in relation to foreign judgments and that if such law is to be changed, it should be by Parliament and not by the Courts. Consequently I am not satisfied that ***Keele v Findley*** was correctly decided. Indeed the facts of this case demonstrate in my mind good reason for applying a different test of fraud in respect of foreign judgments to that applied in respect of domestic judgments; although for reasons which appear hereunder I am also satisfied that even if the domestic judgment test were applied, the defendant would satisfy that test in the present case.

23 There were a number of unsatisfactory features in the evidence. The plaintiff, Ki Won Yoon, is an elderly gentleman in ill health. Although he did not give evidence in the Korean courts (rather strange in itself), he swore affidavits in this Court and attended on 7-9 March 2000 when his affidavits were read, he gave additional oral evidence and was cross-examined. However, his cross-examination was not completed when the case was adjourned as it had exceeded its estimate and I had other commitments. When the hearing was resumed on 14 August, a medical certificate was produced which satisfied me that he was unfit to travel from South Korea, so that Mr McAlary QC, Senior Counsel for the defendant, never had the opportunity to complete his cross-examination.

24 In addition, I found him an unsatisfactory witness in a number of respects. In saying this I recognise that he was cross-examined through an interpreter and that, together with cultural differences, can often lead to misunderstanding, but even taking these factors into account I found his evidence unsatisfactory and unreliable in parts, particularly when he denied (which he later admitted) that he applied in July 1989 for permission to come to Sydney to meet North Korean personnel, a fact that was clearly established by documentary evidence (documents AL 10, AL 12 and AL 16 in Ex. J). Moreover the documents AL 12 and AL 16 in particular support the defendant's claim that although Dong Bang was not referred to in the initial joint venture agreement with Mumbada Co, the North Korean company (Ex. C), the intention was that if and when the approval of the South Korean government was obtained, Dong Bang would be substituted for Lobana Co. Ltd (the defendant's Australian company), but the plaintiff persistently denied any such agreement or understanding. I shall refer later to his evidence regarding the source of the 200,000,000 won. All these matters, and others, reflected badly on his credit.

25 Similar considerations apply to his son, Hak-Min Yoon. He apparently gave evidence for his

father in the South Korean courts and also swore affidavits and gave evidence here, again through an interpreter, but once again some of his evidence was clearly wrong, e.g. in the second sentence of para 10 of his affidavit of 6 March 2000 he swore that the money was sent to Sydney to the defendant on 4 August 1989 and that the defendant was required to fax a Certificate of Custody by return, but other evidence in the case clearly establishes that the funds were not "sent" to Sydney, and that the Certificate of Custody was faxed before the cheques were handed over in Seoul by Mr Yoon senior to Mr Kook (or Kuk), an employee of Lobana SK (the defendant's brother's South Korean company). His evidence attempting to deny that he and his father applied for permission to come to Sydney to meet the North Koreans, including his evidence denying his father's personal seal on the application, were also most unconvincing.

26 On the other hand, the defendant, who has lived in Australia for many years and who gave evidence in English, was also difficult to accept at times particularly in relation to whether or not he was managing director of Lobana SK and how, if Dong Bang could not sign an agreement with the North Koreans without permission of the South Korean authorities, Lobana SK was able to do so. He eventually said Lobana SK was able to because it was not going to do any actual fishing, but the two contracts comprising Ex. F and annexure A to the defendant's affidavit of 2 March 2000 provide exactly the opposite.

27 Finally, Mr Kook who was a senior staff member of Lobana SK and actually received the money from the plainitff and endorsed a receipt on a photocopy of the cheques, and gave evidence for the defendant in the Korean courts was not here in March and so an affidavit he had sworn was not read. He also was not here in August, although his absence on that occasion was explained.

28 Generally, where there is a conflict I prefer the evidence of the defendant to that of the plaintiff and his son as it contains less internal inconsistencies, it is more consistent with the documents, and generally appears the more likely.

29 Essentially the issues in the case came down to three: -

(a) Whose funds were used to pay the 200,000,000 won?

(b) To whom was it paid?

(c) For what purpose was it paid?

30 In relation to the first issue (the ownership of the funds), the plaintiff in this Court said nothing about the source of the funds, but simply that he entered into an agreement with the defendant for the latter to purchase a styrofoam machine and supply it to him (Yoon) and that he *"supplied the said 200,000,000 won to the defendant"* (plaintiff's affidavit of 7 December 1999 paras 2 to 4 inclusive). There was no reference to it being required by a North Korean agency with a view to a proposed joint venture between such agency and Dong Bang.

31 This may be contrasted with his case in the Seoul District Court as presented by his son Hak-Min Yoon (Ex. E) where there was reference to the proposed joint venture between Dong Bang and North Korea and the requirement to buy "them" (the North Koreans) the styrofoam machine and contained the bland statement:

"Due to some difficulties in dealing with North Korean fishing industry through Dong Bang Co, the plaintiff decided to pursue the prospect with his private funds."

but there was no evidence as to the source of the funds used.

32 During the course of the proceedings at first instance in the Seoul District Court, the defendant's

legal representative asked the Court to enquire into the source of the bank cheques used to pay the 200,000,000 won but the bank apparently did not respond.

33 During the course of the appeal hearing, the defendant's lawyer again requested the Court to enquire into the source of the funds, which it did by letter of 22 September 1994 and the Han-Il Bank, Yong San Branch replied on 14 October 1994 to the effect that the cheques had been paid out of an account in the name of Jae-Sun Kim at that branch, and that the funds had come to that branch from an account at the Donghae Branch; so the Court wrote to the Donghae Branch on 7 November 1994 enquiring who was the depositor of such funds and the Bank replied by letter dated 26 January 1995 to the effect that the money came from an account in the name of Ki-Sook Kim (Annexures C to F of defendant's affidavit of 6 December 1999). The Appeal Court does not appear to have pursued this aspect any further, and delivered judgment dismissing the defendant's appeal on 7 April 1995.

34 After the dismissal of the appeal the defendant did nothing further in relation to this matter until served with the Summons in these proceedings, when he caused enquiries to be made in Korea to locate Jae-Sun Kim, who in due course swore an affidavit in these proceedings. That affidavit and the attached property registration documents annexed thereto and translated by Alex Inkeun Leesong in his affidavit of 10 June 1999, together with the affidavit of the Korean lawyer, Byong Wook Kim of 23 June 1999 satisfy me that the 200,000,000 won was paid by Jae-Sun Kim to the plaintiff as the representative of Dong Bang as the balance of the purchase price for a property purchased by Jae-Sun Kim from Dong Bang.

35 This was fresh evidence and clearly material to the first issue, namely whose funds were used to provide the 200,000,000 won. The non-disclosure of this material evidence in the Korean proceedings, particularly as the plaintiff and his representatives must have been aware of the enquiries being pursued by the Court to the Bank at the request of the defendant, in my view constituted fraud. It clearly satisfies the ***Abouloff*** test and I believe it also satisfies the test applicable to domestic judgments, or the ***Keele v Findley*** test, because as the Court was unable to trace the ownership of the funds at the time of the Korean proceedings, it is difficult to see how the defendant could have done so; and the affidavit of the defendant dated 6 March 2000 sets out the further difficulties he had in locating Jae-Sun Kim even after his name was known. It having been established that the judgment was obtained by fraud, it becomes necessary to go behind it.

36 After Jae-Sun Kim's affidavit referred to above was filed, the plaintiff did not respond until his affidavit of 7 March 2000 when he said:

"On 4 August 1989 cash cheques were given to me by Jae-Sun Kim to complete the purchase of a property. The cheques were made out to cash and were Bank cheques."

and it was not until it was put to him in cross-examination that these moneys were really Dong Bang's moneys that he proffered a claim that he had taken the money from Dong Bang in payment of a debt in that amount owed by Dong Bang to him (see transcript at 28, 34 to 36). I found this claim most unconvincing, it had never been made previously, it was unsupported by any details or documentary corroboration, such as a copy of the company's loan accounts, and the whole claim lacked credibility.

37 Moreover, all the plaintiff's fishing and trading activities referred to in the proceedings appear to have been conducted under a corporate structure; and it is difficult to see any reason why this money, whatever its purpose but particularly if it was to purchase a styrofoam machine for use by Dong Bang's joint fishing venture would be provided out of his personal funds rather than out of the funds of the company which I am satisfied was going to participate in the joint venture with Mumbada, i.e. Dong Bang.

38 On the whole of the evidence I am therefore satisfied that the moneys claimed never were the plaintiff's money but belonged to Dong Bang and that it was only after the company was placed in administration in 1992 that the plaintiff ever asserted that the moneys were his. This in itself is

sufficient to dispose of the proceedings, but it is desirable that I deal briefly with the two remaining issues.

39 The second issue in the case is to whom was the 200,000,000 won paid. On the one hand there is the Certificate of Custody dated 4 August 1989 to the effect that the defendant holds the money for the plaintiff, but there is also the affidavit of Byong Wook Kim sworn 6 March 2000, an expert in Korean law, to the effect that such documents are commonly used as simple receipts, that when they are used to signify that a sum is to be held on behalf of the payer further words are commonly added to signify the purpose for which the sum is to be held, that in the case of inter-company transactions such documents may pass between the principals of such companies, and that the interpretation of such documents depends on all the surrounding circumstances. His evidence on these points was not challenged, and I accept it.

40 At the same time there is endorsed on a photocopy of the bank cheques used to pay the money a receipt signed by Mr Kook, an employee of Lobana SK, acknowledging receipt of the money *"as per Certificate of Custody"* on behalf of Lobana Trading Company Ltd (see affidavit of Ki Won Yoon sworn 7 March 2000 para 2(v)). The original photocopy of the cheques containing such endorsement was produced on the 5th day of the trial by Mr Yoon junior, although copies showing the endorsement were already in evidence annexed to the affidavits of the plaintiff and his son; and the photocopy annexure to the affidavit of Jae-Sun Kim sworn 3 November 1999 and filed for the defendant also contained writing (in Korean) which appeared consistent with the top line of the endorsement. However, an official court certified copy of the Korean court file (Ex. G) at p 18 did not contain the endorsement and senior counsel for the defendant submitted that this was evidence of fraud in that it demonstrated that the copy of this vital document (a receipt in the name of someone other than the defendant) which had been presented as evidence to the Korean court had been incomplete, in that it omitted that part which damaged the plaintiff's case.

41 This submission initially appeared attractive, but when the photocopy in the court file was lined up with the original it could be seen that the endorsement on the original was lower on the page than the bottom edge of the photocopy, and the apparent omission may have only been due to the fact that the Korean court official who photocopied what was later certified and became Ex. G had not paid sufficient attention to ensuring that the photocopy included all the writing on this page. Glib as this explanation seems, it cannot be entirely discounted, although it must be conceded that there is no direct reference in the judgments, either at first instance or on appeal, to this document, which would appear on any view of the facts to be significant, and one would have expected it to be dealt with even if only to explain why it was not regarded as significant or even decisive. On the whole of the evidence I am not prepared to hold that the photocopy of cheques produced in Court did not contain the endorsement, but the failure of the Korean courts to refer to it causes me considerable disquiet.

42 Notwithstanding the terms of the Certificate of Custody the defendant claims that the money was not paid to him, but his brother's company, Lobana SK. His explanation for the Certificate of Custody appears in paras 23, 24 and 25 of his affidavit of 6 December 1999. I admitted para 23 subject to objection at a time when it was anticipated that Mr Kook would be called as a witness. He was not called as noted earlier in this judgment, and I now reject para 23 as hearsay.

43 It does however appear from paras 24 and 25 that the money was paid on the assumption that government permission for Dong Bang to deal with the North Koreans would be forthcoming and that the Certificate of Custody was intended to mask the real nature of the transaction. I am satisfied that the money was not sent to Sydney as claimed in Hak-Min Yoon's affidavit of 6 March 2000 para 10, and accept the evidence of the plaintiff in his affidavit of 7 March 2000 para 2 that after receiving the cash cheques from Jae-Sun Kim on 4 August 2000 he handed them over to Soon-Chong Kook, who endorsed the receipt thereon, which was apparently accepted by the plaintiff. Such receipt refers to Lobana Trading Co and not to Lobana SK and there may be some doubt as to which company was intended to be referred to; but it appears that the payment was intended to be made to one of the companies (and the parties do not appear to have been too particular about which one) rather than to

the defendant in his personal capacity.

44 Although on the basis of para 24 of the defendant's affidavit there is some basis for asserting that the money was originally paid to the defendant to be held by him personally until the joint venture received approval from the South Korean Government, it was apparently always intended to ultimately go to one or other of the companies. The plaintiff said that the money was paid to Lombada SK although some of it was later paid by that company to him for salary and reimbursement of travelling and other expenses (transcript pp 149-150). In his "Response to the Cause of Action" filed in the Korean court (annexure B of the defendant's affidavit) the defendant stated on more than one occasion that he received the money, but also said that it was not paid to him as an individual.

45 On the whole of the evidence it seems that the money was not paid to the defendant, but to Lombada SK, although one object of the payment was to secure the defendant's continued personal involvement in the planned fishing venture with the North Koreans.

46 The final issue is the purpose of the payments, the plaintiff claiming that it was to purchase a styrofoam machine for the North Korean fishing vessels, and the defendant claiming that it was to cover salary and reimbursement of travelling and expenses incurred by the defendant through the companies Lombada Trading and Lombada SK.

47 I reject the plaintiff's claim. There would be no point in the plaintiff or Dong Bang providing funds for the purchase of a styrofoam machine unless and until the approval of the South Korean authorities had been obtained to the project going ahead, and as at 4 August 1989 no such approval had been given (and it was never given in respect of fishing in North Korean waters). Moreover there was no evidence given as to the type, size, model etc of the styrofoam machine required or whether the cost of such a machine was 200,000,000 won or anything like it.

48 On the other hand there are some difficulties about the defendant's claim that it was for salary, travelling and other expenses as no invoice appears to have ever been rendered and there has been no break down of the expenses. I have already referred to para 24 of the defendant's affidavit. I also draw attention to some answers he gave at p 145 of the transcript as follows:

"Q. You know what it [the Certificate of Custody] said, you knew what it said when you signed it?

A. Mr Yoon explained to me by telephone why have to have signed with the custody paper. I accepted his word.

Q. And what did he say?

A. He cannot pay expenses for North Korean project. He pay Lobana but that custody paper but when Dong Bang get permission from South Korean authority then he would return the document and pay - prepare the document as a normal expense payment.

HIS HONOUR: Q. When Dong Bang get the--

A. Permission from South Korean authority.

Q. He would what?

A. He will return custody paper and will ask expense cost from Lobana Seoul, Lobana SK."

49 This and other evidence in the case tends to suggest that the money was paid in exchange for the Certificate of Custody to be held as an encouragement for the defendant to continue his involvement (through his company) in the project and negotiations relating thereto on the basis that when approval

was given by the South Korean authorities the Certificate of Custody would be returned and the money would become the property of Lobana SK to reimburse that company for the work done by the defendant along with his travelling and other expenses.

50 It is however unnecessary to finally resolve these issues as I am satisfied that the moneys paid were moneys belonging to Dong Bang and not to the plaintiff, and accordingly the plaintiff had no claim to their return, whatever the basis on which they were paid.

51 I therefore direct entry of judgment for the defendant and order the plaintiff to pay the defendant's costs of the proceedings.

LAST UPDATED: 08/12/2000
