

Judgment 43/2006

HSBC Private Bank (Guernsey) Limited et al v HM Procureur (re Metlika Trading Limited) – Court of Appeal (Civil Appeal 379) - 18th September 2006

Court of Appeal (Civil Division) (Guernsey) Rules, 1964 (Rule 17) – Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1991 – dismissal of application to vary restraint order – appellants’ application for abridgment of time to expedite hearing - principles to be applied in exercise of discretion – application for abridgement of time dismissed

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

The 18th day of September, 2006 before the Hon. Michael J. Beloff, Q.C., presiding; the Rt. Hon. Sir Charles Mantell, P.C. and Michael S. Jones, Q.C.

HSBC PRIVATE BANK (GUERNSEY)
LIMITED et al

Appellants

v

H.M. PROCUREUR

Respondent

In the matter of the appeal from the decision of the Royal Court on the 22nd August 2006 and the application of the Appellants for abridgement of time to enable the said appeal to be heard on the 20th September 2006 or as soon thereafter as may be convenient;

THE COURT, having heard Advocate C. Edwards and H.M. Comptroller for the respective parties thereon, GAVE JUDGMENT in the attached terms and

- (i) REJECTED the said Application; and
- (ii) DIRECTED that the matter be heard by way of appeal at the next sitting of the Court, beginning on 11th December 2006.

K.H.TOUGH
Registrar of the Court of Appeal

Final Judgment 22.11.06

TUESDAY 19TH SEPTEMBER 2006
WEDNESDAY 20TH SEPTEMBER 2006

COURT OF APPEAL

Before

Michael J. Beloff, Esq., QC; presiding
Sir Charles Mantell
Michael S. Jones, Esq., QC

HSBC et al v. HER MAJESTY'S PROCUREUR
(Civil Appeal No. 379)

Decision given by Michael J. Beloff, Esq., QC

BELOFF, JA: In relation to the HSBC Private Bank (Guernsey) Limited matter, on which we heard application this morning, our collective and unanimous decision is that the application will be rejected and accordingly the matter will be heard by way of appeal at the next session of the Court. We are still in the process of considering what I call the alternative order for directions made by Mr. Edwards after the conclusion of the hearing but in any event neither of you will be required to prepare for a substantive hearing tomorrow or for the balance of the week.

We are very grateful to you for actually staying although there was no need for you to do so, we appreciate the courtesy, thank you.

H.M. COMPTROLLER: Costs in the Cause, sir?

BELOFF, JA: Can we deal with that matter- is there any objection to that in here?

ADVOCATE EDWARDS: I don't think so, sir.

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BELOFF, JA: No, well costs in the Cause will be part of the order then made.

We will be giving our reasons tomorrow morning at 10 a.m.

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WEDNESDAY 20TH SEPTEMBER 2006

(Hearing reconvenes for reasoned Judgment)

1. The Appellants pursuant to rule (17)(1) of the Court of Appeal (Civil Division)(Guernsey) Rules, 1964 and/or the inherent jurisdiction of the Court applies for the following orders:
 - (i) That the time within which the Respondent lodge and serve the Respondent's case be abridged to 19th September of this year; and
 - (ii) The appeal be heard on 20th September 2006 or so soon thereafter as may be convenient.
2. The decision, the subject matter of the prospective appeal is that of Lieutenant Bailiff Finch delivered on 28th August 2006, refusing to vary a restraint order made on 9th June 2006 under the provisions of the Criminal Justice (Proceeds of Crime)(Bailiwick of Guernsey) Law 1991 ("the Act") so as to allow the Appellants to pay for legal representation in certain proceedings in the Republic of South Africa collectively known as the Metlika proceedings out of an available bank with sufficient funds.
3. The Notice of Appeal was lodged on 1st September 2006 and the Appellants' case on 6th September 2006 after commendable efforts by the Appellants' lawyers designed to enable the Respondent to collaborate in an expedited hearing, notwithstanding the fact that ordinarily under the rules of Court the Respondents' case was not due until 6th October 2006. However, H.M. Procureur has said by letter of 15th September 2006 that the Respondent is not in a position to defend the appeal within such a short time. Hence, we cannot abridge time by consent.

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4. The order whose variation was sought was made under Section 26(1) of the Act which provides that “*The Court may by order (in this law referred to as a restraint order) to prohibit any person from dealing with any realisable property subject to such conditions and exceptions as may be specified in the order.*” The Appellants will contend in the substantive appeal that the Lieutenant Bailiff erroneously exercised his discretion by failing to have regard to a number of material considerations listed in paragraph 1 of the Notice of Appeal, i.e.

- (a) prejudice likely to be suffered by Metlika;
- (b) inability of Metlika to otherwise obtain the means to pay for legal representation in respect of the Actions;
- (c) nature of the Actions;
- (d) prejudice likely to be suffered by the Appellants;
- (e) fiduciary obligations to which the Appellants are subject;
- (f) distinction between the Trust Assets and the assets held by, and the means of, David King

and in failing to apply principles set out in what is contended to be the analogous Mareva jurisdiction.

5. The urgency said to arise from the fact, as stated in paragraph 14 of Mr. Edwards’ affidavit of 15th September in support of the application “*as matters stand the Appellants are without the means to collectively defend the Metlika proceedings which are ongoing.*” He quotes from a letter from TWB the RSA lawyers acting we are told at present without charge for Metlika, whose shareholding is owned entirely by Glencoe [of which HSBC is the trustee] which describes the current status of certain proceedings in South Africa. At paragraph 17 in the light of that letter he said “*I am instructed that the Appellants’ concern that Metlika was unable to make representations at the recent hearing in relation to the application to sell the Falcon. Similarly, Metlika was unable to oppose an application by the South African Revenue Services (“SARS”) for a*

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final restraint order of the Hawker Aviation Services partnership.” He concludes at paragraph 18 “The Appellants are of the view that both these matters demonstrate both the urgency and prejudice faced by the Metlika Appellants as matters stand. Further they clearly demonstrate that both SARS and the South African Reserve Bank (“SARB”) are seeking to progress the Metlika proceedings. The Appellants are concerned that both SARS and SARB continue to seek to take advantage of Metlika’s present inability to defend itself in the Metlika proceedings.”

6. The purpose of the Act is, as we understand it, to prevent the dissipation of assets, potentially the fruit of criminal conduct, which may become the subject of confiscation orders. Nevertheless, the Courts have recognised that in advance of the resolution of the issue as to whether those assets are or not the product of legitimate activities, it is appropriate to allow the object of a restraining order some leeway in making use of what is prima facie his own property.
7. The Metlika proceedings comprise:
 - (a) An application by SARS to sell the Falcon (“the Falcon Application”);
 - (b) The Sequestration of the Hawker Aviation Services Partnership (“The Hawker Sequestration”);
 - (c) The action brought by SARS against Metlika and others seeking to execute assets owned by those entities in satisfaction of an alleged debt owed by Mr. King (one of the beneficiaries of Glencoe) (“the Piercing of the Veil action”);
 - (d) Attachment orders issued by SARB against the assets of Metlika and others (“the SARB Application”).
8. There is a measure of common ground about the state of play in these proceedings (see the TWP letter of 15th September 2006 and the letter from Mahlangu (SARS lawyers) of 8th September 2006.

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(a) **The Falcon Application:**

The application to sell the Falcon was argued on 31st August and 1st September, judgment has been reserved.

(b) **The Hawker Sequestration:**

On 5th September 2006 SARS sought and obtained a final sequestration order of the partnership.

(c) **The Piercing of the Veil Action:**

No court date has yet been set for the same.

(d) **The SARB Application:**

This application is currently held in abeyance and is not anticipated to take place for 18 months.

9. Mr. Edwards contends forcefully that in relation to the matters concluded or all but concluded (that is the Falcon Application and Hawker Sequestration) Metlika needs to seek advice as to whether, and if so, what steps may be taken to set aside any adverse judgment: and in relation to those not concluded, the Piercing of the Veil Application and the SARB Application, that it is possible in the light of their past behaviour that SARS or SARB may act more swiftly than is envisaged. In this context we note the offer given by the H.M. Procureur that if SARS and/or SARB were to take or threaten to take any further steps in any of the South African civil proceedings, the Law Officers would not resist an application to the Royal Court by HSBC Trustee to release from the restraint order sufficient funds to cover the reasonable fees and disbursements of TWB in advising upon and if appropriate conducting such defence as they consider necessary in response to such steps, provided that the procedure set out in Clause 7 of the Exceptions (granted earlier by the Lieutenant Bailiff) is followed. We are also told by him that insofar as he is aware- (and he puts it cautiously) no order so far made in the Republic of South Africa will make the funds the fruit of the assets sold or sequestrated irrecoverable by the Metlika interests.

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10. We therefore conclude by reference to all these matters that while in the future Metlika may need funds, such need is not so obvious or urgent as to justify the serious abridgement sought. Either the horse has already bolted or no arrangements have yet been made for it to leave the stable. We ought not to make an order when so much – despite the efforts of both sides- remains in the realm of speculation.
11. There is a further material consideration to which we must have regard. A fair trial requires that fairness be extended to both parties in civil litigation; and the doctrine of equality of arms requires prima facie that both sides are given adequate time to prepare. H.M. Procureur necessarily relies, for information relevant to the appeal, on South African lawyers. He assures us – and we accept without demur from Mr. Edwards- that they are acting with professional diligence and are not seeking any tactical delays. He also emphasises the complexity of the South African position, in the absence of full information of the overall value of the trust, the nature of some of its assets, the income generated therefrom, as well as the detail of the Metlika proceedings.
12. We do not doubt that the Lieutenant Bailiff had jurisdiction to make the order sought to release the funds in connection with legal proceedings or that the Court of Appeal has jurisdiction to overrule his refusal.

In *Halifax Plc v. Chandler* (2001) EWCA 1750 (the English Court of Appeal) in the context of a civil action it was said at paragraph 23 that “*the freezing injunction should not in principle prevent such expenditure, given that it was bona fide legal expenditure in connection with an act which had reasonable prospects of success and which was afoot when the injunctions were granted.*”

But whether (1) there can be a direct read across from the civil to the criminal field (2) if so, the criteria indicated in that dictum, if imperative, or any other relevant criteria, are here satisfied and (3) it is appropriate for the Court of Appeal in this case to overrule the Lieutenant Bailiff are all matters upon which we should refrain from expressing even a provisional view.

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13. It will, in short, be for the Court of Appeal in the next session to deal with the substance of the appeal.
 14. We accordingly reject this application; and equally, for effectively the same reasons, the alternative orders for directions sought by the Appellants, which is annexed to this determination, which was an ambitious attempt to gain by the back door that which they could not gain by the front.
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