

9.4.98



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2
3 CAUSE NO. 153 of 1995

4
5 In the matter of the **Cotorro Trust originally** constituted by a Trust
6 Agreement dated the 1st day of June 1979 between Maria Ernestina
7 Barcardi y Gailard and Roywest Trust Corporation (Cayman) Limited, now
8 named Coutts & Co. (Cayman) Limited.

9
10 AND In the matter of the Trust Law (Revised)

11
12 BETWEEN: COUTTS & CO. (Cayman) LIMITED

PLAINTIFF

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15
16 AND: 1. JERRY M. LINDZON
17 2. ELENA GOMEZ DEL CAMPO DE LINDZON
18 3. ELENA LAURA PESSINO DE BALMASEDA
19 4. CESAR JAIME DE BALMASEDA
20 (A minor, by his Guardian ad Litem George
21 Giglioli on his own behalf and on behalf of all
22 minor and remoter beneficiaries of the Cotorro
23 Trust)
24 5. SANTIAGO CASAS
25 6. MARIANA ELENA PESSINO DE QUIRCH
26 7. MARIA EUGENIA PESSINO DE ROTHWELL

DEFENDANTS

27
28
29 APPEARANCES:

30 Graham Ritchie of Charles Adams, Ritchie & Duckworth for the Plaintiff.
31 Neil Timms of Maples and Calder for the 1st and 2nd defendants.

32
33 RULING

34
35 The present summons is brought by the 1st and 2nd defendants seeking the
36 further renewal of a writ of sequestration - already issued and once renewed

1 by this court - but in the form which is proposed as the more usual form, ie:
2 one not prescribing an expiry period.

3

4 Since the date of the renewal new circumstances have arisen which, apart
5 from issues of policy and practice also advanced, are canvassed as
6 additional grounds for the different form of the writ now being sought.

7

8 The contempt which Douglas J found to be proved and which justified the
9 issuance of the writ in the first place was the deliberate disobedience of an
10 order of this court, made on 17 January 1997, restraining the 3rd defendant
11 from continuing certain proceedings she had instituted in Florida, USA
12 against the 1st and 2nd defendants and others. That anti-suit injunction of
13 17 January 1997 was made in the context of it having been clearly
14 demonstrated to this court that the Florida proceedings were oppressive -
15 designed as they were to embarrass and pressure the 1st and 2nd defendants
16 who were already parties to these proceedings, enjoined before this court
17 over issues touching upon essentially the same subject-matter as raised in
18 the Florida proceedings. This court was therefore also then found to be the
19 natural and proper forum for the resolution of the same issues - issues which

1 all related to the Trust which is domiciled in this jurisdiction. The 3rd
2 defendant, although granted leave to do so, never challenged the anti-suit
3 injunction. Instead, in flagrant breach of the anti-suit injunction, she
4 pressed on with the action in Florida. She was however, unsuccessful at
5 first instance, for reasons which included considerations similar to those
6 which had been taken up by this court in granting the injunction in the first
7 place, ie: forum non conveniens and oppression.

8

9 In continued breach of the injunction, the 3rd defendant even now persists
10 in the action in Florida by pursuing it on appeal. In so doing it seems just
11 about every conceivable ploy has been taken on her behalf including, quite
12 remarkably, recourse to an allegation of bias on the part of the first instance
13 judge. Although ultimately unsuccessful, such recourses I am told and
14 accept must have exacerbated the anxiety of the 1st and 2nd defendants who
15 had to join in to all the way to an appeal to defeat the allegation. The 1st
16 and 2nd defendants must now further contend with the substantive appeal
17 against the decision of the Florida court which is set to proceed later this
18 year, despite the anti-suit injunction.

19

1 Mr. Timms has asserted that this has likely been the cause and will continue
2 to be the cause of great stress and of the resultant mental and physical
3 debilitation of his clients, the 1st and 2nd defendants, who are both quite
4 elderly. There is medical evidence to that effect on which he relies.

5

6 I am satisfied that the 3rd defendant is motivated entirely by self-interest
7 and there is every reason for this court to believe that notwithstanding the
8 detrimental effect on the health of the 2nd defendant who is her mother, the
9 3rd defendants' campaign of harassment will continue unless it is brought
10 home to her that the continued disobedience of the orders of this court will
11 not be tolerated and will result in severe consequences.

12

13 For the reason that he is also being affected by the 3rd defendant's actions,
14 the 1st defendant now also joins in the application for the renewal of the
15 writ of sequestration. There can be no doubt that he has the right to do so.

16

17 I must also, of course, consider the obvious public policy interest in
18 reissuing the writ. This court should in no manner be seen as accepting or

1 condoning a contempt of its orders. Refusal to reissue the writ would
2 inevitably carry that implication.

3

4 Douglas J issued and reissued the writ for 3 months only in each instance
5 for reasons which are explained (as to the original order and implicitly
6 carried over to the reissuance) in his written ruling of the 7th September
7 1997.

8

9 Briefly put, he had concerns that as no assets of the 3rd defendant appeared
10 now or in the foreseeable future likely to become amenable to sequestration
11 as being within the jurisdiction of this court, the indefinite extension of the
12 writ would be futile and it was not appropriate for the court to make
13 ineffective orders.

14

15 However - as both Mr. Timms and Mr. Ritchie were able to demonstrate to
16 my satisfaction - the ramifications of public policy and the possible
17 permutations for enforcement of the writ are now more fully apparent than
18 they were before, Douglas J and require a change of approach.

19

1 The third defendant's breach of the order of this court is now established
2 beyond peradventure to be deliberate and calculated to advance her own
3 purposes. Having failed to advance her complaints before this court, the
4 embarrassing pleadings filed in the Florida proceedings are shown to be
5 intended to pressure her mother and the 1st defendant, her stepfather, into
6 an award or settlement of what are essentially the very same complaints.

7

8 So long as the continuation of the writ of sequestration can serve as a
9 deterrent to such a flagrant contempt of the orders of this court, I am
10 persuaded that public policy requires that it be allowed to run in the usual
11 way.

12

13 And although benefit to any party is only incidental to the real reasons of
14 public policy which demand that the writ be continued as a deterrent, that
15 benefit is also a factor to be considered. The element of ensuring that those
16 who are affected by contempt do not suffer insofar as the court can prevent
17 it, may ipso facto, be reason justifying the writ: Richardson v Richardson
18 [1989 3 W.L.R. 865. That was a case in which the court ordered sale of the
19 respondent's house in order to provide the plaintiff with the means by which

1 he could pursue action against the respondent overseas for the return of the
2 child of the marriage to the jurisdiction of the Court where the issues of
3 custody and care and protection were to be resolved. The writ was an
4 appropriate remedy to compel the respondent to obey the order for the
5 return of the child. I accept, as Mr. Timms submits, that that approach is a
6 priori applicable in this case, insofar as the currency of the writ will or
7 might enable the plaintiff to pursue the 3rd defendant to compliance with
8 the anti-suit injunction.

9

10 Thus apart from the element of relief to a party, there is also to be
11 considered the coercive value of the writ as itself being a means by which
12 the contemnor can be compelled to obey. Notwithstanding that the order is
13 an injunction and therefore negative in terms, it would nonetheless
14 ordinarily be practicable that assets of the 3rd defendant be pursued and if
15 appropriate seized and held without - absent further order - having to apply
16 them toward satisfaction of a judgment debt in the way they would be
17 applied if there were a positive debt to be satisfied. This settled practice is
18 discussed also in Richardson v Richardson (supra) at p. 869-870 (citing
19 dictum of Scarman J. in Romilly v Romilly [1964] p 22-23:

1 “....A distinction was drawn between
2 sequestration to enforce payment of a sum of
3 money and sequestration as punishment for some
4 default other than in the payment of money. In the
5 former the court would, upon application, order
6 the sequestrators, if they had the funds, to satisfy
7 the demand, whereas in the latter the property
8 sequestered would only be held in medio until the
9 contempt was purged. See Anderson Law of
10 Education (1889) page 537 and Daniells’
11 Chancery Practice, p. 7909.”
12

13 In this case the only “asset” of the 3rd defendant presently known to be
14 amenable to the jurisdiction of this court is her contingent interest in the
15 Trust. That is an interest which will be actualised only if she survives her
16 mother when an entitlement to one-quarter the income from the Trust is to
17 go to her.

18
19 Mr. Timms accepts that at best that interest is to be regarded as an equitable
20 chose in action and not as an asset which can now be directly sequestered.
21 That I regard as plainly correct. See Halsbury’s Laws 4th Ed. Vol 6. para.
22 8(4). It follows that the interest is not one that can be presently seized to
23 compel obedience of the order of the court as was contemplated in Romilly
24 v Romilly (supra). But that is not necessarily the end of the matter.

1

2 There are already significant sums due from the 3rd defendant to the 1st and
3 2nd defendants for costs incurred in the proceedings in this jurisdiction (in
4 the main action and in this) as well as, perhaps, in the Florida proceedings.

5 Mr. Ritchie, for the trustee, also felt obliged to lay down the marker in
6 respect of costs owed to the trustee in the main action here. The marker is
7 set as follows: Should action be taken any time to recover any or all those
8 debts against the 3rd defendant's entitlements under the Trust, that
9 eventuality would, at least arguably, serve to trigger the forfeiture
10 provisions of the Trust Deed which create a protective discretionary trust
11 over those entitlements (notwithstanding their inchoate nature) in the
12 following terms:

13

14 "This Article Fifth shall come into operation if any
15 part of the income or principal of the Trust Fund
16 or *any interest of any beneficiary* therein shall be
17 subjected to any legal process in any part of the
18 world for the payment of any obligation or
19 indebtedness of any beneficiary or if any
20 beneficiary shall anticipate, pledge or assign any
21 interest in the income or principal of the Trust
22 Fund or shall purport to do so and in any such
23 event the Trusts hereby declared in favour of the
24 beneficiary concerned shall determine and be

1 replaced by a discretionary trust” (emphasis
2 supplied)

3
4 It must of course be recognised that the operation of the discretionary trust
5 once triggered - while disentitling the 3rd defendant to a non-discretionary
6 interest in the Trust replacing it with a discretionary interest only - would
7 also remove her entitlement from the operation of the writ and so the
8 sequestrators could not go against it: Halsbury’s Laws 4th Edition Vol. 17
9 para. 511 citing Dixon v Rowe (1876) 35 L.T. 548.

10
11 This possible outcome was contemplated by Douglas J in his written
12 reasons where he also nonetheless recognised its potential deterrent effect as
13 a “sword of domiciles” to compel the 3rd defendants’ obedience of the
14 injunction. It would, if operational in that way, be an entirely punitive
15 recourse but one which this court may yet come to regard as justified if the
16 flagrant disobedience of its orders and the resultant detriment to others is
17 continued.

18
19 As tangible further reason for the renewal and continuation of the writ, there
20 are at least two other possibilities to be contemplated. These are both

1 possibilities which may arise if the 3rd defendant survives her mother the
2 2nd defendant, but with there being carried over at that time to her estate,
3 the interests of the 2nd defendant in the writ of sequestration itself. Any
4 such interest which this court might recognise - such as, for example, the
5 enforcement of a claim for damages or costs arising from the breach of the
6 anti-suit injunction - may then become enforceable as against any interest
7 which the 3rd defendant might then have in the Trust. See Halsbury's Laws
8 4th Ed. Vol 17 para. 513.- where, (citing
9 Hydes v. Foster (1748) 1 Dick 1132) in the notes it is explained that the
10 interests which devolve to the estate of the person issuing the writ survive,
11 irrespective of whether the sequestration is for disobedience of a final or
12 interlocutory order-as was the nature of the anti-suit injunction here.
13
14 The attempted enforcement of such a claim as against the income interests
15 of the 3rd defendant under the Trust may then operate to trigger the
16 forfeiture provisions under the Trust instead of realising the indebtedness, a
17 possibility already recognised , should the 1st and 2nd defendants claim
18 against the Trust - (See Halsbury's op cit para 511 citing Dixon v Rowe

1 (1876) 545) - but that outcome may well then, in that future event, also be
2 considered a justifiable outcome for the reasons already examined.

3

4 The other possibility is that the indebtedness arising under the operation of
5 the writ and devolving to the estate of the 2nd defendant could be enforced,
6 not directly as against the Trust itself and so not triggering the forfeiture
7 clause, but by way of some mandatory form of order (eg: an injunction - see
8 Willcock v Terrell (1878) P 239 - directing the Trustee to pay over her
9 income entitlements *after it is allocated* to the 3rd defendant. At the current
10 rate of income, even one such payment would be a considerable sum.

11 The foregoing hypotheses are of course not matters which can be
12 definitively pronounced upon now. They are being considered only as the
13 reasons postulated to show that the writ, if re-amended and allowed to
14 continue to run, will be no empty or mere token order.

15

16 Given the primary objective of the writ, which is to compel obedience with
17 the orders of this Court, and to compel the contemnor 3rd defendant, to
18 purge her contempt, it is not necessary for the writ to specify particular
19 property which can now be sequestered. The general form used and to be

1 continued is sufficient: Hydes v Hydes (1888) 13 P.D. 166, 175. Any
2 property seized by means of the writ will be required to be held until an
3 attempt is made to purge the contempt.

4

5 I have seen the first reports provided to this court by the sequestrators.
6 From it there appears no reason to believe that the 3rd defendant has any
7 assets apart from her contingent interest in the trust, within the Cayman
8 Islands. The sequestrators will now turn attention to assets which may exist
9 outside the jurisdiction. They are of course entitled to do so at the instance
10 of the 1st and 2nd defendants who will fund the costs of their efforts.

11 I require, as a means of monitoring and controlling the manner in which the
12 process of this Court is being used, that they report once per year to the
13 court during the continuation of the writ.

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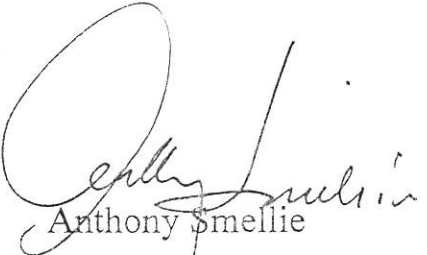
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Anthony Smellie

1 JUDGE OF THE GRAND COURT

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3 Dated: April 7, 1998.

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5 DATED THIS DAY OF MARCH 1998

