

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 555 OF 2005



9-6-09

BETWEEN TASARRUF MEVDUATI SIGORTA FONU PLAINTIFF

AND

- 1. MERRIL LYNCH BANK AND TRUST
COMPANY (CAYMAN) LIMITED ("MLBTC")**
- 2. KAFFEE LIMITED**
- 3. BARLA FINANCE LIMITED**
- 4. CUMUR CASH LIMITED**
- 5. MEDRO LIMITED**
- 6. YAHYA MURAT DEMIREL**

DEFENDANTS

CONSOLIDATED BY ORDER DATED 30 MARCH 2007 WITH

CAUSE NO. 80 OF 2007

BETWEEN TASARRUF MEVDUATI SIGORTA FONU PLAINTIFF

AND

- 1. MERRIL LYNCH BANK AND TRUST
COMPANY (CAYMAN) LIMITED ("MLBTC")**
- 2. KAFFEE LIMITED**
- 3. BARLA FINANCE LIMITED**
- 4. CUMUR CASH LIMITED**
- 5. MEDRO LIMITED**
- 6. YAHYA MURAT DEMIREL**

DEFENDANTS

IN CHAMBERS

THE 8th, and 9th 2009

BEFORE CHIEF JUSTICE ANTHONY SMELLIE

APPEARANCES: Mr. Steven Moverley-Smith QC instructed by Mr. Christopher Russell of Ogier for the plaintiff
 Mr. Nigel Meeson QC instructed by Conyers Dill & Pearman for the 6th defendant
 Mr. Colin McKie of Maples and Calder for the 1st to 5th defendants

1. On 22 May 2008, I granted the plaintiff's application for summary judgment against the 6th Defendant, Mr. Demirel. The grant of summary judgment was by way of recognition and enforcement in this jurisdiction of a judgment *in personam* granted against Mr. Demirel by a court of competent jurisdiction in Turkey. The judgment sum represents a principal amount of US\$30 million, the alleged proceeds of a fraud allegedly committed by Mr. Demirel against Bank Expres S.A. in Turkey, plus interest, costs and related attorneys' fees.
2. The application for summary judgment had been opposed by Mr Demirel on two distinct grounds argued by his attorneys from Mourant, on his behalf.
3. Those two grounds may be described as "the finality point" and "the public receivables point"; both of which were addressed in a written ruling giving reasons for the decision to grant summary judgment and issued on 22 May 2008.
4. The application which is now before me is for leave to appeal against the grant of summary judgment. The application for leave is confined to the finality point and a new public policy point; no challenge being any longer made to the enforceability of the judgment on the basis that it was one seeking the recovery of "public receivables", as that concept is regarded at private international law.
5. The grounds of appeal on the finality point would now deal with the treatment in the Ruling of 22 May 2008, of the expert evidence of Turkish law relied upon by Mr. Demirel to the effect that the Turkish judgment was not a final and conclusive judgment.
6. The argument for appeal at this point would be to the effect that it is wrong on a summary judgment application to seek to resolve disputed issues of foreign law

because such issues are issues of fact for this Court and so can only properly be resolved after full factual enquiry upon the evidence. As no such enquiry took place, this Court could not properly have arrived at the decision which it did that the expert evidence was unreliable.

7. For this proposition reliance is placed on the decision of the English Court of Appeal in National Shipping Corp. v Arab [1971] 2 Lloyd's Report 363 (C.A.), in which guidance was taken from the earlier Victorian judgment of Lord Coleridge reported as Western National Bank of New York v Perez, Triana & Co. (1890) 6. T.L.R. 366.
8. The long-standing principle to be identified from these cases is to the effect (per Lord Coleridge (ibid)) that "*it is impossible for the Court to try a question as to foreign law* (there the law of New York) *on affidavits*", And, per Edmond Davies LJ in National Shipping Corp. v Arab itself (at p. 365):

"I think it is equally, if not more difficult, for the Court to try a question as to what is the law of Saudi Arabia, if it applies, or what is the law of Pakistan, on affidavit. It seems to me that there is clearly a triable issue in this case and I would accordingly allow the appeal and give unconditional leave to defend."

9. The principle to be discussed is clear enough: expert evidence as to what is the law of a foreign country constitutes a matter of fact for the determination of this Court and dispute over such matters can only properly be resolved after full enquiry, not merely on the basis of untested affidavit evidence.

10. While I readily accept the force of that dictum and the practical guidance they provide, neither of those cases dealt with circumstances like those presented upon the summary judgment application leading to the judgment of 22 May 2008.
11. What the cases all have in common, however, is the requirement of the Court to resolve the question whether there is a triable issue involving foreign law and which needs to be resolved at trial by way of evidence.
12. It was specifically in this regard that this case was distinguishable for, far from Mr. Demirel's experts in their evidence demonstrating that there was any such triable issue; viz: whether or not under Turkish Law the Turkish judgment was to be regarded as final and conclusive in the Court in which it was given – their joint opinion confirmed that it was.
13. There were, moreover, the English translations before the court, of the relevant provisions of the Turkish Civil Code which showed this to be the case.
14. The difficulty met by Mr. Demirel in seeking to show that there was nonetheless a real triable issue in this regard, was the internal conflict within the evidence of his Turkish lawyers as between their joint opinion and the Turkish Code mentioned above on the one hand and their subsequent affidavit evidence to the contrary, on the other. No attempt was made to explain that conflict and so, in the end, my conclusion was that there was no plausible evidence before the Court on which it could be said that there was a triable issue as to the finality of the Turkish judgment.
15. Even now no attempt has been made to explain the internal conflicts within the 6th defendant's experts' evidence.

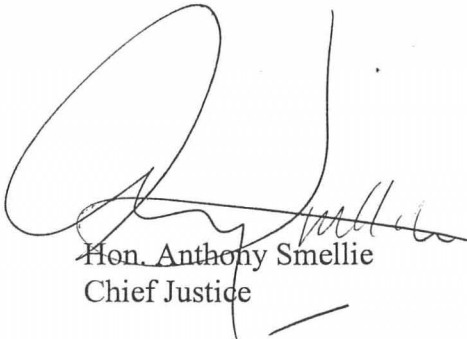
16. I can therefore discern no prospect of success on this ground of appeal.
17. The second ground would depend on what I have referred to as “the new public policy point”.
18. As I understand it, it would be that the Turkish judgment is impeachable and that there will be a basis on which the Court of Appeal can so find on ground of public policy, although that ground was not raised before me and so form no part of the judgment of 22 May 2008 to be appealed against.
19. In summary, the basis on which public policy objections to the Turkish judgment would be raised, is the allegation in Mr. Demirel’s 5th affidavit that, in October 2000, he had been arrested by order of the Ankara State Security Court in violation of his constitutional right and placed in Ankara State Prison (away from Istanbul State where he lived) and physically tortured for six days. He states that he was subjected to electrical shocks all over his body; to hot and cold shower torture and confined to a dark room for a period of six days; that his tormentors tried to force him to admit that he had been involved in wrong doing with regard to Egebank and that his uncle (a former head of State of Turkey) and other family members shared money allegedly embezzled by him; that he was told that if he accused his uncle, his persecutors and tormentors would take his uncle instead and release him.
20. Such atrocities, if true, require of the strongest condemnation and there should be no doubt that any judgment obtained in a foreign court as the result of such treatment could never be obliged by its recognition and enforcement by this Court.

21. That stated, I must nonetheless, look critically at what it is that Mr. Demirel now proposes as his basis for leave to appeal against the summary judgment of 22 May 2008 which recognised the Turkish judgment.
22. In the first place, it must be noted that the foregoing allegations of persecution and torture, although contained in his 5th affidavit then filed with the Court, were not relied upon for the purpose of opposing the grant of summary judgment. As already noted above, the grounds of opposition were the finality point and the public receivables point. Nor were these allegations relied upon in Mr. Demirel's defence filed in the action.
23. Instead, there it is pleaded that paragraph 7 (traversing paragraphs 37 and 38 of the Statement of Claim in then Cause 80 of 2007) that the Turkish Judgment had been obtained irregularly in that Mr. Demirel had not been duly and properly served with the process by which TMSF obtained that judgment, as he was then being held in State Prison.
24. Further, that the judgment having been obtained, TMSF failed to serve it properly upon him within the timeframe allowed for the filing of his appeal, causing his appeal to be wrongly dismissed by the Turkish Court of Appeal on grounds that it was brought out of time.
25. In paragraph 7 of his Defence, Mr. Demirel also cites the fact that he has appealed to the European Court of Human Rights ("ECHR") against the Turkish Judgment on similar grounds of lack of due process which appeal, if successful, would give rise to the action in Turkey having to be reheard.

26. It is for those reasons cited in his Defence, that his Defence also avers at paragraph 7.9. that the Turkish Judgment is not a final and conclusive judgment under Turkish Law and/or should not be enforced, as to do so would be contrary to the public policy of the Cayman Islands.
27. Remarkably absent from the Defence, is any reference to the allegations of torture contained in Mr. Demirel's 5th affidavit. Having seen his pleadings before the ECHR against the Turkish Judgment, I note that those allegations are also remarkably absent from those proceedings too.
28. These allegations are, it seems therefore, truly to be relied upon in opposition outside of Turkey to the Turkish Judgment, for the very first time before the Court of Appeal; should leave be given to appeal against the summary judgment of 22 May 2008.
29. I am invited by Mr. Meeson QC to accept that this is because Mourant, who previously represented Mr. Demirel, somehow failed in their arguments on his behalf, to rely upon these allegations in support of the public policy objection to the recognition of the Turkish Judgment. I am invited to assume that there was a communication problem between Mourant and their client Mr. Demirel in this regard.
30. I do not consider that it is not open to me to proceed in that way.
31. All I think I need say in this regard, is that there is no evidence whatsoever before me in support of such a proposition – one which is all the more troubling because it is apparently raised without notice to Mourant.

32. Whatever the reason for these allegations not having been raised before, the fact of the matter now is that they were not.
33. This means that, for the purposes of his proposed appeal, Mr. Demirel must show that the new evidence he must adduce in support of these allegations, is evidence that he would be allowed to adduce.
34. On the basis of the authority of Ladd v Marshall [1934] 1 WLR. 1489 as approved by the House of Lords in Skone v Skone [1971] 1 WLR. 812 AT 815; it appears that he would be precluded from adducing such evidence as it was available to him at the time of the summary judgment application when he did not see fit to raise it.
35. The White Book RSC O.14. R.4 at p187 1999 Ed. (at paragraph 14/4/45) makes it clear that this principle of prior unavailability of the evidence applies especially to appeals against summary judgments.
36. Our local Court of Appeal has adopted the rule in Ladd v Marshall as being applicable to its jurisdiction: See Columbraria Ltd. v Beteta 2000 CILR Note 2 and so the principle is settled at Cayman Islands law.
37. For all those reasons, it appears to me that Mr. Demirel has no realistic prospect of success on his proposed appeal; either on the finality point or on the allegations of torture raised for the first time now.
38. I am nonetheless urged by Mr. Meeson to grant leave on the further public policy basis that our Court should not be seen to be recognizing and enforcing a judgment which the ECHR might yet conclude was obtained in breach of Mr. Demirel's rights to natural justice.

39. While that is an outcome that would concern this court, to allow such a consideration to operate now as a bar to the plaintiff's right to recognition and enforcement would, in my view, be contrary to principle.
40. The issues of finality and public policy, such as Mr. Demirel's saw fit to raise them with this Court in bar to the plaintiff's claim, have been raised by him and dealt with in keeping with local law and procedure. By that measure the Turkish judgment must be regarded as a final and conclusive judgment in the court in which it was given and, on that basis meets the primary test for its recognition here.
41. If Mr. Demirel succeeds before the ECHR, his remedy will doubtless be to seek the proper resolution of the matter in Turkey, where any relief by way of recoveries obtained by the plaintiff here can then properly be taken into account.
42. The application for leave to appeal against the summary judgment of 22 May 2008 is refused.


Hon. Anthony Smellie
Chief Justice

June 9 2009

