

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN**



**C.I.C.A. NO. 19/97
(GRAND COURT CAUSE NO. 77/96)**

BETWEEN:

**PETER KRUGER
DEFENDANT/APPELLANT**

AND:

**ANDRE LAAGER
PLAINTIFF/RESPONDENT**

**BEFORE: THE RT. HON. EDWARD ZACCA, PRESIDENT,
THE RT. HON. TELFORD GEORGES AND
THE HON. GERALD COLLETT, JUSTICES OF APPEAL**

**ANDREW HOCHHAUSER Q.C. AND ROSS McDONOUGH
INSTRUCTED BY MESSRS. BRUCE CAMPBELL & COMPANY ON
BEHALF OF THE APPELLANT.**

**ANDREW JONES INSTRUCTED BY MESSRS. MAPLES & CALDER
FOR THE RESPONDENT.**

The appellant, Mr. Laager and the respondent, Mr. Kruger, have been friends since the 1970's. Mr. Kruger was employed in a Swiss real estate management company and over the years he introduced Mr. Laager to various investments in real estate which proved profitable. As a result of events which have not been disclosed their friendship and business relationship came to an end.

They met in Bern in December 1991 to settle their differences. As a result of this meeting Mr. Kruger drew up and signed a document. Dated 1st January, 1992 and purporting to be made between Mr. Laager, described as single shareholder of Dynasty AG Glaurus. Under that agreement Mr. Kruger took over 100% of the shares of that company in two named

Swiss companies. The purchase price was SF 20,300,000. – payable in six instalments as follows-

20 th March, 1992	SF 3,000,000.00
31 st December, 1993	SF 1,000,000.00
31 st December, 1994	SF 2,000,000.00
31 st December, 1995	SF 3,000,000.00
31 st December, 1996	SF 5,000,000.00
31 st December, 1997	SF 6,300,000.00

Interest was payable on the capital sum outstanding at 7% per annum from 1st January, 1992. The entire interest fell due in two equal instalments, the first on 30th June, 1998 and the second on 31st December, 1998.

The parties entered into a second agreement dated 28th March, 1992. In effect this recited that on the mandate of Mr. Laager, Mr. Kruger had undertaken to purchase a participating interest of SF 10,000,000.00 representing a 40% share of a company called Canadian Portfolio Ltd. Grand Cayman. Thereupon Mr. Laager had advanced to Mr. Kruger the sum of SF 10,000,000.00 to effect the purchase. Since the negotiations for that purchase, the market had basically changed and the value of the interest to be purchased could not be assessed. Mr. Laager accordingly renounced his claim to acquire the interest and Mr. Kruger agreed to repay the SF 10,000,000.00 in six instalments as follows:-

3 rd July, 1992	SF 1,500,000.00
20 th September, 1992	SF 1,500,000.00
31 st December, 1993	SF 1,500,000.00
31 st December, 1994	SF 1,500,000.00
31 st December, 1995	SF 2,000,000.00
31 st December, 1996	SF 2,000,000.00

There was also a provision for the payment of interest.

There was a third agreement also dated 28th March, 1992. It was in terms similar to the other agreement of even date. The sum advanced for the purchase of the participating interest was SF 6,770,673.00 and the companies in which they were to be purchased were Maitland Ltd. and Morning Ltd. both incorporated in Grand Cayman. Mr. Kruger agreed to repay that loan in four instalments three of SF 1,700,000.00 payable on 31st December, 1993, 1994 and 1995 and one of SF 1,670,573.00 on 31st December, 1996. There was also a provision for the payment of interest.

Mr. Kruger did not pay the instalments of SF 3,000,000.00 due on 20th March, 1992 on the agreement dated 1st January, 1992 and the two instalments of SF 1,500,000.00 due on 3rd July, 1992 and 20th September, 1992 under the agreements dated 28th March, 1992. Mr. Laager filed proceedings in Bern and on 17th February, 1993 was granted provisional judgment for SF 6,000,000.00 and costs of SF 4,000.00. Swiss law permits a defendant against whom such a provisional judgment is entered to challenge it. Mr. Kruger duly lodged a petition for a challenge on the merits. He was required to lodge SF 105,000.00 as security for costs. He failed to do this and the provisional judgment was made final and binding.

On 5th November, 1993 Mr. Kruger was made bankrupt by a court in Bern and the bankruptcy office in Bern was appointed to administer his property. The instalments fixed under the three agreements remained unpaid as they fell due. Mr. Kruger also deposes that

a consequence of Mr. Kruger's bankruptcy was that all the instalments became immediately due.

By a writ issued on 23rd February, 1996 Mr. Laager as plaintiff, claimed against Mr. Kruger (1) the sum of SF 6,061,916.00 the amount awarded under the Swiss judgment; (2) the sum of SF 17,300,000.00 the amounts falling due immediately on the bankruptcy of Mr. Kruger,(3) the sum of SF 7,000,000.00 the balance due under the first 1992 agreement for which no judgment had been sought in the Swiss courts and (4) the sum due under the second 1992 agreement. The total sum claimed was SF 37,132,589.00 and interest totaling SF 4,970,807.00

On 7th March, 1996 Mr. Laager filed summons under GCR Order 14 for summary judgment in the above amounts. The summons was supported by an affidavit sworn to by Mr. Laager.

In response to the summons and affidavit Mr. Kruger filed an affidavit dated 10th April, 1996. He was then in Northward Prison having been arrested and detained as a result of proceedings filed by the Swiss Government seeking his extradition to Switzerland. He had left Switzerland for Grand Cayman shortly before his bankruptcy.

In the affidavit he deposed that in December 1991 Mr. Laager had arranged to meet him and had informed him that he was under pressure from his banker in Geneva. He needed to assure them that he would shortly have available funds to meet repayments promised to

them. He told Mr. Kruger that unless two of Mr. Kruger's companies undertook to buy back from Dynasty A.G. Glaurus at exactly the same price that he had sold them to Dynasty A.G. Glaurus he would institute a complaint against Mr. Kruger alleging that he had misrepresented the value of those shares when he had sold them to Dynasty A.G. Glaurus in June 1987. Mr. Kruger protested that this was not true. Mr. Laager was, however, insistent and fearing the impact that such an accusation would have on his business empire he decided to sign such a document.

As a result he drafted the document tendered as the agreement of 1st January, 1992.

The agreements dated 28th March, 1992 were signed in circumstances which bore similarities to those leading to the signing of the agreement of 1st January, 1992. In the summer of 1988 Mr. Laager had given him Can \$13.6 million to finance real estate investments in companies to be set up as subsidiaries of Canadian Portfolio Ltd. He had made it clear that those investments should be regarded as long term and an immediate return could not be expected. Despite this Mr. Laager approached him and informed him that he was under pressure from his bankers and needed a document to show Credit Suisse to assure them that he would soon be in funds. There was again the threat that unless Mr. Kruger signed such a document he would make an allegation that Mr. Kruger had improperly used the funds. As a result he signed the documents dated 28th March, 1992.

Mr. Kruger denied that the documents were ever intended to have a legally binding effect. He had been advised that had he placed these facts before the Swiss court it would not have

enforced the purported agreements. Because he was unable to put up the sum of SF 105,000.00 the judgment had gone against him.

At the hearing of the GCR Order 14 summons a number of arguments were advanced on behalf of Mr. Kruger.

It was pointed out that on the face of the document itself the proper plaintiff under the agreement of 1st January, 1992 should be Dynasty A.G. Glaurus and not the appellant Mr. Laager.

It was also urged that all the agreements had been entered into under duress.

In the case of the agreement of 1st January, 1992 the circumstances showed that it was never intended to have legal effect. It had been produced by Mr. Kruger at the insistence of Mr. Laager merely for the purpose of showing Mr. Laager's bankers.

Williams J. granted the appellant Mr. Kruger leave to defend the claim under the second of the two agreements dated 28th March, 1992, that is the third agreement for SF 6,770,573.00. He gave summary judgment for SF 30,361,916.00 plus interest. This included the sums claimed for the instalments due under the first and second agreements for SF 6,000,000.00 and the sums under these two agreements which had become due on the bankruptcy.

The argument before this Court centered principally on the issue of duress. In the light of the judgment of the Swiss Court awarding judgment in the sum of SF 6,000,000.00 it was contended that Mr. Kruger was estopped from advancing that defence to any claim under the agreement of 1st January, 1992 and the first agreement dated 28th March 1998 for SF 10,000,000.00.

Clearly that judgment was a judgment entered by default. There had been no investigation of the case on its merits. It had been urged that the Swiss procedure which required the deposit of a sum of money as security for costs in order to challenge by petition the provisional judgment breached principles of natural justice and on that ground procedure offended the principle of natural justice. Before us that point was not pressed and correctly so. There was evidence that even if Mr. Kruger did not have the money he could have easily obtained an advance from his wife. In any event the requirement of a deposit could be waived if the defendant could establish that he or she did not have the money.

There remained the issue whether or not Mr. Kruger was estopped from challenging the judgment on the ground that implicit in it was a finding by the Swiss court that the two agreements were valid agreements. Williams J relied on the well-known dictum of Wigram V.C. in Henderson & Henderson (1843) 3 Hare 100 at p 115 which had been quoted with approval by the Judicial Committee of the Privy Council in Yat Tung Investments Co. Ltd v Dou Heng Bank Ltd. and Another [1957] AC 581.

“...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward

their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which parties, exercising reasonable diligence, might have brought forward at the time.”

It should be noted that Wigram V.C. did reserve from the broad statement of the rule what he described as “special circumstances”.

This was noted in the case of Kok Hoong v Leong Chong Mines [1964] 1 All ER, 300 an authority which was cited to Williams J. but to which he did not refer in his ruling. Viscount Radcliffe in giving the opinion of Board stated at p 305:

“Their Lordships are satisfied that where a judgment by default comes into question, it would be wrong to apply the full rigour of any principle as widely formulated as that of Henderson v Henderson. It may well be doubted whether the learned Vice-Chancellor had in mind all the peculiar circumstances of a default judgment and whether such a judgement would not naturally fall into his reservation of “special cases”.

Their Lordships after full consideration of an older case Howlett v Tarte (1861) 10 C.B.N.S. 813 concluded that the House of Lords decision in New Brunswick Ry Co. v British and French Trust Corp. Ltd. [1938] 4 All ER 747 had given an “authoritative reinterpretation of the case of Howlett v Tarte (supra). It is stated on p. 306:-

“This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinized with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and to use the words of Lord Maugham L.C., they can estop only for what must ‘necessarily and with complete precision’ have been determined thereby.”

Against this reinterpretation of the principle in Henderson v Henderson (supra) it becomes important to examine with care precisely what the judgment of the Bern Court decided.

As had been stated in the affidavit of Mr. Bruno Henziker where a creditor has what purports to be an acknowledgment of the debt signed by the debtor the creditor can have a hearing before a special examining judge. This is a summary proceeding where the judge will consider only the documents. There will be no viva voce evidence or other affidavit evidence relating to the circumstance surrounding the execution of the document. On that basis the judge grants what is referred to as “the provisional removal of opposition”. The debtor then brings an ordinary action for a declaratory judgment that the debt is not due.

It has been urged that implicit in the judgment is a finding that the agreement under which the debt had been claimed was valid. There is no need to make any such assumption. The judgment is based on the fact that there was an acknowledgment of a debt which had not been challenged by an action for a declaration that the sum acknowledged was not in fact due. The judgment may well estop Mr. Kruger from denying that he signed the document

or that he did receive the money acknowledged in the document as having been received, but it should not estop him further.

In the course of the many proceedings which have been a feature of this dispute the Chief Justice, in his function as a single judge of the Court of Appeal, made an order admitting affidavit evidence tending to show that the defence of duress which Mr. Kruger now advances could not possibly succeed. Affidavit evidence was also introduced casting doubt on that evidence.

In deciding this appeal we have not looked at his evidence. Once the defendant is entitled to be granted leave to defend by raising the issue of duress, the question as to whether the defence should succeed is a matter to be determined at the trial. The judge ought not to undertake an assessment of conflicting evidence on the issue as part of the process of determining whether leave should be granted.

The appeal will therefore be allowed and the order of Williams J. varied. The appellant is granted leave to defend the claims contained in paragraphs 8, 9 and 10 of the statement of claim.

There appears to be no dispute over the claim in paragraph 6 under the Bern judgment and the judgment against the appellant under that paragraph for SF 6,061,916.00 will stand.

Costs of this appeal to the appellant.

