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

CIVIL APPEAL M4 OF 1998
GRAND COURT CAUSE NO. 266 OF 1996

17-04-98

BETWEEN: (1) PETER KRÜGER DEFENDANT
(2) BARBARA KRÜGER

DEFENDANT/APPLICANT

AND: ANDRÉ LAAGER
PLAINTIFF/RESPONDENT

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

ANDREW HOCHAUSER Q.C. AND STEPHEN HELLMAN INSTRUCTED BY MESSRS. QUIN & HAMPSON FOR THE APPLICANT
ANDREW JONES INSTRUCTED BY MESSRS. MAPLES & CALDER FOR THE RESPONDENT

JUDGEMENT

This is an application to grant leave to appeal against an order of the Grand Court dated 6th June, 1997, insofar as that order disallowed four specific items of expenses which the applicant had sought leave to pay out of monies now in court and subject to the terms of a modified world-wide Mareva injunction made earlier against her in these proceedings. Because of the nature of the application and in the interests of saving time and costs, this court with the consent of the parties has elected to treat the application as the hearing of the appeal.

The applicant's Notice of Motion claims that the Grand Court Judge, in the exercise of his discretion in relation to these four items, has failed to apply the correct legal principles applicable to the case, which were earlier correctly enunciated by him in another interlocutory judgement pronounced on 12th November, 1996 in the proceedings: it is further claimed that he erred in principle in ordering that the applicant should pay the whole of the Respondent's costs of the entire application before him.

No complaint is made by either party as to the correctness of the principles enunciated in the 12th November, 1996 judgement and, having examined it we are content to accept and endorse those principles. We, therefore, now turn to consider each of the four specific items of the expenses disallowed for the purpose of reviewing the exercise of the judge's discretion.

The first item consists of a sum of US $11,897.58 which the evidence indicates is the amount of a demand by US Revenue authorities for payment by the applicant of luxury tax on a car imported by her into the U.S.A. in 1994, before these proceedings were even commenced. The reason advanced for disallowing that item is that "I can see no reason why U.S. tax should be met from Cayman". That appears to us to disregard entirely the fact that liability to pay the tax is one incurred bona fide at a time when no restriction was imposed upon the free disposition of her resources by the applicant. We do not see how it can be supported in principle nor do we think it right that the applicant should be compelled to met this past tax demand out of monies allowed to her under the modified injunction primarily to meet current living expenses. This item of expense ought to have been allowed.

The second item presents greater difficulty. It consists of a sum of U.S. $83,397.00 demanded by Krüger Business Corporation, a Florida company apparently owned and controlled by the applicant as repayment of a loan advanced to her once again at a time when the injunction was not in place. The loan appears to have been made informally by the company defraying numerous personal expenses of the applicant in the U.S.A. and to have resulted in the company being now unable to discharge its own tax liabilities in that jurisdiction for the years 1995 and 1996. The company's only business enterprise at present seems to be the operation of a launderette and its current profitability is in some doubt.

An unresolved question arises as to whether or not the advancement of this substantial sum can be said to have occurred in the ordinary course of business of the company. The judge regarded it as a device to remove money from the Cayman Islands. Although we are not satisfied upon the evidence that this is necessarily so, we are mindful of the purpose of a Mareva Injunction to preserve assets within this jurisdiction and cannot be sufficiently sure of the true purpose to say that the judge's exercise of his discretion is necessarily wrong in this particular instance. We therefore uphold this part of his order.

The third item is more simple. It refers to landscaping expenses at Victoria House, the former Cayman residence of the applicant and her husband. That property has now been sold because they have relocated to live in Switzerland and the proceeds of sale, in excess of U.S. $1.2 million have been paid into court. It would appear that the benefit of this expenditure has enured to enhance the value of that property and therefore the sale proceeds. It cannot properly be

described as "a gratuitous improvement not maintenance". This is a legitimately allowable expense. We so hold.

The last item relates to the relocation expenses of the couple in their move to Switzerland: Swiss Fr. 778,095.70 is claimed. The evidence discloses a miscellany of expenses, some of a capital nature, some not. The judge disallowed this item en bloc but we consider that to have been erroneous. At the hearing, applicant's counsel offered to cut the claim by half, a broad brush approach which commends itself to us after examination of the details making up this item.

Finally as to costs. The judge allowed thirteen items of expense totaling a greater sum than the ten items which he disallowed and he deferred two more; this despite strenuous opposition from the respondent. Nevertheless, he awarded the whole costs of the summons to the respondent. That approach conflicts with the authorities, notably **Re Elgindata Ltd. (No. 2)** **(1993) 1 AER 232** in the English Court of Appeal, which are applicable also in Cayman. We consider that in the instant case the applicant should instead have been awarded three quarters of her costs in the Grand Court on the summons and will order accordingly.

In the result the application for leave to appeal is granted and the appeal is allowed in part. The order of the Grand Court is varied in the following respects:

(a) by removing items 4 and 9 entirely from the Third schedule and entering them as items 14 and 15 respectively in the First Schedule to the Order;
(b) by amending the figure '778,095.70' in item 10 of the Third Schedule to read '389,047.85';
(c) by entering an item 16 in the First Schedule to read – 'setting up and living expenses for Switzerland SF 389,047.85'
(d) by deleting the order for costs and substituting –

‘7. That the second defendant be awarded three quarters of the costs of this application.’

The applicant is also awarded three quarters of her costs of the appeal to this Court.

Dated 17th April, 1998

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President

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Justice of Appeal

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Justice of Appeal