A Casenote on Henry v. Geoprosco International

In refuting the judgment of Denning L.J. in *In re Dulles' Settlement (No.2)*,[1] the English Court of Appeal in *Henry* v. *Geoprosco International*[2] dealt a fatal blow to a line of jurisprudence widely followed in the Commonwealth. The occasion for this attack on the possibility of reserved appearance to protest jurisdiction before a foreign court arose in Canada.

On the 27th of May 1970, the plaintiff-appellant entered into an agreement, in writing, with the defendant-respondents in Calgary, Alberta. The defendants were a limited liability company, registered in Jersey in the Channel Islands, with their head office in London, England. Under the written agreement, the defendants had agreed to employ the plaintiff as a member of an oil well work-over party in the Trucial States. Clause 13(b) of the agreement was an arbitration clause, and by Clause 14 the parties subjected the agreement to English law. A few days after the agreement was signed, the plaintiff assumed his duties in the Trucial States, but on September 22nd 1970 the defendants summarily dismissed him indicating that they had reasons to justify their actions. As a result of this dismissal, the plaintiff instituted an action in the Alberta Supreme Court claiming a sum of $42,502.22 by way of damages for wrongful dismissal. The plaintiff contended that the Alberta Court had jurisdiction on the grounds that the contract was in fact made in Calgary. Accordingly, Alberta was claimed to be the *loci contractus*.

The defendants were advised in England to retain counsel in Alberta for the limited purpose of contesting the claim of jurisdiction made by the plaintiff before the Supreme Court of Alberta. Both the Trial and the Appellate Divisions held against the defendants on the question of jurisdiction; at both levels, the Court decided in favour of the claim of jurisdiction, on the ground that Alberta was the *loci contractus*.

The Supreme Court of Alberta then proceeded to hear the case on its merits, and as the defendants took no part in these proceedings, awarded $41,879 in damages by default.

---

[1] [1951] Ch.842, [1951] 2 All E.R. 69.

[2] [1976] 1 Q.B. 726. See Collier (1975) 34 Camb.L.J. 219 and Solomons (1976) 25 Int. & Comp.L.Q. 665.

In order to have the Alberta judgment enforced, the plaintiff went before the Queen's Bench Division in England.[3] In these proceedings the defendants raised the only defence open to them, namely, that they had not voluntarily submitted to the jurisdiction of the Alberta courts. Relying on Cheshire,[4] Dicey[5] and Denning L.J. (as he then was) in *In re Dulles' Settlement (No.2)*,[6] the defendants argued that an appearance before a court to protest jurisdiction did not in any way amount to a submission to jurisdiction. Adopting this argument, Willis J. at first instance gave judgment for the defendants:

> The real issue between the parties on the merits was whether the defendants had committed a breach of contract and wrongfully dismissed the plaintiff in circumstances which entitled him to damages, or whether it was the plaintiff who was in breach of contract in circumstances which justified the defendants in dismissing him. This issue was never before the Albertan Court in document or argument. The defendants' case on the merits went by default, and it is not, I think, in any way to be assumed that by taking no further part in the proceedings after failing to secure a stay they were conceding the case on the merits. They clearly wanted to contest the claim not in the Albertan Court but by arbitration, and were urging the Alberta Court not to assume jurisdiction. What happened seems to me to be within the words of Lord Justice Denning, in the well-known passage in *Re Dulles'*:
>
> "I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance he clearly does not submit to the jurisdiction. What difference in principle does it make if he does not merely do nothing but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all. I quite agree, of course, that if he fights the case not only on the jurisdiction but also on the merits he must then be taken to have submitted to the jurisdiction, because he is then inviting the court to decide in his favour on the merits, and he cannot be allowed at one and the same time to say that he will accept the decision on the merits if it is favourable to him and will not submit to it if it is unfavourable. But when he only appears with the sole object of protesting against the jurisdiction, I do not think that he can be said to submit to the jurisdiction. ..." Their sole object, to my mind, was to protest against the jurisdiction, and, by taking them, the defendants did not voluntarily submit to the jurisdiction of the Albertan Courts.[7]

---

[3] [1974[2 Lloyd's Rep. 536.

[4] *Private International Law* 9th ed. (1974), 638-39.

[5] *Conflict of Laws* 9th ed. (1973), Rule 180 and pp.996-97.

[6] *Supra*, note 1.

[7] *Supra*, note 3, 539.

In a unanimous decision of the Court of Appeal, the plaintiff's appeal was allowed.[8] This decision fundamentally altered that part of private international law governing the question of jurisdiction in proceedings before a foreign court and it is this which makes *Henry* v. *Geoprosco* worthy of comment.

Both academics and the courts agree that despite the strong view to the contrary of Buckley L.J. in *Harris* v. *Taylor*,[9] a person does not voluntarily submit to the jurisdiction of a foreign court when his appearance before it is for the limited purpose of protesting jurisdiction. As Professor Cheshire wrote in 1935:

> On principle it would seem that appearance limited to a protest against the foreign jurisdiction cannot properly be said to constitute submission.[10]

Professor Cheshire maintained, that as a matter of judicial policy, *Harris* v. *Taylor* was wrong in denying the defendant the right to protest the jurisdiction of the court without involving himself in litigation on the merits.[11] He also attempted to undermine the authority of *Harris* v. *Taylor*:

> It is submitted, *though without conviction*, that there was one fact in the proceedings which prevents *Harris* v. *Taylor* from being regarded as a decisive authority for the crude proposition that every form of protest against jurisdiction is sufficient to render the defendant amenable to the Court. This was that the defendant did more than protest the jurisdiction, for he expressly pleaded that there was no cause of action against him according to Manx law. This would appear to be an attack on the merits of the plaintiff's claim, and therefore in itself a sufficiently strong reason for preventing a denial of submission.[12]

In subsequent editions, both Cheshire and his editors have maintained this stance. In the current edition North,[13] having first referred to *Harris* v. *Taylor* as a "troublesome case",[14] proceeded to state the rule in the following way:

> Despite this decision [*Harris* v. *Taylor*], however, it can be said with some asurance that to protest is not necessarily to submit.[15]

Rule 180 of the current edition of Dicey's *Conflict of Laws* has remained unchanged throughout nine editions:

> Subject to the Exceptions hereinafter mentioned, a court of a foreign country has jurisdiction to give a judgment *in personam* capable of enforcement or recognition in England in the following Cases:

---

[8] The unanimous decision of the Court, comprised of Lord Justices Cairns, Roskill and Browne, was written by Roskill L.J.

[9] [1915] 2 K.B. 580, 587-88 *per* Buckley L.J.

[10] *Private International Law* 1st ed. (1935), 494.

[11] *Ibid.*, 495-96.

[12] *Ibid.*, 496 (italics added).

[13] P.M. North, fellow of Kebel College, Oxford.

[14] *Cheshire's, Private International Law* 9th ed. (1974), 638.

[15] *Ibid.*

> *First Case* — If the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or theatened with seizure, in the proceedings or *of contesting the jurisdiction of that court.*[16]

Thus, until 1951, both Cheshire and Dicey relied on a combination of slender judicial authority[17] and their own academic standing to meet and refute the view expressed by Buckley L.J. in *Harris* v. *Taylor.* The judgment of Denning L.J. in *In re Dulles' Settlement (No.2)* was, therefore, of the greatest significance to the distinguished authors. The dispute in that case concerned the wardship of an infant[18] and as a part of the proceedings, the mother sought an order for the infant's maintenance. The infant's father, an American citizen resident outside the jurisdiction of the English Court, instructed counsel to appear for the limited purpose of opposing the mother's application under the *Guardianship of Infants' Act, 1925.*[18a] The father lost his claim to be appointed the infant's guardian and the child was awarded to the mother. The Court proceeded to hear her claim for the infant's maintenance but the father took no further part in the proceedings. At the conclusion of the hearing, Romer J. refused to make an order for maintenance on the grounds that the father had not submitted to the jurisdiction of the Court with reference to the claim for maintenance. The mother appealed to the Divisional Court[19] of the Queen's Bench on behalf of the infant and the appeal was heard by two judges, Sir Raymond Evershed M.R. and Denning L.J. It was in the course of affirming the decision of Romer J., and dismissing the appeal that Denning L.J. wrote the passage which later came to be considered as the cornerstone of jurisdiction in private international law.

> I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court, when he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make, if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? I can see no distinction at all.[20]

---

[16] *Conflict of Laws* 9th ed. (1973), 993 (italics added).

[17] *Tallack* v. *Tallack Broekema* [1927] P.211, 222 *per* Lord Merrivale.

[18] The facts are found in the earlier proceedings concerning this dispute reported as *In re Dulles Settlement. Dulles* v. *Vidler* [1951] 1 Ch.265. Roskill L.J. gives a summary of the facts in his judgment, *supra*, note 2, 742-43.

[18a] 15-16 Geo.V, c.45.

[19] The authority of a decision of the Court of Appeal, a branch of the Queen's Bench, is higher than a decision of the Divisional Court of the Queen's Bench. Two judges preside in the latter; three preside in the former.

[20] *Supra*, note 1, 850.

Denning L.J. distinguished *Harris* v. *Taylor* which he found to be an authority on *res judicata* and not on jurisdiction,[21] so strengthening the position taken by Cheshire and Dicey. The Canadian authors adopted this line of authority;[22] Williston and Rolls agreed that *In re Dulles' Settlement (No.2)* expressed "the more sensible view".[23] It is this monumental edifice of authority which the Court of Appeal in England brought tumbling down like a house of cards in *Henry* v. *Geoprosco*.[24] The view expressed by Denning L.J. in *In re Dulles' Settlement (No.2)* was totally rejected. In their unreserved acceptance[25] of Buckley L.J.'s reasoning in *Harris* v. *Taylor* the Court of Appeal tersely refuted the authority of both Cheshire and Dicey:

> We need hardly say that we have considered with the utmost care and respect the views expressed by the editors of Dicey's *Conflict of Laws* in successive editions of that work, by way of criticism of *Harris* v. *Taylor*, culminating in the views expressed in the 9th ed. (1973) to which we have already referred, as well as the views of Professor Cheshire in various editions of *Cheshire's Private International Law*. But however distinguished the authors and editors of these textbooks the law must be taken to be as laid down by the courts, however much their decisions may be criticized by writers of such great distinction.[26]

The Court of Appeal found that for almost 150 years,[27] beginning with *Buchanan* v. *Rucker*[28] in 1808, the law was as set forth by Buckley L.J. in the following passage from *Harris* v. *Taylor*:

> When the defendant was served with the process he had the alternative of doing nothing. He was not subject to the jurisdiction of the Court, and if he had done nothing, although the Court might have given judgment against him, the judgment could not have been enforced against him unless he had some property within the jurisdiction of the Court. But the defendant was not content to do nothing; he did something which he was not obliged to do, but which, I take it, he thought it was in his interest to do. He went to the Court, and contended that the Court had no jurisdiction over him. The Court, however, decided against this contention and held that the defendant was amenable to its jurisdiction. In my opinion there was a voluntary appearance by the defendant in the Isle of Man Court and a submission by him to the jurisdiction of that Court. If the decision of the Court on that occasion had been in his favour he would have taken advantage of it; as the decision was against him, he was bound by it and it became his duty to appear in the action and as

---

[21] *Ibid.*, 851.

[22] See Castel, *Canadian Conflict of Laws* (1975), 224 and the Ontario *Rules of Practice*, R.R.O. 1970, Reg.545.

[23] *The Law of Civil Procedure* (1970), vol.1, 21-22.

[24] *Supra*, note 2, 742-46.

[25] *Ibid.*, 746.

[26] *Ibid.*

[27] *Ibid.*, 739-42.

[28] (1808) 9 East 192.

> he chose not to appear and to defend the action he must abide by the consequences which follow from his not having done so.[29]

Having thus established the respectability and the antiquity of the rule,[30] the Court of Appeal "with the most profound respect"[31] for Denning, proceeded to refute his view[32] in *In re Dulles' Settlement (No. 2)*. Of the several reasons which the Court advanced[33] to support their overruling Denning, there were three which could be considered basic. First, the Court thought that Denning had misunderstood the facts of *Harris* v. *Taylor* in concluding that it was not an authority for jurisdiction but for *res judicata*. (As previously indicated, it was on this ground that Denning L.J. distinguished *Harris* v. *Taylor* from the *Dulles* case.) Secondly, it was implicit that the Court thought that the portion of Denning's judgment in which he distinguished *Harris* v. *Taylor* was, in any event, *obiter*, thus not warranting the attention it had received from the academics and from the Bench. Thirdly, the Court noted that *In re Dulles' Settlement (No. 2)* was a decision of the Divisional Court of the Queen's Bench presided over by two judges; such a judgment is of no authority when it conflicts with a previous decision of the Court of Appeal. In any event, the Court of Appeal possessed the power to overrule *In re Dulles' Settlement (No. 2)* and this the Court did without hesitation.

Having thus re-established the rule espoused by Buckley L.J.,[34] Roskill L.J., for the Court, formulated the law on submission to a foreign jurisdiction as follows:

> Taking this view of the decided cases which bind this court, it seems to us that they justify at least the following three propositions: (1) The English courts will not enforce the judgment of a foreign court against a defendant who does not reside within the jurisdiction of that court, has no assets within that jurisdiction and does not appear before that court, even though that court by its own local law has jurisdiction over him. (2) English courts will not enforce the judgment of a foreign court against a defendant who, although he does not reside within the jurisdiction of that court, has assets within that jurisdiction and appears before that court solely to preserve those assets which have been seized by that court. (3) The English courts will enforce the judgment of a foreign court against a defendant over whom that court has jurisdiction by its own local law (even though it does not possess such jurisdiction according to the English rules of conflict of laws) if that defendant voluntarily appears before

[29] *Supra*, note 9, 587-88.
[30] *Ibid.*
[31] *Supra*, note 2, 745.
[32] *Supra*, note 1, 850.
[33] *Supra*, note 2, 744-45.
[34] *Supra*, note 9, 587-88.

that foreign court to invite that court in its discretion not to exercise the jurisdiction which it has under its own local law.[35]

This decision, in refuting the views of Cheshire and Dicey naturally affects Canada and other Commonwealth countries where the courts closely follow these authorities in deciding issues of private international law. In the past, the courts have held that a person may protest the jurisdiction of a foreign court without thereby submitting to its jurisdiction. Henceforth, this issue will have to be resolved differently since the defendant may be considered to have submitted to the foreign court's jurisdiction. As a result of *Henry* v. *Geoprosco International,* subsequent decisions in Commonwealth courts in this area of law will, in all likelihood, undergo a radical change and the standard works on private international law will require rewriting. Until the House of Lords reexamines the authorities, courts and academics alike must take cognizance of the three rules laid down by Roskill L.J.[36] for "the law must be taken to be as laid down by the courts, however much their decisions may be criticized by writers of ... great distinction".[37]

M.L. Marasinghe*

[35] *Supra,* note 2, 746-47.
[36] *Ibid.*
[37] *Ibid.,* 746.

* Research-Fellow, Max-Planck-Institut for Private International Law, Hamburg, and Professor of Law, University of Windsor.