ROYAL COURT

15th November, 1988

Before: Commissioner F.C. Hamon and
Jurats Coutanche and Hamon.

BETWEEN	**Lazard Brothers & Co. (Jersey) Limited**	PLAINTIFF
AND	**Jacques Pierre Labesse,** **Richard Arthur Falle,** **John Le Cras Bisson,** **Timothy John Le Cocq and** **Steven Slater,** **exercising the profession of advocates** **under the name and style of "Bois and** **Bois, Perrier and Labesse".**	DEFENDANTS

Summons by the defendants requesting:-

(1) under Rule 6/13 of the Royal Court Rules, 1982, that the action be struck out; or in the alternative

(2) that the action be stayed pending the determination of other proceedings; and in any event

(3) that the plaintiff be prevented from obtaining judgment under Rule 6/7(5) of the Royal Court Rules, 1982, until 28 days after the determination of the summons; and

(4) that the defendant be granted costs in relation to the summons on a full indemnity basis.

Advocate J.G. White for the plaintiff
Advocate A.J. Olsen for the defendants.

JUDGMENT

COMMISSIONER HAMON: Lazard Brothers & Co. (Jersey) Limited, the plaintiff in this action, is a well-established bank. The defendants are an equally well-established firm of advocates, carrying on business under the name and style of Bois and Bois, Perrier and Labesse. I shall refer to the plaintiff as "Lazards" and to the defendant as "Bois".

On the 13th November, 1987, a company, Numbers 12 and 13 Britannia Place Limited, purchased two properties from another company, J & G (Property) Limited. A preliminary agreement of sale had been entered into by J & G (Property) Limited, St Aubins Finance Holdings Limited, Numbers 12 & 13 Britannia Place Limited and Lazards. Amongst its terms it was stipulated that Lazards should be a party to the contract of sale of the property to release all or any charges Lazards might hold secured against the property. Bois at all times advised Numbers 12 & 13 Britannia Place Limited. Clause 4 and 5 of the agreement read as follows:-

> "The sale is made for and in consideration of the sum of Three Hundred and Ten Thousand Pounds (£310,000) (hereinafter called "the consideration") which shall be payable by the Purchaser to Lazards (as stakeholder) in cash in the manner following:-
>
> (a) A deposit in the sum of Thirty-one Thousand Pounds (£31,000), that is to say ten per cent (10%) of the consideration, on the date of signing this Agreement.
>
> (b) The balance of the said consideration of Three Hundred and Ten Thousand Pounds (£310,000), that is to say ninety per cent (90%) of the consideration being the sum of Two Hundred and Seventy-nine Thousand Pounds (£279,000) shall be payable by the Purchaser to Lazards ten days after the passing of the deed or contract of sale of the property in accordance with the

provisions of Clause 10 hereof.

5. The Purchaser and Lazards hereby covenant with the Vendor that each of the payments made to Lazards shall be held by Lazards as stakeholder in accordance with the terms and conditions set out in this Agreement and that all interest on such payments will accrue to the benefit of the Vendor and Lazards shall only release payments made to Lazards by the Purchaser as follows:-

(a) To the Vendor or to such other persons as shall be necessary to release any charges secured against the property in accordance with sub-clauses (b) and (c) of Clause 12 hereof ten days after the passing before the Royal Court of Jersey of the contract of sale of the property in accordance with the provisions of Clauses 10 or 13 hereof, or

(b) Otherwise under the provisions of Clause 11 hereof".

And Clauses 11 and 12 read:-

"Should either the Vendor or the Purchaser fail, refuse or neglect to pass the contract of sale of the property in accordance with the provisions of Clause 10 hereof then the party failing, refusing or neglecting so to do shall pay as agreed liquidated damages to the persisting party the sum of Seventy-seven Thousand Five Hundred Pounds (£77,500), that is to say twenty-five per cent (25%) of the consideration, which agreed liquidated damages are accepted by the Vendor and the Purchaser as the amount of liquidated damages which should be paid to the persisiting party as representing a reasonable assessment of the actual damage to be suffered in that event and shall not itself be open by either the Vendor or the Purchaser to challenge or dispute and:-

(a) If the Purchaser shall be the defaulting party then the deposit payable by the Purchaser under the provisions of sub-clause (a) of Clause 4 hereof shall be applied by Lazards as part payment to the Vendor of the agreed liquidated damages and Lazards shall thereupon be released from all its obligations under this Agreement.

(b) If the Vendor shall be the defaulting party the deposit payable by the Purchaser under the provisions of sub-clause (a) of Clause 4 hereof shall be repaid by Lazards to the Purchaser without interest thereon and subject always to Lazards fulfilling its undertaking to the Purchaser in accordance with the provisions of sub-clause (d) of Clause 12 hereof Lazards shall be released from all its obligations under this Agreement.

12. Lazards hereby undertake to the Purchaser:-

(a) That St Aubins and the Vendor shall make payment to the Contractor of all sums properly due under the building contract as certified by the Architects under the provisions thereof.

(b) That Lazards shall be a party to the contract of sale of the property in accordance with the provisions of Clause 10 hereof to release all and any charges Lazards may hold secured against the property.

(c) That Lazards shall procure the discharge ten days after the passing before the Royal Court of Jersey of the contract of sale of the property in accordance with the provisions of Clause 10 hereof of all and any other charges which may be secured or registered against the property.

(d) That Lazards shall guarantee payment by the Vendor to the Purchaser of the amount of liquidated damages referred to in Clause 11 hereof should the Vendor be the defaulting party".

We put those in by way of background.

It appears that some days prior to the passing of the contract before the Royal Court it became apparent to the parties that the premises did not contain 2,645 sq. ft. of floor space as represented but 2,218 sq. ft., a difference of some twenty per cent. All was clearly not going as smoothly as had been anticipated. Discussions between the parties ensued. No agreement on a reduction of price could be agreed. The parties reserved their rights (whatever they might be) and passed the contract in the usual form before the Royal Court. Lazards appeared as party to the contract to release their charge and the hallowed words appeared in the contract: "partant ladite propriété est et demeurera affranchie et dégrevée desdites hypothèques comme si elle n'en avait jamais été grevée à fin d'héritage".

Meanwhile Bois had been busy. Lazards were sitting back to wait for the money held by Bois for ten days in the customary way. We were told that they would have received this from the vendor's lawyers. Bois, however, had advised their clients, Numbers 12 and 13 Britannia Place Limited, to commence proceedings against the parties to the agreement to pay either £61,765.60 being a proportion of the purchase consideration of the property equivalent to a reduction in the net letable floor area. Or alternatively to pay £77,500 being the liquidated damages stipulated in the agreement.

Worse was to follow. Extraordinarily, Bois advised their clients to obtain an immediate interim injunction against Bois within the ten day period to prevent £77,500 from leaving their hands. This was included in the Order of Justice and an action by the defendants to lift the injunction is part heard. The substantive action has not yet been heard, but is due to be heard early in the New Year.

Some eleven months after contract had been passed, Lazards commenced proceedings against Bois. Advocate White appearing for Lazards told us that all had been well until Advocate Falle of Bois successfully applied to amend the first Order of Justice by adding these words:-

1. "That the purchase consideration payable for Number 13 shall be diminished by an amount which shall rateably reflect the reduction in the net letable floor area".

Immediately thereafter Advocate White wrote a stern letter. That letter was handed to us and reads as follows:-

"29th September 1988

Dear Advocate Falle,

12 & 13 BRITANNIA PLACE

I refer to the hearing before Mr. Commissioner Le Cras yesterday and to your application to amend the Order of Justice to include an allegation that the monies standing in your client account belong to the Plaintiff and not to any one or more of the Defendants, notwithstanding the fact that the ten day period following the contract passed before the Royal Court expired on 23rd November, 1987.

Until you applied to amend the Order of Justice the third Defendants had proceeded on the basis that the funds standing in your client account were held by you to the order of one or more of the Defendants. Whilst we still believe that this may be the case, you have made it quite clear that you are of the opinion that the funds belong to the Plaintiff and it was for this reason that you sought to extend the Prayer of the Order of Justice in the terms of the Summons. In making this submission you also maintained that you (and presumably your firm) held the sum of £77,500 for and on behalf of the Plaintifffs. It follows therefore, that both you and your firm aver that the Purchaser failed to account to my client (and/or the Vendor) as it was bound to do on 23rd November 1987.

In accordance with the resolution and direction approved by the Jersey Law Society at its Extraordinary General Meeting of the 7th October 1982, your firm personally undertook to pay the purchase consideration ten days after the passing of the contract. Although such undertaking would in normal circumstances be an undertaking to pay the consideration to the Vendor's Advocates, in the present case the undertaking must have been to pay the sum to the Advocates representing Lazard Brothers & Co. (Jersey) Limited as all parties had agreed in advance that the consideration monies were to be paid to Lazards. Accordingly, and as you allege on behalf of the Plaintiffs that the full consideration has not been paid, this letter constitutes a formal demand to your firm for payment of the sum of £77,500 pursuant to your undertaking. As I am sure you are aware, this undertaking is of a personal nature and is not dependent upon you being placed in funds by your clients. In addition, the injunction obtained at the instance of your clients relates solely to the specific sum of £77,500 held in your client account and does not restrain you from paying away your own money.

If we have not received payment from you by close of business on Tuesday 4th October I am instructed to issue proceedings without further notice".

Advocate White asked us to note carefully the words in the letter: "Although such undertaking would in normal circumstances be an undertaking to pay the consideration to the Vendor's Advocates, in the present case the undertaking must have been to pay the sum to the Advocates representing Lazard Brothers & Co. (Jersey) Limited as all parties had agreed in advance that the consideration monies were to be paid to Lazards".

He says that Lazards only then realised that the plaintiff was claiming that the monies belonged to it personally and that the money caught by the injunction had not been tendered in accordance with the ten day rule.

Advocate Olsen for Bois was less than generous in his interpretation of Lazards' motives. He said that because St. Aubins Finance Holdings Limited the vendor of the property had ceased to have any funds, Lazards were coming in through the back door to attack Bois and had, to put no finer point upon the matter, fabricated an undertaking in order to attack the funds held by Bois. We therefore have a summons by the Defendants in this action that it should be struck out or alternatively stayed on the grounds that the Order of Justice displays no reasonable cause of action if scandalous, frivolous or vexatious and is an abuse of the process of this Court.

At this stage we would like to say something about the way that the matter comes before the Court. In Carl-Zeiss Stiftung -v- Rayner and Keeler Ltd. et al (1969) 3 AER 897 at p.909, Buckley J. said:-

> "When a party to an action seeks to obtain an order striking out some part of his opponent's pleading, it is, in my judgment, incumbent on him to indicate clearly what he wants to be struck out".

We would like to see that procedure followed in future in this Court. Be that as it may, Advocate Olsen's argument was essentially that there was no privity of contract between Lazards and Bois; that they had no possible 'locus standi'. He went further to say that no undertaking expressed or implied was given by Bois to Lazards. Any undertaking which Bois gave was a solicitor to solicitor undertaking to the vendor's solicitors. We do not find it necessary to deal with the potential problems he foresaw of double recovery arising out of the two separate actions. Suffice it to say that we cannot see that the facts of this case are in any way on all fours with the facts set out in the case cited to us, The Royal Bank of Scotland Ltd -v- Citrusdel Investments Ltd (1971) 3 AER 558. In that case not only was the issue to be tried in two separate suits the same, but the parties were also the same in both suits.

Rule 6/13 of the Royal Court Rules, 1982 (as amended) sets out the four grounds upon which the Court may order a striking out. I will cite the Rule:-

"The Court may at any stage of the proceedings order to be struck out or amended any claim or pleading, or anything in any claim or pleading, on the ground that -

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

and may make such consequential order as the justice of the case may require".

In Lablanc Ltd -v- Nahda Investments Ltd JJ 6th May, 1986 - unreported, the learnèd Bailiff said: ...."the party is not to be driven lightly from the public seat of justice....". To which we would add as was stated in Dyson -v- Attorney General (1910) 1 KB 419:- ...."excepting in cases where the cause of action was obviously and almost incontestably bad".

We had much argument from counsel on the lack of affidavit evidence. There is of course no practice direction relating to the production of an affidavit to support an application to strike out or stay proceedings in this Court. The matter is still within the discretion of the Court. We would again follow the words of the learnèd Bailiff in Geoffrey Cooper -v- Tottie Resch, formerly wife of Geoffrey Cooper JJ 10th February, 1988 - as yet unreported:- "We have used the "White Book" on other occasions as a guide, even where our rules are not exactly identical, but where they are a complete copy of the "White Book" we think there is even more reason for us to look at how those rules have been interpreted in the English jurisdiction. The decisions of course are not binding; they are of persuasive effect only".

We can, however, find no argument with the White Book when it says on Order 18/19/2:- "Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence, no evidence is admitted (para. (2), supra; A.G. of Duchy of Lancaster v. L. & N. W. Ry., [1892] 3 Ch. 278; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489, 498): and where the only ground on which the statement of

claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is equally inadmissible (Wenlock v. Moloney), [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, C.A. But in applications on any of the other grounds mentioned in the Rule or where the inherent jurisdiction of the Court is invoked, affidavit evidence may be and ordinarily is used".

But in any event we still have no affidavit evidence at all. We allowed certain documents such as the letter of the 29th September, 1988, to be put in because we wanted fully to understand the background of the case. What it was clear we had to avoid was to have any form of preliminary hearing, or as was stated by Danckwerts, L.J., in Wenlock -v- Moloney et al (1965) 2 AER 871: ...."the summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action". That passage of course was approved by the learned Bailiff in Cooper and Resch.

Let us look at the pleading which we described at one stage of the proceedings as "woolly". Advocate White, in the course of his argument, alleged that there was a question of agency - Bois was agent of the purchaser. The vendor, or his lawyer, was agent of Lazards. If that argument had been sustained, it would have made Lazards' position untenable. It is in our view settled and incontrovertible law that the contract made by an agent acting within the scope of his authority for a disclosed principal is in law the contract of the principal and the principal and not the agent is the proper person to sue or be sued upon such a contract.

The plaintiff however puts his case somewhat differently. He puts it on the basis of an undertaking. He relies on paragraphs 8 and 9 of the Order of Justice. He says that Bois gave an undertaking when the contract was passed. This undertaking extended to Lazards. He says that Rule 6/8 of the Royal Court Rules is sufficient for his purposes and that reads of course: "Every pleading must contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which

those facts are to be proved, and the statement must be as brief as the nature of the case admits".

Had we been able to accept unequivocally the plaintiff's argument we would have had no hesitation in refusing a stay of proceedings, even though Advocate Olson sought and obtained leave during the hearing to substitute an amended prayer to his summons. But the Order of Justice requires careful consideration. Both counsel gave us helpful authorities to illustrate the general rules applicable on a striking out summons. Some of those cases were obviously more helpful than others. A general doctrine was clear, as A.L. Smith, L.J., said in A.G. of the Duchy of Lancaster -v- London and North Western Railway Company 1892 Ch. D.: "It is only when upon the fact of it it is shewn that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies". And again, following Nagle -v- Feildon et al (1966) 1 AER QB 633 and Drummond-Jackson -v- BMA et al (1970) 1 AER 1101, the rule is only to be applied in plain and obvious cases where the action is one which cannot succeed or is in some way an abuse of the process of the court, or the case is unarguable.

Perhaps the most succinct of the many cases cited to us came in the judgment of Pearson L., in Drummond-Jackson -v- BMA et al (1970) 1 AER 1094 at page 1101, where he says:- ...."I do not think that there ....should be any general change in the practice with regard to applications under the rule.
In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to the evident intention of the rule for several reasons. First, there is in r. 19)1)(a)" - and I immediately refer back to Rule 6/13(a) of our rules - ...."the expression 'reasonable cause of action', to which Sir Nathaniel Lindley MR called attention in Hubbock & Sons Ltd v. Wilkinson, Heywood and Clark Ltd. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r. 19 (2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out".

There is in paragraph 4 of the Order of Justice an allegation that the consideration should be paid to Lazard ten days after the passing of the contract. Unfortunately in paragraphs 8 and 9 where we hoped to find the material facts pleaded, there is only evidence of the facts based on the custom and practice of the Island of Jersey. If Bois' undertaking extended to Lazards then that must be specifically pleaded. It is not. In paragraph 9 it is not pleaded that Bois owed any duty to Lazards, but there appears to be an allegation that they were in breach of a duty. One thing is clear and that is that Bois were not at any time advisers to Lazards. We therefore have no difficulty in saying that the pleadings are defective.

We order that paragraphs 8 and 9 be struck out, but without dismissing the action. It appears to us that we have a discretion under Rule 6/12/.-(1), (which reads:- "The court may at any stage of the proceedings allow a plaintiff to amend his claim, or any party to amend his pleading, on such terms as to costs or otherwise as may be just") to allow the plaintiff to amend that part of his pleading in the manner indicated, but he must do so within fourteen days of this judgment. We do not wish to give any indication of whether if the pleading is amended, we support the arguments of either party. Suffice to say in the circumstances that Advocate Olsen must have his taxed costs.

Authorities referred to in the judgment

Carl-Zeiss Stiftung -v- Rayner and Keeler Ltd et al (1969) 3 AER 909.

The Royal Bank of Scotland Ltd -v- Citrusdel Investments Ltd (1971) 3 AER 558.

Lablanc Ltd -v- Nahda Investments Ltd JJ 6th May, 1986 - unreported; (1985/86) JLR Part 4, N.3.

Dyson -v- Attorney General (1910) 1 KB 419.

Geoffrey Cooper -v- Tottie Resch, formerly wife of Geoffrey Cooper JJ 10th February, 1988 - as yet unreported.

Wenlock -v- Moloney et al (1965) 2 AER 871.

A.G. of the Duchy of Lancaster -v- London and North Western Railway Company 1892 2 Ch. D.

Nagle -v- Feilden et al (1966) 1 AER.

Drummond-Jackson -v- BMA et al (1970) 1 AER 1101.

Other authorities referred to:-

Davey -v- Bentinck 1891-4 AER.

Shackleton -v- Swift 1911-13 AER.

Clothilde Abdel Rahman -v- Chase Bank (C.I.) Trust Company Limited and others 1984 JJ 127.

Chapter 12 of Bullen & Leake and Jacobs Precedents of Pleadings, Twelfth Edition.

South Hetton Coal Company -v- Haswell, Shotton and Easington Coal and Coke Company (1898) 1 Ch. 465.

Williams & Humbert Limited -v- W & H Trade Marks (Jersey) Limited (1986) A.C. 368; Headnote and pages 434 to 437 (inclusive) only.

Hubbock & Sons Limited -v- Wilkinson, Heywood & Clark Limited (1899) 1 QB 86.

Burstall & Beyfus (1884) 26 Ch. 35.

Willis -v- Earl Beauchamp (1886) 11 P. 59.

Dow Hager Lawrence -v- Lord Norreys & Others (1890) 15 AC 210.

Halsbury's Laws of England (Fourth Edition) Volume 37 paragraphs 437 and 438.

The Metropolitan Bank Limited -v- Alexander Gopsell Pooley (1885) 10 AC 210.