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vs cost



IN CHAMBERS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 153/95

BETWEEN: Coutts & Co. (Cayman) Limited Plaintiff

AND:

1. Jerry M. Lindzon
2. Elena Gomez Del Campo De Lindzon
3. Elena Laura Pessino De Balmaseda
4. Cesar Jaime De Balmaseda (A minor,  
by the guardian ad litem George  
Giglioli, on his own behalf and on  
behalf of all minor an remoter  
beneficiaries of the Cotorro Trust)
5. Santiago Casas
6. Mariana De Quirch
7. Maria Eugenia Pessino De Rothwell

Defendants

Mr. Graham Ritchie for the plaintiff/trustees  
Ms. Sara Collins for the 6th & 7th defendants  
Mr. Neil Timms for the 2nd defendant

Before Douglas J.

RULING

By notice of motion dated 17th June 1997 the second defendant seeks leave to issue a Writ of Sequestration against the property of the third defendant for breach of an anti-suit injunction granted on 17th January 1997. The following orders are also sought.

1. For personal service of the injunction to be disposed with.

2. For the appointment of one or more sequestrator names on the Writ proposed to be issued.
3. That the sequestrators be at liberty to instruct Maples and Calder.
4. That the third defendant pay the costs of the application, issue and execute Writ of Sequestration.
5. That the Sequestrators report to the Court.

I will endeavour to state the circumstances leading up to the filing of this application as succinctly as possible. Coutts and Company, the plaintiff in these proceedings are trustee for the Cotorro Trust, one set up by Marie Ernestina Bacardi for the benefit of herself and her daughter Elena. The Trust was subsequently amended permitting Elena to take up to 50% of the trust funds over a five year period. Elena has three daughters, Mariana, Maria Eugenia and Elena Laura.

A challenge was raised by Elena Laura as to the validity of the Trust and the amendments. This was done notwithstanding the fact that she had received, and retained one million dollars from the funds obtained as a result of the second amendment. As a consequence of this challenge the trustees filed a Section 45 summons under the Trust Law (Revised) on 29th June 1995 seeking the Court's direction. In the hearings which ensued, Elena Laura as the third defendant played an

active role. Judgment was eventually given declaring that the Trust and its amendments were valid.

Not satisfied with the judgment the third defendant issued proceedings against, inter alia the second defendant who is the applicant in this matter. It was as a result of these proceedings that the anti-suit injunction application was made ex parte on 30th December 1996 by the second defendant.

On the 17th January the Court granted the injunction restraining the third defendant from prosecuting the Florida proceedings against the second defendant, and from commencing or prosecuting any proceedings against the second defendant elsewhere relating to invalidity of the amendments of the Cotorro Trust. The Court held that the Florida proceedings insofar as they related to the first and second defendants were vexatious and intended to be oppressive.

For the purpose of this ruling it is not necessary to expatiate further on these proceedings and those which followed except to say that on 25th June 1995 the Florida Court granted the second defendant motion to dismiss the third defendant's complaints on the grounds of **forum non conveniens**. She has now appealed the ruling.

#### Contempt

Counsel for the applicant has submitted that the third defendant was fully aware of the injunctions made by this Court and their purpose and that she was provided with an opportunity to vary, discharge or

set aside the orders but chose not to do so. That by issuing the Florida proceedings she is in contempt of the order of this Court.

This Writ is being sought pursuant to the G.C.R. Order 45 r 5 (1) which provides as follows:

"Where a person disobeys a judgment or order requiring him to obtain from doing an act, then, subject to the provisions of these Rules, the judgment or order may be enforced...

with leave of the Court, Writ of Sequestration against the property of that person."

The Writ of Sequestration is defined at paragraph 505 of Halsbury's Laws Vol. 17.

"The Writ of Sequestration is a process of proceeding against the property of the contemnor, and is available as a mode of enforcement of judgments or orders only where the person against whom it is sought to be issued is in contempt of Court by disobedience to an order of the court. Before the Writ of Sequestration will be allowed to issue, therefore, the Court must be satisfied beyond reasonable doubt that a contempt of court has been committed."

I have before me a number of documents tendered by the applicant in

support of her claims that a contempt of Court has been committed by the third defendant. Much of this evidence is contained in the affidavits of one Daniel Edwardo Gonzalez, an attorney of the firm of Steel Hector & Davis the second defendant's Florida attorneys. In his second affidavit Gonzalez deponed that the third defendant has been the author of some disparaging remarks concerning the Cayman Islands proceedings. For the purpose of this application this is irrelevant as it does not constitute disobedience to an order of the Court. The main thrust of this application is directed at the third defendant's disobedience to the anti-suit injunction by her prosecution of the Florida proceedings against the second defendant, notwithstanding her obvious knowledge of the injunction. Gonzalez's second affidavit shows that on Friday 17th January 1997 copies of this Court's order of the same date, including the anti-suit injunction, were sent by facsimile to both of the third defendant's Florida lawyers. There is correspondence showing that they both responded, denying that they were authorised to accept service. On Tuesday the 21st January 1997, without notice to the second defendant, the Florida attorneys filed a motion in the Florida proceedings for entry of default judgment against the second defendant. It is apparent from the Memorandum of Law which has been produced, and her own affidavit filed in the Florida proceedings, that the third defendants was fully aware of the injunction, and deliberately chose to ignore it. On 25th June 1997 the Florida Court granted the second defendant's motion to dismiss the third defendant's complaint on the ground of forum non-conveniens. The third defendant has now filed a Notice of Appeal against that order, thereby continuing her contempt.

In view of this evidence I am satisfied that the third defendant has acted in disobedience to the anti-suit injunction thereby committing a contempt of Court. Accordingly, am not precluded from granting leave to issue a Writ of Sequestration against the property of the third defendant should I be so moved.

#### Service of Injunction

In the event of such leave being granted, the applicant seeks an order for personal service of the injunction to be dispensed with.

Grand Court Rules Order 45 rule 7 provides directions on the service of a copy of a judgment. Sub rule 7 allows the court to dispense with service under the rule if it thinks fit. Halsbury's Law Vol. 17 para. 506 deals with the issue of a Writ of Sequestration, and reads as follows:

"As sequestration is a process of contempt it is a necessary preliminary issue of a Writ of Sequestration that the judgment or order intended to be so enforced should be served personally upon the person against whom the process is sought, and the copy of the judgment or order so served must have the requisite penal notice endorsed on it. Nevertheless, a judgment or order requiring a person to abstain from doing a specific act may be enforced by Writ of Sequestration, notwithstanding that a copy of it has not been served personally, if the Court is satisfied, that, pending such service, the person against whose property it is sought to enforce the judgment or order has had

notice of it, either by being present when the order was made or being notified if its terms, whether by telephone telegram or otherwise."

In her affidavit of 6th June 1997 Annette Marie Epp, a legal assistant of the second defendant's attorneys in the Cayman Islands depones that she sent sealed copies of the relevant orders including the penal notice by courier to the third defendant's Spanish attorney. Attached to the affidavit is a copy of the Spanish notarial deed of Mr. Francisco Echavarri Lomo who attempted to serve the documents. This deed shows that service was refused by the third defendant. Copies of both the documents, the injunction order and the penal notice are exhibited to Miss Epp's affidavit.

From the evidence before me it is clear that the third defendant is evading service in which case it is proper and necessary that personal service may be dispensed with. (See Worboys v. Worboys [1953] P. 192, 201, 202)

#### The Effect of Sequestration

It has been submitted that the Writ of Sequestration is analogous to a Garnishee Order. Without enforcement it creates no charge on a particular debt. (See Re Hoare ex p. Nelson [1880] 14 Ch. D 41, 45, 47, 48). Sequestrators taking possession of property detain and hold it until the contempt is cleared or further order. The order will be ineffective against assets outside the jurisdiction except to the extent that the Court in that jurisdiction will enforce it.

Notwithstanding the numerous authorities dealing with the various aspects of sequestration, one of the primary factors to be considered in this application is that apart from the Cotorro Trust there is an absence of any known assets belonging to the third defendant within the jurisdiction. If as is likely, she is in possession of other assets, no order will be effective outside the jurisdiction except to the extent that the Court in that jurisdiction will enforce it. Any writ issued as a result of this application would be directed towards the third defendant's interest in the Cotorro Trust.

The Cotorro Trust is an income interest arising on the death of her mother, the second defendant, and can be regarded as an equitable chose of action. (At paragraph 508 Halsbury's Laws 4th Edition, Vol. 17). A Writ of Sequestration binds the property other than choses an action from the date of issue. The situation surrounding the issue of a writ in this matter is somewhat unique. We will see that apart from the difficulties which would be encountered by the sequestrators in obtaining any payment out of the Trust, the death of the applicant is a prerequisite for the Trust to become operative. The matter becomes even more complicated by the fact that Article Fifth of the Cotorro Trust Deed provides for a protective trust. The relevant passage of the original deed states as follows:

"The net income of this trust shall not be subject to any legal process for the payment of any obligation or indebtedness of any of the beneficiaries....  
and any such interest or right of the

beneficiary shall purportedly be subject to process.....  
the trust hereby declared concerning the same shall automatically terminate and be replaced by a discretionary trust."

The third amendment, that dated 13th February 1984, under the heading "Claims of Creditors" amended Article Fifth of the Trust as follows:

"This Article Fifth shall come into operation in any part of the income or principal of the Trust Fund or any interest of any beneficiary to determine whether the issue of the Writ of Sequestration forfeits the income interest of the third defendant under the Trust..."

Learned counsel has submitted that even if the income interest were forfeited the Court should enforce its order. It has been rightly argued that the Writ does not of itself forfeit the interest, it is not process for the payment of an obligation or indebtedness, but to compel obedience to an injunction, and for the payment of costs. It is not difficult to determine that the efficacy of such a Writ is greatly denuded by the conditions precedent to which it would be subject. Here I am referring not only to the death of the applicant, but also to the forfeiture of clause, as any action taken by the sequestrators against the Trust in this matter is bound to trigger the discretionary trust in the trust deed.

This now brings me to question what benefits can be derived by the applicant during her lifetime by the issuing of this Writ. It is

contended that she can make out special circumstances in which she should be permitted payment from sequestered funds to defend the Florida proceedings, and that in this way, a conclusion to the proceedings consistent with the anti-suit injunction would be affected. This is of course assuming that available assets of the third defendant can be located. I am not at all convinced that a Writ of Sequestration would in any way constitute a Sword of Damocles hanging over the head of the third defendant. In any event, regardless what the outcome might be, the applicant has absolutely no tangible benefit to be gained during her lifetime from any action which could be taken by a sequesterator regarding that Trust. I am of the opinion that in view of the present circumstances it is unlikely that any sequesterator would be able to successfully carry out any function which would discourage the third defendant from pursuing her course of action, or to obtain any benefit for the applicant whose demise is a prerequisite for any foreseeable execution of the Writ. I do not agree with Counsel that it is unnecessary for the Court to determine whether the issue of a Writ of Sequestration forfeits the interest of the third defendant under the Trust. The Court ought not to make an order, or grant an application, the enforceability of which is patently futile to the purpose for which it is sought. It can hardly be denied that the only persons who stand to benefit from the issuance of this Writ are those whose duty it would be to see to its execution.

The situation may be somewhat different should the circumstances change to permit the sequestrators to have immediate access to assets of the third defendant. She is no doubt well aware of the

difficulties to be faced by any sequestrator as far as obtaining any of her present assets is concerned. Accordingly, it is most unlikely that the issue of a general Writ would serve any useful purpose.

These are considerations which must affect the outcome of any ruling to be made in this matter.

#### Issue of Writ

Most of the authorities available show that in such cases a Writ of Sequestration is only issued where the assets targeted are obviously obtainable, and not in the event that certain conditions precedent will occur at some uncertain time in the future. Notwithstanding the fact that the applicant is no doubt financially secure, the issue of such a writ could prove more of a liability to her than any costs which she is likely to incur in the Florida proceedings, and without any prospect of receiving any benefit.

Nevertheless, the Court is cognisant of the fact that a contempt has been committed by the third defendant's deliberate and calculated breach of the injunction. Apart from the fact that some effort should be made to compel obedience, the issue of a Writ would enable the sequestrator to ascertain whether or not the third defendant has any available assets within or without the jurisdiction. Accordingly for these reasons the applicant is entitled to issue a Writ. I find that the applicant is entitled to issue of the Writ with a view to ascertaining the assets position of the third defendant.

Appointment of Sequestrators

I have been unable to find any precedence of the appointment of sequestrators in the Cayman Islands. The English rule is that the Writ should be addressed to not less than four commissioners of whom at least two must act. They are nominated by the person issuing the Writ and need no special qualification (see Halsbury's Laws 4th Edition Vol. 17 para. 508). In this instance I see no necessity to follow the English custom regarding the number of sequestrator being appointed. The situation clearly does not warrant such a procedure. The applicant, through her Cayman Islands attorneys, has nominated as sequestrators Partners of Ernst Young who have acted as Court Appointed Liquidators and Receivers. This meets with the Court's approval.

Accordingly leave is granted to issue a conditional Writ of Sequestration against the property of the third defendant for breach of the anti-trust injunction granted on 17th January 1997.

That a single sequestrator from the Partners of Ernst Young be appointed for a period of three months.

That the sequestrator report to the Court at the determination of that period.

That the sequestrator be at liberty to instruct Maples and Calder.

That personal service of the Injunction be dispensed with.

That the third defendant pay the costs of the application, issue and execution of the Writ of Sequestration.



Kipling Douglas  
Judge of the Grand Court

Dated 7th October 1997

