Enforcement of Foreign Judgments about Forum Land

By Stephen G.A. Pitel, Western University

In common law Canada, it has long been established that a court will not recognize and enforce a foreign judgment concerning title to land in the forum. The key case in support is *Duke v Andler,* [1932] SCR 734.

The ongoing application of that decision has now been called into question by the British Columbia Court of Appeal in *Lanfer v Eilers*, 2021 BCCA 241 (available here). In the court below the judge relied on *Duke* and refused recognition and enforcement of a German decision that determined the ownership of land in British Columbia. The Court of Appeal reversed and gave effect to the German decision. This represents a significant change to Canadian law in this area.

The Court of Appeal, of course, cannot overturn a decision of the Supreme Court of Canada. It reached its result by deciding that a more recent decision of the Supreme Court of Canada, that in *Pro Swing Inc v Elta Golf Inc*, 2006 SCC 52, had overtaken the reasoning and result in *Duke* and left the Court of Appeal free to recognize and enforce the German decision (see paras 44-45 and 74). This is controversial. It has been questioned whether *Pro Swing* had the effect of superseding *Duke* but there are arguments on both sides. In part this is because *Pro Swing* was a decision about whether to recognize and enforce foreign non-monetary orders, but the orders in that case had nothing to do with specific performance mandating a transfer or title to land in the forum.

I find it hard to accept the decision as a matter of precedent. The title to land aspect of the foreign decision seems a significantly different element than what is at issue in most non-monetary judgment decisions, such that it is hard to simply subsume this within *Pro Swing*. What is really necessary is detailed analysis of whether the historic rule should or should not be changed at a normative level. How open should courts be to recognizing and enforcing foreign judgments concerning title to land in the forum? This raises related issues, most fundamentally whether the *Mocambique* rule itself should change. If other courts now know that British Columbia is prepared to enforce foreign orders about land

in that province, why should foreign courts restrain their jurisdiction in cases concerning such land?

In this litigation, the defendant is a German resident and by all accounts is clearly in violation of the German court's order requiring a transfer of the land in British Columbia (see para 1). Why the plaintiff could not or did not have the German courts directly enforce their own order against the defendant's person or property is not clear in the decision. Indeed, it may be that the German courts only were prepared to make the order about foreign land precisely because they had the power to enforce the order *in personam* and that it thus did not require enforcement in British Columbia (analogous to the *Penn v Baltimore* exception to *Mocambique*).

Given the conflict with *Duke*, there is a reasonable likelihood that the Supreme Court of Canada would grant leave to appeal if it is sought. And if not, a denial of leave would be a relatively strong signal of support for the Court of Appeal's decision. But the issue will be less clear if no appeal is sought, leaving debate about the extent to which the law has changed.