

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**



6/8/10

CAUSE NO: FSD 115 OF 2010

IN THE MATTER of a Deed of Trust dated 28 June 1999 made between Yahya Murat Demirel, as Settlor and Merrill Lynch Bank and Trust Company (Cayman) Limited as TRUSTEE, known as the "Mana Trust"

AND IN THE MATTER of a Deed of Trust dated 28 June 1999 make between Yahya Murat Demirel, as Settlor and Merrill Lynch Bank and Trust Company (Cayman) Limited as TRUSTEE, known as the "Dolphin Trust "

AND IN THE MATTER of the Trusts Law (2009 Revision) and GCR Order 85, rule 7

BETWEEN:

**MERRILL LYNCH BANK AND TRUST
COMPANY (CAYMAN) LIMITED**

PLAINTIFF

AND

- (1) YAHYA MURAT DEMIREL**
- (2) AYSE NUR DEMIREL (FORMERLY KNOWN
AS AYSE NUR ESENLER)**
- (3) TASARRUF MEVDUATI SIGORTA FONU**
- (4) THE ATTORNEY GENERAL**

DEFENDANTS

**IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
THE 18TH MAY 2010**

APPEARANCES: Mr. Colin McKie and Mr. Stephen Alexander of Maples and Calder for Merrill Lynch Bank and Trust Company (Cayman) Limited

RULING

1. The Plaintiff, Merrill Lynch Bank and Trust Company (Cayman) Limited (“the Trustee”) applies for leave, to the extent leave is required, to serve an application for Beddoe relief (Re Beddoe, Downes v Coltam) [1893] 1 Ch. 547] out of the jurisdiction upon the First, Second and Third Defendants.
2. The Trustee issued its Originating Summons on 26 April 2010 bringing its application for Beddoe relief. It seeks directions of the Court in respect of the role the Trustee should take in an appeal in related proceedings from a decision of the Court of Appeal to the Privy Council. The Privy Council Appeal arises from circumstances more fully explained below.
3. The Trustee’s application for leave to serve the Originating Summons upon the First, Second and Third Defendants out of the jurisdiction is made pursuant to GCR O. 11, Rule 1 (1) (j) (“the Application”).

THE TRUST, THE TRUSTEE AND THE DEFENDANTS

4. The Trustee is the trustee of two revocable Cayman Islands trusts known as the "Mana Trust" and the "Dolphin Trust" (the "Trusts"). The First Defendant ("Mr Demirel") is the settlor and principal beneficiary of the Trusts. The Second Defendant, ("Mrs Demirel") is Mr Demirel's wife. Mrs Demirel and all children and remoter issue of Mr Demirel are also named as beneficiaries of the Trusts. So far as the Trustee is aware, Mr Demirel has, as yet, no children. The residuary beneficiary is charity, so the Attorney General has been named as the Fourth Defendant.

5. The Third Defendant ("TMSF") is a Turkish public legal entity established to restructure and administer failed banks whose banking licences have been revoked. TMSF's pleadings indicate that TMSF appears to have acquired the assets and rights of two banks – Bank Ekspres and Egebank (“the Banks”) – when they collapsed in 1999, including the right to receive the proceeds of all legal actions taken against third parties who fraudulently obtained property of the Banks or who may have participated in or conspired in the fraudulent losses sustained by the Banks.

THE CAYMAN ISLANDS PROCEEDINGS

6. On 1 December 2005, TMSF commenced proceedings in this Court against the Trustee and the underlying Cayman Islands Companies (the “Trust Companies”) (Cause no. 555 of 2005). TMSF alleges in those proceedings that the Trustee holds the Trusts' assets on constructive trust for TMSF on the basis of a proprietary and tracing claim said to attach to the proceeds of certain loans allegedly fraudulently obtained by Mr. Demirel from Bank Ekspres ("the Proprietary Action"). Mr Demirel's response is that the assets settled onto the Trusts originated from legitimate business activities and therefore are held to the benefit of the beneficiaries of the Trusts. The Proprietary Action is still on-going.
7. Meanwhile TMSF had commenced legal proceedings in Turkey and in various other jurisdictions in respect of the collapse of the Banks. On 20 November 2001, it obtained final judgment in Turkey in the amount of US\$30 million (plus costs and interest) against Mr Demirel in respect of his alleged misappropriation of the proceeds of what TMSF describes as fraudulent loans from Bank Ekspres ("the Turkish Judgment").

8. On 23 February 2007, TMSF commenced separate Cayman proceedings against Mr Demirel, the Trustee and the Trust Companies (Cause no. 80 of 2007, later consolidated with Cause no. 555 of 2005) to enforce the Turkish Judgment ("the Enforcement Action"). On 30 April 2008 I granted TMSF's application for summary judgment in the Enforcement Action against Mr Demirel in the amount of US\$30 million ("the Summary Judgment"). The Court of Appeal subsequently refused Mr Demirel's application for leave to appeal against the Summary Judgment.
9. TMSF sought to enforce the Summary Judgment, and applied for, amongst other relief, the appointment of receivers by way of equitable execution over certain putative "properties" of Mr Demirel, including Mr Demirel's powers to revoke the Trusts ("the Receivership Application"). On 26 June 2009 I dismissed the Receivership Application for want of jurisdiction with an order that TMSF pay the Trustee's costs. I did, however, order that any payments made out of the Trust for Mr. Demirel's benefit as the primary beneficiary, should be paid to a receiver for TMSF's benefit in satisfaction of the Summary Judgment. The Court of Appeal also dismissed TMSF's appeal against the decisions in the Receivership Application and it is against that dismissal that TMSF has appealed to the Privy Council.

THE BEDDOE RELIEF SOUGHT

10. The Trustee and the Trust Companies were prepared to appear at, and take a neutral role on, the Privy Council Appeal. On 1 April 2010 Maples and Calder for the Trustee, wrote to Ogier, TMSF's Cayman attorneys, requesting that TMSF voluntarily provide security for the Trustee's costs of the Privy council Appeal (as well as for costs already incurred in this Court and the Court of Appeal) in the amount of

approximately US\$230,000. On 12 April 2010 Ogier replied that TMSF was not prepared to provide security and that TMSF did not consider that the Trustee had any role to play in the Privy Council Appeal.

11. There being a conflict in the Privy Council Appeal between, on the one hand, the interests of Mr and Mrs Demirel (beneficiaries of the Trusts) and, on the other hand, of TMSF (as purported beneficiary by way of the constructive trust pleaded in the Proprietary Action), the Trustee issued the Beddoe application seeking the directions of the Court in relation to the following two questions:
 - (a) what role, if any, it should take in the Privy Council Appeal; and,
 - (b) If the Court directs the Trustee to appear at the Privy Council Appeal, whether or not it should apply to the Court of Appeal for security for its costs of appeal.

LEAVE TO SERVE OUT OF THE JURISDICTION

12. Mr and Mrs Demirel are resident in Turkey and TMSF is incorporated there. Notice of the Beddoe application must therefore be served upon them there as the proposed respondents to it.
13. Leave to serve out of the jurisdiction is a jurisdictional question for the Court. The summoning of a foreign subject to submit to the jurisdiction of the Court is an exercise of sovereign authority outside the territorial limits of the Court which the common law regards as exercisable only with the leave of the Court: *Dicey, Morris and Collins, The Conflict of Laws 14th Ed. Vol 1. Ch.11 Rule 22(1)*. The Rule as to service of process on a person who is not of the jurisdiction defines, for present purposes, the limits of the Court's jurisdiction. As the common law also shows,

(Dicey op. cit.) there can be other jurisdictional restraints. There is, however, no authority in this jurisdiction as to whether or not a Trustee needs leave to serve out of the jurisdiction, an originating summons seeking Beddoe relief. The Trustee's primary view, taken on advice, is that exceptionally, leave is not required. Given the jurisdictional nature of the question and the timetable facing the Trustee (in particular the Court of Appeal – which is the court in which any application by the Trustee for security for costs of the Privy Council Appeal must be heard - will be sitting on 9 August 2010) the Trustee applies, I am told out of an abundance of caution, for leave to serve its Beddoe application out of the jurisdiction. If leave is required and is granted then, I am told, it is unlikely that there would be any delay in effecting service because Conyers, Dill & Pearman and Ogier have each written to the Trustee's attorneys Maples and Calder, confirming that they will accept service of the Originating Summons on behalf of Mr and Mrs Demirel and TMSF respectively.

14. On behalf of the Trustee, Mr. McKie submits that whether or not leave is required to serve the Originating Summons out of the jurisdiction upon Mr and Mrs Demirel and TMSF is a matter of the proper construction of Grand Court Rules (“GCR”) O. 11, r. 1(2). If the Court determines that as a matter of construction leave is in fact required, then GCR O. 11, r. 1(1)(j) is clearly a proper basis for granting leave, and the Trustee submits that the weight of the relevant connecting factors to this jurisdiction as the proper forum for hearing of the Beddoe application, tend to support the exercise of the discretion in favour of granting leave to serve out.

IS LEAVE TO SERVE OUT OF THE JURISDICTION REQUIRED?

15. Section 48 of the Trusts Law (which is the statutory expression of the Court's wide administrative jurisdiction over trusts) and GCR O. 85, r. 7 (which sets the procedure for *Beddoe* type applications under section 48), are silent as to whether or not leave to serve out of the jurisdiction is required. Without more, that would tend to suggest that an application for *Beddoe* relief is to be treated like any other originating summons and leave to serve out of the jurisdiction would be required under GCR. O.11 r. 9(2) (as would appear to be the case in England).
16. However, by virtue of GCR O.11, r.1(2) as modified by r.9(1) (and see also r.9(2)), leave is not required, "*if every claim made in the action begun by the [originating summons] is one which by virtue of a Law the Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction*"
17. Where the governing law of a trust is Cayman law, then pursuant to section 90 of the Trusts Law "*All questions arising in regard to a trust which is for the time being governed by the laws of the Islands or in regard to any disposition of property upon the trusts thereof including questions as to ... (c) the administration of the trust, whether the administration be conducted in the Islands or elsewhere, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal ... are to be determined according to the laws of the Islands, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected*". There is no counterpart to this in the English

Trustee Act.

18. It appears that the words "*without reference to the laws of any other jurisdictions with which the trust or disposition may be connected*" are intended to abrogate the English common law rules of *forum non conveniens* and the exercise of judicial discretion which they imply insofar as those rules may otherwise apply to Cayman Islands trusts. Thus, insofar as the application of the common law forum rules would point to another jurisdiction as the appropriate forum for the resolution of disputes involving a Cayman Islands trust by virtue of factors connecting the trust to that jurisdiction, then section 90 would operate to negate such factors.
19. This is not a surprising proposition when viewed in the context of the sort of issues of management, administration or construction of a trust which are contemplated by sections 48 and 90 of the Trusts Law. Different considerations may well apply, however, to contentious disputes involving Cayman Islands trusts (such as over the origins and ownership of trust assets or allegations of breach of trust). In such cases, it may well be appropriate that the question of the *forum conveniens* be determined according to the established common law principles. See *Helmsman Limited and another v The Bank of New York Trust Company (Cayman) Limited*. G.C. Cause 555 of 2008, written judgment delivered on 11th June 2009 (per Henderson J) (unreported).
20. Conversely, as section 90 must be a "Law" for the purposes of GCR O. 11, r. 1(2) and 9(2); leave would not be required to serve out because the *Beddoe* application is one which this Court has jurisdiction to hear and determine in any event, notwithstanding that the persons to be enjoined are not within the jurisdiction.

21. Some additional support for this latter construction may be derived from GCR O. 85, r. 7. That rule specifically requires that an Originating Summons for relief under section 48 of the Trusts Law be in expedited form with a hearing date that is fixed, that is, Form No. 3. That procedure is not consistent with there having to be an application for leave to serve the Originating Summons before it might be issued. It is notable that notwithstanding the fact that the GCR are based on them, the English Rules of the Supreme Court (pre-2000) had no equivalent of O.85 rule 7 and an Originating Summons would there be found in the ordinary form, that is, without a return date (see *Atkins Court Forms*, second edition, Vol. 41 (1991 Issue)).
22. By the express operation of section 90 of the Trust Law, it is my conclusion therefore, that service of the Originating Summons on Mr. and Mrs. Demirel and TMSF out of the jurisdiction, is permissible without the leave of the Court on the basis that the *Beddoe* application is one that must be taken before this Court, in any event.
23. If I am wrong in that conclusion and the Trustee requires leave to serve out of the jurisdiction then, clearly in my view GCR O. 11, R. 1(1)(j) – which reads in relevant part: "*the claim is brought for any relief or remedy in respect of any trust ... that is governed by ... the laws of the Islands, or in respect of the status, rights, or duties of any trustee thereof in relation thereto*" – would be a proper basis for granting leave in this case. This rule is subject to the test of *forum non conveniens* which also requires the Court to consider whether there are connecting factors making Cayman the appropriate forum for the trial of the dispute and so "a proper one for service out of the jurisdiction under this Order". See GCR O.11 R.4(2)
24. Clearly the questions raised in the Originating Summons are serious issues to be tried

and the Trustee has a good arguable case for directions thus bringing the case within GCR O.11 R.4(2). The weight of the relevant connecting factors disclosed in the supporting affidavit tends to point to the Cayman Islands courts as being the appropriate forum for the determination of the matters raised in the Originating Summons thus satisfying the requirements of GCR O.11 R.(4(2)). The connecting factors are:

- (1) The trusts are expressly governed by Cayman Islands law;
- (2) The express choice for the "forum of administration" of the Trusts is the Cayman Islands courts, as provided in Clause 6 of each Trust Deed. The expression "forum for administration" includes aspects of the administration of the Trusts where the court's assistance is required and clearly includes applications for Beddoe relief – see "What is a Trust Jurisdiction Clause? [2003] JLR 232" by Prof. Paul Matthews, referred to with approval in Helmsman Ltd v The Bank of New York Trust Company (Cayman) Ltd. (above) per Henderson J (at pp7-8).
- (3) The assets subject to the Trusts are shares in Trust Companies together with costs orders in the Receivership Application granted by this Court and Court of Appeal in favour of the Trustee and against TMSF. The jurisdiction most closely connected with these assets is the Cayman Islands, although the Trustee accepts that if TMSF did not pay the costs orders (after the amount had been agreed or as taxed) then enforcement of the costs orders would likely have to be in Turkey.
- (4) The over-arching proceeding is an Originating Summons so, by its nature, it is

unlikely that there will be any substantial dispute of fact – see GCR O. 5, r. 4(2). It follows that there is no automatic discovery of the parties' documents and it is unlikely that any witnesses from Turkey would be required to attend and testify at the hearing. Thus, there would be no logistical concern that the Beddoe application may not most appropriately be taken in this jurisdiction.

- (5) The substantive matters raised by the Beddoe application would be (a) the merits of the Appeal (a matter purely of Cayman Islands law), (b) the costs implications to the Trusts of the Trustee's participation in the Privy Council Appeal, and (c) issues concerning the enforceability of the costs orders against TMSF in Turkey. Only the lattermost would require the parties to submit evidence from non-party witnesses. It would be surprising if the Court were not able to determine any such Turkish law questions on affidavit evidence and the attendance of Turkish lawyers to give testimony on enforceability issues therefore seems a remote possibility only.
- (6) The Trustee acknowledges that Mr Demirel's first language does not appear to be English and the officers of TMSF are unlikely to have English as their first language. Thus, for instance, all of Mr Demirel's affidavits submitted in the Cayman proceedings to date have been primarily in Turkish translated to English; however, in the case of TMSF some of its officers have submitted affidavits in the Cayman proceedings to date in English and some in Turkish. Mr Moxam (corporate secretary of the Trustee and on whose affidavit of 12th May 2010 the Trustee relies in this application) confirms that he has met Mrs Demirel and that she speaks English fluently and that she has corresponded in

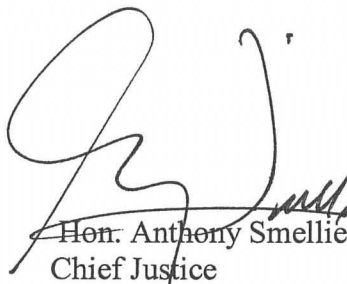
English. The ability of all the witnesses to have their evidence placed before this Court should therefore not be in issue.

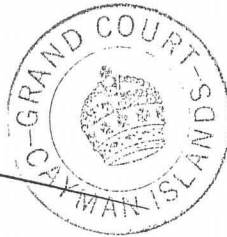
- (7) The Trustee acknowledges that Mr Demirel may be the subject of a travel ban. However, it does not appear that such travel ban has impeded Mr Demirel's recent applications for leave to appeal against the Summary Judgment nor his recent participation in TMSF's appeal in the Court of Appeal, and its application for leave to appeal to the Privy Council, in respect of the Receivership Application.
- (8) The Trustee is incorporated and licensed in the Cayman Islands, although the Trusts in question are administered in the Isle of Man.
- (9) The Attorney General who may wish to intervene on behalf of charity is, of course, based in the Cayman Islands.
- (10) The proceedings to which the application relates are proceedings in the Privy Council as the final court of appeal of the Cayman Islands and, possibly, in the Court of Appeal; where any application for security for costs would have to be made – see Judicial Committee (Appellate Jurisdiction) Rules 2009, Rule 37.

25. In the circumstances, as the Trustee submits and I accept; if leave to serve out of the jurisdiction is required then the Court may grant leave pursuant to GCR O. 11, r. 1(1)(j) and the weight of connecting factors favours the Cayman Islands courts as the forum most closely connected to the matters raised in the Originating Summons. I would, therefore, if leave were required, exercise the jurisdiction in favour of granting leave to serve Mr. and Mrs. Demirel and TMSF out of the jurisdiction.

**TIME FOR THE FIRST TO THIRD
DEFENDANTS TO ACKNOWLEDGE SERVICE**

26. If, as I conclude, leave to serve out of the jurisdiction is not required – pursuant to GCR O. 11, r. 1(4), the period for the service of an acknowledgment of service is 28 days.
27. If leave to serve out of the jurisdiction is required then, pursuant to GCR O. 11, r. 1(3) and r. 9(4) the Court must set the period for the service of an acknowledgment of service. The established practice of this Court is to allow 21 days (following the practice set out in *Extra Jurisdiction Table, Section 3A-5 of the Supreme Court Practice 1999*), but for these purposes, 28 days would have been appropriate and I would have so directed.
28. I am grateful to Messrs. McKie and Alexander for their able submissions on this application.


Hon. Anthony Smellie
Chief Justice



August 6 2010