



1 IN CHAMBERS

2  
3 IN THE GRAND COURT OF THE CAYMAN ISLANDS

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5 CAUSE NO: 669 OF 1996

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9 IN THE MATTER OF THE BANKRUPTCY LAW (CAP 7) (REVISED)

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11 AND IN THE MATTER OF PETER KRUGER, A DEBTOR

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13 EXPARTE ANDRE LAAGER, CREDITOR.

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18 **Appearances:**

19 Mr. Andrew Jones of Maples & Calder for the Cayman Islands Trustee in Bankruptcy  
20 ("the CITB").

21 Mr. Andrew Bolton of Hunter & Hunter for the three principal creditors: Andre Laager;  
22 UBS and Dezenium Finanz AG (formerly Cantonal Bank of Berne).

23 Mr. Ross McDonough of Bruce Campbell & Co for Barbara Kruger.  
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26 **Before:** Chief Justice Anthony Smellie

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29 **Date:** 31.5.2000

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34 **JUDGMENT**

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36 This is the CITB's application for directions on the action to take upon a dispute arising  
37 from the Settlement Agreement into which he entered with Mrs. Kruger with the approval  
38 of this Court. The CITB seeks the Court's ruling upon the construction to be placed upon  
39 certain provisions of the Settlement Agreement.

1 The bankruptcy Estate which is affected by the Agreement is that of Peter Kruger, Mrs.  
2 Kruger's husband. Some of the assets fall within his bankruptcy estate in Switzerland,  
3 others come under the control of the CITB.

4 Peter Kruger has been convicted before the Courts of his native Switzerland for offences  
5 of fraud related to his fraudulent disposition of assets of various entities which he  
6 controlled with intent to defraud his creditors.

7 Many assets were transferred into his wife's name for no consideration.

8 The overall effect of the Settlement Agreement is that Peter Kruger's creditors will gain  
9 access to a substantial proportion of the assets which he gave to his wife for no  
10 consideration and she will gain an unchallenged title to those assets which it is agreed she  
11 may keep.

12 Mrs. Kruger has accordingly been required by the Agreement to surrender a number of  
13 assets to the Estate, including assets purchased in their joint names or which had been  
14 transferred into her name by her husband.

15 By the Agreement she has been allowed to retain other assets and to stand as a creditor of  
16 the bankruptcy Estate as to 15% of the net recoveries.

17 Significant among the assets she retains is a house purchased in their joint names located  
18 in St. Tropez, France but which is encumbered by a subsequent mortgage for some 6  
19 million F Fr in favour of the Banque Populaire de la Cote d'Azur, Draguigan, Franc  
20 ("BPCA").

21 Also at BPCA in her name is an account which contains the equivalent of CAD  
22 1,236,000. That account is also the subject of a lien in favour of BPCA as further  
23 security for the mortgage loan over the St. Tropez house.

1 The BPCA account contains the proceeds of the sale of bonds Mrs. Kruger had bought  
2 using a loan of 6 million FFr she had borrowed from the BPCA for that purpose. This she  
3 asserts is an important factor to be borne in mind in the construction of the Settlement  
4 Agreement now to be taken as the proceeds of the BPCA account represent capital  
5 appreciated from the investment in bonds which she had undertaken at her own risk and  
6 that she should not be taken as having agreed to surrender the benefit of that account  
7 without an equivalent benefit in return.

8 The Settlement Agreement provides that the assets listed in its Schedule 2 are to go to the  
9 CITB for the Estate and that the assets in Schedule 3 are to go to Mrs. Kruger.

10 Among the assets listed in Schedule 2 is the BPCA account of CAD 1,236,000.

11 Among the assets listed in Schedule 3 is the St. Tropez house. The mortgage debt  
12 associated with it - now in the amount of FFr 6.7 million - is also specified in Schedule 3.

13 It is common ground that both sides were aware at the time of the Settlement Agreement  
14 that the St. Tropez house was mortgaged and that BPCA had a further lien over the  
15 BPCA account in respect of the mortgage loan. As a matter of BPCA's legal  
16 entitlements, both sides accept that the bank could recover as against either security as a  
17 matter of its own priority. This was however subject to a judicial order of restraint  
18 which was in place over the BPCA account at the time of the Settlement Agreement.

19 The issue for construction now is whether, as Mrs. Kruger asserts, the agreement was that  
20 the CITB was prepared to assume the risk that if the bank proceeded first to recover as  
21 against the BPCA account, the CITB would stand to get nothing from that account or  
22 whether, as the CITB asserts, Mrs. Kruger was obliged to take steps to secure that the  
23 BPCA account was realisable by the CITB; subject to any shortfall the bank would take

1 from it if, in event of sale, the proceeds of sale of the house did not cover the entire  
2 mortgage loan. This would have meant that if - as has happened - BPCA were to recover  
3 first against the BPCA account, the CITB would be entitled to reduce Mrs. Kruger's  
4 claim in the Estate. This would be to the extent that she received a windfall represented  
5 by the excess value of the house over the mortgage loan up to the amount of the BPCA  
6 account.

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8 Both sides - Barbara Kruger and the CITB - would have been mindful of the net values of  
9 the assets being respectively transferred and retained as listed in Schedules 2 and 3 to the  
10 Agreement. This is the only reasonable inference even though no specific valuations  
11 were obtained and no warranties as to value given. It was clear to all concerned that the  
12 combined value of the assets in the house and the BPCA account was greater than the  
13 amount owed to the bank secured by the mortgage and the lien over the BPCA account.

14 Neither side should be taken as having agreed to accept assets believing them to be  
15 worthless not, particularly where on the face of the Agreement, an asset would have  
16 appeared to the CITB to represent a significant portion of the overall value of the estate to  
17 be realised or, in the case of Barbara Kruger, of the assets she would keep.

18 Looked at in that way, the BPCA account retained in Schedule 2 at a known value of  
19 CAD \$1,236,000 (although no value was ascribed in Schedule 2 itself) would have  
20 represented a very significant part of the Estate to be realised by the CITB and, as events  
21 have proven, approximate to 1/20<sup>th</sup> its value. From Mrs. Kruger's point of view, the St.  
22 Tropez property in Schedule 3 would have represented a very significant portion of the  
23 value of assets she would retain - perhaps as much as one half. Even when looked at as

1 against the value of the mortgage loan of 6.7 million F Fr (USD 1,270,000); there must  
2 have been some expectation of a significant value being realised for the house over and  
3 above the value of the mortgage loan.

4 This objectively is the point of view to be ascribed to Mrs. Kruger at the time of the  
5 Settlement Agreement. The CITB has now discovered that she had instructed real estate  
6 agents to list the St. Tropez property for 10 - 12 million F Fr - substantially more than the  
7 value of the mortgage loan of 6.7 million F Fr owed to BPCA.

8 A reasonable person in Mrs. Kruger's position with that consideration in mind could well  
9 have agreed to keeping the St. Tropez house while foregoing the BPCA account. This  
10 view is only reinforced by the further consideration that she stood to benefit as to 15% of  
11 the BPCA account coming back to her from the Estate.

12 On the other hand, there is to be seen no commercial sense from the CITB's point of view  
13 in accepting the BPCA account as subject to the risk that BPCA would be entirely at  
14 liberty to foreclose primarily against it so as, in effect, to accept the BPCA account as  
15 worthless. This would be the reality if Mrs. Kruger is right in her argument. BPCA has  
16 in fact called in the loan ahead of forcing the sale of the St. Tropez property - a situation  
17 brought about it must be accepted on the face of the exhibits, in significant measure by  
18 Mrs. Kruger's legal actions in France and negotiations with BPCA. These negotiations  
19 happened without notice to the CITB and notwithstanding her obligation expressed in the  
20 Settlement Agreement to do all within her power to secure the transfer of the assets in  
21 Schedule 2 to the CITB.

1 If she is right, then the CITB would have entirely accepted the risk of this coming about  
2 although the CITB would have been aware of the probability and notwithstanding that the  
3 event would have been entirely beyond the CITB's control.

4 The CITB could only sensibly have agreed to acceptance of the BPCA account (which  
5 being the subject of judicial order of restraint could not have been called in by the bank at  
6 the time of the Settlement Agreement) on the basis that the bank would treat the  
7 mortgage as its primary security and would move against the BPCA account only in  
8 respect of any shortfall.

9 That, I find, is the most crucial factor in determining what must have been objectively the  
10 reasonable intention of the parties. It also gives the rationale for the agreement that the  
11 BPCA account should be specified in Schedule 2 as to be retained by the CITB. This I  
12 find was subject only to the lien in favour of BPCA for any shortfall from the sale of the  
13 house. I find that the St. Tropez house in Schedule 3 was intended to go to Mrs. Kruger  
14 entirely subject to the mortgage and with the intention of the parties that if the bank had  
15 to foreclose it would do so primarily in respect of the mortgage over the house.

16 In taking steps to have the judicial restraint against the BPCA account lifted and to  
17 entreaty the bank to move primarily against the BPCA account and to cancel the sale of  
18 the house by auction already scheduled, I find that Mrs. Kruger acted in breach of the  
19 specific terms of the Settlement Agreement which required her to take steps to effect the  
20 transfer of the proceeds of the BPCA account to the CITB.

21 In arriving at the foregoing conclusion on the construction of the Settlement Agreement, I  
22 have sought to apply and be guided by the principles of contractual interpretation  
23 developed in the modern cases and most recently and authoritatively confirmed by the

1 House of Lords in ICS v West Bromwich BS [1998], All E.R. 98. In his speech at pages  
2 114-115 Lord Hoffman summarised the principles in the following terms:

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4 "(1) (Contractual) interpretation is the ascertainment of the meaning  
5 which the document would convey to a reasonable person having  
6 all the background knowledge which would reasonably have been  
7 available to the parties in the situation in which they were at the  
8 time of the contract.

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10 (2) The background was famously referred to by Lord Wilberforce (in  
11 Prenn v Simmonds [1971] 3 All. ER 237 at 239-242) as the  
12 "matrix of fact", but this phrase is, if anything, an understated  
13 description of what the background may include. Subject to the  
14 requirement that it should have been reasonably available to the  
15 parties and to the exception to be mentioned next, it includes  
16 absolutely anything which would have affected the way in which  
17 the language of the document would have been understood by a  
18 reasonable man.

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20 (3) The law excludes from the admissible background the previous  
21 negotiations of the parties and their declarations of subjective  
22 intent. They are admissible only in an action for rectification. The  
23 law makes this distinction for reasons of practical policy and in  
24 this respect only, legal interpretation defers from the way we  
25 would interpret utterances in ordinary life. The boundaries of this  
26 exception are in some respects unclear. But this is not the occasion  
27 on which to explore them.

28  
29 (4) The meaning which a document (or any other utterance) would  
30 convey to a reasonable man is not the same thing as the meaning of  
31 its words. The meaning of words is a matter of dictionaries and  
32 grammars; the meaning of the document is what the parties using  
33 those words against the relevant background would reasonably  
34 have been understood to mean. The background may not merely  
35 enable the reasonable man to choose between the possible  
36 meanings of the words which are ambiguous but even (as  
37 occasionally happens in ordinary life) to conclude that the parties  
38 must, for whatever reason, have used the wrong words or syntax  
39 (see Mannai Investment Co. Ltd v Eagle Star Life Assurance Co.  
40 Ltd. [1997] 3 All E.R. 352, [1997] 2 WLR 945).

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42 (5) The "rule" that words should be given their "natural and ordinary  
43 meaning" reflects the common-sense proposition that we do not

1 easily accept that people have made linguistic mistakes,  
2 particularly in formal documents. On the other hand, if one would  
3 nonetheless conclude from the background that something must  
4 have gone wrong with the language, the law does not require  
5 judges to attribute to the parties an intention which they plainly  
6 could not have had. Lord Diplock made this point more vigorously  
7 when he said in *Antaios Cia Naviera SA v Salen Rederierna AB*,  
8 *The Antaios* [1984] 3 All E.R. 229 at 233:

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11 "--- if detailed semantic and syntactical analysis of words in  
12 a commercial contract is going to lead to a conclusion that  
13 flouts business common sense, it must be made to yield to  
14 business common-sense".  
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17 At risk of oversimplification, I regarded all the foregoing dicta as enjoining me to arrive  
18 at the appropriate construction with the objective commonsensical approach of seeking to  
19 identify what must have been the reasonable commercial intention of the parties at the  
20 time of the Settlement Agreement.

21 A construction which would ascribe to the CITB an intention to assume the risk of the  
22 BPCA account being rendered worthless to the Estate as a result of action of Mrs. Kruger  
23 or the bank acting in their own interests entirely beyond the CITB's control would be  
24 abhorrent to the CITB acting in a business-like fashion. On the other hand, the  
25 construction taken does not carry that imputation to the position of Mrs. Kruger whose  
26 amenability to compromise must be considered against the background of a reasonable  
27 hope of realising more from the house than the value if the mortgage and against the  
28 background reality of the strong allegations (now proven) against her husband of  
29 bankruptcy fraud. While no doubt seeking to protect her own interests, her position  
30 would not have been as strong and would not have been influenced in the same degree as  
31 the CITB's in being guided by the objective commercial interests of his Estate.

1 Put another way, while the construction contended for by Mrs. Kruger is very favourable  
2 from her point of view, it makes no commercial sense whatsoever from the CITB's point  
3 of view and given the relative position of the parties I can discern no reason why the  
4 CITB would have yielded such a bargain to Mrs. Kruger.

5 Finally, I agree with Mr. Jones that if she was intended to have the net proceeds of the  
6 BPCA account (ie: whatever was left after the bank redeemed its mortgage vis-à-vis the  
7 house and the BPCA account) then the account would have been listed in Schedule 3 and  
8 not in Schedule 2.

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10 I will give specific directions as to the steps the CITB might now properly take following  
11 this judgment after hearing further from Counsel.

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Anthony Smellie  
Chief Justice

Dated the 31<sup>st</sup> May, 2000.

