IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO:77/96

3-05-96

IN CHAMBERS

BETWEEN: ANDRE LAAGER PLAINTIFF

AND: PETER KRUGER DEFENDANT

APPEARANCES : Mr. Andrew Jones for the plaintiff

Mr. Ross McDonough for the defendant

1996 April, 1,4 & 18

" May, 3

JUDGMENT

WILLIAMS, J.

By summons filed on 1st April 1996 the defendant sought to have the summons of the plaintiff filed on 7th March 1996 for summary judgment dismissed or stayed. Having heard arguments of Counsel on both sides the Court refused the said application.

Counsel for the defendant then raised the issue of jurisdiction and

contented that the Court did not have jurisdiction to hear the said summons. The Court again having heard arguments of Counsel on both sides came to the view that it had jurisdiction to hear the matter and that the proceedings should be proceeded with, accordingly the hearing continued.

The facts are that the plaintiff entered into three written agreements with the defendant in Switzerland. The first agreement was dated 19th December, 1991 by which the plaintiff advanced to the defendant the sum of SFr 20,300,00 which the defendant was to repay by way of instalments on specifics dates as per the said agreement.

The second, agreement was dated 28th March, 1992 (the "First 1992 Agreement") in which the plaintiff advanced the defendant the sum of SFr 10,000,000 which sum the defendant was to repay by way of instalments on specific dates as per the said agreement.

The third agreement was dated 28th March, 1992 (the "Second 1992 Agreement") in which the defendant agreed to repay a loan of SFr 6,770,673 by way of instalments on specific dates as per the said agreement.

The respective loan agreements were of course subject to the payment of interest.

The first instalment on the first agreement was to be paid on 20th March 1992 and it amounted to SFr 3,000,000 which the defendant

failed to pay over to the plaintiff on the due date or at all.

As a result the plaintiff commenced collection proceeding against the defendant in the Swiss Courts for the sum of SFr6,000,000 being the instalments then due and payable under the 1991 agreement and ("First 1992 Agreements") up to that time other instalments with respect to the various agreements had not yet fallen due. On the 17th February, 1993 the President of the IV Court of Berne granted provisional judgment for SFr6,000,000, plus costs and Court fees of SFr 4,200 to the plaintiff.

The defendant contested the plaintiff's provisional judgment in the Swiss Court by lodging a petition on 17th June, 1993 to have the said provisional judgment discharged. The defendant was required to lodge SFr 105,000 in Court as security for costs, but failed to do so. As a result his petition was dismissed by the Court of Appeal of Berne Canton on the 27th August 1995, where upon the judgment became final and binding upon the defendant.

With respect to that judgment the defendant is now indebted to the plaintiff in the sum of SFr 6,061,916 inclusive of the principal, Court fees and interest up to the 5th November 1993 the date of the defendants bankruptcy.

It should be noted that the defendant left Switzerland on 10th August 1993 and eventually took up residence in the Cayman Islands.

As a consequence of the defendants bankruptcy on 5th November 1993 all the amounts payable under the 1991 and First 1992 Agreements became due immediately pursuant to Article 208 of the Swiss Bankruptcy Law.

It is against this background that the present proceedings are brought in the Cayman Islands.

A writ of summons and statement of claim was filed by the plaintiff against the defendant on 23rd February 1996 claiming the respective sums of money due and owing by the defendant to the plaintiff as follows:-

1. The sum of SFr 6,061,916 being the judgment of the Swiss Court against the defendant in favour of the plaintiff including Court fees and interest up to 5th November, 1993.

2. The sum of SFr 17,300,000 being the balance due and owing by the defendant to the plaintiff under the agreement of 19th December 1991.

3. The sum of SFr 7,000,000 being the balance due and owing by the defendant to the plaintiff under (the "First Agreement) dated 28th March 1992.

4. The sum of SFr 6,770,673 being the amount of the loan of the

"Second 1992 Agreement) dated 28th March 1992.

5. Interest of SFr 4,970,807 pursuant to section 34 of the Judicature Law (1995 Revision) and the Judgment Debt (Rates of Interest Rules 1995) upon the total principal sum of SFr 37,132,589 calculated at the applicable prescribed rate from the 5th November 1993 or, alternatively from the 23rd February, 1996 and continuing at the rate of SFr 3,815 per day.

6. Costs.

It is the summons for summary judgment and discovery filed on 7th March, 1996 upon which this Court is called upon to adjudicate. However, it should be noted that an exparte summons was filed by the plaintiff on 23rd February, 1996 for a Mareva Injunction which injunction was heard by Harre, C.J. and granted in the following terms :-

"IT IS ORDERED that:

1. The defendant be restrained until further order from doing, whether by himself or his nominees or agents or otherwise howsoever, the following acts or any of them, that is to say removing from the jurisdiction of this Court or mortgaging, assigning, charging or otherwise dealing with or disposing of his assets located within the jurisdiction, whether held in his own name or jointly with other persons or by any

nominee or trustee on his behalf.

2. Without prejudice to the generality of paragraph 1 above, the Defendant is restrained until further order from causing or permitting Canadian Portfolio Limited, Maitland Investments Limited, Morning Investments Limited, Glenhuntley Investments Limited from moving from the jurisdiction of this Court or mortgaging, assigning, charging or otherwise dealing with or disposing of their respective assets.

3. An inhibition restricting all dealings shall be registered against the title of all the land specified in the schedule hereto.

4. The Defendant be restrained until further order from doing,whether by himself or his agents or nominees or trustees, any of the following acts, that is to say parting with possession of or destroying or mutilating or amending or deleting or removing or disposing of any documents or records (whether in hard copy or computerised form) containing information about all of his assets,including the assets of any company in whose share he has a beneficial interest.

5. The Defendant or any other person affected by this Order shall have liberty to vary or discharge it upon giving not less than 3 days' notice to the plaintiff.

6. Costs reserved.

By summons dated 1st April 1996 application was made before me to have the Order made on 23rd February, 1996 varied which variation the Court granted in the following terms.

"Axminster Investments Ltd undertakes by its Counsel as follows:-

1. To complete Transaction Nos. 1 and 2 (as described in the Schedule hereto) strictly in accordance with the terms set in the Schedule;

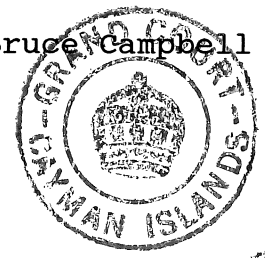
2. To pay the net proceeds of sale arising upon completion of Transaction Nos. 1 and 2 into account number 200 1873 at The Royal Bank of Canada in the name of Bruce Campbell & Co. escrow account re Axminster Ltd; and

3. Not to remove from the jurisdiction of the Court or mortgage, assign, charge or otherwise deal with or dispose of the net proceeds of sale arising upon completion of Transaction Nos. 1 and 2 and any interest subsequently earned thereon,

AND Morning Investments Ltd undertakes by its Counsel as following:

1. To complete Transaction No.3 (as described in the Schedule hereto) strictly in accordance with the terms set out in the Schedule;

2. To pay the net proceeds of sale arising upon completion of Transaction No.3 into an account in the name of Bruce Campbell &



Co. escrow account re Morning Ltd with the Royal Bank of Canada, particulars of which are to be advised to the plaintiff;

3. To take all such steps as may be necessary to cause Cayman Overseas Development Ltd to pay the balance of the purchase price and the interest thereon into the said bank account;

4. Not to remove from the jurisdiction of the Court or mortgage,assign,charge or otherwise deal with or dispose of the net proceeds of sale arising upon completion of Transaction 3 and any interest subsequently earned thereon;

5. Not to assign, charge or otherwise dispose of the debt arising under Transaction No. 3 and payable by Cayman Overseas Development Ltd to Morning Investments Ltd; and

6. To provide the plaintiff's attorneys, upon demand, with written evidence of the receipt by Morning Investments Ltd of the interest and balance of the principal payable by Cayman Overseas Development Ltd.

AND UPON the plaintiff undertaking to withdraw his application for the imposition of an inhibition upon the title of all that land comprised within West Bay Beach North Registration Section, Block 10E, Parcel 52H8.

IT IS ORDERED:

1. The inhibition registered against the titles of the properties comprised in.

   (a) West Bay Beach North Registration Section, Block 11D,Parcel 21H1; and

   (b) West Bay Beach South registration Section,Block 13B,Parcel 7, be discharged for the purpose of completing Transaction No.1 and No.3 respectively, but not for any other purpose.

2. Notwithstanding the terms of the Ex Parte Order made on the 23rd February, 1996 Axminster Investments Ltd and Morning Investments Ltd shall be at liberty to complete Transaction Nos. 1,2 and 3 in accordance with the terms specified in the Schedule hereto.

3. That the Ex Parte Order of the 23rd February, 1996 be varied by the insertion of the following:

   "7. Notwithstanding the provisions of paragraphs 1 and 2 hereto,Maitland Investments Ltd., Morning Investments Ltd., Glenhuntly Investments Ltd and Axminster Investments Ltd will be at liberty to draw and expend such sum or sums, if any, as the Plaintiff's attorneys may from time to time agree in writing."

4. Costs reserved.

With respect to the application for discovery Counsel for the Plaintiff submitted that the Defendant is unlikely to make a frank and honest disclosure of his assets and that therefore an ordinary order for discovery whereby the Defendant be required to file an affidavit and if possible be cross examine on same, will not have the desired effect, as in his view the defendant is determined to hide his assets from his creditors. That in the present circumstances of the case an order ought to be granted that permits the plaintiff acting by his Attorneys Maples and Calder to inspect and take copies of the books and records removed from the Defendants home by the Cayman police with respect to the extradition proceedings now pending in the Magistrate's Court against the Defendant for his extradition to Switzerland to face his creditors.

Counsel for the Plaintiff further contended that if the Defendant is extradited to Switzerland the books and records will be sent to Switzerland and the plaintiff would then have no access to them. On the other hand if he is not extradited the books and records will be returned to the defendant and he is therefore likely to destroy or otherwise dispose of any material likely to give a true picture of his assets.

Counsel for the Defendant submitted that the discovery sought by the plaintiff is excessive and unwarranted and that so long as the documents are in the possession of the Cayman Islands Police there is

no likely hood of them being destroyed. That the Court should make the normal order of discovery by way of affidavit with the possibility of cross examination of the defendant as to his assets and if he no longer have such asset who are the beneficial owners of same.

It was further submitted by Counsel for the Defendant that an alternative to discovery asked for by the Plaintiff would be to have copies of the documents in the custody of the police made at the expense of the plaintiff and that the Defendant's Attorney would be prepared to undertake to retain a set of copies of the documents within the jurisdiction.

I agree that this is not a type of order for discovery that a Court would make in normal circumstances but these are not normal circumstances. We have a situation in which the defendant claims he has no assets. He is indebted to his creditors for millions of dollars, he has been made bankrupt, he left Switzerland on 10th August 1993 rather than face his creditors. Before his bankruptcy on 5th November 1993 he was presumably a successful businessman and owned or had interest in various companies some of which hold real estate in the Cayman Islands. He is now resisting with great vigor attempts to have him extradited to Switzerland to face his creditors. It is therefore of critical importance that some means be found to discover and determine the true position as to his assets. If he has no assets at present as claimed how were those assets disposed of and to whom, what were the circumstances of such disposal. The

answers to these questions are of paramount importance and should be determined speedily and with a minimum of delay.

The outcome of the extradition proceedings in the Magistrate's Court against the defendant is of critical importance. If he is extradited the books, records and other materials that may be relevant will be dispatched to Switzerland with him. If he is successful in evading extradition then the books, records and other materials that may be relevant will have to be returned to him. He would then be in a position to take whatever steps he deemed necessary to prevent disclosure of his assets, which to date he has successfully been able to do.

In my view allowing copies of the documents to be in the custody of the Defendant's Attorneys would not meet the exigencies of the situation, this will not bring about a speedy resolution of the disclosure of the information required, accordingly I am prepared to allow discovery of the documents now in the custody of the Caymanian police upon terms which I will later indicate in my final order.

With respect to the application for summary judgment Counsel for the plaintiff contends that the affidavits filed on behalf of the defendant does not raise a triable issue with respect to the judgment obtained in the Swiss Court. He submits that the defendant has now shifted his ground and is raising new issues that were not previously raised in the Swiss Court. Namely, that the debt is not owned to Laager but to Dynasty and that he acted under duress with respect to

all three agreements.

He submitted that with regard to the first two agreements res judicata would apply and it would not be possible for the defendant to have the issues already determined by the Swiss Court to be re-litigated.

He further contends that with regard to the 2nd 1992 agreement even though there is no res judicata as regards that agreement it would be an abuse of the process of the Court to allow the defendant to litigate same because there is an issue estoppel.

Counsel for the Defendant submitted that there is a very high hurdle to overcome before it is proper to shut out a defendant and he relied on the Supreme Court Practice 1995 Vol 1 Order 14/3-4/8 page 155 headed "Leave to defend - unconditional leave" which reads as follows:-

> "The power to give summary judgment under Order 14 is intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay". "As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to

facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment."

I do not agree with Mr. McDonough's submission that the proper plaintiff in this case would be the Trustee in Bankruptcy and not Mr. Laager. I am satisfied that the Swiss bankruptcy law does not have extra territorial effect but is merely territorial as stated in Mr. Oederlin affidavit dated 23rd February 1996 at paragraph 4 of the said affidavit and therefore the Swiss Trustee in Bankruptcy cannot bring proceedings in the Cayman Islands against the Defendant. However, any monetary benefit gained by the plaintiff in the Caymanian Court would not enured solely to the plaintiff but would be to the benefit of all the defendants' creditors including the plaintiff. It would have to be put into a pool so to speak.

Mr. McDonough submitted that the fact that the Swiss Court required the defendant to put up a certain sum of money as security for costs namely SFr 105,000 in some way tainted the judgment delivered by the Swiss Court.

In my view although a Caymanian Court would not impose such a condition, a Caymanian Court could require a defendant to pay money into Court as a condition of leave to appeal, which condition was never satisfied by the defendant. I consider the lodging of security for costs as analogous to payment of money into Court, and therefore not an issue of sufficient significance to cause the Cayman Court to disregard the Swiss judgment. The Swiss judgment cannot now

be appealed against;it is a final and conclusive judgment, although it is in the nature of a default judgment.

According to Mr. Oederlin's first affidavit under Swiss law before a default judgment is given the Judge look at the documents and come to a decision. The defendant is notified of the Order and is allowed 10 days to indicate his opposition to same which opposition Mr. Kruger entered. However the opposition was later removed by the Court on an application by Mr. Laager. I accept Mr. Oederlin's interpretation of the Swiss law.

Counsel for the defendant contends that the defendant would be only estoppel with respect to the SFr6,000,000. I do not agree with that submission. The SFr6,000,000 formed part of the 1991 agreement and the first 1992 agreement the only reason why the judgment was limited to SFr 6,000,000 was because the other instalments with respect to those two agreements had not fallen due at the date when the Swiss Court dealt with the matter. The issue of the validity of those two agreements would have been open to the Court to consider at the time the issue was considered by the Swiss Courts and before judgment, and the issue of duress was never raised. That issue therefore cannot now be raised with respect to the 1991 agreement and the first 1992 agreement and the defendant is now estoppel from doing so under the principle of res judicata and I entirely agree with Mr. Jone's submission on this point.

Order 14/3-4/8 of the White Book at page 156 1995 Edition Vol.1 reads as follows-

"It is trite law that the mere assertion of a given situation does not,ipso facto, provide leave to defend, since the defendant must satisfy the Court that he has a fair or reasonable probability of showing a real or bona fide defence, i.e. that his defence is reasonable capable of belief.

After reviewing all the authorities, the Court of Appeal has laid down a definite ruling that if the evidence of the defendant is incredible in any material respects, it cannot be said that there is a fair or reasonable probability that the defendant has a real bona fide defence and judgment will be given to the plaintiff.

Two tests are appropriate, namely, is what the defendant say credible? and is there a fair or reasonable probability of the defendant having a real or bona fide defence? Where an issue of fact is raised the first question must be answered in the affirmative before considering the second".

The order goes on to say

"On the other hand, a complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some other reason there ought to be a trial; and leave to defend ought to be given unless there is clearly no defence in law such as could have been raised on the former demurrer to the plea and no possibility of a real defence on the question of fact..... Where there are unexplained features of both the claim and the defence which are disturbing because they bear the appearance of falsity and disreputable business dealings and questionable conduct, the Court should not make tentative assessments of the respective chances of success of the parties or the relative strength of their good or bad faith, and should not on such an examination grant the defendant conditional leave to defend but should give unconditional leave to defend".

The Court must therefore strike a balance between the earlier

provisions of this order as against the latter portion of it. Having regard to the latter portion of the above Order I would be prepared to grant the defendant leave to defend the 2nd 1992 agreement since that agreement was never considered by the Swiss Court, although I do have reservations about the defendant's bona fides with regard to his defence of duress .

I have read the numerous authorities cited on both side with respect to the case before me but I do not propose to review them all as that would make the judgment unneccesarily lengthy.

However I do propose to refer to one Privy Council decision.

Yat Tung Investment Co. Ltd and Doo Heng Bank Ltd And Another (1975) A.C. p 581.

The facts of this case is that owners of property borrowed money from the first respondent (the bank) which loan was charged upon the property. The owners defaulted on payment of the loan interest due to the bank and absconded.
The bank, in exercise of its rights, sold the property to the appellant. The bank assigned the property, pursuant to the sale, to the appellant and the appellant borrowed money from the bank on the security of a mortgage of the property. The appellant defaulted on the payment of interest under the mortgage and the bank exercised its right of sale thereunder and sold the property to the second respondent. The appellant brought an action against the bank (no.969

of 1969) claiming that the sale of the property to it was a sham; that the property had been conveyed to it as trustee for the bank and the mortgage was accordingly a nullity. The bank denied that the sale was a sham and counterclaimed for the loss suffered on the re-sale of the property to the second respondent. The Court dismissed the appellant's claim and upheld the bank's counterclaim. One month after that judgment the appellant brought an action against the bank and the second respondent (no. 534 of 1972) claiming that the sale by the bank to the second respondent was void or voidable as fraudulent in that the bank and the second respondent "were in fact essentially one certain interest and/or alternatively acting in concert with a common design calculated to obtain.....property at a low price and to distinguish the plaintiff's interest therein". The bank and the second respondent applied by summons for an order that the statement of claim be struck out as (inter alia) being vexatious, frivolous and /or otherwise an abuse of the process of the Court. The judge held that the allegation of fraud and the voidability of the sale by the bank to the second respondent were matters which were available for litigation in action No. 969, and ordered that the statement of claim be struck out. The order striking out the statement of claim was affirmed by the full Court.

"On appeal to the Judicial Committee"-

"Held dismissing the appeal, that there was no reason why a defence impugning the bona fides of the sale by the bank to the second respondent could not have been pleaded as a counterclaim to the counterclaim in action no.969, that accordingly, the doctrine of res

judicata in its wider sense applied and it would be an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings".

Lord Kilbrandon in delivering the judgment at page 590 said-

"The locus classicus of that aspect of res judicata is the judgment of Wigram V.C. in Henderson v Anderson (1843) 3 Hare 100, 115 where the judge says:

> " .....where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which parties, exercising reasonable diligence, might have brought forward at the time."

I am fortified in my view by this authority that the defendant ought not to be granted leave with respect to the 1991 agreement and the first 1992 agreement. I make a distinction between these two agreements that were before the Swiss Courts as against the 2nd 1992

agreement which was never before the Swiss Court.

Accordingly judgment is ordered in favour of the plaintiff against the defendant in the following terms.

The final judgment will read as follows:-

1. That summary judgment in the principal sum of SFr 24,300,000 plus interest to be computed in the appropriate amounts.

2. That the judgment in the Swiss Court in the amount of SFr6,000,000 plus costs, court fees and interest be affirmed.

3.(a)That the defendant do attend before a Judge in Chambers at the Law Courts, George Town on a date to be fixed to be orally examined about the debts owing to and the property owned by him; and

(b) That the defendant produce all the books and records in his possession or power relating to the debts owed and property owned by him including all books and records of Canadian Portfolio Limited, Maitland Investments Limited, Axminster Investments Limited and any other companies owned and / or controlled by the defendant, and

(c) That the plaintiff (acting by his attorneys) be permitted to inspect and take copies of all books and records of whatever kind

removed from the possession of the defendant and now in the custody of RCIP, that are relevant to these proceedings and that same be done at the expense of the plaintiff.

4. An order that an inhibition restricting all dealings be registered against the title of all the land comprised in Registration Section West Bay Beach North, Block 10E, Parcel 52 H2.

5. An order that the injunction contained in paragraphs 1,2 and 4 of the Ex Parte Order made on the 23rd February 1996 and the variation thereto on 1st April 1996 be continued until the judgment granted herein be satisfied in full or the Court order otherwise.

6. That the defendant is hereby granted leave to defend the 2nd 1992 agreement on the following terms:-

(a) That the defendant file and serve on the plaintiff a defence within 14 days of the date of this judgment.

(b) That all other proceedings be in accordance with rules of Court.

7. An Order that the injunction contained in paragraphs 1,2 and 4 of the Ex Parte Order made on the 23rd February, 1996 be

continued until after judgment with respect to the 2nd 1992 agreement or the Court Orders otherwise.

8. An Order that paragraph 5 of the Ex Parte Order made on the 23rd February, 1996 be discharged and replaced by an order that any person, other than the defendant who may be affected by the Ex Parte Order (as varied) shall have liberty to apply to vary or discharge it upon giving not less than 3 days notice to the plaintiff.

9. Liberty to apply.

10. That the costs to the plaintiff be assess by consent in the sum of CI $1500 plus CI$10,180 Court fees.

Dated this 3rd day of May, 1996

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CAYMAN ISLANDS - GRAND COURT

Lloyd G. Williams Q.C.

Judge of the Grand Court