Douglas J.
12.11.96

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 266/96

BETWEEN	:	Andre Laager	PLAINTIFF
AND	:	Peter Kruger	FIRST DEFENDANT
AND	:	Barbara Kruger	SECOND DEFENDANT

For the Plaintiff: Mr. Andrew Jones and Mrs. Anna Peccarino

For the Second Defendant: Mr. Charles Quin and Mr. Steven Hellman

For an interested Party: Mr. Ross McDonaugh

HARRE CJ

JUDGMENT

By a summons dated 5th June 1996 the second defendant Mrs. Barbara Kruger sought leave to use monies which are the subject of a world wide injunction to meet legal and living expenses. She has between that time and today filed four affidavits in which she gives details

of properties in which she claims to have a beneficial interest, and of what she says are her liabilities.

Orders dated 12th and 21st August and 16th September have been made concerning certain specific payments and related obligations of the second defendant.

Leave was also given, by consent, for the second defendant to open a bank account for the payment of a weekly allowance for living expenses subject to the plaintiff's attorney being provided with monthly statements of that account.

I also gave leave for immediate payment of outstanding sums relating to a property at 4731 Fisher Island Drive, Miami on which foreclosure proceedings are imminent out of a nominated account of Axminster Investments Ltd. subject to an undertaking that the money be replaced from funds in safe deposit boxes in Florida in the name of Mrs. Kruger once these are paid into court. Unfortunately there have been problems of jurisdiction in Florida in relation to the release of these funds. These were described to me in some detail but it was acknowledged on behalf of the plaintiff that such risks as there were in relation to this would have to be taken in view of the urgency of the matter.

From these I can turn to the main issues.

On the 3rd May, 1996 the plaintiff ("Mr. Laager") obtained a final

judgment in Cause No. 77/96 ("the principal action") requiring Peter Kruger to pay the principal sum of SFr.30,361,916 plus interest of SFr.4,282,797 and costs of CI$11,680.00. This judgment remains wholly unsatisfied. The purpose of the present action, No. 266/96 is to seek orders enabling Mr. Laager to enforce his judgment against numerous assets on the basis that they are beneficially owned by the first defendant, Peter Kruger or, to the extent that they have been transferred to his wife Barbara, the second defendant, on the basis that those transfers were made during the past 6 years either for no consideration at all or at an undervalue, with the intention of defeating the obligations owed to Peter Kruger's creditors in general and Mr. Laager in particular, at a time when Peter Kruger was contemplating bankruptcy or after he was declared bankrupt in Switzerland on 5th November 1993. It is alleged that assets in the name of Barbara are held by her as nominee for Peter. I am going henceforth to refer to the first and second defendants in this convenient and I hope not overly informal way.

This matter came on for hearing on 19th July. The arguments on each side can be conveniently marshalled by reference to subparagraphs (a) to (d) of paragraph 2 of the first affidavit of Anna Peccarino, an attorney acting for the plaintiff, and the responses by Barbara's attorney. Before turning to that I will deal with the legal principles. It is the applicability of these to the facts of this case, rather than the principles themselves, which is the real issue.

The fundamental purpose for which a Mareva injunction is granted is to

prevent parties from causing assets to be removed from the jurisdiction in order to avoid the risk of having to satisfy any judgment which may be entered against them in pending proceedings: see

A. v. C. (No.2) [1981] 1 QB 956 per Goff J. at 959

Such an injunction does not establish the plaintiff as a secured creditor of a defendant or give him priority over others who deal in the ordinary course of business with him. It is Barbara's case that she was not a defendant in the principal action, remains the owner of the assets which are subject to the injunction and is entitled to use them for her reasonable living expenses including meeting the costs of any proceedings to which she is a party. For that she relies on -

Kea Corporation v. Parrot Corporation Limited & Others
Transcript 09/24/86, CA per Donaldson MR and Woolf LJ.
Campbell Mussells and Others v. Thompson and Another LT
29th May 1984 PCW Ltd. v. Dixon (1983) 2 All ER 158-159.

I have to acknowledge that the injunction in its original form was plainly wrong in that it made no provision for these matters. Some variation was clearly necessary. See -

Law Society v. Shanks (1987) 131 SJ 1626
PCW (Underwriting Agencies) v. Dixon (1983) 2 All ER 697.

The following is from the judgment of Lloyd J in the PCW case. His order was varied by consent but I adopt his approach -

> "The purpose of the jurisdiction is not to secure priority for the plaintiff; still less, I would add, to punish the defendant for his alleged misdeeds. The sole purpose or justification for the Mareva order is to prevent the plaintiffs being cheated out of the proceeds of their action, should it be successful, by the defendant either transferring his assets abroad or dissipating his assets within the jurisdiction: see Z Ltd. v. A [1982] 1 All ER 556 at 561, 571, [1982] QB 558 at 571, 584 per Lord Denning MR and Kerr LJ.
>
> I am not going to attempt to define in this case what is meant by dissipating assets within the jurisdiction or where the line is to be drawn; but whereever the line is to be drawn this defendant is well within it. It could not possibly be said that he is dissipating his assets by living as he has always lived and paying bills such as he has always incurred. I say nothing about the cost of defending himself in these proceedings. The Mareva jurisdiction was never intended to prevent expenditure such as this or to produce consequences such as would inevitably follow if this ex parte order is upheld."

And later in the same judgment, Lloyd J said this -

> "The plaintiffs may well feel strongly in the justice of their case and they may in the end prove right. But until the matter is tried they are not entitled to exercise undue pressure on the first defendant. In my view that is what they have been doing. They are entitled to a Mareva injunction. There is no dispute about that. But they were not entitled to put forward a figure, and still less to continue to insist on a figure, as low as L100. They must have known that if the figure L100 a week was maintained it could only result in the first defendant's capitulation."

These sentiments were echoed in a judgment of this Court in J.P. Morgan & Co. v. Collins and others No. 482/95.

It is common ground that assets covered by the injunction should only be used for the payment of liabilities incurred in good faith by Barbara personally or, in the case of corporate liabilities, in the

ordinary course of the business of the company which incurred them. Barbara has now sworn four affidavits in which she positively avers, and in great detail, that the sums are due and owing by her and that there is a legal liability to pay them. The court is not bound to accept without question that where there is a claim by a third party. The principles were set out in the judgment of Lloyd LJ in SCF Finance Ltd. v. Masri (1985) 2 All ER 747 at 753 -

> (1) Where a plaintiff invites the court to include within the scope of a Mareva injunction assets which appear on their face to belong to a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant.
> (ii) Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene.
> (iii) In deciding whether to accept the assertion of a defendant or a third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party.
> (iv) Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, again depending in each case on what is just and convenient.

That is not the position here. No third party is seeking to discharge the injunction in relation to assets which it is claimed should not have been caught by it all. The true ownership of the assets is the very issue in these proceedings and it is because the plaintiff alleges that the assets really belong to another party that he has sought to have Barbara fettered by the injunction.

The next argument of the plaintiff is this -

> Unless Barbara and Peter are asking this Court to lift the corporate veil and treat all the assets reflected in the schedules to the Orders as belonging to either or both of them directly, then liabilities incurred on behalf of a company or other legal entity should only be paid out of assets apparently owned by such company or other legal entity.

A company is entitled to pay a dividend, provided of course that after meeting liabilities incurred by it the funds to do so are properly available under ordinary principles of company law and the proper corporate procedures are gone through. That will be paid to the shareholder of record, subject to any trust in favour of the ultimate beneficial owner. It is not a case of lifting the corporate veil and is distinguishable from the gratuitous payment out of company funds of liabilities incurred by others.

The next argument of the plaintiff was that -

> Barbara should not be permitted to use assets within the jurisdiction which are clearly caught by the Order so long as she has available to her, either directly or indirectly, assets outside the jurisdiction which may properly be used and which are not effectively subject to the Order in the sense that the relevant foreign court has not recognized and enforced it.

Initially I found that argument attractive, but I now reject it for two reasons. The first is that to direct that Barbara should use assets in other jurisdictions, or at least to release them from the injunction with the intent that they should be so used does not seem to me to be a practical or desirable proposal at all. I do not doubt that the assets of Mr. and Mrs. Kruger are the subject of hot pursuit

in various jurisdictions. To seek to extract them for present purposes could lead to all manner of jurisdictional conflict which this court cannot possibly foresee.

Secondly, the judgment of the then Master of the Rolls, Sir John Donaldson, in Kea Corporation v. Parrot Corporation Ltd. (1986) expresses principles which I respectfully adopt -

> "That brings me to the other aspect of the appeal, namely whether it is right that the money in this country, which is subject to the Mareva injunction, should be available to pay [the defendant's] legal costs in the proceedings. It is said that he must have money in America which could equally well be used. If this were done there would be no erosion in the amount of money which would be available to satisfy a judgment against [him] ....
>
> Applying that principle here, I cannot see that if [the defendant] uses English funds to pay his lawyers to defend him in proceedings which are brought against him in England it can possibly be said that his purpose is to ensure that assets are not available to satisfy a judgment. It would be quite different if the proceedings were in America and he was seeking to take money from this country to defend himself in America. One can work out all sorts of permutations in which one could say, "This is an unnatural thing to do. It is unreasonable. The real purpose must be to remove assets from the potential clutches of a plaintiff."

Woolf LJ agreed. The following two passages in his judgment are particularly apposite -

> "Taking the case of a person who is living in this country and who is subject to a Mareva injunction, one would normally expect him in the ordinary way to use his funds in this country for his ordinary everyday expenses. Equally, one would normally expect a person, if he is subject to litigation in this country, to use the funds in this country for the purpose of that litigation, albeit that at the time the proceedings are

commenced he is then living abroad."

Later, he referred to the judgment of Hutchinson J in the Court below in the following terms.

> "He referred to what my Lord the Master of the Rolls had said in [Southern Cross Commodities Limited v. Martin] and then went on to say:
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> "That decision turned very much on the fact that, although other funds existed, they could not be shown to be freely available. I have already expressed a prima facie view that there are considerable assets possessed by [the defendant] outside the jurisdiction. However, I have to say that approaching the matter in the spirit of what the Master of the Rolls said (and bearing in mind the submission by Mr. Buckley that there is no suggestion here of overt cheating) and being mindful of the public policy interest that non-resident persons should be allowed to use funds within the jurisdiction to discharge legal expenses, I am not persuaded that this is a case in which I ought to vary the provision as to legal expenses. Despite the evidence that there are considerable assets abroad there is no evidence that those assets are freely available.
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> Speaking for myself, I cannot fault that reasoning of Mr. Justice Hutchison."

With these observations, I also adopt the proposition that it is a matter of public policy that a person should not be deprived of funds to defend legal proceedings which are being brought in this country. The case is stronger in that the second defendant is actually resident here, though on the other side of the balance is the factor that an allegation of cheating is a prominent, and indeed the main issue, in this case.

With regard to the argument of the plaintiff that if there is more than one asset from which Barbara can properly pay selected debts of her husband she should use the asset which is most clearly hers and

not diminish assets most likely to be made available to her husband's creditors, my view is that it is not for the court at this stage to form a view as to the category into which any asset might fall. This is the very issue to be determined at the trial. The court should not in the meantime be embarking on mini trials in relation to particular payments. Moreover, I am unable to perceive an element of fraudulent preference in relation to what she seeks to do.

In spite of all that I have said, my view is that the court should exercise the degree of control sought by the plaintiff in relation to the companies of which Barbara claims to be the beneficial owner and where the position of the shareholders needs to be regularised. These companies are the subject of correspondence which is at Exhibit 22 to the fourth affidavit of Barbara dated 7th November 1996. Accordingly, bearer share certificates should be delivered to the Courts Funds Office in accordance with GCR Order 92 rule 12 and the registered shares should be transferred into the name of the Accountant General in accordance with rule 13. I detect no prejudice to Barbara in this.

This judgment seeks to set out clearly my views on the applicability of the legal principles to the matters to be set out in schedules to a draft order to the extent that they already appear in the exhibits to affidavits referred to last week by Mr. Quinn. I was also invited to devise a formula for dealing with onging expenses, and in particular the legal expenses concerning which the attorneys cannot be left in an equivocal position. I confess that I have not yet solved this and will have to return to it with the assistance of the attorneys if

necessary.

Costs of summons to second defendant in any event.

Draft order and particulars of expenses approved as amended, following further submissions of counsel.

12th November 1996

G.E. Harre

Chief Justice