C/S.

12.3.98



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 818 of 1997

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| BETWEEN: | Max Christopher Donnelly (Trustee in Bankruptcy) | PLAINTIFF |
| AND: | Karess Properties Limited Kyle Investments Limited et al | DEFENDANTS |

For the Plaintiff - Mr. Richard Morgan and Mr. Diarmad Murray
For the 1st and 2nd Defendants - Mr. Ross McDonaugh

**JUDGMENT**

This is an application by the first and second defendants, whom I will call Karess and Kyle for discharge of a Mareva Injunction made on the 8th December 1997, as subsequently varied, insofar as it is directed to the first and second defendants on the ground that the plaintiff does not have a good arguable case against these defendants.

The plaintiff is the trustee in bankruptcy of one Christopher Skase ("Skase"). The date of Skase's bankruptcy in Australia was 13th June 1991 and there is evidence that since around August 1991 he has resided in a property in Majorca called La Noria.

It is the plaintiff's case that before his personal bankruptcy Skase took steps to put his assets beyond the reach of his creditors by getting them out of Australia and putting them in the names of his four step-daughters, Amanda Larkins, Alexandra Louise Buckham (formerly Frew), Carolyn Argenti and Felicity Argenti ("the stepdaughters") or companies which were created or acquired for the purpose and that the assets were

then moved around for no consideration and without the apparent knowledge or approval of the step-daughters or any independent directors of the companies. It is also claimed that these transfers were made on the instructions of Skase or by one Harold Larkins ("Larkins") who is married to one of the step-daughters.

I now consider the arguments presented on behalf of Kyle and Karess in support of their application to discharge the injunction. The plaintiff swore an affidavit in support of the application for the injunction and exhibited a letter of request from the Federal Court of Australia to the High Court of England which contained representations that the registered holders of each of the four issued shares in Karess were the four step-daughters of Skase, Amanda Larkins, Alexandra Louise Buckham, Caroline Argenti and Felicity Argenti ("the step-daughters"); that Karess owns the entire issued share capital of Kyle; and that Kyle owns the entire issued share capital of La Noria SA. It was submitted that the plaintiff's failure to make good these contentions disentitled him to the relief which he sought.

I accepted however, that, the essential case set out in the writ even without recourse to the Statement of Claim, which was filed after the application for the injunction, was that the shares in Kyle and Karess and their property and ultimately La Noria, the property in Majorca, remained beneficially owned by Skase and consequently on his bankruptcy by the plaintiff as trustee in bankruptcy and the matter was fought on that footing.

The first and second defendants have filed an affidavit by Larkins in his capacity as the sole director of Karess and Kyle. He exhibits what he claims to be true copies of the Register of Members of Karess and Kyle. The document relating to Karess shows that the step-daughters transferred their holdings of one share each to Cayman nominee companies on the 12th June 1991 the day before Skase's bankruptcy; and since then there have been six different owners of the shares. Larkins also depones that to the best of his knowledge and belief neither Skase nor any of the step-daughters have any interest in the shares of Karess.

With regard to Kyle the Register exhibited by Larkin shows a transfer by Karess of its shareholding in the company in January 1996 with two subsequent shareholders since then. Larkins also says on oath that Kyle does not hold any of the shares in La Noria SA nor does it have any other interest of any nature in that company.

The first and second defendants also relied on sections 37 and 47 of the Companies Law. Section 37 provides that the subscribers of the Memorandum of Association and every other person who has agreed to become a member of a company and whose name is entered on the Register of Members shall be deemed to be a member of a company. Section 47 provides that the Register of Members shall be prima facie evidence of any matters by the law directed or authorised to be inserted therein.

On the basis of that proposition the first and second defendants argue that there is no evidence to rebut the evidence in Karess's Register of Members that the step-daughters transferred ownership of their shares on 12th June 1991; or to rebut the

evidence in the register of Kyle that Karess became the sole shareholder of Kyle on the 18th November 1994 and transferred its one share in Kyle on the 2nd January 1996 to Marcosti BV of Amsterdam. So, it is argued, there is no evidence that Karess owned the shares in Kyle at the time of the making of the injunctive order, that evidence now before the court is to the opposite effect and there is no evidence from which the court could infer that Karess continues to own Kyle; moreover the plaintiff could not adduce evidence at the hearing on 8th December 1997 as to the ownership of La Noria SA by Kyle and the affidavit of Mr. Larkins sworn in his capacity as Director of Kyle is that Kyle does not own La Noria SA.

Karess and Kyle are both companies registered in the Cayman Islands and the plaintiff's target in these proceedings is the residence in Majorca which he claims was held by Kyle which was in turn owned by Karess which was operated by and on behalf of Skase who was the true beneficial owner of Karess and Kyle,. with the consequence as a matter of law that such ownership vests in the plaintiff on the bankruptcy of Skase.

It is an important element of the plaintiff's case that in order to meet the equitable claim the onus of proving the transfer of the legal interest bona fide for value and without notice rests on the purchaser and I am satisfied that he is right in that regard.

The plaintiff takes issue with Mr. Larkin's truthfulness and made an application, which I refused, for his cross-examination in connection with the present application. I do however have before me the affidavits of the plaintiff to which he has exhibited

documents and transcripts of evidence from examinations of people connected with Skase. I was taken through it by the plaintiff to the extent necessary, as he put it, to provide a snapshot of the evidence as to why Larkins affidavit is not to be believed. That is not for final resolution now, the question being whether the position should be held until that can be done. I refer to the evidence simply by three broad categories, as follows -

Averments that -

(a) Skase habitually backdates transactions. In support of that I was taken to evidence about a property in London, 82 Chesson Road, including the record surrounding a "gift" of that property to Karess by Alexandra Frew, a Declaration of Trust by Nahmea Investments Ltd in relation to the property; and a transfer, ostensibly on 29th October 1990 of shares in a company called Halcyon Park Ltd.;

(b) The evidence of at least three of the step-daughters has contradicted itself and their memory has apparently improved with the passage of time. They, and Larkins, are fronts for Skase;

(c) a short term loan of L100,000, secured on 82, Chesson Road, to Karess, with payment to be on 15th March 1991 to a bank account in Skase's name, contradicts Skase's evidence in relation to the Australian Securities Commission on 30th May 1991 that he had no involvement with Karess and Skase's lawyer received instructions from Skase with regard to the gift of 82 Chesson Road to Karess.

(d) Skase was involved after the bankruptcy with Karess and Kyle, as shown by evidence of Skase's lawyer of Skase's instruction in September 1991 concerning a debt of Karess to Bank Austria and the removal of files from that lawyer's firm.

(e) There are anomalies relating to the document sworn by Larkin to be a true copy of the register of members of Karess.

(f) The record indicates that the shares in Karess and Kyle must at some point have had a value of at least the value of La Noria; so if Karess had no assets in November 1996, as sworn to by Larkins, that value must have been properly or improperly taken out of Karess. La Noria is an asset whose value and ownership have not been identified otherwise than by the plaintiffs evidence.

So the plaintiff's argument is simply that the court is left with the position that Larkin's evidence is contradicted by other evidence and the only reasonable conclusion which the court can reach in those circumstances is that there is a serious issue to be tried (though in fact I shall later be giving my view that that is not the correct test) and in any event Larkin's evidence does not show anything to suggest that the shares were transferred to a bona fide purchaser for value without notice. Moreover there is no evidence contesting the allegation that the corporate structure of Karess and Kyle was a sham set up in an attempt to defraud Skase's creditors, a proposition which is supported by the involvement of various of his family members in transactions carried out in times corresponding to actions taken by or against him

and without apparent compliance with normal transfer formalities or proper explanation.

As to the law as to the strength of the case which the plaintiff has to show in order to sustain his injunction, in my view the first and second defendants are wrong in their submission that in considering whether the plaintiff has a good arguable case the court has to reach a provisional or tentative conclusion on all the admissible material before it that the plaintiff is probably right on any disputed question of fact. Attock Cement Ltd v. the Romanian Bank for Foreign Trade (1989) 1 All ER 1189 does not support that in such general terms. It was a case where the defendant applied to set aside leave granted ex-parte under RSC Order 11 Rule 1 to serve a writ out of the jurisdiction and there was a disputed question of fact essential to determining whether the action fell within the provisions of that order. The following passage appears in the judgment of Staughton LJ at page 1194 -

> "Traditionally, masters and judges have directed themselves in accordance with the note now found in The Supreme Court Practice 1988 vol. 1, para 11/1/6:
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> > "The degree of proof required was discussed in The Brabo ([1949] 1 All ER 294, [1949] AC 326) and Vitkovice Horni v. Korner ([1951 2 All ER 334, [1951] AC 869). The expression "good arguable case" is probably the best way of summarising the effect of these authorities; it indicates that, though the Court will not, at this stage, require proof of the plaintiff's case to its satisfaction, it will expect something better than a mere prima facie case. The practice, where questions of fact are concerned, is to look primarily at the plaintiff's case and not to attempt to try disputes of fact on affidavit; it is, of course, open to the defendant to show that the evidence of the plaintiff is incomplete or plainly wrong. On questions of law, however, the Court may go fully into the issues and will refuse leave if it concludes that the plaintiff's case is bound to fail. Even if the Court does not reach so adverse a view, if the plaintiff's case is

> weak, this may be a relevant consideration on the exercise of the Court's discretion."

That has been refined in the 1997 edition of the Supreme Court Practice by dividing the relevant passage in note 11/1/6 at page 85 into two parts - the first being the degree of proof required by the court to show that the case falls within one of the sub-paragraphs of Order 11 Rule (1) so as to give it jurisdiction to consider the application. That is good arguable case as discussed in The Brabo and Vitkovice Horni v. Korner. Secondly comes the test of serious issue to be tried which arises once the court is satisfied that it has jurisdiction which under sub-heads of Rule 11 (1) require an examination of the merits. That is the lower degree of proof required to enable the court to exercise its discretion to grant leave.

The first and second defendants relied on the following later passage in the judgment of Staughton LJ at page 1196 -

> "I conclude that where there is a disputed question of fact which is essential to the application f Order 11 R.1 the judge must reach a provisional or tentative conclusion that the plaintiff is probably right on it before he allows service to stand. The nettle must be grasped, and that is what I take to be meant by a good arguable case."

Nothing in those observations which were very specific to issues pertaining to service out of the jurisdiction under Order 11 Rule 1 or in the later local cases to which I was referred, lead me away from the general principle which was enunciated by Mustill J in Nenemia Maritime Corp v. Trave GMBH, the Niedersachsen (1984) 1All ER 398 and approved by the Court of Appeal. After an exhaustive review of authority

Mustill J considered the meaning of the phrase "likely to recover judgment". I shall refer only to the last of these authorities, as did Mustill J in the following passage -

> "There is, however, another authority to be taken into account. In Z Ltd v. A [1982] 1 All ER 556, [1982] QB 558 Kerr LJ laid down a series of guidelines, in which Eveleigh LJ concurred, for the exercise of the Mareva jurisdiction which have been widely acted on in practice. In section 1 of his judgment, Kerr LJ refers on three occasions to the grant of an injunction where the plaintiff is 'likely' to recover judgment. Does this entail that, whatever Vitkovice v. Horni a Hutni Tezirstvo v. Korner [1951] 2 All ER 334, [1951] AC 869 may appear to say, the jurisdiction should not be invoked unless the available evidence points to the conclusion that the plaintiff has a better than even chance of success? I believe not. Kerr LJ was not addressing himself specifically to the present issue. In my judgment, he was doing no more than reiterate that the plaintiff must always demonstrate a likelihood of success, and was not prescribing the degree of likelihood.
> In these circumstances, I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success."

That is the test which I adopt in this case.

I have already referred to the categories of evidence on which the plaintiff relied. Taking this evidence as a whole I am satisfied that the plaintiff has a good arguable case and that the injunction should not be discharged.

Costs in the cause.

12th March 1998

G.E. Harre
Chief Justice