Judgement 50/2006 **Braun (as Insolvency Administrator of Walter Marketing GMBH & Co KG) v Brantridge Estates Limited – Royal Court (Civil Action File 996) – 23 November 2006**

Royal Court Civil Rules, 1989 (Rule 48) – defendant's application for security for costs – principles to be applied – whether the Royal Court could exercise effective control over assets held by a German Insolvency Administrator – application granted – (see also Judgment 40/2006)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil File 996

The 23rd day of November, 2006, before Richard John Collas, Esquire, QC, Deputy Bailiff, sitting alone.

In the matter of:

Between: **DR EBERHARD BRAUN AS INSOLVENCY ADMINISTRATOR OF WALTER MARKETING GMBH & CO.KG** Plaintiff

V

BRANTRIDGE ESTATES LIMITED Defendants

The Deputy Bailiff having considered an application by the Defendant that the Plaintiff shall deposit at the Greffe the sum of £65,825 (on an indemnity basis) or alternatively £39,777 (at recoverable rate) by way of security for the Defendant's costs and that the case be stayed until such sum is lodged of if it is not lodged within twenty one days, the Plaintiff's proceedings be dismissed.

And having considered submissions by Advocates K.Le Cras and C.H. Edwards counsel for the Defendant and Plaintiff respectively. The Deputy Bailiff this day handed down judgment in the terms attached hereto and ORDERED THAT security be lodged to cover the Defendant's anticipated recoverable costs to the conclusion of a hearing in the sum of £39,777.

S.M.D.ROSS
Her Majesty's Deputy Greffier

Final Judgment
23 November 2006

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between **DR EBERHARD BRAUN AS INSOLVENCY ADMINISTRATOR OF WALTER MARKETING GMBH & CO.KG** **Plaintiff**

-v-

BRANTRIDGE ESTATES LIMITED **Defendant**

SECURITY FOR COSTS

Judgment handed down: 23 November 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Plaintiff: Advocate C H Edwards
Advocate for Defendant: Advocate K Le Cras

Cases, texts & statutes referred to:

1. Gilliham v NRG Benelux BV trading as NRG Distribution, Royal Court, 2 January 2002
2. McNamara v Gauson and Another, Royal Court 24 August 2004
3. Aeronave S.P.A. v Westland Charters & Others [1971] 1WLR 1445
4. Thune v London Properties Ltd [1990] 1 All ER 972
5. Nasser v United Bank of Kuwait [2201] EWCA Civ 556
6. Royal Court Civil Rules 1989, Rule 48 (1)(b)
7. Companies (Guernsey) Law Section 99(4)(a) and 102
8. Civil Procedure Rules, Rule 25
9. Companies Act 1967, Section 726(1)

The Present Application

1. The Defendant, Brantridge Estates Limited, has applied for an Order that the Plaintiff, Dr Eberhard Braun as Insolvency Administrator of Walter Marketing GMBH and Co KG shall deposit at the Greffe the sum of £65,025 (on an indemnity basis) or alternatively £39,777 (at the recoverable rate) by way of security for the Defendant's costs and that the case be stayed until such sum is lodged or if it is not lodged within twenty-one days, the Plaintiff's proceedings be dismissed.

2. After an inter partes hearing I invited counsel to make further written submissions on a particular issue which they duly did. There have then been further delays in the production of this judgment which I regret and for which I apologise.

Substantive Proceedings

3. The Plaintiff alleges that on 15 November 2000 the Defendant lent DM 3,400,000 to three German limited partnerships ("the Debtors") which, together, were the owners of the Plaintiff. The loan was to provide the Debtors with the funds they needed to provide capital to the Plaintiff in order to fund its activities. The loan was to bear interest at 10% per annum. By a supplemental agreement dated 21 March 2002, it was agreed to vary and extend the term of the loan until 31 May 2005. The Plaintiff alleges that contrary to the agreed terms, the Debtors did not pay any of the interest instalments due in respect of the loan. Instead, the Plaintiff paid certain sums to the Defendant in respect of interest and other associated expenses due by Debtors. The Plaintiff pleads it was under no obligation to the Defendant or any other party to make any of the payments and that it received no consideration for doing so. It alleges the payments made by the Plaintiff, totalling DM 660,219.29 and Euros 388,052.48, were gratuitous benefits which, under German law, may be contested if made within four years prior to the request to open insolvency proceedings.

4. The Plaintiff seeks a declaration that the payments made by the Plaintiff to the Defendant are gratuitous benefits for the purposes of the relevant provision of German Insolvency Law and that they be set aside. The Plaintiff also seeks judgment on the sum of DM 616,785.79 (sic) and Euros 388,052.48 together with interest and costs and such further orders as the Court considers appropriate.

5. I have been told that the proceedings were issued in Guernsey, rather than Germany, because the decision to commence proceedings was taken shortly before a prescription deadline. The Defendant is a Guernsey registered company and in the time available it was simpler to issue and effect service on the Defendant in Guernsey.

The Law

6. The Court's power to order security for costs is in Rule 48 (1)(b) of the Royal Court Civil Rules, 1989:-

"The Court may in any action……
(b) order any party to give security for costs in such amount, on such terms and in such manner,
as the court thinks just".

7. The grounds on which the Defendant relies are that:-

   (a) the Plaintiff is non-resident;
   (b) the Plaintiff is impecunious; and
   (c) the Plaintiff has chosen to sue in Guernsey rather than Germany where the costs, it is alleged, would be considerably less.

8. The 1989 Rules repealed the Royal Court (Security for Costs) Order 1957 whereby the court had power to order security for costs, but only in cases where the plaintiff, or in the case of an appeal, the appellant, is ordinarily resident out of the jurisdiction. In place of that limited power, Rule 48 gives the Court a wide discretion to order security for costs.

9. In *Strawn v Hemery Trustees Limited* 23 February 2001 Royal Court, Sir de Vic Carey, Bailiff, held that:

> "*the approach of the Court on any application for security for costs is a matter of judicial discretion and judges here look to the White Book for guidance".*

He also held that he preferred to be guided by Order 23 of the old Supreme Court Rules in preference to Rule 25 of the new Civil Procedure Rules.

9. Counsel also referred me to the decisions of Lieutenant-Bailiff Hancox in *Gilliham v NRG Benelux BV trading as NRG Distribution*, Royal Court, 2 January 2002 and *McNamara v Gauson and Another*, Royal Court 24 August 2004. In the latter case, Hancox LB said at page 3:

"I think I can fairly say that it is now the accepted practice of this Court to follow the principles as they appear in the 1999 R.S.C., as tempered by subsequent decisions in England, as to the basis upon which the discretion should be exercised".

10. I gratefully accept this as an accurate statement of the current practice of the Court.

11. In *Strawn*, Carey B. adopted the passage at pages 430 and 431 in the 1999 White Book commentary on Order 23 stating that it is no longer an inflexible rule of practice that a plaintiff resident abroad will be ordered to give security for costs. He cited the authority of *Aeronave S.P.A. v Westland Charters & Others [1971] 1WLR 1445* in which Lord Denning M.R. said at page 1449 A:-

> *"It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order. It is to be noted that Italy is not within the provisions as to the recognition of foreign judgments. But even if it were, Kohn v Rinson & Stafford (Brod.) Ltd. [1948] 1 K.B. 327 shows that is not a ground for refusing security. The ordinary rule still remains, that it is a matter of discretion".*

12. When deciding whether to exercise my discretion in this case, I have to take account of the financial circumstances of the Plaintiff.

13. I am aware that Dr Braun is the Insolvency Administrator of Walter Marketing but he has not disclosed any evidence as to the financial state of his administration. The Plaintiff has not said that he does not have the funds available to lodge as security and he has not claimed that he would be unable to pursue these proceedings if security is lodged.

14. Advocate Le Cras, on behalf of the Defendant, has exhibited to her third Affidavit a letter from Dr Thomas Weimer LLM, the German lawyer acting on behalf of the Defendant, containing his opinion as to why the Plaintiff should be ordered to put up security for costs.

15. He states that as an insolvency administrator, Dr Braun acts on behalf of the assets of the insolvent company and does not act in the name of the company. After reviewing the provisions of Sections 207 to 211 of the German Insolvency Act, Dr Weimer concludes:

"Under the framework of German insolvency law set out above, it is evident that Dr Braun is in a situation in which he has no duty at all to make any financial reserve for contingent liabilities. There are very few and limited statutory duties regarding the cash management of Dr Braun in his capacity as insolvency administrator. He is not obliged to calculate and keep separate any financial reserves covering the event of liability for cost under a Guernsey cost award in the future. He simply waits until this event occurs and if he finds himself in lack of cash he makes the notification of insufficiency of assets. Should he believe at some point of time in the future that it is likely that the situation of insufficiency of assets may arise, he can make as well a notification of insufficiency of assets.

Should Brantridge not be given security for costs with respect to the Guernsey procedure before continuing the Guernsey procedure and should Brantridge later be successful in its defence against the claim make by Dr Braun and should Brantridge be awarded a claim for compensation with respect to the cost of the Guernsey procedure, Brantridge would then entirely depend on the amount of cash left under the administration of Dr Braun at that time. In other words, whether or not Brantridge may successfully enforce its claim for compensation with respect to the cost of the Guernsey procedure would be a question of hazard unless security for costs is given".

The Plaintiff has not challenged Dr Weimer's legal opinion.

16. In relation to the practice in England concerning an insolvent plaintiff, Advocate Le Cras relied upon *Thune v London Properties Ltd* [1990] 1 All ER 972. The plaintiffs were Norwegian lawyers appointed by a Norwegian court as trustees of the estate of a Norwegian who had died a bankrupt. They alleged that during his lifetime he had secreted away large sums of money and that assets representing those sums were in the hands of the defendants. The judge refused to grant an order for security for costs on the grounds that a costs order could be quickly, easily and cheaply enforced against the plaintiffs in Norway.

17. The decision of the Court of Appeal allowing the defendants' appeal is summarised in the head note:

"The Judge had been entitled in the exercise of his discretion to treat the ease of enforcement in Norway as a sufficient ground for denying the defendants an order for security for costs, provided always that he did not ignore any other relevant factors. Furthermore, although the impecuniosity of a personal plaintiff was never of itself enough to confer on the court a discretion to order security, where jurisdiction to make an order was established it was a matter which the court might and in a proper case should consider, although not as a decisive or conclusive factor, when deciding whether to order security. Since the judge had failed to take account of that factor his exercise of his discretion was flawed and the court would in the circumstances order security to be given, despite the ease of procedural enforcement in Norway, because although the deceased's estate was bankrupt the plaintiffs held sufficient assets to fund the litigation and pay

the defendants' costs if they were successful and therefore an order for security would not stifle the claim and, furthermore, there was a risk, albeit small, that because of other competing priority claims the defendants might not be able to recover their taxed costs if they were ultimately successful and the defendants ought not to be subjected to that risk, however small. The appeal would accordingly be allowed".

18. In his judgment Bingham L J (as he then was) reviewed a number of authorities and concluded (at page 980h):

"I am, therefore, of opinion that, where jurisdiction to make an order is established, the financial position of the plaintiffs may, in an appropriate case, be properly considered, not as a decisive or conclusive factor, but together with other relevant considerations in deciding what is the proper result".

19. English law has moved on and *Thune* was considered by the Court of Appeal in *Nasser v United Bank of Kuwait* [2201] EWCA Civ 556 where Mance LJ, delivering the decision of the Court said (at page 419, paragraph 61):

> *"[61] Returning to rr 25.15(1), 2513(1), (2)(a) and (b), if the discretion to order security is to be exercised, it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned. The former principle was that, once the power to order security arose because of foreign residence, impecuniosity became one along with other material factors (see the case of Thune v London Properties Ltd [1990] 1 All ER 972, [1990] 1 WLR 562). This principle cannot in my judgment survive, in an era which no longer permits discrimination in access to justice on grounds of national origin. Impecuniosity of an individual claimant resident within the jurisdiction or in a Brussels or Lugano state is not a basis for seeking security. Insolvent or impecunious companies present a different situation, since the power under r 25.13(2)(c) applies to companies wherever incorporated and resident, and is not discriminatory".*

20. Rule 25.13(2)(c) mirrors the provisions of section 726(1) of the Companies Act 1985. The effect of both is that the English court has power to make an order for security for costs against a company, wherever it is registered, if there is reason to believe it will be unable to pay the defendant's costs if ordered to do so. In Guernsey we do not have the equivalent of either of those provisions.

21. I accept the principle in *Nasser* that a plaintiff should not be discriminated against on the ground of not being resident in the jurisdiction. That leads me to consider what I would order if Walter Marketing was a Guernsey registered company.

22. Insolvency law in this Island is not as sophisticated as in Germany and we do not have provisions for the appointment of an administrator of the assets of an insolvent company who does not act in the name of the company. In Guernsey, an insolvent company may be placed in compulsory liquidation and the liquidator will have the power to bring or defend civil actions in the name of the company (section 99(4)(a) of the Companies (Guernsey) Law 1994). He is appointed by the Court and subject to supervision by the Court. When he has realised the

company's assets a Commissioner of the Court examines his accounts before the funds derived from the assets can be distributed (section 102 of the 1994 Law).

23. The situation envisaged by Dr Weimer where the Plaintiff could distribute assets without making provision for a future costs award in the Guernsey proceedings could not arise in a Guernsey liquidation where the Court would be able to ensure that the liquidator does not distribute funds without making provision for a future costs order. Consequently, if I make an order for security for costs against the Plaintiff I will not be putting the Plaintiff at a disadvantage in comparison with an insolvent Guernsey company.

24. I carefully considered all the circumstances of the case including in particular the risk that the Plaintiff could distribute assets without making provision for a future costs order in the Guernsey proceedings. I also took into account that the Plaintiff has not produced evidence to suggest the claim would be stifled if I make the order requested. I reached a preliminary view that it would be appropriate that the Plaintiff be ordered to provide security for the Defendant's costs. I invited counsel to make further submissions as to whether the Plaintiff might be able to dissipate assets under his administration without prior Court approval, whereas the assets of a Guernsey company under compulsory liquidation could not be distributed without Court approval.

25. Advocate Edwards submitted that:

"Dr Braun has indicated that he would, if the Court thought it appropriate, apply to be recognised by the Court in his capacity as insolvency administrator of Walter Marketing. This would then provide the Court with the ability to exercise a degree of control over him in his conduct of the proceedings.

> *In addition, I am instructed that Dr Braun, as insolvency administrator, is responsible to the German Courts which supervise him in that capacity. He is required to report to the Court on a periodic basis and the Court has the ability, if he does not fulfil his duties, to impose an administrative fine on him".*

26. In her written reply dated 11 September 2006, Advocate Le Cras said she did not understand in what capacity or under which jurisdiction the Royal Court would recognise Dr Braun and said that even if the court had such jurisdiction which it was willing to exercise she does not see how it would provide any security for the Defendant's costs.

27. I agree with Advocate Le Cras' concerns and after careful consideration I am not persuaded that Advocate Edwards has been able to demonstrate that his proposal would enable the Royal Court to have effective control over the assets that are under Dr Braun's administration to ensure that he will have sufficient funds to meet any costs order that may be made in favour of the defendant during these proceedings.

28. As for quantum, the Defendant has submitted two alternative bills of costs. One was prepared on an indemnity basis and the other on the recoverable basis. There is no reason for me to conclude that any future costs order will be on an indemnity basis. Hence my order should be confined to costs on a recoverable basis. I have considered whether I should limit the order to include costs only to

the conclusion of interlocutory matters. If I do so, the Defendant would have to make a further application before the case could proceed to trial. There is a risk that by then the Plaintiff may have distributed some of the assets it is administering and may not be in a position to make a further payment at that time. I therefore order that security be lodged to cover the Defendant's anticipated recoverable costs to the conclusion of a hearing, that is in the sum of £39,777.

