

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

3
4 CAUSE NO. 478/2004

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6 **BETWEEN:** TASARRUF MEVDUATI SIGORTA FONU
7 (An entity Established Under Turkish Law)

8
9 **PLAINTIFF**

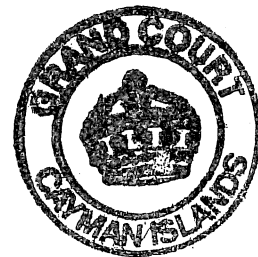
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11 **AND:** (1) WISTERIA BAY LIMITED
12 (2) UTTERTON LIMITED
13 (3) ABDALLAH IBRAHIM ABDALLAH AL-AYED
14 (4) THE REGISTRAR OF SHIPPING

15
16 **DEFENDANTS**

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18 **Appearances:** Charles Geoffrey Cox Q.C. and Richard Davison instructed
19 by Alistair Walters and Martin Jones of Campbells
20 all for the Plaintiff
21 Nigel Sanders of Walkers for the First and Second
22 Defendants
23 Hector Robinson of Quin & Hampson for the Third
24 Defendants

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27 **Before:** Hon. Justice Levers

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30 **Heard:** January 9 & 10, 2006



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33 **RULING**

34 In this matter the issues for determination by the court were as follows:

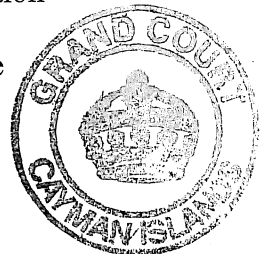
- 35 (a) whether to permit the plaintiff to amend its Statement of Claim and if so
36 what consequential directions to make;
- 37 (b) whether to strike out certain parts of the Statement of Claim or amended
38 Statement of Claim on the grounds that they disclose no reasonable cause
39 of action;

1 (c) whether to vary the injunction obtained by the plaintiff upon its own
2 application to the court on the 6th of December, 2004 to allow for the
3 sale of two Cayman registered vessels dealing in which the injunction
4 restrained;

5 (d) whether to order that certain original documents be produced by the
6 Defendants for forensic examination.

7
8 By consent the issues in (a) and (b) were adjourned for the Defendants to further study
9 the amendments and the issue as to (d) which was discovery was in fact agreed by a
10 consent order.

11
12 This ruling therefore, deals with the narrow point of whether a court of first instance
13 should exercise its discretion in reopening the *inter partes* hearing to vary an injunction
14 which was invoked at the instance of the plaintiff and which the plaintiff has had the
15 benefit of for well over a year.



16
17 On the 6th December, 2004 the Grand Court made an order on the plaintiff's application
18 restraining the registrar of shipping from registering ship mortgages against the entries
19 for the vessels "Frequency" and "Air Waves". On 16th December, 2004, that order was
20 varied so as to allow the mortgages to be registered. The order of 16th December, 2004
21 also provided that the proceeds of sale of the vessel Frequency which was sold at auction
22 in Turkey on the 10th December, 2004 be paid into an escrow account and the court
23 continued the order of the 6th December that there should be no further dealings with the

1 vessel. When the vessel was sold on the 10th December, 2004, the Plaintiff conceded that
2 there could be a contempt of court, apologised to the court for the perceived contempt
3 and agreed to pay the money into an escrow account.

4

5 The Plaintiff now comes before the court for the discharge of part II of the order. They
6 submit that the court had no jurisdiction in the first instance to make the order restraining
7 the sale of the ships by the Plaintiff and submit that it is a conflict with the fundamental
8 and well established principles of international and common law. They argue that the
9 vessels are situated in Turkey and that the Cayman courts have no jurisdiction over the
10 vessels which are not physically in the jurisdiction.

11

12 They submit that this court should hear the injunction *de novo* because the original order
13 contained liberty to apply and that as jurisdiction is fundamental to the making of the
14 order, the court is bound to reopen the hearing.

15

16 The Court is mindful of the fact that it should not clothe itself with jurisdiction if it does
17 not have jurisdiction.

18

19 The central issue in the substantive trial will be the legal right of title of the two vessels
20 Frequency and Airwaves. Mortgages were registered in the Cayman Islands. The
21 plaintiff concedes that this court can restrain any dealings with the vessels by any persons
22 in these islands. What they submit however, is that the court should hear their



1 submissions on jurisdiction thereby reopening the merits of the grant of the initial
2 injunction.

3

4 **The Law**

5

6 When an order has been granted *ex parte* the Defendants have the opportunity to apply
7 for its discharge at the hearing *inter partes*. If the opportunity is not taken or the order is
8 continued at that hearing, the Defendants can apply subsequently for discharge on the
9 basis of new material which was not available at the earlier hearing.

10

11 In *Columbia Pictures Industries Inc. v. Robinson* 1987 Chancery 3886 Scott J. said it
12 “has always been my understanding that an interlocutory application to set aside or vary
13 an interlocutory order can be made on due notice at any time.” As a matter of judicial
14 discretion however the first instance judge will not set aside or vary an *inter partes*
15 interlocutory order made by a Court unless the application to set aside or vary is made on
16 the basis of fresh material not before the court when the original interlocutory order was
17 made.

18

19 If no new material is relied on or if the only new material is material that the applicant
20 could and ought to have placed before the court on the original application, (the applicant
21 to set aside or vary being the respondent of the original application) then the original
22 order can only be disturbed on appeal. The respondent to an *ex parte* order who has not



1 been heard at all on the application for the order can in my view make an interlocutory
2 application at any time for a review of the order.

3

4 The significance of the return date is that it provides a fixed date on which the respondent
5 if so advised can apply to vary or set aside. It does not in my judgment preclude a
6 respondent who does not take advantage of the return date from applying subsequently.

7

8 In my view the plaintiff may appeal to the Court of Appeal on the refusal to rehear the
9 injunction to vary. An appeal of course is on the ground that the decision was wrong.

10 While an application to a judge of first instance to discharge or vary an interlocutory
11 order made or continued *inter partes*, is on the ground that there is fresh material not
12 previously available to present to the court.

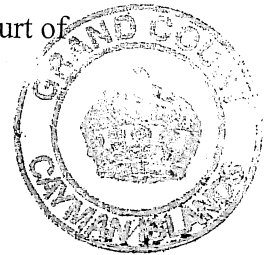
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14 In the *London Underground Limited v. The National Union of Railway Men Number 2*
15 *1989 IRLR page 343* Brown, J. was invited to decide whether he had jurisdiction to
16 discharge any interlocutory injunction granted by a high court judge, even an injunction
17 made after a hearing *inter partes* whenever the needs of justice so required. His Lordship
18 summarized the obvious examples where it was open to a party joined to apply to a judge
19 a first instance for discharge rather than to appeal against an injunction to the Court of
20 Appeal.

21

22 (1) That the injunction was obtained strictly *ex parte*;

23 (2) that the injunction was obtained *ex parte* on notice the Defendants not having



1 filed any evidence;

2 (3) the sole or main basis for sealing the discharge is that there has been a
3 material change of circumstances since the injunction was granted;

4 (4) after the injunction is granted it became apparent that it was founded on an
5 erroneous view of the law.

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7 None of these factors are present in this case.

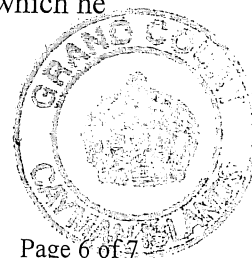
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9 In *Newsgroup Newspaper Ltd. v. Mirror Group Newspapers (1986) Ltd.* 1991 FSR 487

10 Lord Hoffman discharged an injunction, on the basis he said “in my judgment it is
11 incumbent upon a plaintiff whose position has been protected by an interlocutory
12 injunction to proceed with the action with due diligence so as to limit as far as possible
13 the period during which the Defendants’ liberties restricted without there having been any
14 determination of the merits”. In this case the plaintiff obtained the injunction and has
15 been guilty of undue delay.

16

17 It was on the plaintiff invoking the jurisdiction of the court that the injunction was
18 granted. If a motion for an interlocutory injunction is stood over on the Defendants
19 giving an undertaking under the trial of the action or further order, an application to
20 discharge or modify the undertaking will generally fail, unless it is based in my view on a
21 significant change of circumstances or the Defendants becoming aware of facts which
22 could not reasonably have been known or found out in time for the hearing at which he
23 gave the undertaking.



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The plaintiff having invoked the jurisdiction of the court, a full *inter partes* hearing having been undertaken and no new material being placed before the court I am of the opinion that this court should not exercise its discretion and reopen, the interlocutory injunction granted.

Costs to the Defendants to be agreed or taxed.

Dated this 24th day of January, 2006



Levers, J.
Judge of the Grand Court

