GRAND COURT – CAYMAN ISLANDS

26/5/08

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 555 OF 2005

BETWEEN **TASARRUF MEVDUATI SIGORTA FONU** **PLAINTTIFF**

AND
1. **MERRIL LYNCH BANK AND TRUST COMPANY (CAYMAN) LIMITED ("MLBTC")**
2. **KAFFEE LIMITED**
3. **BARLA FINANCE LIMITED**
4. **CUNUR CASH LIMITED**
5. **MEDRO LIMITED**
6. **YAHYA MURAT DEMIREL** **DEFENDANTS**

CONSOLIDATED BY ORDER DATED 30 MARCH 2007 WITH

CAUSE NO. 80 OF 2007

BETWEEN **TASARRUF MEVDUATI SIGORTA FONU** **PLAINTIFF**

AND
1. **MERRIL LYNCH BANK AND TRUST COMPANY (CAYMAN) LIMITED ("MLBTC")**
2. **KAFFEE LIMITED**
3. **BARLA FINANCE LIMITED**
4. **CUNUR CASH LIMITED**
5. **MEDRO LIMITED**
6. **YAHYA MURAT DEMIREL** **DEFENDANTS**

IN CHAMBERS
THE 16th MAY 2008
BEFORE CHIEF JUSTICE ANTHONY SMELLIE

APPEARANCES: Mr. Jeremy Walton of Appleby for the plaintiff
Mr. Kenneth Farrow of Mourant for the sixth defendant
Mr. Martin Livingston of Maples and Calder for the 1st to 5th defendants

RULING

1. To what extent is a party entitled to pay his living expenses and his attorney's fees for his representation, from assets which the Court has ordered to be injuncted? That is the question before me now. It raises at least the following further questions:

2. Are living expenses to be allowed as the party is accustomed? Are legal fees to be allowed on the full indemnity attorney and own client basis? Or, are expenses and legal fees allowed on the basis that primary regard must be had to preserving as much as possible of the assets to meet the plaintiff's claim, if successful? Or, further alternatively, is there some other basis to be characterized by a standard of reasonableness to be established by the Court?

3. All these questions involve tests which are to be considered by the Court in determining the extent to which access to injuncted funds may be allowed. I am, however, satisfied on the existing state of the case law, that the fourth test – that of reasonableness – is ultimately the only appropriate basis for allowing access to injuncted funds for these present purposes.

4. While that must generally be the basic test, I am here primarily concerned with the payment of attorneys' fees. The starting point of course is to remember that a person is entitled to the legal representation of his choice and the terms upon which a client engages his attorney is a matter of contract between them.

5. Thus, a plaintiff who obtains an injunction against the assets of a defendant cannot be heard to say that the defendant's choice of attorney should be restricted by the plaintiff's interests in having as much as possible of the injuncted assets preserved to meet a judgment that he might obtain.

6. If it were otherwise, a defendant could be unfairly restricted as to the level of competence, experience or expertise of the attorney he might engage.

7. So long as the terms are reasonable, a defendant should be entitled to pay from his injuncted assets, the costs of the legal representation of his own choosing.

8. It is also to be remembered, in keeping with the foregoing, that a plaintiff is not entitled to treat injuncted assets of a defendant as if they are preserved to secure, in priority to other claims, a judgment which he might obtain. The purpose of the injunction is to prevent undue dissipation of the assets which is really aimed at defeating a just claim or claims: see ***A v C*** ***[1981] Q.B. 956n, [1980] 2 All ER 347,*** per Goff J. (as he was then) and as applied in ***Laager v Kruger*** ***1996 CILR 361.***

9. It follows that a plaintiff can claim no prior right over the injuncted assets ahead of the defendant's attorney's right to fees (or ahead of any other existing claimant). Prima facie, the payment of reasonable legal fees is not dissipation of assets: ***J.P. Morgan & Co. v Collins et al*** ***1996 CILR Note 5.***

10. On the other hand, even while some degree of priority must be afforded for the payment of attorneys fees; there have to be checks and balances to ensure their reasonableness and so to ensure that assets are not frittered away unjustly.

11. These competing considerations point to the need for a balance to be struck and recent developments in the case law show that this is precisely what the Courts have been seeking to achieve.

12. The particular context of each case must, of course, be considered. In this case, the injuncted assets are assets settled upon discretionary trusts of which the defendant, Mr. Demirel, is a primary beneficiary.

13. TMSF the plaintiff asserts a claim over them in respect of a judgment debt obtained against Demirel in Turkey arising out of an alleged fraud upon a regulated financial institution named Bank Ekspres. Mr. Demirel, as the former directing mind and major shareholder of another institution named Egebank,, has been directly implicated in the fraud. As I understand it, TMSF's claim in respect of the injuncted assets is not proprietary in nature. Rather, TMSF alleges that the injuncted assets though ostensibly settled upon trusts, remain Mr. Demirel's assets and so are available to satisfy TMSF's judgment debt obtained as against him. That was a judgment obtained in the amount of US$30,000,000 plus costs and expenses as the result of TMSF having made good the liabilities to the depositors of Bank Ekspres.

14. TMSF not being able to trace the stolen monies into the trusts here will have the difficult task of showing that the trusts are, in effect, sham trusts. As yet, the prima facie position is therefore, that the assets belong to the trusts and can be used for Mr. Demirel's benefit by the Trustee, subject only to the order of the Court.

15. Even in a more straightforward case where the plaintiff's claim against the injuncted assets is proprietary in nature, the Court may nonetheless, in the exercise of discretion, allow the payment of a defendant's legal fees. See ***Cala Cristal SA and Others v Al-Borne and Others***, ***The Times,*** ***6 May 1994.*** The position must be a fortiori here, where the claim against the injuncted assets is not proprietary in nature.

16. The immediate issue before me is confined to the matter of Mr. Demirel's attorneys' fees and specifically as to the amounts claimed in their latest bill of costs – US$163,543.75 (after admitted deductions of US$11,225).

17. On 30th March 2007 the injunction order in this case was varied to allow that:

> *"(The trustee) be at liberty to exercise its discretion as a trustee of the Trusts to procure payment out of Merrill Lynch International Bank Limited account number 110-07095… of the following sums:-*
>
> > *Such further reasonable legal expenses as may be incurred by (Mr. Demirel) in defending in this action, subject to prior approval by (the trustee) and agreement with the Plaintiff. In the absence of such approval and agreement, application is to be made to the Court."*

18. It is in the absence of that agreement envisaged by the order that the parties are now before me for the decision of the Court. TMSF objects to the claim and says, in effect, that there is significant overcharging by Mourant, Mr. Demirel's attorneys.

19. Mourant denies this and have presented an itemized spreadsheet of all items of costs with explanatory notes.

20. There are three main items disputed:

    (i) The work done which relates in any way to English proceedings in which Mr. Demirel is also sued by TMSF to recover the same judgment debt. TMSF says that Mourant has no business advising Mr. Demirel in respect of those proceedings and so may not charge for that advice. Mourant says that this is merely work which is reasonably ancillary to the work done here to defend against TMSF's claim in this jurisdiction.

(ii) The work done for Mr. Demirel relating to his appeal to the European Court of Human Rights ("ECHR") against the same judgment against him in Turkey. TMSF likewise objects to this work as being irrelevant to these proceedings and as undertaken only to benefit Mr. Demirel in the context of the ECHR proceedings. Mr. Farrow's response is also likewise: that this is work necessarily undertaken as ancillary to these proceedings and specifically in relation to TMSF's application for summary judgment; in which context reliance was placed upon the fact of and context of the institution of the ECHR proceedings. At the time of the hearing of this application the decision on that summary judgment application is still awaited.

(iii) The costs incurred by lawyers from Mourant (Mr. Robinson and Mr. Dickson) in traveling to Turkey to meet with and take instructions from Mr. Demirel who is under travel restrictions there. This, I am told, involved five (5) days in Turkey and long meetings involving the use of interpreters because Mr. Demirel does not speak English.

21. On behalf of TMSF, Mr. Walton submits that in order to assess the specific items of the bill of costs the appropriate course now is to refer the bill of costs to the Taxing Officer for assessment (as distinct from formal taxation for which there is no power as power exists only for the taxation of party and party costs).

22. From my own knowledge of this case (including as the judge who dealt with the summary judgment application) I felt I had sufficient insight to allow me to undertake a fair and reasonable assessment of the bill, without the need to refer it for assessment by the Taxing Officer. On that basis I granted the amount claimed.

23. I concluded however, that, in an appropriate case, it may be necessary to refer the matter for a detailed assessment by the Taxing Officer, even though, as was also said in the ***Cala Cristal*** (above) case; it would be wrong to ascribe to the plaintiff a standing to require taxation or to attend upon such a taxation in respect of expenses at this stage of proceedings. Rather, the assessment would be one undertaken by the Taxing Officer administratively and purely for the assistance of the judge who would ultimately decide.

24. The attorneys' fees should be allowed if, as I found here, there was no element of an ulterior purpose in the work undertaken on behalf of the defendant (such as impermissibly or clandestinely in furtherance of foreign proceedings) or blatantly extravagant service (such as unjustifiable expense for travel alleged in this case but not shown). See again the ***Cala Cristal*** case.

25. In summary, the following principles are to be applied when deciding whether to allow payment of a defendant's legal costs out of injuncted assets, including in circumstances where the plaintiff asserts a proprietary claim to the assets (the list is not intended to be exhaustive); (see also the helpful judgment of the Court of Appeal of Jersey; ***Armco Inc. et al v Donohue et al*** *1998 JLR Note 12):*

(i) Payment of reasonable fees will be allowed, i.e., if there is no element of ulterior purpose or blatant or extravagant service.

This is in keeping with the principle that a defendant should be allowed the legal representation of his own choosing.

(ii) *In instructing his attorney, a defendant should be entitled, subject to proper safeguards to be described below, to expect that his attorney would be remunerated on an attorney and own client basis, and not as constrained by the formal process of taxation aimed at the protection of a losing litigant.*

(iii) *While it is also settled principle that the plaintiff has no priority over other claimants (including attorneys for their fees) by virtue of the injunction; a careful judgment has to be made as to whether possible injustice to the plaintiff – by permitting the use of the assets by the defendant – is outweighed by the possible injustice to the defendant if he is denied the opportunity of presenting a proper defence or counter-claim.*

(iv) *It follows that a defendant has the burden of satisfying the Court that he has no other funds of his own available to pay legal fees (or other expenses).*

(v) *The Court will look to the reality of what would occur if no order were made. If the Court is not satisfied about the unavailability of other funds (including such as might be made available by a third party) then the Court will take that consideration into account.*

(vi) *While the Court will not ordinarily concern itself with the quantum of individual items of costs, it may well fix a limit to the* *overall amount to be allowed (or monthly amounts in the case of living expenses). The Court will not act as a form of provisional taxing body for the purposes of scrutinizing the defendant's legal fees but, in keeping with its responsibility to ensure only such expenditure as is reasonable, will in appropriate circumstances take a general assessment itself of the bill of fees or refer the bill to the Taxing Officer for informal assessment and advice to the Court.*

(vii) *The Court may impose safeguards, e.g., a requirement (by way of undertaking from the defendant; by order or otherwise) that the defendant will make good, out of any available funds in respect of which the plaintiff may be found to have no proprietary claim, any amounts spent on the defendant's legal fees which are subsequently found to have come out of property to which the plaintiff is proven to have a proprietary claim.*

GRAND COURT – CAYMAN ISLANDS

Hon. Anthony Smellie
Chief Justice

May 26, 2008