

12.3.98
c/s.

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

BETWEEN: Max Christopher Donnelly (Trustee)
In Bankruptcy PLAINTIFF

AND: Karess Properties Ltd et al DEFENDANTS

C 818/97

For the Plaintiff - Mr. Diarmad Murray
For the First & Second Defendants - Mr. Ross McDonough

REASONS FOR RULING

This was an application to cross-examine Mr. Harold Anthony Larkins sworn on behalf of the First and Second Defendants whom I will call respectively Karess and Kyle in support of their summons dated 14th January 1998. Insofar as it is relevant that summons seeks that the Plaintiff's claim be dismissed and judgment entered for the First and Second Defendants on the grounds that the Plaintiff's claim has no prospect of success or alternatively that the world wide Mareva Injunction made on the 8th December 1997 as subsequently varied be discharged insofar as it is directed to the First and Second Defendants on the grounds that the Plaintiff does not have a good arguable case against them.

The Deponent Mr. Larkins claims to be the sole director of Karess and Kyle and he exhibits what he swears to be a true copy of the Register of Members of both these companies. He also says that to the best of his knowledge and belief neither Christopher Skase who is a bankrupt in Australia and the real target of these

proceedings nor any of the Third to Sixth Defendants who are his stepdaughters have any interest in the shares in Karess and that the same applies to Kyle. He also says that Kyle does not hold any of the shares in La Noria SA, a Spanish company which is alleged to be the owner of a property of that name in Majorca in which Mr. Skase lives. Mr. Larkins also lives on that island and is the husband of the Third Defendant, Mr. Skase's stepdaughter.

In those circumstances it is not surprising that the Plaintiff who is Mr. Skase's Trustee in Bankruptcy views the evidence of Mr. Larkin with considerable suspicion and wishes that he be available for cross-examination.

The writ in the present action seeks various declarations in relation to the shares or other securities in the capital of Karess or Kyle on issue or otherwise owned by the Third to Sixth Defendants or any of them as at the 13th June 1991 the date of Mr. Skase's bankruptcy.

It is not in dispute that the Court has jurisdiction to order cross-examination of a deponent in accordance with Order 38 2 (3) of the Grand Court Rules 1995. For my guidance in the exercise of my discretion I was referred to several authorities which indicate a number of factors which are to be weighed on one side or the other of the balance.

Although the court will not usually order cross-examination on an affidavit in support of an application to discharge or vary Mareva relief because this would tend to turn

such an application into a mini-trial involving unnecessary costs and excessive use of court time, the Plaintiff claims that this is an exceptional case where the defendants themselves have raised a discrete issue as to whether or not the Plaintiff has an arguable case and this cannot be dealt with on conflicting affidavit evidence without cross-examination. On the other hand it cannot be right to allow a roving cross-examination merely because a Plaintiff harbours a suspicion that the person sought to be made the subject of the order has not been entirely open. That will be commonplace in cases of this kind.

In Darby & Co Ltd et al v. Weldon et al (No.1) (1989) 1 ALLER 469 it was observed per curiam that on an application for a Mareva Injunction one of the issues was whether the Plaintiff has a good arguable case and that this was among the issues which should be decided on comparatively brief evidence. In particular the court ought not to be asked either to resolve disputed questions of fact whether relating to the merits of the underlying claim or the Mareva jurisdiction. These must be matters which are also to be given weight in relation to an application to discharge a Mareva Injunction.

There are indeed disputed questions of fact in this case. Mrs. Buckham, another of Mr. Skase's stepdaughters swore as late as April 1996 that she believed that she was the owner of 25% of the shares in Karess in a way which is claimed by the Plaintiff to give rise to the inference that she still had an interest in the shares.

On the other hand, the motives and reasons of Mr. Larkins, while certainly a matter for investigation at trial, are not the main issue to be determined, nor indeed the subject of Mr. Larkins' affidavit. In that respect the case is distinguishable from Smith v. Fawcett Ltd. (1942) 1 Ch 304 where the whole case turned on the question of the motives of directors in exercising their powers, and Lord Greene M.R. said this -

“Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw inferences as to the bona fides or mala fides of the actors. If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination. That does not mean that it is illegitimate in a proper case to draw inferences as to bona fides or mala fides in cases where there is on the face of the affidavit sufficient justification for doing so, but where the oath of the deponent is before the court, as it is here, and the only grounds on which the court is asked to disbelieve it are matters of inference, many of them of a doubtful character, I decline to give to those suggestions the weight which is desired.”

The court will always be concerned to see that an order for cross-examination is not made needlessly or when it would be oppressive. The purpose sought to be achieved when cross-examination is ordered is that this is necessary for disposing of the

particular issue. Whether it is so necessary will necessarily depend on the circumstances of the particular case. In Re Bank of Credit and Commerce SA (No. 6 Mahfouz v. Morris et al 1 BCLC 450 per Sir Donald Nicholls VC at p.453.

Mr. Larkins lives in Majorca. The ease of modern travel is such that I attach no great weight to that. I exercised my discretion on the broad ground expressed by the Vice Chancellor. The cross-examination of Mr. Larkins on his affidavit is not necessary for the disposing of the particular issue. Although the ground on which discharge of the injunction will be sought is that the plaintiff does not have a good arguable case against Karess or Kyle the hearing of that matter must not be the occasion for a mini trial or a roving cross-examination.



12th March 1998

G.E. Harre
Chief Justice