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IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 126 OF 2005

BETWEEN: **BRITCAY HOUSE LIMITED** PLAINTIFF

AND: INTERNATIONAL FINANCIAL SERVICES LTD DEFENDANT

(BY ORIGINAL ACTION)

AND
BETWEEN INTERNATIONAL FINANCIAL
SERVICES LIMITED PLAINTIFF BY COUNTERCLAIM

AND BRITCAY HOUSE LIMITED
AND BRITISH CAYMAN INSURANCE
COMPANY LIMITED DEFENDANTS BY COUNTERCLAIM
(BY COUNTERCLAIM)

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
THE 30TH DAY OF OCTOBER 2006

Appearances: Mr. Kyle Broadhurst and Mrs. Terri Caudieron of Broadhurst
Barristers for the defendant.
Mr. Richard Annette for 2nd defendant by counterclaim BCIC
Mr. Ramon Alberga QC instructed by Mr. Brian Ashenheim
for Britcay House

RULING

1. There are three aspects to the present summons. It is brought by Internet Financial Services (IFS) which is the defendant to the original action and plaintiff by counterclaim.
2. The first aspect of the summons seeks the settlement of the question of costs which arose from an earlier application of IFS by which it had sought and was given leave to appeal out of time against an earlier order made in the action. By that order IFS was required to pay security for the costs of the defendants to its counterclaim – Britcay House Limited (BHL) and British Caymanian Insurance

Company Limited (BCIC). BHL is the plaintiff in the original action and the 1st defendant to IFS' counterclaim. BCIC is the 2nd defendant to the counterclaim.

3. Upon IFS' application for leave to appeal out of time, a preliminary objection was taken by Mr. Alberga on behalf of BHL that a single judge of the Court of Appeal (as then constituted) lacked jurisdiction to hear that application. That objection proved unsuccessful, as did the overall objection to the grant of leave.
4. The question now is whether IFS should have its costs in any event of arguing against BHL's unsuccessful objection, in particular the *in limine* aspect of it; or whether BHL should have its costs of the application in any event being costs arising from the default of IFS in not filing its application in time in the first place; or whether costs should be reserved pending the outcome of the actual appeal.
5. BHL points to Grand Court Rules, (GRC) Order 62 Rule 6(6), which provides that the costs of any application to extend time fixed by the GCR or by any direction or order thereunder shall be borne by the party making the application.
6. Mandatory in terms though that sub-rule is expressed, IFS points to Rule 6(1) which provides that the provisions of Rule 6 shall apply in the circumstances mentioned in it, unless the Court orders otherwise – thus apparently preserving the Court's inherent discretion on questions of costs.
7. While I accept that the discretion is preserved, it is equally clear that the primary intention of the Rules is that they should apply unless the court considers that there are good reasons for departing from them. In other words, the discretion not to apply them strictly is one to be exercised only for exceptional reasons.

8. Rule 6(6), it must be borne in mind, is expressed in mandatory terms because of the reality that a party who acts in default of the Rules should expect to bear the costs of so acting; not the opposite party who complies. That is the reality that attends IFS' failure – brief though it was for being only one day out of time – to file its application in time. The further question is whether the costs to be associated with the *in limine* aspect of BHL's unsuccessful objection, should also be imposed upon IFS. That, Mr. Broadhurst says, involved a whole morning of arguments and preparation in advance and as it was unsuccessful IFS should have the costs associated with it.
9. While the *in limine* objection may not be characterized as frivolous or vexatious, it was rather technical in nature (see Written Ruling of 17th August 2006). Leave to appeal was granted and so, in short, it was not a meritorious objection to jurisdiction.
10. I conclude that as IFS' application for leave to appeal was only one day out of time, the costs of that application and of the first aspect of today's summons are to be in the appeal for which leave was granted. The intention is that the party which succeeds on the appeal should have its costs associated with the appeal.
11. The second aspect of IFS's present summons seeks an order allowing IFS to pay its legal fees of prosecuting its counterclaim and to pay a debt said to be owed to its managing director. These payments would be made from the funds which have been restrained by the injunctive order of Levers J. on 12th March 2005 in favour of BHL; and by extension, BCIC.

12. This latter payment called the "O'Dwyer debt", is said to have been incurred by the Company in settling medical expenses for Mary O'Dwyer, then an employee of the Company who was diagnosed with a brain tumor and needed surgery.
13. I have already during the arguments, explained why I do not see my way clear to granting the latter of these two aspects of the summons. Simply stated, insufficient evidence has been put before me to allow for a conclusion that this fairly large sum (USD 108,500) represents an obligation duly and properly assumed or undertaken by IFS itself. The evidence put before me shows that the managing director assumed personal responsibility for the expenses when the insurance company failed to pay. This is notwithstanding that the managing director appears subsequently, but before the injunctive order, to have procured IFS to make two payments from its account (USD12,000 each) against the debt which had been assumed as against his own credit card. During the arguments, I directed that admissible evidence to prove IFS' acceptance of the debt; for instance by appropriate resolution of its Board, is required.
14. I also took account of the fact that the claim in respect of the O'Dwyer debt are the subject of legal proceedings against the medical insurance company and depending on the outcome, there may be no need to use the enjoined assets to redeem it.
15. Subject to the ascertainment of the debt as being properly that of IFS, the authorities seem clear enough that a defendant company should be allowed access to funds to meet pre-existing obligations incurred in the ordinary course of business and which were being met prior to the injunction over *its funds*:

Halifax Plc v Rupert Sydney Chandler [2001] EWCA Civ. 1750 C.A.

16. It is also clear that an injunction should not be allowed to operate so as to prevent a defendant from meeting its financial obligations arising in the established course of its business: Avant Petroleum Inc v Gatoil Overseas Inc [1986] 2 Lloyd's Rep. 236.
17. I also note that in Iraqi Ministry of Defence and Others v Arcepey Shipping Co S.A., and The Angel Bell [1981] 1 Q.B. 65; it was decided that a defendant is entitled to pay his debts as they fall due, even if the creditor would not be able to recover them at law.
18. The situation here is, however different; where the very question whether the debt has been duly and properly assumed by the defendant is yet to be answered to the satisfaction of the Court.
19. A plaintiff's claim ought not to be defeated by allowing the enjoined assets of a defendant to be retrospectively encumbered by the irregular assumption of a third party debt.
20. I am, however, persuaded that IFS should now be allowed to pay the reasonable legal costs of prosecuting its own counterclaim, by use of the funds which have been restrained by the mareva injunction.
21. As was stated in an earlier ruling in this matter on 21st September 2005, the purpose of a mareva injunction is not to give a plaintiff priority over the enjoined assets or to enable a plaintiff to exert pressure on a defendant to settle. It is to ensure that assets which should be available to meet a plaintiff's claim are not dissipated so as to cheat a plaintiff out of the fruits of his action if successful; citing (Underwriting Agencies) Ltd. V Dixon and Another [1983] 2 All E.R. 158. See also Iraqi Ministry of Defence v Arcepey Shipping (above).

22. Still less, it must follow, would a plaintiff have the right to use the injunction to prevent access of a defendant to enjoined assets for the purpose either of defending against the plaintiff's claim or for prosecuting a just counter-claim.
23. By another order delivered herein on 21st July 2005 and made with the consent of the parties; IFS was allowed, among other things; access to the enjoined assets for payment of its legal fees for its defence of the BHL's claim. That access is to be monitored and amounts agreed by BHL's attorneys.
24. There is, however, a further concern on the particular facts of this case. The counterclaim having been ordered to be struck out on the 8th August 2006 by virtue of IFS' failure to comply with an earlier order of Madam Justice Levers made on 11th August 2005; IFS now seeks access to the restrained assets for the purpose of funding its appeal against that order of Levers J. It has already obtained leave to appeal against that aspect of her order (see Written Ruling delivered on 17th August 2006). Only if successful in that appeal will IFS require funds to prosecute the counterclaim.
25. I am therefore going to confine myself now to the question whether access should be had to the assets for the more limited purpose of pursuing that appeal. If it is successful, the Court of Appeal can determine whether the counterclaim merits being funded generally.
26. I can see no distinction in principle between access to a defendant's assets (as so they remain while enjoined) for the purpose of funding its defence and for the purpose of funding an appeal relating to its counterclaim. I think the essential question is whether the litigation is justified and that will depend, among other things, upon the merits of the counterclaim itself. Bearing in mind also, that by its

very nature, a counterclaim would be expected to bear some relationship to the claim which initiated the action.

27. There is clear authority for the proposition that a defendant may in appropriate circumstances be allowed to use injunctioned funds to prosecute even an entirely unrelated action: Halifax Plc v Rupert Sydney Chandler (above).
28. The position will be *a fortiori* where the action to be funded is a related counterclaim. Here the appeal in support of the counterclaim is shown prima facie to be at least arguable and having some realistic prospect of success.
29. Nothing in my earlier ruling of 21st September 2005, where I disallowed IFS' application to use the injunctioned assets to post security for the plaintiff's costs, should be taken as going to the contrary. In that regard I therefore do not accept Mr. Alberga's submission that this aspect of the matter was then decided when I stated (at paragraph 3) that:

"The order of 21st July 2005 in allowing certain payments ... contemplated only such payments as to legal fees and the like which may be properly associated with the defendant having to defend against the plaintiff's claim. They may not be taken as including such costs as may be associated with prosecuting the defendant's counterclaim against the plaintiff. Such use of funds would be outside the ordinary ambit of payments which are allowed as exceptions to mareva injunctive orders."

30. To be clear, in referring then to "such costs as may be associated with prosecuting the defendants counterclaim" and "Such use of funds...."; I was referring only to use of the injunctioned assets for the purposes of paying security for the plaintiff's costs, the issue then before me. I was not then addressing my mind to whether the funds could be used to meet IFS' actual costs of prosecuting its counterclaim.

31. The third aspect of the IFS summons seeks leave to appeal against that earlier ruling by which I refused IFS' application to be allowed to use the injunctioned assets to meet its obligation to provide security for BHL's costs of defending the IFS counter-claim. This was an obligation earlier imposed by the ruling of Levers J. of 15th August 2005; by which she required IFS to pay security for BHL's and BCIC's costs of defending against its counterclaim. She then also required that the security in the sum of \$150,000 be paid by way of capital injection from the shareholders of IFS, being concerned to ensure that the known injunctioned assets not be used for those purposes and in the absence of any credible evidence as to the true financial status of IFS, its shareholders or officers, or as to the source of funding for the IFS counterclaim.
32. My ruling of the 21st September 2005 recognised and enforced the earlier ruling of Levers J. which, when taken in its full context, still appears to me to be unexceptionable. At paragraphs 4, 5 and 6 of my ruling of 21st September 2005 the following was stated:

"The order of 21st July 2005 [made by the consent of the parties] in "allowing" certain payments and on which Mr. Broadhurst also relies, contemplated only such payments as to legal fees and the like which may be properly associated with the defendant having to defend against the plaintiff's claim. They may not be taken as including such costs as may be associated with prosecuting the defendant's counterclaim against the plaintiff. Such use of funds would be outside the ordinary ambit of payments which are allowed as exceptions to mareva injunctive orders.

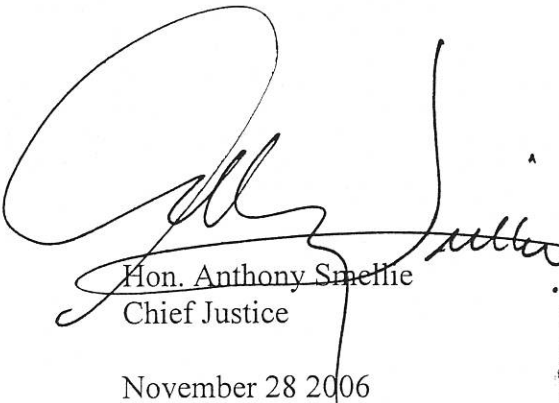
In any event it is plain enough that the order for security for costs be met by "a further injection of capital" into the defendant company; not by the use of its current available assets which are intended to and which are admitted to be caught by the mareva order.

The thinking behind that requirement was plain enough. Levers J accepted that there had been already paid out of the company's

resources \$500,000 from the proceeds of the insurance coverage earlier received, without proper accounting by those responsible. They, as principals of the defendant, would be the same persons required to inject the capital necessary to meet the order. For the foregoing reasons the application to vary the mareva injunction order or as appropriate my order of 21st July 2005, to allow the order for security for costs to be met from the proceeds of the latter insurance payment, is refused”.

33. These and the other pronouncements in the ruling of 21st September 2005 were made having regard to the particular circumstances of this case. They were not intended to lay down a proposition to the effect that assets caught by a mareva injunction might never be allowed to be used to pay an order for security for costs. As the cited cases generally show and as is most comprehensively explained in Anglo Eastern Trust and another v Kermanshachi and Another [2002] All E.R (D) 135; the injunctive jurisdiction is flexible and the rules relating to an application to use frozen assets to fund litigation depend upon the facts of the case.
34. Given the circumstances of this case, the earlier refusals to allow the use of these assets to pay security for costs, as being outside the ordinary ambit of payments which are allowed as exceptions to mareva injunctive orders, remain correct in my view.
35. Here, far from there being exceptional circumstances to justify such use, the reasonable concerns expressed by the Court as to the lack of evidence explaining the true financial condition of the company or of the ability of its principals to fund the litigation, remain entirely unanswered. It is also in that context that the use of the funds to meet the order for security for costs would be an unwarranted dissipation of the known assets of the company.

36. The application for leave to appeal against the ruling of 21st September 2005 is for all those reasons refused.
37. Given the mixed results upon IFS' present summons, I order the costs of its summons to be in the cause.
38. I think I have an obligation to again record the advice I have given time and again in this matter, that it should be settled.
39. As these various interlocutory applications demonstrate, the immediately available assets of the Company are being eaten away by the litigation costs. If these applications and the associated appeals are continually pursued, soon there will be nothing left.
40. Having been involved now in a number of such applications, I have an understanding of the issues behind the case such as would allow me to make recommendations for a settlement.
41. I will be available if the parties wish to make a bona fide attempt.


Hon. Anthony Smellie
Chief Justice

November 28 2006

