29. 9. 97

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 77 of 1996

BETWEEN: ANDRE LAAGER PLAINTIFF

AND: PETER KRUGER DEFENDANT

JUDGMENT

On 3rd May 1996, the Honourable Mr. Justice Williams gave summary judgment against the Defendant and made an Order which included the following -

> "1. The Plaintiff do have final judgment against the Defendant in respect of the claims contained in paragraphs 6,7 and 8 of the Statement of Claim in the principal sum of Sfr 30,361,916 plus interest thereon in the sum of Sfr 4,282,797."

There were also ancillary orders for attendance for oral examination, discovery and inspection.

The summary judgment was based, in part, on a judgment by the Court of Appeal of Berne Canton, 2nd Civil Chamber, and in part upon agreements entered into by the defendant in Switzerland, where he is a bankrupt. The Defendant has applied for leave to appeal against that judgment, and for a stay pending appeal.

The defendant in support of his application for leave relies on well known principles. The fundamental test is to be found in the judgment of Lord Donaldson of Lymington MR in the Iran Nabuvat (1990) 1 WLR 1115 at 1117. It is this -

> "The grant or refusal of leave to come to the Court of Appeal is a very sensitive power which has to be exercised by the court. The bias must always be towards allowing the full court to consider the complaints of the dissatisfied litigant ... For my part, I have no doubt at all that no one should be turned away from the Court of Appeal if he has an arguable case by way of appeal."

In deciding whether to grant leave to appeal, consideration should be given to whether there are issues of importance which would benefit from further argument and whether the decision of an appeal court, particularly on a question of principle decided for the first time, would be to the public advantage; In the Matter of Universal and Surety Company Limited 1992-93 CILR 157. (Malone CJ).

The defendant says that there are two issues of importance which were wrongly decided by the judge:-

(1) The fact that the Swiss Court required the Defendant to put up security for costs in the sum of Sfr 105,000 as a condition to his bringing an action to have a provisional judgment of the Swiss Court discharged; and

(2) the position of the Defendant's trustee in bankruptcy under Swiss law.

Before turning to consider whether two issues should go to the Court of appeal it is important to remember when considering Order 14 applications that a complete defence need not be shown. Even where the defence can be described as "more than shadowy but less than probable", leave to defend should be given, especially where the events have taken place in a country with different mores and law; Rafidain Bank v. Agom Universal Sugar Trading Co, The Times December 23, 1986 Court of Appeal.

The facts relating to the first issue were these. On 17th February 1993, the IVth Court of Berne granted the Plaintiff provisional judgment for Sfr 6,000,000 plus costs and Court fees. This judgment was reached by a summary procedure applied by a special examining judge before whom the Defendant was not allowed to adduce any evidence relating to the circumstances surrounding the execution of documents which purport to be written acknowledgment of debt.

According to this Swiss procedure the Defendant must then take steps to discharge the provisional judgment by bringing an action for a declaration that the debt was not due and owing.

The judge, whilst agreeing that a Caymanian Court would not impose a security for costs condition as the Swiss Court had done, dismissed the issue as not being "of sufficient significance to cause the Cayman Court to disregard the Swiss judgment."

Civil law procedures such as are to be found in Switzerland differ greatly from those to which we are accustomed. Analogies between the two systems, such as the learned judge sought to show by a comparison with our appeal procedure may be false friends. What he had before him was evidence of a final judgment, albeit a default judgment, of the Swiss Court, arrived at by a procedure which is acknowledged to be established in Switzerland and before a court of competent jurisdiction.

In Adams v. Cape Industries plc, the English Court of Appeal considered the leading cases applicable to enforcement of foreign judgments against individuals at common law. The following passages are from the judgment of Slade LJ -

> "Two points at least are clear. First, at common law in this country foreign judgments are enforced, if at all, not through considerations of comity but upon the basis of principle explained thus by Parke B in Williams v. Jones (1845) 13 M & W 628,633:
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> > "where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced ...."
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> Secondly, however, in deciding whether the foreign court was one of competent jurisdiction, our courts will apply not the law of the foreign court itself but our own rules of private international law. As Lindley M R put it in Pemberton v. Hughes [1899] 1 Ch 781, 791:
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> > "There is no doubt that the courts of this country will not enforce the decisions of foreign courts which have no jurisdiction in the sense above explained - i.e. , over the subject matter or over the persons brought before them ... But the jurisdiction which alone is important in these matters is the competence of the court in an international sense - i.e., its territorial competence over the subject matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country."

We have in the present case a court before the defendant appeared and conducted his case; a final and conclusive judgment on the dismissal of his petition to discharge the provisional judgment; and a judgment for a specific sum payable to a private party.

With regard to the issue of estoppel, I cannot conceive that an appeal court would reach a conclusion different to that expressed by Williams J at page 15 of his

judgment. There is in my judgment no grant for granting leave to appeal on the first ground advanced by the defendant.

The second ground concerns the effect of the defendants bankruptcy in Switzerland. The defendant became a bankrupt there on 5th November 1993.

There was a conflict between Swiss experts about the extraterritorial effect, if any, of a Swiss Bankruptcy decree. However, neither Mr. Oederlin nor Mr. Patocchi for the plaintiff nor Mr. Hunziger for the defendant state unequivocally that Mr. Laager is not a proper plaintiff in this action. It is important to remember that it is that to which the arguments of the experts are directed. However, I did allow a late affidavit from Professor Kurt Siehr of the Centre for Private International Law of the University of Zurich. I find the following passage in his discourse, although it deals with a situation which is the reverse of what we have in the present case, particularly illuminating -

> "It is emphasized that foreign primary proceedings do not seize automatically the debtor's assets located in Switzerland. This is only done by Swiss authorities opening ancillary proceedings after having recognized the foreign primary proceedings.
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> Here already is evident that two questions are mixed: (1) Which assets form the estate or should form it and (2) who is going to achieve it by seizure? The same confusion can be found with respect to Swiss primary bankruptcy proceedings. Because Swiss authorities cannot extend their power beyond state borders and effectively seize assets located abroad, some authors draw the fallacious conclusion that those foreign assets do not form part of the estate. It may be that Mr. Patocchi's and Mr. Oederlin's affidavits have to be interpreted in this way: Swiss authorities can only act within the Swiss territory and therefore are restricted to seizure within Switzerland. Whether a foreign country will recognize Swiss policy to liquidate the entire (also foreign) assets of the debtor, must be left to the respective foreign state. However, it is completely wrong to conclude that a Swiss bankruptcy decree is not intended to have an

extraterritorial effect."

He then gives examples of non Swiss case law on Swiss Bankruptcy Proceedings and reaches the following conclusions -

> "This line of cases cannot be explained if Swiss Bankruptcy Law for primary proceedings - as the affidavits for the Plaintiff contend - follows the principle of territoriality. It would simply not be possible for Swiss bankruptcy offices to seek to be recognized abroad if - as is said by the affidavits for the Plaintiff - a Swiss Bankruptcy Decree is restricted to local assets. Swiss Bankruptcy Law and Primary Insolvency Proceedings adheres to the principle of universality, and wants to work universally and relies on cooperation of foreign states to enforce this bankruptcy decrees because Swiss authorities cannot exercise their powers abroad without such cooperation.
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> My opinion is further supported by the fact that Mr. Meir himself considers that he has the power to sue for and recover assets which are located outside Switzerland."

Professor Siehr exhibts to his affidavit a copy of a letter which was sent by Mr. Meir to each of the creditors in the bankruptcy together with a translation. That letter includes the following passage -

> "In connection with the extradition application by Switzerland and the arrest of Peter Kruger it became know that assets of the common debtor were apparently situated in the Cayman Islands, Florida and Canada. These are alleged to have been transferred in part to Barbara Kruger. The Berne Bankruptcy Office would have to act abroad to recover these assets for the bankrupt estate. This would entail high costs. The financial situation does not permit actions of this nature.
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> One of the principal creditors of Peter Kruger has already obtained an enforceable judgment against Peter Kruger in Grand Cayman, which has led to the seizure of the known assets of Peter and Barbara Kruger. The creditor's expenses amounted to approximately Sfr. 500,000. In order to participate in the proceeds the receiver would have to share the costs. This is not possible. The receiver has therefore concluded that those claims for which action outside Switzerland is necessary should be assigned to the creditors. Apart from the holiday home in Motier, the claim to the property in St. Tropez is not covered by such assignment. It is not yet clear whether the receiver will pursue these matters directly."

The letter continues with a proposal for a Creditors Resolution. It reads as follows -

> "The Peter Kruger bankrupt estate waives assertion before the courts of all claims made against Peter Kruger or against third parties, whether natural persons or legal entities, arising from non-fulfilment of contracts, default, tortious circumstances, actions to set aside agreements made by a debtor to defraud his creditors, or on any other legal basis, insofar as action outside Switzerland may be necessary. This waiver expressly excludes rights to dispute the transfers of the Motier and St. Tropez properties to Mrs. Barbara Kruger."

I have no evidence as to whether that resolution was ever passed. The receiver did offer however that if it should be passed to assign the various claims individually or en bloc under Article 260 of the Sch Kg on condition that creditors applying for assignment undertake to take legal or equivalent out of court action to assert the assigned claims within six months.

Mr. Meir swore an affidavit himself in the present case. It was dated 23rd July 1997. He confirmed that he was the Director of the Bankruptcy Office presently charged with responsibility for all matters relating to the City of Berne and was the most senior executive within the Bankruptcy Office involved in the administration of Peter Kruger's bankruptcy and had been so since he was declared bankrupt on 5th November 1993. He continued as follows -

> "I am authorized to swear this affidavit on behalf of the Bankruptcy Office to clarify any misunderstanding which might exist as to Mr. Laager's right to take action to recover any assets of Peter Kruger outside of Switzerland.
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> I have read the contents of the 1st affidavit of Paolo Michele Patocchi in Cause No. 266 of 1996 exhibited hereto as MM1.
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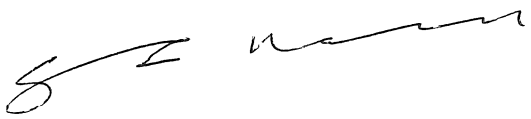
> I agree with Mr. Patocchi's explanations of territoriality and assignment of claims, which he details in paragraphs 8 and 9 of his Affidavit (see pages 3 to 6 inclusive) and I confirm that, at the time when Mr. Andre Laager commenced Cause 77 of 1996 he had the right to do so and did not require an assignment from this office pursuant to article 260 of the Swiss Debt Collection

and Bankruptcy Law before he could commence that action."

In the face of this I conclude that the argument that Mr. Laager is not an appropriate plaintiff in this case is bound to fail.

Leave to appeal is refused.



G.E. Harre
Chief Justice

29th September 1997