

COURT OF APPEAL

224.

26th November, 1996

Before: Sir Peter Crill, K.B.E., Single Judge.

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| Between: | Khalid Yousuf Al Marzook | Plaintiff/Appellant |
| And: | Faisal Yousuf Al Marzook Jassim Yousuf Al Marzook | First Defendants/ Respondents |
| And: | Bank America Trust Company (Jersey) Limited (formerly Woboco Trust (Jersey) Limited | Second Defendant/ Respondent |

Application by the Plaintiff/Appellant, under Rule 16 of the Court of Appeal (Civil)(Jersey) Rules, 1964, for a stay of execution, pending determination of an appeal, of the Order made by the Royal Court on 20th November, 1996 - following the hearing of the Representation of the Second Defendant seeking directions pursuant to Articles 43, 47(1) and 49 of the Trusts (Jersey) Law, 1984 - that the assets of the Gable Trust and of the Eagle Trust be distributed in accordance with the Award of the Liquidation Committee of 21st March, 1994.

Advocate J.P. Speck for the Plaintiff/Appellant.
 Advocate R.J. Michel for the First Defendants/
 Respondents.
 Advocate M.J. Thompson for the Second
 Defendant/Respondent.

JUDGMENT

5 CRILL JA: This is an application to stay the Orders of the Royal Court contained in its judgment dated 20th November following a Representation of the Bank of America Trust Co (Jersey) Ltd seeking directions under Articles 43, 47/1 and 49 of the Trusts (Jersey) Law, 1984.

10 The application is brought by Khalid Yousuf Al Marzook (to whom I will refer in future as "Khalid") who is appealing against the judgment.

The background to the case is fully set out in the Royal Court's judgment and I need not repeat it. Nevertheless there are one or two matters that seem clear to me. First, the dispute is

between Khalid and his two brothers, Jassim and Faisal, about the interpretation of certain Orders emanating from the Kuwaiti Courts. The Trust Company has found itself, so to speak, caught in the middle between the brothers. There are substantial assets in two Trusts now amounting to some £9m. which in due course will be distributed. Of that £9m. some £4m. will be distributed to Khalid.

The nub of the arguments before the Royal Court was when should that distribution take place. Should it be now as the Royal Court found, or should there be a delay until the *Cour de Cassation* has given its decision, which I understand will be in March, 1997.

In October, 1993, there was a consent order in the Royal Court which provided for the distribution of the Trust monies according to an Award of a Liquidation Committee in Kuwait. The Award was to be made in March, 1994. At that time the Order was in fact given and was challenged subsequently by Khalid. He failed in the Kuwaiti Court of Appeal and is now applying to the *Cour de Cassation* which, as I said, is due to give its judgment in or about March, 1997.

I have been informed in the course of this morning by Mr. Michel for the brothers Jassim and Faisal - and there are also some beneficiaries who are, I believe, their sisters but that is immaterial for the present hearing - that the award of the arbitration panel in Kuwait has been implemented in as much as the assets, which are subject to the jurisdiction of the Kuwaiti Courts, have been distributed. It is also beyond argument - and all parties agree - that any Order of the *Cour de Cassation* can have no effect on assets outside Kuwait's jurisdiction and therefore cannot bear directly on the Trust assets administered by the Bank.

Not unnaturally Khalid asked that the distribution be stayed until the decision of the *Cour de Cassation* is handed down. His brothers oppose any such delay and wish the assets to be distributed now. The Trustees have been threatened with breaches of trust if they do or do not implement the arbitration award confirmed by the Order of the Royal Court. Accordingly they sought further directions from the Royal Court which resulted in the judgment of 20th November, 1996, ordering the distribution to be made, and which is now under appeal.

Khalid's main complaint about the Award in Kuwait is that it ought to have provided for the distribution after payment of any debts and expenses. It did not do so and he has deposed that he fears that if there were a gross distribution the creditors might look to him for payment. However, as I have said, so far as the Kuwaiti assets within that jurisdiction are concerned they have already been distributed. Furthermore, Khalid says, the powers of

the *Cour de Cassation* are, according to the advice which he has received from a Kuwaiti lawyer, limited to assets within the Kuwaiti jurisdiction. If a distribution takes place, he argues, and the *Cour de Cassation* subsequently reverses the Kuwaiti Court of Appeal it will not be possible, in the words of one of his affidavits "to unwind the distribution of the Trust's assets which are all outside Kuwait".

I am minded to ask myself whether they should be unwound in the way he is suggesting, as the powers of the Kuwaiti Courts are limited strictly to assets within their jurisdiction; although, of course, on the principles of international comity that is something which would have to be borne in mind.

The principles governing the power to stay were reviewed by the Court of Appeal in Seale Street Developments -v- Chapman (1992) JLR 243 CofA. In that case the Court of Appeal reviewed the principles which should govern an application for a stay. An important extract from that judgment is to be found on p.251 where, after considering the English authorities and referring to several Jersey cases, the Court said this:

"We do not propose to set out in this judgment all those factors which may be taken into account in deciding whether to grant or refuse a stay. The discretion of the court is ex facie unfettered and it may take into consideration any matter which it properly considers material to the exercise of its jurisdiction. Plainly, the factors referred to by Cotton, LJ in Polini -v- Gray (and I interpolate there that these were first whether the failure to grant a stay would render a judgment nugatory, and secondly whether there were reasonable grounds of appeal) are of first importance; but there may in a particular case be other factors, such as the consequences to the parties respectively of the grant or refusal of a stay, which require also to be weighed in the balance".

It would be very difficult, in my opinion, to quantify the nugatory effects, if any, of a failure to grant a stay. As regards the question of reasonable grounds for appeal it should be borne in mind that what the Royal Court was doing in its judgment was exercising a discretion in the sense of ordering a distribution of assets on the application of a Trustee. It was not adjudicating and did not purport to do so on the relative merits of the case for Khalid or for his brothers and sisters in relation to the *Cour de Cassation* matter.

That being so, it is only in exceptional circumstances that a Court will overturn the exercise of a discretion by an inferior court. I am not satisfied, on that basis, that there would be reasonable grounds for an appeal seeking to overturn the exercise of that sort of discretion. I cannot find that there were matters

of law to be argued; the Court heard the arguments; they read all the papers and they did not take into account matters they ought not to; nor did they omit to take into account matters which they should have. Accordingly, on those two points, I cannot find for the Appellant in this matter. I take into account the background to this case, and in particular the fact that when the parties - as Mr. Michel pointed out to me this morning - agreed to an arbitration they also agreed to be bound by the award of the arbitration body. Unless that arbitration body has misdirected itself - and it is impossible to say at this stage whether the Kuwaiti Courts did; (in fact it does not appear to be alleged that they have) - there is merely the allegation that they ordered a gross instead of a net distribution.

So, as regards Kuwait, they appear to have apportioned some of the debts amongst the beneficiaries but it is impossible to say whether they were wrong or not and it is not for this Court to do so. I am, however, impressed by the fact that Khalid, having solemnly consented in October, 1993, to the award of the Board of Liquidators - subsequently taken over by another judicial body for the administration of the liquidation which is not material to my judgment - became dissatisfied with what was finally handed down in March and sought to overturn it.

Under all the circumstances there will be no Order for a stay and I wish to hear the parties as regards the costs of this application.

[Counsel addressed the Court on costs.]

The costs will follow the event and my decision accordingly is that Khalid will pay the costs, of and incidental to this application, of both Respondents.

Authorities.

Seale Street Developments -v- Chapman (1992) JLR 243 CofA.

R.S.C. (1995 Ed'n): O.59 r.1A; 50/10-19-26.

Maister -v- Rind (14th June, 1995) Jersey Unreported.

Marley -v- Mutual Security Merchant Bank (1991) 3 All ER 198 PC.

Allsop Wilkinson -v- Neary (1995) 1 All ER 431.

Re. Esteem Settlement and No. 52 Trust (14th September, 1995)
Jersey Unreported.

In Re Barker [1987-88] JLR 1 CofA.

Sloan -v- Sloan [1987-88] JLR 651 CofA.

In Re Blue Horizon Holidays Limited (19th May, 1994) Jersey
Unreported; (1994) JLR 173.