

Judgment 3/2006 Motorola Credit Corporation v (i) Uzan (ii) Incidentally Limited (iii) Kocibey (iv) Alcor Limited (v) Cetus Limited – Royal Court (Civil Action File 720) – 25th January, 2006

Application for declaratory relief – powers of the Court – Court able to do justice between parties by setting aside a share transfer – therefore no need to consider whether to grant any declaratory relief

IN THE ROYAL COURT OF GUERNSEY

The 25th day of January 2006 before Richard John Collas, Deputy Bailiff; sitting alone

BETWEEN

MOTOROLA CREDIT CORPORATION

The Plaintiff

and

(1) CEM CENGIZ UZAN

The First Defendant

(2) INCIDENTALLY LIMITED

The Second Defendant

(3) ALARA KOCIBEY

The Third Defendant

(4) ALCOR LIMITED

The Fourth Defendant

(5) CETUS LIMITED

The Fifth Defendant

UPON the hearing of the Plaintiff's claims for declaratory and other relief as set out at paragraphs (b) to (i) of the Amended Cause dated 18 November 2005;

AND UPON the Court having awarded judgment against the First Defendant in default of the First Defendant's appearance on 8 July 2005 in the amount of US\$2,097,896,905.66;

THE COURT having heard Advocate J.P. Greenfield for the Plaintiff and Advocate J. T. Le Tissier for the Fourth and Fifth Defendants, granting the relief sought under paragraphs (e), (h) and (i) of the Plaintiff's Amended Cause **ORDERED** as follows:

- (i) the transfer of the 2,998 Shares from the First Defendant to Mr Saydem on or about 20 August 2001 and the transfer of the Shares from Mr Saydem to the Third Defendant on or about 29 November 2001 be set aside and that the Second Defendant be ordered to amend the register of members to provide that the First Defendant is the legal owner of the said 2,998 Shares;
- (ii) the Second Defendant shall produce up to date accounts for the period from 1 January 2001 to 25 January 2006 within 21 days of the date of this Order;
- (iii) the Second Defendant shall produce to H.M. Sheriff within 21 days of H.M. Sheriff's request a copy of all of its company records, accounting records and correspondence within its power, possession and control from its date of incorporation to the date of this Order and that H.M. Sheriff shall provide a copy of such documents to the Plaintiff **SAVE THAT** the Second Defendant shall not be obliged to provide:
 - (a) copies of any such documents which are privileged; and/or
 - (b) copies of any such documents where production could render it or anyone liable to prosecution under section 41 of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999;
- (iv) the Second Defendant shall be at liberty to apply to the Court for an extension of the time limits detailed in paragraphs (ii) and (iii) on giving 2 days' notice to the Plaintiff and the Fourth and Fifth Defendants.
- (v) the Plaintiff's remaining applications for declaratory and other relief as set out in the Amended Cause dated 18 November 2005 be adjourned sine die.

M.A. TOSTEVIN
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF
GUERNSEY
(Ordinary Division)**

Between	MOTOROLA CREDIT CORPORATION	Plaintiff
	-v-	
	CEM CENGIZ UZAN	First Defendant
	And	
	INCIDENTALLY LIMITED	Second Defendant
	And	
	ALARA KOCIBEY	Third Defendant
	And	
	ALCOR LIMITED	Fourth Defendant
	And	
	CETUS LIMITED	Fifth Defendant

Judgment handed down: 27 February 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

**Advocates for Motorola Credit Corporation: J P Greenfield and K M Le Cras
Advocate for Alcor Limited and Cetus Limited: J Le Tissier**

Cases, texts & statute referred to:

Motorola Credit Corporation v Uzan and others [2003] EWCA Civ 752
1999 Rules of the Supreme Court (White Book), para.15/16/2
re the Westbury Property Fund Limited, Royal Court, 4 July 2005
Morgan v Donaldson 2.GLJ.51

Introduction

1. The Plaintiff is a large multinational mobile telephone company. The First Defendant is a member of a wealthy and powerful Turkish family who own a company which is the second largest supplier of mobile telephone services in Turkey. The Third Defendant is the wife of the First Defendant. The other three Defendants are Guernsey companies. Each of the Fourth and Fifth Defendants is the registered owner of one of the 3000 issued shares of £1 each in the Second Defendant. The Second Defendant is the registered owner of a luxury yacht called the “Be Mine” which is the subject of these proceedings and is alleged to be beneficially owned by the First Defendant. The yacht, “Be Mine” is estimated to be worth between US\$6 and US\$8 million and is presently in Eilat where it is under arrest at the instance of the Plaintiff.

Background

2. The Plaintiff is seeking to enforce a Judgment (“the US Judgment”) obtained against the First Defendant and other members of the Uzan family in the US District Court for the Southern District of New York in respect of a fraud perpetrated by the family on the Plaintiff. The fraud was summarised in the following terms by Judge Rakoff in the New York Court:

“all the credible evidence before the Court proves that the defendants – in particular, the members of the Uzan family – have perpetrated a huge fraud. Under the guise of obtaining financing for a Turkish telecommunications company, the Uzans have siphoned more than a billion dollars of plaintiff’s money into their own pockets and into the coffers of other entities they control. Having fraudulently induced the loans, they have sought to advance and conceal their scheme through an almost endless series of lies, threats, and chicanery, including, among much else, filing false criminal charges against high level American and Finnish executives, grossly diluting and weakening the collateral for the loans, and repeatedly disobeying the orders of this Court”.

3. Following various appeal procedures, a final and conclusive judgment of the New York Court was entered against the First Defendant, jointly and severally with the other Defendants in the US Action, on 31 July 2003 in the sum of US\$2,132,896,905.66.

History of Proceedings in Guernsey

4. Proceedings in Guernsey commenced on 14 November 2002 when the Royal Court granted a Freezing Order preventing the Second Defendant from dealing with the “Be Mine”. That Freezing Order was varied on an interim basis by Act of the Royal Court dated 8 July 2005 but remains in place.
5. By a Summons dated 15 June 2005 the Plaintiff sought recognition in the Royal Court of the US Judgment against the First Defendant and declaratory and other relief to enable enforcement of the US Judgment against the Second

Defendant and against the “Be Mine”. The Summons was served on the Second, Fourth and Fifth Defendants on 15 June 2005.

6. By Act of the Royal Court dated 17 June 2005 the Bailiff granted leave for substituted service out of the jurisdiction. Service on the First Defendant was effected by fax and postal delivery on Baker Botts LLP in Washington DC who confirmed by letter dated 11 July 2005 that the firm represented him in connection with proceedings in the United States but denied having authority to accept any documents in connection with Guernsey proceedings.
7. Notices of further steps in these proceedings, including the date of hearing this application, have also been sent to Baker Botts LLP. Ryan E Bull of Baker Botts had said he will consult with the First Defendant regarding their authority to accept the documents sent to him through their office. He has never confirmed that he has been given such authority but nevertheless I am satisfied service has been effected in accordance with the Order of 17 June and also that the First Defendant has been made aware of the Guernsey proceedings.
8. Also pursuant to the Bailiff’s Order of 17 June 2005, service on the Third Defendant was by way of fax and postal delivery on Baker Botts LLP and by post to an address in Turkey. Baker Botts have indicated that the Third Defendant is not their client although, as I have mentioned, they have confirmed acting for her husband.
9. On 8 July 2005 the Plaintiff was awarded judgment against the First Defendant in the sum of US\$2,097,896,905.66 (“the Judgment”) in default of appearance. No application has been made by the First Defendant (or any of the Defendants) to set aside the Judgment.
10. The First and Third Defendants were notified of the hearing to be held on 25 January 2006 by letters from the Plaintiff’s Guernsey Advocate addressed to the First and Third Defendants, c/o Baker Botts LLP in Washington USA. The First and Third Defendants did not appear.
11. Notice of the 25 January hearing was also served on the Second Defendant. The Second Defendant previously instructed Guernsey Advocates who entered an *Exception Declinatoire* on its behalf but I dismissed the *Exception* on 18 November 2005 because the Second Defendant failed to pursue it. The second Defendant has not participated any further in these proceedings and did not appear on 25 January. The only Defendants to appear on that day were the Fourth and Fifth Defendants who, through Advocate Le Tissier also confirmed that the Second Defendant, through its corporate directors, was aware of the hearing.

Relief Sought

12. The Plaintiff is seeking a number of heads of relief, mainly declaratory orders, with the intention of putting the Plaintiff in a position where it can assert sufficient control over the “Be Mine” to achieve a sale of the yacht at the best

possible price by giving clean and adequate title to a purchaser in part satisfaction of the US Judgment

English Proceedings

13. There have been related proceedings in the English courts. On 13 May 2002 in the High Court, Moore-Bick J granted worldwide freezing orders over the assets of the First Defendant. An application by the First Defendant to discharge the order was dismissed by Steel J on 22 July 2002. On 12 August 2002, Steel J ordered the First Defendant to attend for cross-examination as he was not satisfied that he had provided full disclosure of his assets. He did not appear and on 20 December 2002, Gross J found the First Defendant to be in contempt of court, ordered that he be committed to HM Prison Pentonville for 15 months, and issued a warrant for his arrest.
14. Appeals by the First Defendant against some of the orders made in the High Court were dismissed by the Court of Appeal on 12 June 2003 in a Judgment which is reported at [2003] EWCA Civ 752.
15. There have also been proceedings in Bermuda and the Isle of Man which have resulted in the sale of two aircraft, but the greater part of the US Judgment remains outstanding.

Court's Power to Grant Declaratory Relief

16. The first issue on which Advocate Le Cras, on behalf of the Plaintiff, sought to persuade me was whether the Royal Court had the power to grant declaratory relief in the absence of the other parties who have received notice of the proceedings but have chosen not to appear. I was referred to O.15 r.16 of the former Rules of the Supreme Court and to the commentary in the 1999 White Book, para. 15/16/2. The 1999 White Book is still regarded as authoritative in this jurisdiction being the last edition to be published before the introduction of the Civil Procedure Rules and because the Royal Court Civil Rules 1989 were based on the Rules of the Supreme Court. Para. 15/16/2 reminds me that the power to make a binding declaration of right is a discretionary power. It continues:

“If relief is to be granted without trial or evidence, the right course for the Court is not to make a declaration but to state on what footing the relief is to be granted (per Buckley and Scarman L.JJ. in Wallersteiner v Moir [1974] 1 W.L.R. 92; [1974] 3 All E.R. 217). A declaration can only be made after proper argument and cannot be made merely on admissions by the parties whether in pleadings or otherwise (per Megarry V.-C in Metzger v Department of Health and Social Security [1978] 1 W.L.R. 1046; [1977] 3 All E.R. 444 at 451) nor in default of compliance with rules of Court.

On the other hand, the rule of the court that a declaration will not be granted when giving judgment by consent or in default without a trial is a rule of practice and not of law and will give way to the paramount duty of the court to do the fullest justice to the plaintiff to which he is entitled”.

17. On 4 July 2005 in *re the Westbury Property Fund Limited*, a Judgment of this court given by Lieutenant-Bailiff A R W Hancox, consideration was given to the Royal Court’s power to grant a declaration *simpliciter*. In that case HM Procureur, appearing as *amicus curiae* drew the court’s attention to O.15.r.16 of the RSC and to rule 40.20 of the new CPR. Lieutenant-Bailiff Hancox accepted that the Royal Court has the power to grant a declaration and stated:

“the power to exercise this discretion stems from the paramount duty of the court to do the fullest justice to the plaintiff, or applicant, as the case may be”.

Evidence

18. The evidence relied upon by the Plaintiff in support of its contention that the First Defendant is the beneficial owner of the “Be Mine” is contained in an affidavit sworn on 7 December 2005 by Thomas Sprange, a partner in the firm of Steptoe and Johnson LLP, the UK firm of Solicitors instructed to act on behalf of the Plaintiff and in particular in paragraphs 52 to 73 of the affidavit and the documents exhibited thereto.
19. In summary, the “Be Mine” is a 35 metre steel hulled pleasure yacht built in 1991 and registered in the British Virgin Islands in the name of the Second Defendant. The Second Defendant was initially formed with two subscriber shares of £1 each which were later transferred to the Fourth and Fifth Defendants. The Register of Members records that on the 21 May 1993, 2,998 shares of £1 each were allotted to the First Defendant. Mr Sprange produced e-mails indicating that during this period the First Defendant regarded the boat as his own.
20. On 20 August 2001 the First Defendant transferred his holding of 2,998 shares in the Second Defendant to one Engin Saydem. He is described as a long-term business associate and trusted confidant of the First Defendant.
21. Mr Saydem held the shares for just over 3 months and, on 29 November 2001, transferred them to the First Defendant’s wife, Alara Kocibey, the Third Defendant.
22. The Plaintiff produced evidence indicating that even after the transfer of the shares to the Third Defendant, the First Defendant continued to treat the “Be Mine” as if he was the owner. The evidence included an affidavit by Stephen Doyle, a yacht broker in Massachusetts, sworn on 8 June 2002 in connection with the Guernsey Freezing Order. He was acting for a prospective purchaser and had a number of discussions with the agent acting for the vendor of the “Be Mine” who informed him:

“that ownership of the yacht was formerly now in the name of Cem Uzan’s wife, but confirmed that Cem Uzan was in reality the owner”.

23. Mr Doyle received a purchase and sale agreement which he understood had been signed by the First Defendant. The sale was never completed.
24. The Plaintiff also points out that the First Defendant has failed to challenge the Plaintiff’s evidence of his beneficial ownership of the “Be Mine” first asserted in this court when the Freezing Order was obtained in November 2002. The First Defendant entered an appearance in connection with the Freezing Order but has not sought to discharge the Order. The Plaintiff informed me that in a number of other jurisdictions proceedings that were afoot at the same time were vigorously contested by the Plaintiff and his family.
25. The New York Court has also concluded that the First Defendant owns and/or controls the Second Defendant, although it has remanded the issue of whether that finding on its own is sufficient to allow the direct enforcement of the Judgement against the Second Defendant. That factual finding was not challenged in the appeal pursued in the United States by the First Defendant.
26. The Plaintiff points out that the date of transfer of the shares on 20 August 2001 to Mr Saydem took place shortly after the failure of a meeting that had been held in London in July that year between representatives of the Plaintiff and members of the First Defendant’s family with a view to resolving the very serious issues that had arisen between the parties. Following the failure of that meeting, the First Defendant was aware of the existence of the Plaintiff’s claims and of the likelihood of proceedings being issued. The Plaintiff argues the transfer of the shares out of the name of the First Defendant was no more than a crude attempt to seek to make himself judgment proof.

Application to Set Aside the Share Transfer

27. The Plaintiff asked me to order that the transfer of the 2,998 shares from the First Defendant to Mr Saydem on or about 20 August 2001 and that the transfer of the same shares from Mr Saydem to the Third Defendant on or about 29 November 2001 be set aside.
28. I have reminded myself of the decision of the Royal Court in *Morgan v Donaldson 2.GLJ.51* although the case was not cited to me in argument. The then Bailiff, Sir Charles Frossard directed the Jurats that the task of the Court was to decide whether the issued shares in a company called Sea View Agency Limited belonged beneficially to the Defendant’s wife, as he alleged, or whether they were held for him by his wife as a device to frustrate a judgment creditor in satisfying its judgment. It was alleged the shares had been transferred to her in an act of bad faith. The decision of the court was to grant permission to sell the arrested shares in execution of the judgment debt owed by the husband to the plaintiff.
29. There is therefore a precedent for the Royal Court to order the sale of shares held in the name of the wife of a judgment debtor if there is evidence that the

judgment debtor is the true beneficial owner and that the shares are held by his wife solely for the purposes of attempting to frustrate the judgment creditor.

30. The evidence produced in this case by the Plaintiff, which I have summarised above, shows a strong prima facie case that the Third Defendant is holding 2,998 shares in the Second Defendant for her husband who remains the true beneficial owner of those shares. That evidence has not been challenged either by the First Defendant or the Third Defendant.
31. Accordingly, I am satisfied that I have the power to order, and it is proper I should order, that the transfer of the shares from the First Defendant to Mr Saydem and from him to the Third Defendant should be set aside.
32. I am therefore able to do justice between the parties without needing to consider whether to grant any declaratory relief on this occasion, although the Plaintiff has indicated that it may bring a further application for such relief at a future date.
33. I should mention that Advocate Le Tissier, on behalf of the Fourth and Fifth Defendants, raised no objection to the making of this Order and of a further Order that accounts of the Second Defendant be prepared. The production of accounts is a necessary step before the Plaintiff can decide how to proceed further and I anticipate further applications in due course.
34. I was not prepared, on this occasion, to grant the declaration sought in paragraph (b) of the prayer of the Plaintiff's claim, namely "*a declaration that the Plaintiff is entitled to enforce the Judgment dated 8 July 2005 granted against the First Defendant, and any subsequent Judgment (s) granted against the First Defendant directly against the assets of the Second Defendant, in particular the "Be Mine"*". I was concerned that such a step might be prejudicial to any legitimate creditors of the Second Defendant.