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IN CHAMBERS
IN THE GRAND COURT OF THAT CAYMAN ISLANDS
CAUSE NO: 478/04

BETWEEN: TASARRUF MEVDUATI SIGORTA FONU PLAINTIFF

AND: (1) WISTERIA BAY LIMITED
(2) UTTERTON LIMITED
(3) ABDALLAH IBRAHIM ABDALLAH AL-A-YED
(4) REGISTRAR OF SHIPPING

DEFEDANTS

CORAM: HON. CHIEF JUSTICE

Appearances:
Mr. Geoffrey Cox QC instructed by Miss Christine Haughton of Campbells for the plaintiff.
Mr. Hector Robinson of Quin & Hampson for the 3rd defendant.
(Other defendants not appearing).

Dates of hearing: 10th and 25th August 2006

RULING

1. I have before me cross-applications by summonses of the plaintiff ("TMSF") and of the 3rd defendant.
2. TMSF seeks an order discharging the earlier order made on 12th December 2004 by Justice Levers by which she required it to provide security in the sum of $500,000 for the costs of the defendants in defending TMSF's claim brought as a foreign plaintiff ("the Order").
3. The 3rd defendant's summons seeks an order increasing the amount of security to one million dollars.
4. It is necessary to give a brief summary of the factual background. TMSF is a Turkish State entity authorized by statute, to recover deficiencies in the accounts of insolvent banks by among other things, seizure and sale of the assets of their

managers, shareholders or auditors. This authorization is given as part of a regulatory scheme to protect depositors against bank failure.

5. On March 2004 TMSF seized in Turkish waters, two motor yachts registered on the Cayman Islands Shipping Registry in the names of the corporate defendants each valued at more than $23,000,000 (U.S.). These yachts called "the Frequency" and "the Airwaves" are said to belong in fact to the controlling shareholders of a leading Turkish bank now in administration by TMSF, a bank alleged to have been rendered insolvent by massive misappropriation of funds; the subject of criminal charges before the Turkish Courts.
6. In December 2004, TMSF brought action in this Court to prevent the completion of registration of mortgages for amounts in excess of their total value, granted against each vessel in favour of the third defendant in person. TMSF obtained ex parte, an order not only restraining the completion of the registration of the mortgages in the Registry; but also restraining all further dealings with the vessels.
7. TMSF claims that the mortgages were granted fraudulently for the purpose of frustrating a then imminent auction of the vessels in Turkey and says that its purpose in seeking the restraining order was to prevent dealings on the mortgages and thus to facilitate its own efforts to sell the vessels.
8. The further injunctive order by which TMSF itself (as well as the defendants and any one on their behalf) were restrained from having any dealings with the vessels, was sought later to be set aside by TMSF; first before this Court unsuccessfully, then successfully before the Court of Appeal. (See CICA #7 of 2003 Judgment delivered on 17th July 2006). This wider injunctive aspect of the restraint order had been included inadvertently by TMSF's lawyer at the ex parte hearing but its discharge was objected to by the defendants at the subsequent inter partes hearings.
9. The Court of Appeal held that such an injunction, purporting as it did to restrain TMSF, a foreign state agency; from taking action in its own State in the exercise of that State's sovereign immunity, was unlawful for being contrary to sections 13 and 14 of the State Immunity Act 1978 U.K. (as extended to the Cayman Islands).

10. The gravamen of the concern before me now arises from a further development at the time of the auction. TMSF had not yet then secured the setting aside of the injunction by its appeal, but had nonetheless proceeded with the auction of the vessels and secured an offer for the purchase of one, the Frequency.
11. In so doing, it acted technically in breach of the restraint order, a fact which is acknowledged by Mr. Cox before me now.
12. He explained, as he sought at the earlier inter partes stages to do before Levers J.; that TMSF had so acted because it had no choice. It had been required by Turkish law to take all possible steps to realise all the available assets of the bank and when faced with the dilemma of breaching an order of this Court or failing in its statutory duty (all arrangements then already being at great effort and expense in place for the auction) it did not act capriciously, but had sought the directions and guidance of the Turkish Court. That Court directed that the auctions proceed but that, in deference to the concerns of this Court, the proceeds of sale be held in escrow pending the outcome here.
13. That state of affairs and the proffered explanations notwithstanding, as an expression of its loss of faith in TMSF as a foreign plaintiff being in breach of its order and in contempt; this Court required the payment of the security for costs by TMSF.

Jurisdiction to reconsider - material change of circumstances

14. Grand Court Rules Order 23 Rule 1 vests, in terms identical to the English counterpart Rule, a wide discretion in the Court "having regard to all circumstances of the case (and) if the Court thinks it just to do so ---" to order a foreign plaintiff (or local plaintiffs in defined circumstances) to give security for a defendant's costs.
15. It has been persuasively decided by the English Court of Appeal in Gordano Building Contractors Ltd. v Burgess [1988] 1. W.L.R. 890 C.A.; that a plaintiff who has had an order for security for costs made against him, may apply to have it varied or discharged, if he can show a material change of circumstances since

the date of the previous order. This is although he might not do so by seeking to produce fresh evidence about his affairs at the date of the previous order.

16. In so holding the Court of Appeal cited with approval the earlier obiter dictum of Kerr LJ from Parkinson v Myer Wolff and Manley (unreported) 23 April 1985, Court of Appeal (Civil Division) Transcript No U.B. 1888 of 1985 where he stated that:

> "--- just as the defendant may from time to time make further applications for security in the light of changed circumstances, so a plaintiff may be entitled to apply for a variation or discharge of an order previously made if his circumstances have changed. Whether the Court would accede to such an application must then depend on the circumstances, the nature of the order previously made and any other material considerations".

17. Both sides by their counsel before me sought to rely upon those cases, the principles from which, given the common origins of the Rules, I am satisfied should apply in this Court. There is, however, an important limitation upon the ambit of the jurisdiction to review previous orders made upon applications for security for costs; distinguishing between an earlier successful and unsuccessful applications.

18. This distinction is conveniently set out in the following passage from the Notes to R.S.C Order 23/3/28 1999 Edition under the heading "Effect of refusal to order security": "If an application for security is refused by a Master, and his decision is not appealed from it is final. It estops the parties from making a further application on the same facts. *Aliter*, if security is ordered. It may then be increased by subsequent order (Hermite v Allingham, January 13th 1936, C.A; Greer Slegger and Scott, LJJ (unrep))."

19. Here we have an earlier successful application and so the arguments revolved around the question whether there has been a material change of circumstances since the making of the order.

20. Mr. Cox argued that the Court of Appeal's subsequent decision, declaring to be unlawful the injunctive order which purported to restrain TMSF (the non-

observance of which predicated the making of the Order), presents such a change of circumstances.

21. Mr. Robinson replied to the effect that the Court of Appeal's decision did not pronounce in any way upon the finding of contempt arising from TMSF's non-observance and which, because of the Court's resultant loss of faith in its intention to comply with directions and decisions of this Court, taken with the fact that TMSF is a foreign plaintiff; were the real reasons for the making of the Order. And, in that regard, that there is no material change of circumstance.
22. This is not an argument without some weight but not one which I could accept as requiring me to overlook the fundamental consideration that the injunction ought not to have been made in the first place.
23. It had impermissibly placed TMSF in the invidious position of having to decide between a breach of this Court's order and non-observance of its duties imposed under Turkish law. When TMSF sought the guidance of the Turkish Court as it was obliged to do and was there ordered to proceed with its statutory duty to auction the vessels, TMSF's position became entirely irreconcilable: it then had to choose between disobeying the injunction here or an order of its own domestic Courts.
24. It has now transpired from the Court of Appeal's judgment that TMSF ought not to have been placed in that dilemma in the first place.
25. It would in those circumstances be, to my mind, artificial to seek to separate the effect of the impermissible injunctive order from the disobedience of it which predicated the Court's loss of faith and its decision to require security.
26. This is all notwithstanding my acknowledgement of the principle that TMSF was obliged, as a matter of Cayman law, to have complied with the injunction unless and until it was set aside on appeal. A proposition for which, if recent authority is required, one needs look no further than the judgment of the Supreme Court of Canada in Taylor and the Western Grand Party v Canadian Human Rights Commission and the Attorney General of Canada and others [1990] 3S.C.R. 892.
27. The injunction having been set aside, I conclude that I am able now, in the currently prevailing circumstances, to consider the further explanation given and

to examine the fundamental question presented; that is whether an agency of a friendly foreign State, enjoying good standing in the International Community and which has invoked the jurisdiction of this Court, should be required to put up security for a defendant's costs of the action.

28. Approaching the question in that way, one has to consider what the normal practice would be and whether there are now reasons to depart from it. This is, of course, bearing in mind that the reasons for the imposition of an order for security for costs against a foreign plaintiff is the risk of non-payment of a successful defendant's costs.

29. There is no hard and fast rule that every foreign plaintiff must be required to put up security. The matter is one, as already stated, of discretion to be exercised in every case. All the circumstances will be considered including the means and ability of the plaintiff to pay and even, in an appropriate case, the relative strength or weakness of the case for each side provided those factors are clearly discernable from the evidence. See for these propositions the leading case of Sir Lindsay Parkinson & o. Ltd. v Triplan Ltd [1973] Q.B. 609 at 626 – 627 (per Denning MR).

30. Dicey and Morris on the Conflicts of Laws 13th Edition at para 10-026 states that once a foreign State has become amenable to the jurisdiction of the Court (eg: by suing as a plaintiff), it will be treated just like any other litigant in such matters as security for costs.

31. Among the cases cited as authority for that proposition are two 19th century cases: Republic of Costa Rica v Erlanger (1876) 3 Ch. D 62 (C.A.) and The Newbattle (1885) 10 P.D. 33 (C.A). Another more modern case - Ministers de la Culture at la communication de France v Lieb The Times 24th December 1981 – was also cited but as will become clear from the examination of this and other modern cases, the approach taken in it produced a different result from that of the earlier cases.

32. In the first of the 19th century cases, the Government of Costa Rica was required to put up security on a basis which must now, in light of the modern restatement of principles be reconsidered.

33. At page 69 Mellish LJ stated:

> *"Certainly there is nothing unjust in the rule which always has prevailed, that suitors who live abroad and have no property in this country should give security for costs .... The Plaintiff is a foreign republic having no property in this country, and if the Defendants succeed, they will probably not get their costs unless they have security". (Emphasis supplied).*

34. As to that last reference to the Plaintiff foreign republic's doubtful compliance, there appeared nothing from the report of the case to support it, although it may have influenced the outcome. Nonetheless, it is clear that the real ratio of the case rested instead upon what was then regarded as "the rule which always has prevailed".

35. The second 19th century case The Newbattle proceeded upon the same, now outdated precept; that an order for security should be made, as a matter of course, even against a foreign plaintiff state. There the question was whether the plaintiff, the Belgian Sovereign, should provide security for costs having sued the owners of the Newbattle for damages arising from a collision with another ship – the Louise Marie - owned by the Sovereign. A cross-claim was brought by the owners of the Newbattle.

36. Section 34 of the Admiralty Court Act provided that in circumstances where the vessel of a defendant had been detained or security given (as had happened with the Newbattle) but detention or security was not available against the vessel of the plaintiff (as was the case with the Louise Marie because it was owned by a foreign sovereign) the Court may, if it think fit, suspend the plaintiff's cause until security had been given.

37. That statutory provision taken with what the Court referred to as "authority from the other Divisions of the High Court to show that the practice has been to oblige a foreign government to give security for costs" (referring to Republic of Costa Rica v Erlanger above) led it seems axiomatically, to the making of the order for security against the Belgian sovereign.

38. Given the changes to the Rules since then and the discretionary nature of the exercise requiring the Court to consider all the circumstances, the modern practice

where the plaintiff is a foreign State, is discernable from four first instance judgments, two of which are from this Court.

39. In Banco Economic SA v Allied Leasing and Finance Corporation 1998 CILR 102, the question was whether the petitioner, a large Brazilian bank then in liquidation under the control of the Brazilian Government and petitioning as a creditor against the defendant Allied Leasing, to wind up its affairs here; should be required to give security for the costs of the defendant in defending the petition. It was held, among other things, that in the absence of evidence to support any suggestion that the Brazilian Government would not honour its obligations for costs (to be incurred if its appointed officer proved unsuccessful before this Court); any presumption must, in the interests of comity, be in favour of concluding that it would.

40. In Ministere de la Culture at de la Communication de France v Lieb (above) Mr. Justice Dillion refused to make an order for security for costs against the French Government in a dispute in the English Courts over the ownership of a painting.

41. He did not doubt that he had jurisdiction to do so (given the wide discretionary terms of the Rules in England as they are here) or that in the case of some foreign states an order for security would be essential for the protection of the defendant. However, he concluded that in the case before him the costs would be paid if ordered against the plaintiff. He observed that the good name and credit of the French Government would be too much at stake, and there were good reasons for an order for costs being met by the French Government as a matter of course.

42. In In the Matter of the Cybervest Fund 2006 CILR 80; the question whether the Kuwaiti Government should be required to put up security for costs was resolved in similar terms. There the petitioner, the Public Institution for Social Security of the State of Kuwait, petitioned for the winding up of the Cybervest Fund (a Cayman Islands investment vehicle) on the just and equitable ground that the substratum of the Fund in which it was the major investor, had failed.

43. On the question of security for the defendant's costs it was held; citing the Banco Economics case (above) that the petitioner was a state agency of undoubted resources, which was well known and respected internationally and therefore had

a financial interest in complying with Court orders made against it in foreign jurisdictions. There was therefore little prospect that it would not meet any order for costs made against it. The same considerations also prevailed to refute the further suggestion that the Kuwaiti Government might invoke State Immunity if efforts were made to enforce a costs order against it in Kuwait.

44. Taken together, there is a common practical principle to be discerned from these last cited three cases: It is that where the plaintiff is the Government (or a State Agency) of a foreign State enjoying good standing in the International Community (in particular from this Court's point of view, enjoying diplomatic relations with H.M. Government) it should be assumed as a matter of comity and common sense, in the absence of anything to the contrary; that it will honour its obligations for costs made against it.

45. Nonetheless, as the question remains one to be decided on a case by case basis in the discretion of the Court, an order for security for costs could undoubtedly be made against a foreign State in appropriate circumstances.

46. Research in this case was able to produce only one such modern instance however – Government of Sierra Leone v Edward Davenport & Others [2003] EWHC 1913 (Ch). The action was brought before the English High Court by the Government of Sierra Leone at a time when that country had only recently emerged from a devastating civil war and there were good reasons for concern, not so much whether the Government would wish to honour its obligations, but more whether it would be able to do so in a timely fashion. The issues are discussed at paragraph 14 of the judgment of Mr. Justice Donaldson Q.C (Acting):

> "The next point made by Mr. Higham goes to the question of discretion. He says that there is no reason to believe that the first to third defendants would be unable to recover any cost ordered in their favour. He says that although Sierra Leone had had a difficult history, things have taken a turn for the better since 1997, matters have stabilized, and international finance is now available from the IMF. He says that no question of impecuniosity arises here and the money is available. The question is, however, how readily the defendants are likely to see the money. There is no certainty that, faced with many competing demands on limited

> financial resources, the claimant Government is likely to provide spontaneous payment in a rapid timescale and, so far as enforcement is concerned, there is nothing to indicate that there is likely to be any ready means by which the judgment for costs could be enforced against the Government in Sierra Leone. Nor is it suggested that there are any assets readily susceptible to execution, either in this country or in a Brussels or Lugans State [(a reference to the Conventions on Jurisdiction and the Reciprocal Enforcement of Judgments in Civil and Commercial matters entered into at those cities)]. Accordingly, I do not see Mr. Highams submission as a reason in itself for refusing security".

47. Such patently relevant concerns justifying an order, do not arise in this case. Turkey has enjoyed better economic fortunes and a more stable history. Time and again Mr. Cox made the point that there is no basis for thinking that the Turkish Government would not be able to or would not in a timely fashion, meet an obligation for costs ordered by this Court. He emphasized that his instructions were to assure this Court that any orders for costs would be met and, indeed, it is not contended that the Order has not been satisfactorily complied with since it was made some 20 months ago.
48. The ignominy of having the Order made against it, implying as it does this Court's loss of faith, and its continuing discredit in that way as a foreign state litigant before this Court, is what is of most concern to TMSF.
49. The circumstances under which TMSF failed to comply with the injunctive order might not now reasonably, to my mind, be taken as portending a general inclination or intention on its part to disobey orders of this Court.
50. TMSF's explanation and full apology have been tendered by Mr. Cox (and supported by affidavit evidence from its relevant officer).
51. I think those explanations and the apology should now be accepted by the Court. The upshot is that there is, to my mind, no basis for apprehending that TMSF, having invoked the jurisdiction of this Court as a plaintiff on behalf of the Turkish State would fail to meet in a timely fashion, an order for costs made against it by this Court in the proper exercise of its jurisdiction in due course; if that be the case.

52. All the relevant factors militate against such a concern, not least of all the fact that, as Mr. Cox also accepted, by refusing to meet an order for costs properly made against it by a foreign Court whose jurisdiction it invoked, the Turkish State would be taking the severe risk of loss of faith before this or any other foreign Court in which it might need to litigate in the future.

53. The vessels remain on the register here both still to be sold. The sale of the Frequency fell through when someone on behalf of the defendants brought the injunctive order to the notice of the prospective buyer. It is simply inconceivable in all the circumstances that the Turkish State should wish to risk its reputation for the sake of avoiding costs in this case especially in light of its express undertaking given on oath by its officer and repeated by its Counsel that it would not behave in that way.

54. For all those reasons, and having regard to the recent developments in the case law, I accede to the application to set aside the Order.

55. It follows that the 3rd defendant's cross-application is refused.

56. Costs of both summonses to be in the cause.

Hon. Anthony Smellie
Chief Justice
Delivered on 25th August 2006