

DEFENDING THE ALLEGED DEVIL

A Tale of Tainted Turkish Tycoons

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The “Devils” and their antecedents

- The Uzan family and their “accomplishments”
 - The U.S. Motorola decision
 - Spin off Motorola litigation in England
 - 8 decisions reported or noted in CILR
- Cem Uzan
 - Leader of rightist Young Party
 - Facing extradition requests from Turkey to France
 - Sentenced to 23 years *in absentia* for fraud
- Hakan Uzan
 - Facing arrest warrant from Turkey for fraud

Imar Bank and TMSF

- Imar Bank controlled by Uzans
- Turkish banking regulator takes control of Imar Bank from the Uzans
- Regulators find US\$5 billion shortfall in deposits
- Tasarruf Mevduati Sigorta Fonu (TMSF), Turkish deposit insurance agency, bails out depositors
- TMSF pursues the Uzans and others to recover shortfall in deposits applying “The Law For the Collection of Public Receivables”

BVI Companies and “Swimming Palaces”

- Wisteria Bay Limited and Utterton Limited
 - Registered in the BVI
 - Beneficially owned by Cem and Hakan Uzan
 - Owned “*Frequency*” and “*Airwaves*”, luxury yachts registered on Cayman Islands Shipping Registry
- TMSF commenced proceedings in Turkey for seizure and sale of *Frequency* and *Airwaves* using The Procedures for Recovery of Public Receivables

The Turkish proceedings

- Turkish criminal court makes freezing order against *Frequency* and *Airwaves*
- Multiple proceedings in different criminal courts for release then seizure of yachts but resulting in interim order for yachts to be sold and injunction to continue over proceeds
- Auction for sale scheduled for 10 December 2004
- Public viewing of yachts on 24 November 2004

The Cayman ship mortgages

- 29 November 2004 - agent of Jordanian national submits to Cayman Shipping Registry for registration, mortgages against *Frequency* and *Airwaves*
- Mortgages purportedly to secure loans under loan agreements dated 2000 and 2001
 - US\$30 million over *Frequency*
 - US\$25 million over *Airwaves*

The commencement of Cayman litigation

- 6 December 2004 - TMSF issues claim to set aside mortgages
- 6 December 2004 – TMSF obtains *ex parte* injunction “restraining all dealings” with yachts
- 9 December 2004 - Application to “clarify” injunction
- 10 December 2004 - TMSF proceeds with auction in Turkey
- 16 December 2004 - Defendants obtained order holding TMSF in contempt of court and that TMSF posts US\$500,000 security for costs

Sovereign immunity and the interlocutory war

- TMSF appeals and successfully claims sovereign immunity
 - Claim made for first time in Court of Appeal
 - Based on Sovereign Immunity Act, U.K.
 - Court of Appeal rules that TMSF exercising sovereign authority as agent of Turkish state
 - Injunction against TMSF varied and security for costs order vacated
- Interlocutory war begins

The orders for disclosure and production

- Order for production of original loan and mortgagee documents for expert ink dating tests
- Defendants missed first date for production
- Court extends time for production but makes "*unless order*"
- On second date for production Defendants unable to produce originals of one of the documents
- Court granted relief from production of those originals but continued unless order in respect of others
- Defendants produced 1 set of original loan agreement and mortgages

More interlocutory battles

- Application to strike out pleadings for failure to plead elements of Turkish law
- Application for stay pending Turkish criminal proceedings
- Application to strike out claim as an attempt to enforce Turkish penal and public laws in Cayman
- Application to have question as to title to yachts certified for trial as a preliminary issue
- Limited success on interlocutory applications
- 5 week trial scheduled before C.J.

A good arguable case

- Defendants had strong arguments that issue of fraud should not even arise
 - Real issue was a title dispute
 - TMSF needed to prove good title in order to claim it has been defeated by registration of mortgages

Elements of defendants' argument (1)

- Under rules of private international law the law governing title to a ship was not the *lex situs*, but law of port of registration
- Title to yachts governed by Cayman law
- Under Cayman law, Wisteria and Utterton were the owners of the yachts
 - No challenge to title of companies or registration
 - No claim that yachts were acquired with the proceeds of fraud
 - No contractual or equitable claims against Wisteria or Utterton
 - No maritime claims *in rem* against the yachts
 - No final or conclusive judgment capable of enforcement against Wisteria or Utterton

Elements of defendants' argument (2)

- If title to be determined according to Turkish law
 - Under Turkish law, the law governing title to non-Turkish ship is the law of port of registration
 - The acts relied on by TMSF were insufficient to convey title to TMSF under Turkish law
- Cayman court had no jurisdiction as claim was an effort to enforce Turkish penal and public laws
 - TMSF had already claimed and been accorded sovereign immunity
 - Orders for seizure and sale made by criminal court in criminal proceedings
 - Recovery proceedings under “The Procedures for Collection of Public Receivables”

Defendants score massive “own goal”

- Defendants, before producing documents, took them to their own expert for “destructive” testing
- Another set of original documents existed but was not produced
- Court held that defendants’ conduct constituted an abuse of process rendering it impossible to have a fair trial and that defendants had forfeited their right to defend
- Defence struck out and judgment entered for plaintiffs in default of defence
- Ultimately no appeal

The Lessons (1)

- The irony of *TMSF v Wisteria Bay Limited et al*
 - If defendants had done nothing – title dispute without taint of fraud allegations
 - Defendant's case on title would have had a good prospect of success

Lessons (2)

- Ethical and other Considerations for Lawyers
 - Importance of clarity of thought as to ethical boundaries
 - Importance of clear written advice on disclosure obligations

Lessons (3)

- Risk and Compliance Issues
 - Positive scrutiny of each case before acceptance of new business
 - Anti-money laundering law and regulations
 - Internal procedures to guard against *"reputational risk"*
 - *WorldCheck* and PEPs
 - *"Non-relevant financial business"*

Lessons (4)

- Effective use of Tactical Procedural Applications
 - Benefits of effective tactical deployment of effective procedural applications
 - Defendants' applications
 - Plaintiff's applications which ultimately won the case

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