**EASTERN CARIBBEAN SUPREME COURT**
**IN THE COURT OF APPEAL**

**ANTIGUA AND BARBUDA**

**ANUHCVAP2016/0006**

**BETWEEN:**

**FLAT POINT DEVELOPMENT LIMITED**

Appellant

**and**

**CANISBY LIMITED**

Respondent

**Before**:

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| The Hon. Mde. Louise Esther Blenman | Justice of Appeal |
| The Hon. Mr. Paul Webster | Justice of Appeal [Ag.] |
| The Hon. Mde. Clare Henry | Justice of Appeal [Ag.] |

**Appearances**:

Mr. Frank Walwyn with him, Ms. Jacqueline Walwyn for the Appellant.
Mr. Anthony Astaphan, SC and with him, Ms. Rika Bird for the Respondent.

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2017: April 6;
December 7.

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*Civil appeal – Civil procedure – Submission to foreign court's jurisdiction – Finality and conclusiveness of default judgment obtained in foreign court – Summary enforcement of default judgment in local court –Natural justice principles – Whether learned master was correct in granting summary judgment in circumstances where objections were made on the basis of breach of natural justice in the foreign court and that the summary judgment was obtained in violation of public policy of Antigua and Barbuda.*

Canisby Limited ("Canisby") is a company incorporated under the laws of the Isle of Man and registered in the Isle of Man. Flat Point Development Limited ("Flat Point") is a company incorporated under the laws of Antigua and Barbuda and registered in Antigua and Barbuda. Flat Point and Canisby entered into a loan agreement whereby Canisby loaned a sum of money to Flat Point. Flat Point defaulted on repayment of the loan and thereafter Canisby filed a claim in the Manx court for repayment of the loan together with interest. Article 14 of the loan agreement provided that the agreement was governed by Manx law and that the parties submit to the non-exclusive jurisdiction of the Manx court.
The claim was served on Flat Point and in response Flat Point filed an acknowledgment of service but failed to provide an address for service in the Isle of Man. Canisby then filed

an application for the acknowledgment of service to be set aside and that judgment in default be entered against Flat Point. Canisby asserted that it advised Flat Point by way of letter that the acknowledgement of service was defective and that it applied to set it aside and to enter judgment in default against Flat Point. In addition, Canisby contended that in the letter to Flat Point, it enclosed a copy of the application to strike out the acknowledgment of service and to enter the default judgment. Flat Point submitted that it received neither the letter nor the enclosures.

On 25th August 2017, Canisby filed a claim in the High Court of Antigua and Barbuda seeking to enforce, at common law, the default judgment against Flat Point. Flat Point filed its acknowledgement of service followed by its defence on 6th October 2015. Canisby applied for summary judgment based on the default judgment on 13th October 2015 on the basis that Flat Point had no real prospect of successfully defending the claim. Flat Point strenuously opposed the application on several grounds.

The learned master, after examining the pleadings and documents, granted summary judgment based on the default judgment against Flat Point. Flat Point has appealed this decision on the basis that the learned master made factual findings in the face of several defences it relied on namely: that it had not submitted to the jurisdiction of the Isle of Man court, that the default judgment was obtained in breach of natural justice since it was unaware that Canisby had applied for and obtained the default judgment and that Canisby had applied to strike out its acknowledgment of service; that the default judgment was neither final and conclusive nor was it lawfully obtained because it was not served with the applications and that the default judgment was obtained in violation of public policy. In light of those objections, this Court had to determine the appropriateness of the summary judgment procedure.

**Held**: (the majority Blenman JA and Henry JA [Ag.] with Webster JA [Ag.] dissenting) allowing the appeal; setting aside the summary judgment and costs granted to Canisby Ltd; remitting the substantive enforcement claim to the High Court to be determined in accordance with the Civil Procedure Rules 2000 and awarding costs to Flat Point Development Limited fixed at two thirds of the costs of $650.00 awarded in the court below, that:

1. It is settled law that a foreign court has jurisdiction over a defendant who had previously contracted to submit to that jurisdiction. Based on article 14, the non-exclusive jurisdiction clause, Flat Point submitted to the jurisdiction of the Isle of Man court. Therefore, the Isle of Man had jurisdiction in the private international law sense, to hear and determine the claim that was brought there. Accordingly, the learned master cannot be properly criticised for concluding that Flat Point had submitted to the jurisdiction of the Isle of Man. Consequently, the appeal on this issue fails.

   **Raffle America Inc. v Kingsboro International Holding Co. Ltd and Another** (1993) 52 WIR 37 considered.

2. In private international law, in order for the local court to enforce a foreign judgment, it must be satisfied that the judgment was obtained in circumstances that do not infringe the local jurisdiction's standards of natural justice. In the case at bar, the learned master, having examined the papers, seemed to have decided that Flat Point was served with the documents. The learned master could not have made a proper determination of that issue by a mere examination of the papers and the letter in circumstances where Flat Point vehemently denied receipt of the letter and the enclosures. Flat Point maintained that its acknowledgment of service had been struck out and default judgment entered against it unbeknownst to it. These are critical issues which warranted full ventilation in order for the court to be able to properly determine whether the default judgment was obtained in breach of natural justice. Further, the issue of whether Flat Point was provided with the opportunity to be heard on the applications was a matter which required a proper investigation in the form of a trial where there is testing of the evidence. The fact that the acknowledgment of service indicated that judgment can be entered if no defence is filed within 28 days, is irrelevant to the issue of whether or not Flat Point was afforded the opportunity to be heard on the application for the default judgment.

   **Langer v International Transport and Earthmoving** Unreported April 11, 1983 CA Bermuda 26/1982 cited.

3. **Per Blenman JA**: The finality and conclusive nature of a judgment is by no means a straight forward matter and should only be determined at a trial except in the clearest of cases. The case at bar is not a clear case. There were serious contentions made by Flat Point, and if proven to be correct in relation to the default judgment, could potentially undermine the finality and conclusiveness of the default judgment. This issue could not have been properly determined by an examination of the pleadings and opposing affidavits which contained conflicting evidence and the master erred in determining the issue in those circumstances.

4. **Per Blenman JA**: The violation of public policy has always been recognised as an acceptable basis, at common law, to refuse to enforce a foreign judgment. In this case, the raising of this objection is important and required full ventilation. It is only after a full and proper trial that a court can properly test the merits and demerits of the issues that have been raised by the parties.

   **BCB Holdings Ltd and the Bleize Bank Ltd v The Attorney General of Belize** 2013 CCJ 5 (AJ) cited; **Loucks v Standard Oil of New York** 224 N.Y. 99 cited.

5. Part 15 of the **Civil Procedure Rules 2000** provides for summary judgment to be granted in appropriate cases where the claim or defence has no realistic prospect of success. In this case, there are in depth triable issues to be dealt with and in relation to which there is conflicting evidence by Flat Point and Canisby. The learned master could not have properly concluded, on the pleadings and documents, that flat point's defence of natural justice and public policy were fanciful. These types of claims are unsuitable for resolution by the summary

judgment procedure. Accordingly, the learned master exercised his discretion improperly in granting Canisby summary judgment in circumstances where there were factual disputations which ought to have been ventilated at a trial. Due to the factual disputes in this case, this Court will be in no better position to resolve those issues even if it minded to exercise its discretion afresh.

**Comodo Holdings Limited v Renaissance Ventures Ltd. et al** BVIHCMAP2014/0032 (delivered 3rd May 201, unreported) followed; **Alfa Telecom Turkey Ltd. v Cukurova Finance International Limited et al** BVIHCVAP2009/0001 (delivered 16th September 2009, unreported) followed; **SGL Holdings v Aiham Shammas** GDAHCVAP2010/0002 (delivered 13th August 2010, unreported) followed; **Saint Lucia Motor & General Insurance Company Ltd v Peterson Modeste** SLUHCVAP2009/0008 (delivered 11th January 2010, unreported) followed.

**Per Webster JA [Ag.] dissenting**:

6. The issue of natural justice in the context of the entry of a default judgment usually arises when the defendant in the proceedings was not served with the claim and was unaware of the proceedings. No such issue arises in this case as Flat Point was served with the claim form and entered an acknowledgement of service. Flat Point took no further part in the proceedings even though it would have been aware from the terms of the acknowledgement of service that it was required to file a defence within 28 days of service of the claim. There is no evidence in Manx law that the intended defendant must be notified of the default judgment after it has been obtained from the foreign court. The law requires that the defendant be notified of the claim in the foreign court, as was done in this case. Flat Point was given ample opportunity to respond to the claim in the Isle of Man court.

7. On a summary judgment application, the judge or master must not conduct a mini-trial and make findings of fact on important issues which must be resolved before judgment can be given. However, this does not mean that a master, hearing a summary judgment application, should adopt a sterile approach. He or she should examine the pleadings and the evidence critically to see if when properly assessed they disclose a reasonable prospect of succeeding on or defending the claim. Service of the default judgment on Flat Point was not an essential or important part of the claim against Flat Point. What was important was that there was a foreign judgment of which Flat Point was aware and participated. In the circumstances, the learned master's finding that Flat Point was served with notice of the default judgment when this issue was disputed does not affect the integrity of his overall finding that Flat Point does not have a reasonable prospect of succeeding on its defence. Thus, there is no basis for this Court to interfere with the exercise of the master's discretion.

**Saint Lucia Motor & General Insurance Company Ltd v Peterson Modeste** SLUHCVAP2009/0008 (delivered 11th January 2010, unreported) followed;

**Doncaster pharmaceuticals group Limited and others v Bolton pharmaceutical Co 100 Ltd** [2006] EWCA Civ 661 applied.

## JUDGMENT

### Introduction

[1] **BLENMAN JA**: This interlocutory appeal has as its focus in cross border litigation. It is an appeal against the ruling of the learned master in which he granted summary judgment against Flat Point Development Limited ("Flat Point") in favour of Canisby Limited ("Canisby") in circumstances in which Canisby sued Flat Point, at common law, based on a default judgment it had obtained in the Isle of Man against Flat Point. Flat Point resisted Canisby's efforts to enforce the judgment on a number of grounds. However, the learned master granted summary judgment based on the default judgment to Canisby. Flat Point has appealed against the learned master's ruling and Canisby resists the appeal.

[2] I will now briefly examine the factual background.[1]

### Background

[3] Canisby is a company incorporated under the laws of the Isle of Man and registered in the Isle of Man. Flat Point is a company incorporated in Antigua and Barbuda and registered under the laws of Antigua and Barbuda.

[4] Canisby loaned Flat Point money, which was based on an agreement that was executed and which memorialized the terms and conditions upon which the money was lent. It is alleged that Flat Point agreed to repay, on demand, the sum of money that Canisby had loaned to it. It is further averred that Canisby gave notice to Flat Point that upon expiration of five working days it will demand repayment of the loan. It is also averred that Canisby made a further demand for the immediate repayment of the loan together with interest. Prior to this, Flat Point is said to have been informed by way of letter, that the loan amount was due. It is averred that despite demands for repayment, Flat Point failed to repay the loan whereupon

[1] Most of the facts are extracted from the pleadings and the affidavits.

Canisby filed a claim in the Isle of Man pursuant to clause 14 of the agreement. It is further alleged that Flat Point filed an acknowledgment of service but failed to provide an address for service in the Isle of Man. Canisby then filed an application for the acknowledgment of service to be set aside and that judgment in default be entered against Flat Point. Canisby asserts that it advised Flat Point by way of letter that it was seeking to have the acknowledgment of service struck out since Flat Point did not provide an address for service in the Isle of Man and that it was applying for judgment in default in the same letter. In addition, Canisby contends that in the letter to Flat Point, it enclosed a copy of the application to strike out the acknowledgment of service and to set aside the default judgment.

[5] Subsequently, Canisby filed a claim in the High Court of Antigua and Barbuda seeking to enforce, at common law, the default judgment against Flat Point. In the court of first instance, Canisby sought several reliefs including:

(a) Damages in the sum of US$1, 150,000.00
(b) Court fees of £765.00; and
(c) Interest pursuant to section 27 of the **Eastern Caribbean Supreme Court Act**.[2]

[6] In response to the Canisby's claim, Flat Point filed an acknowledgment of service followed by a Defence in the High Court of Antigua and Barbuda in which it took issue with the jurisdiction of the Isle of Man court to hear the claim. It also contested whether the judgment was lawfully obtained, final and conclusive and raised the issue of breach of natural justice.

**Summary Judgment**

[7] Thereafter, Canisby filed an application in which it sought summary judgment on its enforcement claim. The summary judgment application was opposed by Flat Point on a number of grounds. However, Canisby asserted that the agreement provided for the non-exclusive jurisdiction in the Isle of Man court and therefore that court had jurisdiction to entertain the claim and give judgment in default.

[2] Cap.143, Laws of Antigua and Barbuda Revised Edition 1992.

[8] In its defence, Flat Point complains that it was never notified that Canisby was applying to have the acknowledgment of service struck out or that Canisby was applying for default judgment against it. Flat Point maintains that it never received the letter that Canisby says that it had sent, in which it was stated that Canisby was applying to have the acknowledgment of service struck out and the default judgment set aside and which contained the actual application.

[9] Flat Point asserts that the Isle of Man High Court struck out its acknowledgment of service unbeknownst to it and entered default judgment against it also without its knowledge. Also, Flat Point is adamant that it was not served with the default judgment after it was obtained and therefore had no opportunity to seek to set it aside or to appeal against the judgment. In fact, Flat Point complains that it never knew of the existence of the default judgment until Canisby brought its enforcement claim in Antigua and Barbuda, and this was many years after the default judgment had apparently been obtained. Flat Point therefore maintains that it could not take steps to have the default judgment set aside. More critically, it opposes the enforcement of the default judgment.

[10] In the court below, on the summary judgment application, Flat Point also asserted that it had not submitted to the jurisdiction of Isle of Man court in the circumstances which obtained, namely that it had filed an acknowledgment of service which was struck out without any notice and thereafter default judgment was entered. It also argued that the default judgment in the Isle of Man was not lawfully obtained neither was it final and conclusive.

[11] Importantly, Flat Point maintained that the default judgment was obtained in breach of natural justice since it was unaware that Canisby had applied for the default judgment or that it had applied to strike out the acknowledgment of service, and that it had no notice of default judgment having been obtained. It said that the default judgment should not be enforced in Antigua and Barbuda.

[12] Canisby appeared to have vigorously pursued summary judgment on its claim on the ground that Flat Point had no real prospect of successfully defending the

claim. Quite interestingly, in the face of critical factual disputes, Canisby also asserted in the application for summary judgment that, 'all of the substantial facts that are relevant to the case are undisputed or there are no reasonable prospects of successfully disputing them.' Flat Point strenuously opposed the summary judgment application on a number of grounds as indicated above. The learned master gave a two page ruling in which he granted summary judgment to Canisby.

[13] It is noteworthy that the learned master made the ruling merely by examining the pleadings and documents, in circumstances in which there were serious factual disputes as to what had transpired in the Isle of Man proceedings in which Canisby obtained the default judgment. I propose now to reflect the learned master's ruling since this lies at the heart of this appeal.

**The Ruling Below**

[14] The learned master stated:

> "In respect of jurisdiction it is clear that the parties have by agreement chosen a jurisdiction to which they would submit themselves. Notwithstanding the fact that this was a non-exclusive agreement, there is nothing to suggest that Flat Point objected to this choice of forum. [Flat Point] indicates that its acknowledgment of service was struck out by Manx court and as such there was no submission to that court. This submission does not aid [Flat Point]. The filing of the acknowledgment itself indicates, at the very least, that [Flat Point] was aware of the Manx proceedings and sought to engage itself therein. There is no evidence that [Flat Point] took any steps in the Manx court proceedings once its acknowledgment was removed. This posture was entirely its right. But [Flat Point] ought to be heard to say at this juncture that it did not submit itself to the jurisdiction of the Manx court because its acknowledgment of service was struck out. It could have appealed that decision or taken other steps to challenge the court's jurisdiction. Its inaction left it to face the consequence of having a default judgment entered against it.
>
> "In terms of whether the judgment was final and conclusive, the law is equally clear that a default judgment is sufficient for these purposes. Counsel for [Flat Point] asks the court to consider what he terms procedural irregularities both in [the] obtaining of the said judgment and the lack of service thereof. The court cannot see how this posture can assist can assist [Flat Point]. [Flat Point] was served with notice of the default judgment, albeit, quite some time after it was obtained. Once it became aware of the same, it was entirely within its power to apply to

have it set aside. No such steps were taken. This court is confronted with a final and conclusive order. The court is cognizant of the authorities that suggest that in some circumstances the local court may have regard to breaches of natural justice or other improprieties that may have an impact on whether or not it would consider the foreign judgment. The court is convinced that this is not one of those situations. These being the substantial disputations on this application, the same will be granted since it is apparent that Flat Point does not have a reasonable prospect of succeeding on the claim."

[15] The learned master ordered that:

> "1. The application for summary judgment is granted. The applicant is awarded a summary judgment on the terms as prayed in paragraphs 1 to 3 of the relief set out on the claim form which judgment will attract interest at the statutory rate of 5% per annum from today's date.
>
> "2. The applicant is granted costs of $650.00 on the present application."

[16] It is readily apparent that the learned master felt able to make factual findings, in the face of the very important defences relied on by Flat Point namely, that the default judgment was in breach of natural justice and that it was obtained in violation of public policy, without there being a trial on the issues that were joined. The learned master did so by simply perusing the pleadings and the other documents, even though Flat Point maintained that it was neither served with nor notified of the application to set aside the acknowledgment of service or to apply for the default judgment. Flat Point was adamant that it was never notified of the default judgment.

[17] In this appeal, Flat Point took issue with the learned master's ruling and has filed a number of grounds of appeal –

(a) The learned master erred in finding that Flat Point does not have a reasonable prospect of succeeding on the defence.

(b) The learned master erred in law by failing to examine the merits of Flat Point's defence.

(c) The learned master erred in finding that Flat Point submitted itself to the jurisdiction of the Court of the Isle of Man by virtue of the contractual provision only; and

(d) The learned master erred in law in considering issues raised in the submissions of the parties rather than the grounds of Canisby's application or the affidavit of support.

**Issues on Appeal**

[18] The issues that I have distilled from the grounds of appeal are as follows:

1. Whether it was open to the learned master to grant summary judgment on the claim in the circumstances which obtained or whether the learned master erred in finding that Flat Point's defence does not have a reasonable prospect of success where Flat Point:
   (a) Asserted the defence of lack of jurisdiction which was pleaded and relied upon.

   (b) Asserted that it was not served with notice of application to strike out the acknowledgment of service and for default judgment.

   (c) Flat Point asserted in its defence that the Isle of Man judgment was not final and conclusive.

   (d) Flat Point contended that there was no personal service of the default judgment on Flat Point and there was a breach of natural justice.

   (e) Flat Point asserted that the default judgment was obtained in breach of public policy of Antigua and Barbuda.

   (f) Whether the learned master erred and engaged in a fact finding exercise which is the reserve of the substantial trial – in effect improperly conducted a mini trial by perusing the

pleadings.

**Appellant's Submissions**

[19] Learned counsel Mr. Walwyn submitted that the master erred in giving summary judgment, based on the default judgment, in breach of the clear rules that attend to summary judgment applications and which have been consistently applied by this Court. Mr. Walwyn was adamant that the claim below, was totally unsuitable for disposition on a summary judgment application.

[20] Learned counsel Mr. Walwyn reminded this Court that before summary judgment could be granted, it must be established that there is no real prospect of successfully defending the claim. He submitted that it was impossible for the learned master to properly conclude that Flat Point had no real prospect of defending Canisby's claim based on the clear pleadings by Flat Point in its defence. He said that in its defence, Flat Point raised several triable issues. In support of his argument Mr. Walwyn referred this Court to **Buzzmaker LLC v Lindsay Fitz-Patrick Grant**.[3] He also referred to the well-known case of **Swain v Hillman**[4] and the salutary pronouncements of Lord Wolf, MR, where he said that the summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. Mr. Walwyn said that those critical defences such as breach of natural justice that were relied upon by Flat Point could only have been properly resolved at a hearing of the substantial trial and that it was impossible to resolve the serious factual conflicts based on the reading of the pleadings and other documents. Mr. Walwyn advocated that unless the learned master could have properly come to the conclusion that Flat Point's defence was fanciful then, and only then could he have lawfully granted the summary judgment. Mr. Walwyn argued that this was no way near an application which summary judgment was appropriate. Learned counsel Mr. Walwyn posited that Flat Point had strong defences to Canisby's claim, at common law, and they warranted a trial on their

[3] SKBHCV2015/0280 (delivered 12th September 2016, Unreported).
[4] [2001] All ER 91.

merits.

[21] Learned counsel Mr. Walwyn emphasised that the master's only task based on the summary judgment application was to have determined whether Flat Point's defence raised triable issues. Mr. Walwyn said given the very important issues that were joined namely, lack of jurisdiction in the foreign court, that the default judgment was not final and conclusive, coupled with the clear allegations of breach of natural justice and the assertion that the Isle of Man default judgment offended public policy of Antigua and Barbuda, there was absolutely no basis upon which the learned master could have properly granted Canisby summary judgment on the pleadings simply by reading the relevant documents.

[22] Mr. Walwyn said that once Flat Point maintained that it was unaware that Canisby was applying for default judgment and for its acknowledgment to be set aside, the default judgment was justice obtained in breach of natural justice. Also, learned counsel Mr. Walwyn complained about the fact that the learned master sought to resolve critical factual issues that were joined between the parties by merely examining the pleadings and exhibits. He said that it should be uncontroversial that that approach was fatally flawed. Mr. Walwyn submitted that if there ever was a case that warranted a full trial and not summary disposal, the case below was such a case. Mr. Walwyn underscored his argument above by highlighting to this Court that the learned master made impermissible findings of fact based on the pleadings. He said that the master ought properly to have allowed the case to proceed to trial and so enable Flat Point to deploy its full defence and in so doing lead evidence and cross examine Canisby's witnesses before any findings of fact could have been made in circumstances where there were serious factual disputations. He said that it was impossible for the master to determine whether the letter that Canisby alleges that it sent to Flat Point informing of the application to the Isle of Man Court to set aside the acknowledgment of service and for default judgment was received by Flat Point by simply looking at the letter.

[23] As a separate and distinct matter from the above defences that have been relied

upon, Mr. Walwyn submitted that in the circumstances which obtained in which both parties have referred to foreign law, this would in effect give rise to an issue of fact, and the proof of those facts would require both sides to lead evidence through expert witnesses who may need to be cross examined in order to determine the correctness or otherwise of their respective opinions. In addition, Mr. Walwyn also criticised the correctness of the learned master's treatment of the issue of jurisdiction in the limited sense of the court having jurisdiction to hear a matter with the question of jurisdiction in the private international law sense such as whether there was jurisdiction in the Isle of Man court to hear the matter.

[24] Finally, Mr. Walwyn asserted that the learned master exercised his discretion improperly. He maintained that the learned master's approach to summary judgment was unorthodox and contrary to the approach that has been consistently taken by this Court in relation to summary judgments. The main thrust of his argument was that the learned master got it totally wrong in granting summary judgment in the circumstances that obtained and therefore this Court should allow Flat Point's appeal and set aside the learned master's ruling and remit the case to the High Court for trial on its merits.

**Respondent's Submissions**

[25] Learned Senior Counsel Mr. Astaphan's main argument was that the foreign default judgment was properly obtained. He pointed this Court to a letter which he says was written to Flat Point by Canisby and which indicated that Canisby had applied to the Isle of Man Court to set aside Flat Point's acknowledgment of service and for judgment in default. He said that it was open to the learned master to examine the pleadings and the affidavits that were placed before him together with the letter and to arrive at the conclusion he did. Quite interestingly, Mr. Astaphan, SC said that even though Flat Point has denied that it had received Canisby's letter, it was open to the master to find that indeed Flat Point did receive the letter which stated that Canisby had filed the application to set aside the acknowledgment of service and to obtain default judgment. He said that there was no need for a full trial in order to determine the correctness of each side's position.

Learned Senior Counsel Mr. Astaphan maintained that the judgment from the Isle of Man is valid. He further posited that a judgment of a court is valid unless set aside, in accordance with the applicable law. In fact, the gravamen of his position was that the finality of the judgment was sufficient to bring an end to the matter and that the master was correct to grant summary judgment to Canisby on the default judgment.

[26] Also, learned Senior Counsel Mr. Astaphan, took issue with Flat Point's contention that it had not submitted to the jurisdiction of the Isle of Man court. He said that there is evidence that it had filed an acknowledgment of service to Canisby's claim in the Isle of Man. He reiterated that Flat Point was sent a letter by Canisby informing of the application to strike out the acknowledgment of service and seek default judgment but chose to take no further part in the proceedings.

[27] Mr. Astaphan, SC said that the learned master had sufficient evidence that allowed him to arrive at the conclusion that Flat Point was aware of the default judgment as a consequence of the letter that was allegedly written to Flat Point. Mr. Astaphan, SC said that there was no basis upon which the default judgment could be properly impugned even though Flat Point has led the affidavit evidence to support its position that it was never notified of the application for the default judgment or to set aside its acknowledgment of service nor the fact that the default judgment had been obtained. To buttress this, in its affidavit in opposition to the summary judgment application, Flat Point maintained that it was unaware of the default judgment until the enforcement proceedings in the High Court of Antigua and Barbuda.

[28] Further, Mr. Astaphan, SC argued that if Flat Point wanted to take the issues that it did before the learned master, it should have adduced evidence of foreign law in opposition to the summary judgment application. He said that Flat Point failed to do so and this was fatal to its opposition. He purported to rely on **Ronald Green and Peter Saint Jean v Roosevelt Skerrit et al**[5] in support of this proposition.

[5] DOMHCVAP2012/0001 (delivered 11th March 2013, unreported).

[29] Learned Senior Counsel Mr. Astaphan, acknowledged that Flat Point had placed evidence before the learned master in which it disputed that the default judgment had been properly entered in the Isle of Man and maintained that it had not submitted to the jurisdiction of the Isle of Man court. However, Mr. Astaphan, SC posited that there was a distinction to be made where a claimant seeks to enforce a foreign judgment. Mr. Astaphan, SC stated that where a claimant seeks to sue at common law based on a foreign judgment, the issues that arise for consideration are very different in relation to the two distinct circumstances.

[30] Mr. Astaphan, SC submitted that in view of the fact that article 14 of the agreement provided non-exclusive jurisdiction to the Isle of Man, Flat Point cannot properly complain about lack of jurisdiction. Mr. Astaphan, SC further argued that even though in the summary judgment application Flat Point specifically complained that it only became aware of the default judgment that was obtained in the Isle of Man during the summary judgment application, and therefore had no opportunity to set aside default judgment that was entered against Flat Point, it was open to the master to enforce it since Flat Point had notice by way of letter from Canisby of the application to strike out the acknowledgment of claim and to obtain default judgment. He pointed this Court to the letter which he said was sent to Flat Point's representative. Mr. Astaphan, SC reiterated his contention that despite Flat Point's demurer, to the contrary it was open to the learned master to resolve these matters in the manner that he did namely by simply perusing the documents. He therefore urged this Court to dismiss Flat Point's appeal and affirm the learned master's ruling.

**Discussion**

[31] In private international law, it is settled law that someone who obtains a foreign judgment has recourse to two methods in an effort to gain the fruits of the judgment locally.[6] Indeed, that person can either seek to have the judgment

[6] See Chapter 14 of Dicey and Morris on Conflict of Laws Fourteenth Edition for a comprehensive exposition on foreign judgments. The common law of England is the same as the common law of the Eastern Caribbean.

enforced locally once there is a statutory scheme in existence which provides for this or failing which it can sue at common law on the judgment. It is noteworthy however, that even the absence of an international agreement or corresponding incorporating legislation, in specific circumstances, common law countries have permitted the recognition and enforcement of foreign judgments provided that certain conditions are satisfied.

[32] At paragraph 10-001 - 10.004 of **Caribbean Private International Law**,[7] Justice Winston Anderson provides a full and enlightening exposition on the recognition and enforcement of foreign judgments at statute as distinct from the enforcement of a foreign judgment at common law. He states that at common law, enforcement of a foreign judgment required a fresh action under which the foreign judgment creditor sued on the obligation. This is exactly what Canisby did by instituting its claim in the High Court of Antigua and Barbuda.

[33] In the case at bar, it is common ground that Canisby sued Flat Point, at common law on its default judgment. It was in this context that Flat Point took several serious issues of law in defence to the enforcement of the default judgment Canisby had obtained and the summary judgment application. It is important to look at the defence of Flat Point in relation to the claim and then to address the issues that have been distilled above. It is settled law that the defences such as breach of natural justice and contrary to the local forum's public policy have absolutely nothing to do with proof of foreign law. They arise to be determined in private international law, by reference to the lex fori that is the law of the forum in which the claim is pending - in this case the laws of Antigua and Barbuda. The question of enforcement of a foreign judgment gives rise to the local court seeking to determine whether in the face of the defences that have been raised in opposition to the enforcement, the local court – namely Antigua and Barbuda court should enforce the foreign judgment. Enforcement of foreign judgments fall to be examined in accordance with the standards of justice and public policy of the lex fori – the local forum which is the laws of Antigua and Barbuda.

[7] Winston Anderson: Caribbean Private International Law (2nd edn., Sweet & Maxwell 2014) 236.

[34] I propose now to review the main issues that Flat Point has taken with the enforcement of the default judgment with a view to determining whether or not the learned master erred in granting summary judgment on the default judgment in circumstances where the foreign default judgment obtained was being impugned. In so doing, I accept the very helpful guidance provided by learned Justice Anderson where he reminds us that the fresh action is governed by the ordinary rules of civil procedure. In this case, the **Civil Procedure Rules 2000** as amended ("CPR"). It is trite law that summary judgment can be obtained based on a default judgment.

[35] Indeed, the learned Justice Anderson also acknowledges that summary judgment could be obtained on the ground that the defendant has no reasonable prospect of defending the claim, or that the claimant has no reasonable prospect of succeeding on the claim. The learned author reminds us that in order for the claimant to be able to sue on the foreign judgment it had to establish that the foreign court had jurisdiction over the parties, that the judgment had been final and conclusive and that the judgment had been for a fixed sum. Jurisdiction is a live issue in the case at bar. Also, Flat Point takes issue with the finality and conclusiveness of the default judgment. I will treat with these matters in detail shortly.

[36] Yet again, the learned Justice Anderson provides us with some very helpful pronouncements at paragraph 10 – 004 of his textbook 'that with the establishment of these three elements the claimant became entitled, prima facie, to have the judgment enforced, **but the defendant could then negate such enforcement by producing evidence relating to one or more of the accepted defences**'. (Emphasis mine).

[37] Turning again to the case below, in its defence, Flat Point, as indicated earlier, has asserted that the default judgment was not final and conclusive since it was unaware of its existence until Canisby's claim in the High Court of Antigua and

Barbuda and therefore Flat Point complains that it was unable to seek to have the default judgment which, it says was improperly obtained, set aside or at least appeal against it. In my view, it was not open to the learned master to seek to determine whether that averment was correct in the summary judgment application. Insofar as this is a matter that goes to the root of the default judgment it could only have been properly determined after a full trial. It was improper for the learned master to have embarked on a mini trial and to make findings of facts on the pleadings and documents. The finality and conclusive nature of the judgment is by no means a straight forward matter and it should only be determined at a trial of that issue, except in the clearest of cases. This is not a clear case.

[38] Learned Jutsice Anderson explores the practice of private international law as it relates to the Commonwealth Caribbean in his textbook and provides an incisive discussion on the issues of finality and conclusiveness. Justice Anderson enunciates that in order for a foreign judgment to be enforced it must be final and conclusive in the sense that the parties must be able to identify the extent of their rights and obligations under it. He states that if a judgment is subject to a further investigation by the court giving it, before a final decision is made, then the earlier judgment cannot be enforced. The learned author cites the well-known case of **Nouvion v Freeman**[8] as authority for this proposition.

[39] In the case at bar, the learned master, on the summary judgment application, determined that the default judgment was final and conclusive. In view of the very enlightening exposition of the law by the learned Justice Anderson the issue of the finality and conclusiveness of the default judgment needed full ventilation on the merit of the arguments. There were serious contentions made by Flat Point, and if proven to be correct in relation to the default judgment, could potentially undermine the finality and conclusiveness of the default judgment. This is definitely not the sort of defence that could have been properly determined by an examination of the pleadings and opposing affidavits which contained conflicting

[8] [1889] 15 App Cas 1.

evidence.

[40] It must be remembered that, Flat Point asserts that had it known of the default judgment it would have applied to the Isle of Man court to set it aside. It maintains that it only became aware of the default judgment that was granted against it during the hearing of the claim in the High Court of Antigua and Barbuda where Canisby was seeking enforcement of the default judgment and this was many years after it had been obtained. This is a defence which if proven to be true at a trial can be viable and for this reason alone there ought to have been a full ventilation of the issues.

[41] The learned Justice Anderson cautions that "as a matter of prudence the common law enforcement proceedings are likely to be stayed pending the disposal of the foreign appeal, in relation to default judgment." This much is settled law and does not admit of any contradiction.

[42] There is no doubt, therefore that the law on enforcement of foreign default judgments indicates that care should be taken in the local court where such a defence is raised. More critically, the issues that were raised by Flat Point warranted a full ventilation in order for the court to be able to properly determine whether the default judgment was final and conclusive. It is necessary however for me to address this matter in greater detail in the context of the summary judgment and I will do so when I address the pertinent principles of natural justice and public policy, which in this case are interrelated to the issues of finality and conclusivity.

[43] Yet again, Justice Anderson very significantly reminds us that '[c]aribbean law is replete with examples of litigation on the point whether a foreign judgment may be properly regarded as final and conclusive' The learned author said that most problematic has been the foreign judgment given in default of appearance or issuance of a defence. In support of this proposition the learned author relied on

**Triangle Refineries Inc. v Carle**[9] in which the Supreme Court of the Bahamas held that a Texas judgment obtained by default, was not a judgment obtained on the merits and therefore did not meet the requirement of finality as stipulated by Bahaman law.

[44] The learned author, Justice Anderson indicated that:

> "This approach ignored a line of authority going back over 150 years and was itself rejected in *Raffle America Inc. v Kingsboro International Holding Co. Ltd* which held reasserting traditional law, that it was immaterial that a New York judgment was a default judgment. Similarly in *Menendez v Sawyer III* it was agreed that a judgment was not final and conclusive if the Court who pronounced it had power to rescind or vary it."[10]

What the above discussion indicates is that contrary to the learned master's postulation, the law Is far from clear, and there are divergent views.

[45] Applying those principles enunciated above, to the case at bar at the very least, I have no doubt that the issues on the finality and conclusive nature that Flat Point has raised in relation to the default judgment are real and in depth issues and required a full ventilation at trial. I have no doubt that they could not have been resolved "on paper" by way of an examination of pleadings and documents. The learned master clearly erred in the approach he adopted – resolving factual disputes by merely examining documents. This approach is incongruous with the approach that has been approved by our Court of Appeal in numerous cases; some of which will be highlighted shortly. I turn now to the defence of lack of jurisdiction.

**Jurisdiction**

[46] It is the law that a foreign court has jurisdiction in the private international law sense if the defendant voluntarily submits to its jurisdiction. Submissions cover a multitude of activities. It is settled law that a foreign court has jurisdiction over a defendant who had previously contracted to submit to the jurisdiction. Clause 14 of the agreement is relevant to this issue.

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[9] Unreported September 22,1988 SC Bahamas 1045/1988.
[10] At para. 10-012.

[47] There is no dispute about the relevant term of the agreement. Indeed, to the contrary it is common ground that in the case at bar, clause 14 of the agreement provides non-exclusive jurisdiction to the Isle of Man. It is clear therefore that Flat Point agreed to submit to the jurisdiction and therefore the Isle of Man had jurisdiction in the private international law sense to hear and determine the claim that was brought there. On this issue, I find the argument that was advanced by learned Senior Counsel, Mr. Astaphan very attractive and persuasive and therefore accept them in preference to that of Mr. Walwyn. I am fortified in my view by the pronouncements by the learned Justice Anderson in his treatise **Caribbean Private International law** at paragraph 10 – 010 in which he stated that "a foreign court will have jurisdiction over a defendant who had previously contracted to submit to that jurisdiction" and in support of his proposition the learned judge referred to the case of **Raffle America Inc. v Kingsboro International Holding Co. Ltd and Another**.[11] The case concerned a contract between the parties in which there was a term of the agreement that all disputes should be submitted to the jurisdiction of the Supreme Court of New York for determination. Expressly adopting the ratio of **Emmanuel v Symon**,[12] the High Court of Barbados held that the New York judgment was enforceable since the defendant had expressly contracted to submit to that forum.

[48] By way of emphasis based on the non-exclusive jurisdiction clause in the agreement Flat Point has submitted to the jurisdiction of the Isle of Man Court and cannot properly contend otherwise. Accordingly, the learned master cannot be properly criticised for concluding that Flat Point had submitted to the jurisdiction of the Isle of Man. The fact that the acknowledgement of service was struck out cannot assist Flat Point on the issue of the jurisdiction of the Isle of Man court to hear the claim, since absolutely nothing would turn on that in relation to the issue of whether or not the Isle of Man court had jurisdiction in the private international law sense to entertain the claim. On this issue, the learned master did not err and

[11] (1993) 52 WIR 37.
[12] [1908] 1 KB 327.

it was unfair to cirticise him on this basis. I now turn to the defence of breach of natural justice.

**Natural Justice**

[49] I come now to one of Flat Point's main defence namely breach of natural justice. It has long been established that trial courts will not recognise or enforce a foreign judgment that was obtained in breach natural justice as determined by the local forum - the notion of fairness and natural justice by which the foreign judgment is assessed is that of the local jurisdiction's standard. Here again, this defence does not engage any proof of foreign law. The lynchpin of Flat Point's submission is that it did not receive the letter which indicated that an application had been made to set aside its acknowledgment of service and to apply for default judgment neither did it receive the application itself and therefore the default judgment was obtained against it in breach of natural justice and it is therefore unenforceable in Antigua and Barbuda.

[50] The learned Justice Winston Anderson expounds the applicable principle at paragraph 10 – 027 which he states that 'a foreign judgment may be impeached in an action for recognition or enforcement if it was obtained in proceedings that violated the principles of natural justice … The parties must have had due notice of the allegations and a proper opportunity to have been heard.' The learned Justice Anderson very helpfully referred to **Langer v International Transport and Earthmoving**[13] as authority for this proposition. In that case, the plaintiffs asked a Bermuda court to exercise its power under Order 14 to give summary judgment to enforce a default judgment obtained in Illinois. The Illinois judgment had been given in respect of an amended complaint. The original complaint had listed the first defendant and contained 63 paragraphs. The amendment sued three defendants and the allegations were described in 152 paragraphs. Yet the amended complaint was never served on the first defendant. The Bermuda courts held that the foreign award given in respect of this amended complaint breached the rules of natural justice because the defendant had never seen it and had never

[13] Unreported April 11, 1983 CA Bermuda 26/1982.

had the opportunity to answer it. Indeed, in order for the local court to be able to enforce a foreign judgment it must satisfy itself that the judgment was obtained in circumstances that do not infringe the local jurisdiction's standards of natural justice.

[51] In the case at bar, the defence of breach of natural justice remained alive in the summary judgment application. The master seemed to have decided that Flat Point was served with the application to set aside the acknowledgment of service and for the default judgment. It was wholly incongruous for the learned master to have concluded that "while Flat Point has complained of breaches of natural justice or other improprieties, the court is convinced that this is not one of those situations". In my view, the learned master could not have made a proper determination of that issue by a mere examination of the papers and the letter which stated that Canisby was applying for the acknowledgment of service to be set aside and for the default judgment in circumstances where Flat Point was adamant that it did not receive any letter from Canisby notifying it of the application to strike out its acknowledgment of service and to apply for default judgment. More importantly, Flat Point said that it did not receive the letter advising it that a default judgment had been obtained against it. Also, bearing in mind that the crux of Flat Point's complaint is that its acknowledgment of service had been struck out unbeknownst to it and it was unaware that Canisby was applying for default judgment and that the default judgment had thereafter been issued against it, I have no doubt that the issue of whether or not Flat Point was provided with the opportunity to be heard on the application to strike out the acknowledgement of service and to obtain the default judgment was a separate matter which required a proper investigation in which there is the testing of evidence in cross examination and re-examination.

[52] In my view, it was impermissible for the learned master to have concluded on a summary judgment application based on the pleadings that 'Flat Point had been served with notice of the default judgment, albeit, quite some time after it was decided. Once it became aware of the same, it was entirely within its power to

apply to have it set aside. No such steps were taken. This court is confronted with a final and conclusive order.' It is very interesting that the learned master felt able to make a determination that Flat Point was served with the default judgment on the mere examination of the papers in the face of highly conflicting evidence in the affidavits and clearly divergent positions in the pleadings. I have no doubt that this approach taken by the master in the exercise of his discretion, in my view, amounts to an error of law on the part of the learned master which can be assailed. The important question is whether Flat Point was given the opportunity to be heard on Canisby's application to set aside the acknowledgment of service and to obtain the default judgment. This could not be determined by examining documents. Also, it is irrelevant that the acknowledgment of service indicated that judgment can be entered if no defence is filed within 28 days.

**Public Policy**

[53] For the sake of completeness, I will now address the final issue on the appeal namely, breach of public policy. It is noteworthy that learned counsel Mr. Walwyn complained that the default judgment had been obtained in breach of the public policy of Antigua and Barbuda and therefore should not be enforced. The violation of public policy has always been recognised as an acceptable basis, at common law, not to enforce a foreign judgment. I do not propose to address this matter in great detail. Suffice to say that it is self-evident that this is a critical issue for enforcement.

[54] Justice Anderson in **Caribbean Private International Law** at paragraph 10 – 028 propounds that, '[n]o action can be sustained on a foreign judgment which is contrary to the forum's principles of public policy.' He referred to the recent Caribbean Court of Justice decision in **BCB Holdings Ltd and the Belize Bank Ltd v The Attorney General of Belize**.[14] There is no single example of public policy. It is for the court to determine whether in the factual circumstances the public policy has been breached. The case of **Loucks v Standard Oil of New**

[14] 2013 CCJ 5 (AJ).

**York**[15] provides for a helpful distillation of the principles of public policy and how it arises:

> "It is a principle of every civilized law that vested rights shall be protected. The plaintiff owns something, and we help him to get it. We do this unless some sound reason of public policy makes it unwise for us to lend our aid … If it is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare. The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonwealth."

[55] In my opinion, the raising of such critical and important defences namely, breach of natural justice and contrary to public policy have merit and required the full ventilation; it is only after a full and proper trial that any court can properly test the merits or demerits of the issues that have been joined between Flat Point and Canisby in relation to the enforcement of the default judgment.

[56] Based on what I have indicated above, it is evident that I am of the view that the objections that were taken by Flat Point in its defence to the enforcement of the default judgment warranted a full interrogation at the trial. Indeed, very shortly it will become apparent that there is much learning where this Court has steadfastly applied the principle that summary judgment is unsuitable for disposition of matters in which there are factual disputations or complex legal issues to be resolved, as has occurred in the case at bar.

**The Summary Judgment Below**

[57] I turn now to the summary judgment application with a view to ascertaining whether in view of the defences/issues above that have been raised and the extrapolation of the relevant principles from the cases, whether it was open to the learned master to grant summary judgment to Canisby.

[58] Part 15 of the CPR provides for summary judgment to be granted in appropriate

[15] 224 N.Y. 99.

cases where the claim or defence has no real prospect of success. I have already indicated that there are in depth triable issues to be dealt with and in relation to which there is conflicting evidence between Flat Point and Canisby. It is evident that I have foreshadowed my opinion as to the suitability of the summary judgment procedure to the claim below, however it is noteworthy that the principles that are applicable to the grant of summary judgment are well-known and need no repetition. Suffice it to say that summary judgment should not be granted unless it is clear that the defendant has no real prospect of successfully defending the claim. In this regard, I refer to the well-known cases of **Swain v Hillman**, **Three Rivers District Council and others v Bank of England (No 3)**,[16] **The Bank of Bermuda Ltd. v Pentium (BVI) Ltd et al**[17] and **SGL Holdings Inc. v Aiham Shammas**.[18]

[59] In my view, insofar as the law on summary judgment is settled and this Court has consistently applied the principles, there is no need to go into the details of the cases.[19] I would however treat with **SGL Holdings Ltd v Aiham Shamma** in some detail. In this case, George-Creque JA (as she then was) allowed the appeal and set aside the order for summary judgment made by the learned master and directed that the matter proceed to trial. Her Ladyship held that, the master, in deciding that the agreement was not to be construed as a whole and thus placing reliance on clause 7 only, fell into error since clearly having recognised, at least that clause 4 and 6 of agreement afforded substantive defences. George-Creque JA (as she then was) found that on this basis alone the master ought to have rejected the respondent's application for summary judgment. These pronouncements are very instructive and I apply them to the case at bar in relation

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[16] [2001] 2 All ER 513.
[17] BVIHCVAP2003/0014 (delivered 20th September 2004, unreported).
[18] GDAHCVAP2010/0002 (delivered 13th August 2010, unreported).
[19] See Comodo Holdings Limited v Renaissance Ventures Ltd. et al BVIHCMAP2014/0032 (delivered 3rd May 201, unreported); Bank of Bermuda Ltd v Pentium (BVI) Ltd BVIHCVAP2003/0014 (delivered 20th September 2004, unreported); Citco Global Custody N.V v Y2K Finance Inc BVIHCVAP2008/0022 (delivered 19th October 2009, unreported); St. Lucia Motors Ltd and General Insurance Co. v Peterson Modeste SLUHCVAP2009/0008 (delivered 11th January 2010, unreported); SGL Holdings v Aiham Shammas GDAHCVAP2010/0002 (delivered 13th August 2010, unreported) ;Alfa Telecom Turkey Ltd. v Cukurova Finance International Limited et al BVIHCVAP2009/0001 (delivered 16th September 2009, unreported).

to the defences that have been raised in opposition to the summary judgment application.

[60] In a word, the principle that can be extrapolated from the cases decided by this Court is that where there are real triable issues, they need to be fully ventilated at trial and cannot be properly determined on a summary judgment. Applying that principle to the case at bar, it is plain the learned master could not have properly concluded, on the pleadings and documents, that Flat Point's defence in breach of natural justice to Canisby's claim in the High Court was fanciful. There is clearly a dispute as to whether Canisby notified Flat Point of his application to set strike out the acknowledgment of service and to obtain default judgment. This brings rise to the issues of breach of natural justice according to the standards that are recognised in Antigua and Barbuda and breach of public policy of Antigua and Barbuda. Also, the issue of whether or not Canisby did notify Flat Point of the default judgment remains at large and it was impossible to properly determine that issue on the pleadings as the learned master purported to do. It is imperative that the issue of whether or not Flat Point received the letter which indicated that the application was being made in the Isle of Man coupled with the application to strike out the acknowledgment of service as Canisby contends be resolved. In the present case, complex issues have been raised which involve both and questions of fact and law. This Court has already held in **Comodo Holdings Limited v Renaissance Ventures Limited et al**[20] that these types of claims are unsuitable for resolution by the summary judgment procedure. There is no reason to depart from that ruling now. In seeking to reinforce this point is the allied consideration that on a summary judgment application it is not open to the judicial officer to conduct a mini-trial or to resolve issues which ought to be fully ventilated at a trial. In this regard the warnings of Gordon JA in **Alfa Telecom Turkey Limited v Cukurova Finance International Limited et al**[21] must be heeded. I reiterate that the learned master made impermissible findings of fact on the summary judgment application on the critical issue of whether or not Flat Point was served with the

[20] BVIHCMAP2014/0032 (delivered 3rd May 201, unreported).
[21] BVIHCVAP2009/0001 (delivered 16th September 2009, unreported).

notice of application for the default judgment and to strike out the acknowledgment of service and critically whether it was served with the default judgment, contrary to their protestations. Learned counsel Mr. Walwyn's complaints are well founded and are sufficient to undermine the learned master's ruling. Taking into account the factual disputations between the parties, it simply was not open to the learned master to resolve those on a summary judgment application.

[61] I am of the view the learned master erred in exercising his discretion and granting summary judgment in circumstances where there was conflicting evidence, this much is settled law. I buttress my view above by the decision of this Court in **Alfa Telecom** in which the judgment of the Court was delivered by Gordon JA who held, that: (1) in granting or refusing an application for summary judgment the court must consider whether the applicant or respondent has a real prospect of succeeding on the claim or issue as required by Part 15 of the **Civil Procedure Rules 2000**; (2) the decision on a summary judgment application does not involve the judge conducting a mini trial. By the very nature of the proceedings, the testing of evidence is not an option and (3) there are many conflicting facts and in depth issues to be dealt with in the matter and the summary judgment procedure is inappropriate.

[62] I am guided by those very helpful enunciations by Gordon, JA in **Alfa Telecom** and I can do no more than apply them to the case at bar. Accordingly, I reiterate that Flat Point, on its pleadings, has raised several fundamental legal issues such as breach of natural justice and breach of public policy in its defence to Canisby's claim which if proven to be correct can undermine Canisby's enforcement of the default judgment that it obtained. There is therefore much force in the argument that the learned master ought to have allowed the claim to proceed to trial and erred in granting Canisby summary judgment. I therefore accept the arguments that were advanced by the learned counsel Mr. Walwyn. Here was a case of one person's word against the other, it is simply impossible to look at the documents and determine where the truth lies; that is whether or not Flat Point was notified about the application to strike out the application for the default judgment and

more critically about the default judgment by way of letter.

[63] Unlike the master, I am definitely not of the view that the summary judgment procedure was appropriate. In **Comodo Holdings Ltd. v Renassance**, this Court held CPR15.2 provides that summary judgment is appropriate when the claim or defence has no real prospect of success. A claim or defence may be fanciful where it is entirely without substance or where it is clear beyond question that the statement of case is contradicted by all documents or other materials on which it is based. In that case, the Court held that Comodo's defence was neither frivolous nor fanciful. In the case at bar, the defences that Flat Point deployed are fact sensitive and in order to be able to properly make a factual determination in the face of conflicting evidence, at the minimum, it required a full trial with the testing of the evidence in order to determine issues of credibility and reliability of the witnesses.

[64] It is also of significance that in its claim, Canisby alleged that it sent Flat Point letters informing them about the application to strike out the acknowledgment of service and to apply for the default judgment. It also alleged in its pleadings that by letter it informed Flat Point of the default judgment. In its defence, Flat Point denied that it ever received either of the two letters. This factual dispute raises in a very central way Flat Point's defence of breach of natural justice and its assertion that the default judgment should not have been enforced more so by way of summary judgment. In my view, it is impossible to resolve those factual disputes by simply perusing documents. The admonitions of Gordon JA in **Alfa Telecom** on the misuse of the summary judgment procedure and the prohibition against conducting a mini trial, which is exactly what the learned master did is instructive on this point.

[65] In a very short affidavit deposed to by Mr. Michael Barry in support of the summary judgment application at paragraph 11, Mr. Barry states that by letter he informed the defendant of the application to set aside the acknowledgment of service and to seek judgment in default. At paragraph 12, Mr. Barry stated that the High Court of

Justice of Isle of Man entered judgment against the respondent/defendant. However, nowhere in the affidavit does Mr. Barry state that either the default judgment was brought to Flat Point's attention or was served on Flat Point. For its part, Mr. Claudio Marieschi deposed to an affidavit on behalf of Flat Point, in opposition to the summary judgment application that, the Isle of Man court set aside its acknowledgment of service without notice of such application or entry of default judgment coming to the attention of the defendant company. Also, at paragraph 14 of the affidavit, Mr. Marieschi stated that the defendant company has only now had notice of the judgment of the Isle of Man court in these proceedings and any opportunity to appeal or to get such judgment set aside is now wasted as more than five years have elapsed. In view of the major factual disputes, it is entirely unclear upon what basis the learned master could have arrived at the conclusion that the "Respondent/Defendant was served with the default judgment albeit late".

[66] The above situation underscores the inappropriateness and dangers of a judicial officer conducting a mini trial in a summary judgment application and impermissibly arriving at findings of fact. This much Gordon JA said in **Alfa Telecom** should never occur. I agree with him entirely.

[67] I reiterate that the learned master exercised his discretion improperly in granting Canisby summary judgment in circumstances where the defences as set out by Flat Point had more than a fanciful prospect of succeeding. I would therefore set aside the learned master's ruling. This is dispositive of the appeal. It would serve no useful purpose in this Court seeking to exercise its discretion afresh since we would be in no better position than the master in resolving the critical factual issues for example of whether Fat Point was served with the notice to strike out the acknowledgment of service and to obtain default judgment.

[68] Also, since the gravamen of Flat Point's claim is based on the defences to the enforcement of the foreign default judgment it is unnecessary to engage with the arguments on the matter of proof of foreign law since the above conclusion is

dispositive of this appeal and in any event the defences to a claim for the enforcement of a foreign judgment, in private international law, are to be assessed in accordance with the laws of Antigua and Barbuda.

[69] I would therefore allow the appeal and remit the enforcement claim to the High Court for trial.

[70] Flat Point has prevailed in this appeal and is therefore entitled to two thirds of the costs of $650.00 that were awarded in the court below.

**Conclusion**

[71] In view of the foregoing, Flat Point Development Limited's appeal against the ruling of the learned master dated 2nd March 2016 is allowed.

(1) The summary judgment and costs that were granted to Canisby are set aside.

(2) The substantive enforcement claim is remitted to the High Court to be determined in accordance with the **Civil Procedure Rules 2000**.

(3) Flat Point Development Limited shall have costs on this appeal against Canisby Limited fixed at two thirds of the costs below.

[72] I gratefully acknowledge the assistance of all learned counsel.

**Louise Esther Blenman**
Justice of Appeal

[73] **HENRY JA [AG.]:** I have read the judgment of Blenman JA. I concur with her conclusions and for the reasons set out below I would allow the appeal.

[74] The statements of facts as well as the issues raised have been amply set out in the draft judgment of Blenman JA and I adopt same.

[75] I accept as an accurate statement of the law that, at common law, a foreign

judgment is enforceable if it is established that the foreign court had jurisdiction over the parties, the judgment was for a definite sum of money and was final and conclusive.

[76] The issue of whether a default judgment obtained in a foreign court is enforceable at common law is addressed in **Dicey, Morris & Collins on The Conflict of Law**.[22] There, it is noted that it is not necessary that the judgment should be given as the result of investigation of the merits of the case, if the court were one which in the view of English law had jurisdiction over the defendant, and he failed to defend. The court's judgment is as enforceable as if he had defended the case on the merits.

[77] In the case of **Raffle American Inc. v Kingsboro International Holding Co. Ltd**, the plaintiff had obtained default judgment in New York and sought to enforce it in Barbados. The judgment, which was produced in evidence, stated that the defendants had been served notice of the proceedings by registered mail, according to the procedure of the New York courts and had failed to appear or answer. The court in Barbados held that the judgment, albeit a default judgment, was regular, final and conclusive and had been regularly obtained. The defendants having contracted to submit themselves to the forum of New York court were bound by the final judgment.

**Jurisdiction**

[78] It is not disputed that the contract between the parties contained a clause by which the parties submitted themselves to the non-exclusive jurisdiction of the Manx court. It is also undisputed that the claim was served on Flat Point in accordance with an order of the Manx court. Flat Point filed an acknowledgment of service in which it indicated its intention to defend the claim. However, Flat Point took no further action in the matter. Notwithstanding that the acknowledgment was later struck out by the court, Flat Point submitted to the jurisdiction of the Manx court and cannot properly contend otherwise.

[22] Dicey and Morris on The Conflict of Laws (Vol. 1, 14th edn., Sweet & Maxwell 2006) 575,para. 14 -019.

**Final and Conclusive - Natural Justice**

[79] As noted, notwithstanding the fact that Flat Point had submitted to the jurisdiction of the Manx court, no foreign judgment will be enforced unless it is final and conclusive. A foreign judgment which is liable to be varied by the court which pronounced it, has been held not a final judgment. But a default judgment may be final and conclusive even though it is liable to be set aside in the very court which rendered it.[23] It is now well settled that a default judgment obtained in a foreign court is final and conclusive for purposes of enforcement at common law.[24]

[80] However, courts today will refuse to enforce the judgments of a foreign court obtained in circumstances that are considered to be contrary to natural justice, for example, where one of the parties have not been served with process or has not been allowed a hearing by the foreign court pronouncing the judgment.[25]

[81] In its statement of claim, Canisby pleaded that it had served the claim in the Manx action on Flat Point on 5th August 2010. Flat Point had filed acknowledgment of service on 16th August 2010 and in September 2010, Canisby subsequently served Flat Point in accordance with the instructions of the court with a copy of a notice of application to set aside the acknowledgment of service and to enter judgment against Flat Point. Upon consideration of the application, the Manx court ordered (1) Flat Point's acknowledgment of service be set aside forthwith and (2) judgment in default be entered against Flat Point. Flat Point denied that it had been served with the application and was unaware that its acknowledgement of service had been set aside.

[82] In my view, the issue of whether Flat Point was served with the application was crucial in determining whether Flat Point was given an opportunity to be heard by the court pronouncing the judgment and by extension whether the judgment was obtained under circumstances amounting to a breach of natural justice. The issue

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[23] See Dicey and Morris on The Conflict of Laws (Vol. 1, 14th edn., Sweet & Maxwell 2006) 577, para. 14-021 and the cases cited therein.
[24] Raffle American Inc. v Kingsboro International Holding Co. Ltd (1993) 52 WIR 37.
[25] JF Garner, Natural Law and Natural Justice, New Law Journal, 1994 Volume 144

was a live one since there were contradictory allegations by the parties as to service. The law is clear on an application for summary judgment the court ought not to conduct a mini trial. Serious issues of fact should be resolved at trial.

[83] The facts herein are to be distinguished from the case where no acknowledgment of service or defence is filed and default judgment is entered by the foreign court as a matter of course in accordance with their laws. Here, there was an acknowledgment of service followed by an application and a pronouncement by the foreign court. I am of the view that the principles of natural justice would require that Flat Point be served with notice of the application. I agree with Blenman JA that the issue of whether or not Flat Point was provided with the opportunity to be heard on the default judgment required a proper investigation in which there is the testing of evidence in cross examination and re-examination.

[84] For these reasons, I would allow the appeal and remit the enforcement claim for trial in the court below.

**Clare Henry**
Justice of Appeal [Ag.]

[85] **WEBSTER JA [AG.]:** I have read in draft the judgment by my learned sister, Blenman JA, and for the reasons set out in this dissenting judgment, I disagree with some of her conclusions and with her order allowing the appeal.

**Background**

[86] In June 2007, Flat Point and Canisby entered into a loan agreement by which Canisby loaned $1,150,000.00 to Flat Point. Article 14 of the loan agreement provided that the agreement was governed by Manx law and that the parties submit to the non-exclusive jurisdiction of the Manx courts. Flat Point defaulted on repayment of the loan and in July 2010, Canisby filed a claim in the Manx court for repayment of the loan plus interest. The claim was served on Flat Point. In response to the claim, Flat Point filed an acknowledgement of service in which it selected the box that reads 'I intend to defend all of this claim', and did not select

the box that reads 'I intend to dispute the court's jurisdiction.' The acknowledgement of service also stated that if the defendant did not file a defence within 28 days of service of the claim judgment may be entered against it.

[87] Canisby claimed that the acknowledgement of service was defective and applied to set it aside and to enter judgment in default against Flat Point. On 15th October 2010, the Manx court ordered that the acknowledgement of service be set aside and entered a judgment in default against Flat Point for the sum of US $1,150,000.00 plus costs. Canisby asserted in its amended statement of claim that in October 2010 the default judgment was sent to Flat Point by email. This is disputed by Flatpoint and I will deal with this issue below.

[88] On 25th August 2015, almost 5 years after the default judgment was entered, Canisby filed this claim on the basis of the default judgment. Flat Point filed its defence to the claim on 6th October 2015 and Canisby applied for summary judgment on 13th October 2015.

[89] There is no evidence that Flat Point has taken any step to set aside the default judgment in the Manx court or to appeal against the entry of the judgment.

[90] The history of the proceedings before the lower court leading to the entry of summary judgment by the learned master and the resulting appeal by Flat Point are set out in the judgment of Blenman JA and further repetition by me is unnecessary.

**Issues**

[91] The main issues in this appeal are helpfully set out Blenman JA in paragraph 18 of her judgment and I gratefully adopt them with minor modifications. I will deal with the issues under the following headings:

(a) Flat Point's assertion that it did not submit to the jurisdiction of the court of Isle of Man.

(b) Flat Point's assertion that the default judgment was not final and

conclusive.

(c) Whether Canisby's alleged failure to serve the default judgment personally on Flat Point resulted in a breach of natural justice.

(d) Whether the default judgment was obtained in breach of public policy.

(e) Whether the learned master erred by engaging in a fact-finding exercise which is the reserve of the trial judge.

**Submission to the jurisdiction**

[92] The issue of Flat Point's submission to the jurisdiction was dealt with by Blenman JA in paragraphs 46 of her judgment and I agree with her conclusion that Flat Point submitted to the jurisdiction of the Manx court by virtue of article 14 of the loan agreement. Further, I reject any suggestion by Flat Point that its submission to the jurisdiction was affected in any way by the fact that the acknowledgement of service that it filed was set aside by the Manx court. The filing of an unqualified acknowledgement of service stating in effect that Flatpoint was not disputing the jurisdiction of the Manx court is further confirmation of its submission to the jurisdiction.

**Default judgment - final and conclusive - Natural Justice**

[93] Flat Point submitted that the default judgment by the Manx court cannot form the basis of a claim in the courts of Antigua and Barbuda because the default judgment was not final and conclusive. There are two aspects to this submission. The first, which was dealt with by the master but not addressed by Mr Walwyn, was that default judgment was not a final and conclusive judgment for the purposes of enforcement. The second, which was relied on by Mr Walwyn, is that the default judgment was not final and conclusive because it was not served on Flat Point which therefore did not have an opportunity to appeal against the judgment.

[94] On the first point the learned master found that the law is clear that a foreign default judgment is final and conclusive for the purposes of the proceedings to enforce the judgment in Antigua and Barbuda. There is no appeal against this finding and I take it to be settled law that a default judgment for a specific sum of money (as in this case) is final and conclusive for the purpose of bringing a subsequent claim to recover the judgment debt, notwithstanding that the court issuing the judgment can set it aside in later proceedings. If authority is needed for this point it can be found in **Raffle America Inc v Kingsboro International Holding Co Ltd and Another**, a decision of the High Court of Barbados, and in the extract from **Dicey and Morris**[26] that is attached to Flat Point's written submissions on the appeal.

[95] Mr. Walwyn relied heavily on the second point, namely, that the default judgment is not final and conclusive because it was not served and as a result it was obtained in breach of the rules of natural justice.

[96] The issue of natural justice in the context of the entry of a default judgment usually arises when the defendant in the proceedings was not served with the claim and was unaware of the proceedings. No such issue arises in this case because Flat Point was served with the claim form and entered an acknowledgement of service which was subsequently set aside by the Manx court.

[97] The issue of natural justice arose in this case because Mr Walwyn submitted that Flat Point did not have notice of the default judgment and therefore did not have the opportunity to appeal or to set it aside the judgment. Canisby pleaded in paragraph 12 of its amended defence that the default judgment was brought to the attention of Flat Point by an email dated 27th October 2010. However, the email was not exhibited to the amended statement of claim. In its amended defence, Flatpoint denied paragraph 12 of the amended statement of claim and put Canisby to strict proof that service of the default judgment "was effectively served." Flat Point also filed evidence in the form of an affidavit by Mr Claudio Marieschi in

[26]Dicey, Morris & Collins on The Conflict of Law (Vol. 1, 14th edn., Sweet & Maxwell 2006) para. 14-021.

which Mr Marieschi deposed that Flat Point only had notice of the default judgment "…`in these proceedings…" which effectively means prior to the filing of its defence on 6th October 2015.

[98] The learned master, in a very short decision, found that the respondent was served with notice of the default judgment. The evidence of service of the default judgment on Flat Point is disputed and learned master's factual finding that notice of the default judgment was served on Flat Point may have been premature. The authorities establish that on a summary judgment application, the court should not embark on a mini-trial and make findings of fact on important issues. In **Doncaster pharmaceuticals group Limited and others v Bolton Pharmaceutical Co 100 Ltd**,[27] Mummery LJ said:

> "it is well settled by the authorities that the court should exercise caution in granting summary judgment in certain kinds of cases. The classic instance is where there are conflicts of fact on relevant issues, which have to be resolved before the judgment can be given (see Civil Procedure Vol1 24.2.5). A mini-trial on the facts conducted under CPR Pt 24 without having gone through normal pre-trial procedures must be avoided, as it runs a real risk of producing summary injustice."

[99] I agree that this is a correct statement of the law regarding the general approach to findings of fact on a summary judgment application. It is that the judge or master must not conduct a mini-trial and make findings of fact on important issue which must be resolved before judgment can be given. However, this does not mean that a master hearing a summary judgment application should adopt a sterile approach. He or she should examine the pleadings and the evidence critically to see if when properly assessed they disclose a reasonable prospect of succeeding on or defending the claim, as the case may be. This approach has been followed by this Court in cases such as **Saint Lucia Motor & General Insurance Company Ltd v Peterson Modeste**[28], where George-Creque JA (as she then was) said**:**

[27] [2006] EWCA Civ 661 at para 17.
[28] SLUHCVAP2009/0008 (delivered 11th January 2010, unreported).

> "The principal distilled from these authorities by which a court must be guided may be stated thus: Summary judgment should only be granted in cases where it is clear that a claim on its face cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in **Swain v Hillman** is that the claim or the defence has no "real" (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise of the court arrives at the view that it would be difficult to see how the claimant or the defendant could establish its case then it is open to the court to enter summary judgment." (Emphasis added)

[100] Following this approach, I remind myself that this is a case where Flat Point was served with the claim in the Manx court for the repayment of the money that it had borrowed from Canisby and filed an unqualified acknowledgement of service further submitting itself to the jurisdiction of that court. It then took no further part in the proceedings even though it would have been aware from the terms of its acknowledgement of service that it was required to file a defence within 28 days of service of the claim (see paragraph 86 above). In the circumstances, I agree with and adopt the learned master's finding that –

> "The filing of the acknowledge itself indicates, at the very least, that the respondent (Flat Point) was aware of the Manx proceedings and sought to engage itself therein. There is no evidence that the respondent took any steps in the Manx court proceedings once its acknowledgement was removed. This posture was entirely its right."

[101] I also note that there is no evidence of Manx law, and I am not aware of any requirement of the laws of Antigua and Barbuda, that the intended defendant must be notified of the default judgment after it has been obtained from the foreign court. The law requires that the defendant be notified of the claim in the foreign court and there is no dispute that this was done in this case. There is no equivalent requirement that the defendant be served or notified of the default judgment before recognition and enforcement proceedings are commenced in the local court. In the circumstances, I do not think that the finding by the master that

Flat Point was notified of the judgment was an important consideration in the summary judgment application in the sense that it had to be resolved before the application was disposed of. Flat Point was given ample opportunity to respond to the claim in the Manx court.

[102] The undisputed evidence is that Flat Point took one step to defend the claim and then ignored the proceedings. Unsurprisingly, judgment in default was entered against it. On these facts, I do not think that there is any basis for interfering with the learned master's finding that this is not the case where Flat Point's natural justice rights were breached.

**Public Policy**

[103] It is not clear what aspect of the public policy of Antigua and Barbuda was affected by the proceedings to enforce the default judgment. Any suggestion that there was a breach of the public policy of Antigua and Barbuda would be answered by my observations and findings in the preceding paragraphs in relation to the allegations of breach of Flat Point's natural justice rights.

**Fact finding by the Learned Master**

[104] I have already dealt with the one instance where the learned master may have gone too far in making a finding of fact in relation to the service of the default judgment on Flat Point. As is clear from the passage cited above from the **Bolton Pharmaceutical case**, the restriction on making findings of fact in the summary of judgment application applies to relevant or important findings. Service of the default judgment on Flat Point was not an essential or important part of the claim against Flat Point. What was important was that there was a foreign judgment for a definite sum of money obtained in proceedings of which Flat Point was aware and participated, and yet took no proper steps to avoid judgment in default being entered against it. In the circumstances, I do not find that the learned master's finding that Flat Point was served with notice of the default judgment when this issue was disputed affects the integrity of his overall finding that Flat Point does not have a reasonable prospect of succeeding on its defence of the claim.

**The Master's Discretion**

[105] The test for interfering the exercise of a trial judge's or master's discretion is settled in this Court and the passage that is most often referred to is in the judgment of Chief Justice Sir Vincent Floissac in **Dufour and others v Helenair Corporation Limited and others**[29] when he said:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and consideration; and (2) that as a result of the error or degree of the error, in principle the trial judge's discretion exceeded the generous ambit within which reasonable disagreement is possible and may therefore said to be clearly or blatantly wrong.

[106] I am also guided by the approach to summary judgment applications suggested by the Chief Justice Pereira in the **Saint Lucia Motor & General Insurance** case and having reviewed the pleadings and the evidence, and the written and oral submissions of counsel, I am satisfied that there is no basis for this court to interfere with the exercise of the learned master's discretion in granting the summary judgment application on the ground that Flat Point's defence does not have a reasonable prospect of succeeding at the trial.

[107] I would add that were I to set aside the exercise of the master's discretion on account of his finding that the default judgment was served on Flat Point, I would exercise discretion afresh and grant the application for all of the reasons set out in this judgment.

[29] (1996) 52 WIR 188.

[108] In all the circumstances I would dismiss the appeal, affirm the master's order and order Flatpoint to pay Canisby's costs of the appeal.

**Paul Webster**
Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**