WeirFoulds LLP

Case Law Update: United States v. Yemec

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Enforcement of Foreign Judgments Defences Meaningful Opportunity to be Heard Equitable Orders Injunctions

The defendants operated cross-border telemarketing businesses selling Canadian and foreign lottery tickets to U.S. customers. In October 2002, a U.S. judge granted an *ex parte* "Temporary Restraining Order with Asset Freeze and Order to Show Cause Why a Preliminary Injunction Should not Issue" against the defendants. The U.S. obtained a *Mareva* injunction and *Anton Pillar* order days later from the Ontario Superior Court of Justice, which were eventually set aside on a finding that the court had been misled. The U.S. brought proceedings against the defendants in Illinois, obtaining a permanent injunction and a $19M judgment. The U.S. amended its Ontario claim in 2005 to seek enforcement of that judgment. It brought summary judgment for that part of its claim, which was dismissed on the basis that there was a question as to whether the defendants had a "meaningful opportunity to be heard" in the U.S. proceedings. The decision on this motion, and two other related motions, was the subject of this appeal to the Court of Appeal.

The Court held that the motions judge erred in finding a genuine issue for trial for a fourth "new defence" apart from the three listed in *Beals v. Saldanha*, namely that of denial of a "meaningful opportunity to be heard". Such a fourth defence should not be added to the three defences in *Beals*, as any new defence must be "narrow in scope" and "raise issues not covered by the existing defences". The "new" defence was indistinguishable from the natural justice defence. Further, the facts in this case were found not to support an argument that the defendants were denied a "meaningful opportunity to be heard".

The defendants raised the argument, for the first time on appeal, that the injunctive relief component of the U.S. judgment should not be enforced. The Court of Appeal rejected this submission. The factors set out by the Supreme Court of Canada in *Pro Swing* militated in favour of enforcing the injunction. Its terms were simple, clear and specific; there were no unforeseen obligations to which the defendants would be exposed; it had minimal effect on third parties; and its enforcement is consistent with the types of orders that would be allowed for domestic litigants.

Finally, the defendants sought the enforcement of the damages undertakings given by the U.S. on the *Mareva* and *Anton Pillar* orders. The U.S. sought to resile from its undertaking given on *ex parte* orders it wrongfully obtained, arguing that the undertakings were worthless from the outset as no damages could flow from the termination of an illegal operation. The Court of Appeal rejected this argument, finding that this would undermine the serious nature of a damages undertaking. While the quantum of damages was an open question, it was not clear that the defendants' damages claim was "plainly unsustainable". Further, the orders were dissolved as a result of the U.S. government's wrongful conduct in obtaining the *ex parte* orders. While illegality is an important consideration in determining whether to order a damages inquiry, it does not automatically preclude a damages inquiry.

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