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ROYAL COURT 56.
(Samedi Division)

Hearing dates: 16th, 17th, 18th, 19th, 20th, 23rd, 24th, 25th, 26th and 31st March, 1992.

Judgment: 31st March, 1992.

Before: P.R. Le Cras, Esq., Commissioner, and Jurats Blampied and Gruchy

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BETWEEN:	**Arya Holdings Limited**	PLAINTIFF
AND:	**Minories Finance Limited**	DEFENDANT

Defendant's application to strike out the plaintiff's Order of Justice and amended Order of Justice pursuant to Rule 6/13. - (1). of the Royal Court Rules, 1982, (as amended)

Advocate R.J. Michel for the plaintiff.

Advocate A.J. Dessain for the defendant.

JUDGMENT

COMMISSIONER LE CRAS: This is an application to strike out proceedings brought by Arya Holdings Limited (Arya) against Minories Finance Limited, the successor in title to Johnson Matthey Bankers Ltd (the Bank) and arise as a result of the *désastre* declared by the Bank on the 17th January, 1986.

The action is brought under a number of headings, and following its receipt the Bank issued a summons asking for the

Order of Justice, subsequently heavily amended, to be struc out.

The grounds are:

(a) that it discloses no reasonable cause of action; or,

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

(c) that it is an abuse of the process of the Court; or,

(d) pursuant to the Court's inherent jurisdiction t· strike out.

The principles which the Royal Court follows on these applications is well known and we do not propose to rehearse them here. It will suffice to say that we were referred, *inter alia*, to Rule 6/13 of the Royal Court Rules, Cooper -v- Resch (1987-88) JLR 428 and Stephens -v- Stephens, (1st November, 1989) Jersey Unreported, as well as Channel Islands & International Law Trust Co. Ltd., and Ors. -v- Pike and Ors. (30th January, 1990) Jersey Unreported, and various paragraphs of the Rules of the Supreme Court Rule 18, and it is in the light of these various authorities that we approach this summons. In particular we bear in mind that we are not trying the action, but merely exercising a discretion as to whether pleadings should be struck out, one of the tests adumbrated being that this should only be done in plain and obvious cases.

Mr. Dessain mounted his attack on a number of grounds, which we may perhaps briefly set out as follows:

Ground 1.

(a) paragraphs 6.4 to 9A.4 of the amended Order of Justice should be struck out on grounds which may be summarised as being witness immunity, there being no duty to the Court or to the other litigant, and a change in the procedure of the Royal Court which has altered the previous position;

(b) paragraph 9A.5 of the Order of Justice should go as no predominant wrongful purpose was pleaded; and

(c) that paragraphs 10.1 and 10.2 should go under the Rule in Foss -v- Harbottle, or as Mr. Dessain preferred it, Prudential Assurance Co. Ltd. -v- Newman Industries Ltd. (No.2) [1982] 1 Ch. 204 CA..

Ground 2.

(a) that the matters now pleaded are *chose jugée;* and

(b) prescription

Ground 3.

(a) he repeats all five grounds raised under grounds 1 and 2;

(b) that the suspense accounts allowed the Bank to hold monies for uncalled guarantees; and

(c) generally, that the circumstances were such that a *désastre* must have been declared.

We turn first to ground 1(a).

Ground 1(a)

Mr. Dessain put this submission on the grounds, first, that a witness is not liable to an action for damages for anything said at a trial, and that the affidavit given for the purpose so counts; second that in these circumstances there is no duty by the witness to the Court and no duty in the conduct of litigation, in general, to the other side; and third that whatever may have been the case in Jersey previously, Rule 12 of the Royal Court Rules have brought declarations of *désastre* and the affidavits supporting them within the ambit of these propositions.

Mr. Harper, he submitted, and consequently by necessary implication his employer, the Bank, is not liable to be sued in proceedings such as these in respect of or in consequence of his sworn evidence in proceedings.

He put the position as high as this, that on his reading of the authorities, even were the application to have been made *mala fide*, no civil action would lie at the instance of the party damaged thereby, although as we understood it he made an exception where malicious prosecution or a wrongful predominant purpose was concerned. He put it in this way:

1. Conspiracy, slander, negligence are all torts. Torts alleged in relation to the evidence of witnesses are not actionable.

2. All causes of action in relation to the evidence of witnesses are not actionable.

3. Those propositions apply to all evidence whether at trial or any stage of Judicial proceedings.

4. They also apply to all material even before it is used in proceedings, which is prepared with a view to proceedings.

5. This also applies to oral and written evidence.

6. It also applies to all material, even if not used in proceedings, i.e. prepared, given, produced, or procured for them.

7. These propositions apply however improper, dishonest, or malicious evidence may have been.

8. The reason is based on (ancient) public policy.

There can be, he submitted, no cause of action in respect of what Mr. Harper has said.

Now the position is perfectly clear, and indeed, in our view, not open to argument, that where evidence has been given at a trial (Marrinan -v- Vibart [1963] 1 QB 528, Watson -v- M'Ewan [1905] AC 480, Cabassi -v- Vila (1940)64 CLR 130) there are clear grounds of public policy which apply in such cases, and even for the preparation of statements therefor. Counsel urged that these considerations of public policy should be applied to a witness supporting an *ex parte* application as he would be fearful if he could be sued in damages if he were wrong or negligent. He sought to equate the procedure with the affidavit prepared for an injunction, although this, of course, is adversarial and served upon the other side.

Counsel for the Bank indeed went so far as to say that if, for example, a deliberately wrong application were made to register a will the person so making it could not be sued for damages; these applications as for those in the case of an injunction being in the hands of the Court. However, it seemed to the Court that the position here was rather different, as the declaration of a *désastre* is made *ex parte* and the swearing of an affidavit has only recently come in; the debtor is not appraised necessarily of the proposed declaration which is merely a holding operation preparatory now to the filing of claims and previously to litigation. The affidavit is normally neither challenged nor served on the debtor.

Furthermore, we bear in mind in dealing with the submission that this Court has not to decide this question, but only whether the proposition is so clear and obvious as to make the argument effectively unsustainable.

Counsel excepted cases where the *désastre* was declared maliciously, or cases where the predominant motive was wrong (see below) Business Computers International Ltd. -v- Registrar of Companies [1988] Ch. 229 at 234F.

However his case, here, was that neither of these causes of action appeared in the pleadings.

His next submission on this head is that no duty of care is owed by one litigant to another in the conduct of litigation. His authority for that was Business Computers International Ltd. -v- Registrar of Companies [1988] Ch. 229 where a notice of bankruptcy was served at the wrong address and Scott J. held that there was no duty of care as to the manner in which litigation was conducted whether as to service of process or otherwise. His Lordship found any duty of care in an adversarial system conceptually odd as the control of litigation lies with the Court.

Counsel conceded that the declaration of *désastre* is not what one would normally call litigation i.e. an adversarial process, opening the way as it does for all creditors who sue, or nowadays claim, to obtain the same preference.

Again this is not a question which the Court is asked to decide; merely whether it is plain and obvious that the argument is, for practical purposes, unsustainable.

Counsel for the Bank accepted that there was a local case against him on that point, namely d'Allain -v- de Gruchy (1890) Ex. 196 where damages had been obtained after a wrongful declaration of *désastre*, that is, one made without a right at law to do so.

After a diversion he returned to this submission. He referred first to the Royal Court Rules:

> ***"12/1.-(1) When the moveable property of a debtor is declared "en désastre", the procedure prescribed by this Part of these Rules shall apply.***
>
> ***(2) In this Part of these Rules, unless the context otherwise requires -***
>
> > ***"claim" includes a claim for repossession of goods and a claim for rent, but does not include a claim for an unliquidated sum;***
> >
> > ***"creditor" includes a person claiming repossession of goods.***
>
> ***12/3.-(1) The Court may refuse to receive the declaration "en désastre" of the moveable property of a debtor -***
>
> ***(a) where the declaration is made by the creditor, unless it states that he has a claim against the debtor and that to the best of his knowledge and belief the debtor is insolvent but has realisable assets, and***

contains a statement of the claim and of the grounds on which he believes the debtor to be insolvent";

and noted that the Court shall refuse the application if the claim is for repossession of goods. He put his case in this way that on a plain reading of the Rule the material here did comply with the required procedure and that, in effect, is all that is required. One is, he submitted, entitled to make a declaration as of right providing the conditions set out in the Rule are fulfilled. The previous remedy was the raising of the *désastre* and damages, but the previous position has now changed because there is now a machinery. He seemed appalled at the thought that, even in a case where a *désastre* was declared correctly, a debtor might have the right to challenge it; and went on to urge that if a creditor making the declaration were not protected by absolute immunity there was no reason why counsel should be protected. The immunity of parties was tied up with the immunity of the Court and the Judiciary. It would be extraordinary if the authorities applied to process generally and not to *désastre*.

Rules he submitted were a form of law under delegated authority; and what would otherwise be a cause of action does not apply because of the rules and changed procedures (see Business Computers at 237).

What he is asking the Court to do, as it would appear to us, is to change the Law as enunciated in d'Allain -v- de Gruchy on a striking out application; which he asserts is plain and obvious despite there being no further case overruling it nor any direct legislation.

The Court did not find this part of his argument plain and obvious. It is clear to this Court that it should be argued at a full hearing.

He then asserted that as a result of the changed procedure the declarant is better off because he swears an affidavit than he was when he did not. There was, he said, in Barker (6th September 1984 Jersey Unreported) no requirement made by the learned Bailiff as to full and frank disclosure. No duty lay on the Court beyond the bare terms required by the rules. As he put it, it was effectively clear that whatever the Bank did it could not be liable to either

a) the party *lesé*, as this was (see above) now covered as part of the Court's procedure, or
b) the Court, as there was no undertaking given in damages as, for example, in an Anton Pillar order. Court proceedings do, he suggested, create harsh results for those who lose.

At this point, and leaving the allegations of malice, or, it may be predominant improper motive aside, counsel submitted that if the Court accepted that the protection of the witness was absolute and that there was no duty of care to the other litigant, or, in the circumstances, to the Court; and that, as the procedure had changed, d'Allain -v- de Gruchy has, as it were, gone down the stream of time, then paragraphs 6.4, 7, 8 and 9A.1, i.e. the engine room of Arya's case, must go.

As to malice, and a wrongful predominant purpose - both of which were discussed in Business Computers International Ltd. -v- Registrar of Companies (1988) Ch.229 and in Metall Und Rohstoff AF -v- Donaldson Lufkin Inc [1990] 1 QB 391, CA 472E -F, his case was quite simple: because his witness is protected and as he owes no duty of care in litigation, no action can lie; and that although it might for a malicious action or a wrongful predominant purpose, these are not pleaded.

I have to say, and without expressing the Court's view as to the outcome of a full and reasoned argument, the Court does not find that he makes his case out, on the pleadings, with regard to the first point in this application. In fact the Court would say that far from finding these points unarguable, there is an argument to be put forward and Arya is entitled to do so. We may perhaps add that we did not need to hear Mr. Michel on this point.

Finally, before leaving this point, we should perhaps say here that the question for the necessity for full and frank disclosure in the affidavit will surface again in another part of the application under ground 3(c) and we propose to deal with Mr. Michel's reply to it there.

Ground 1(b) To strike out clause 9A.5.

This clause reads as follows:

> *"That by reason of all the aforesaid, the conduct of the Bank amounted to an abuse of process alternatively an abus de droit".*

Counsel's criticism of this paragraph was put in this way, that the adduction of a false case for the purpose of sustaining a claim in legal proceedings does not, *per se*, constitute a tort; so that before the plaintiff, Arya, can rely on a tortious abuse of process it has to show that the predominant purpose was a purpose other than that for which the litigation was designed, and that the abuse has caused damage.

Taking that as the test, he puts it in this way that, under this limb no reasonable cause of action is disclosed, as the ingredients have not been alleged. He submitted that it was

essential to allege that the predominant purpose in bringing the proceedings was improper. It is the pleading itself which is important and if it is not pleaded it cannot be said to be alleged and cannot be a basis for the Order of Justice; or, put another way, if it is improperly or partially i.e. not sufficiently and fairly pleaded then it should be struck out *ipso facto.*

Counsel for the Bank then went on to analyse the pleadings on which this paragraph relies. His submission was that if Arya seeks to rely on the allegation it must allege the ingredients and it simply does not do so. Nothing on the face of the pleading will get Arya home.

As his authority he referred to the well-known passage in Macrae -v- Jersey Golf Hotel Limited (1973) JJ 2313 at 2320:

> ***"The practice in England was not in dispute. Before 1875, each party was bound to state with reasonable precision the points which he intended to raise; this he generally did by stating, not the facts which he meant to prove, but the conclusion of law which he sought to draw from them. The fundamental rule of the present system of pleading is now contained in Order 18, r.7(1) of the Rules of the Supreme Court, which requires that every pleading must state material facts only and not law.***
>
> ***The effect of that rule is succinctly stated in Odgers on Pleading and Practice (Twentieth Edition) at page 85:-***
>
> > ***"State the facts and prove them, and the judge will then decide the question of validity. He knows the law, and can apply it to the facts of the case without its being stated in the pleadings."***
>
> ***and by Denning, L.J., in Shaw v. Shaw (1954) 2 All E.R. 638 at page 645 -***
>
> > ***"It is said that an implied warranty is not alleged in the pleadings, but all the material facts are alleged, and, in these days, as long as the material facts are alleged, that is sufficient for the Court to proceed to judgment without putting any particular legal label on the cause of action."***
>
> ***Although it is no longer necessary to plead inferences of law, they are still sometimes pleaded, and one example is the case of Maclenan v. Segar (already cited) where a hotel guest injured by a fire at the hotel alleged both the tort or negligence and breach of an implied warranty. The reason for such pleading is explained in Halsbury (Third Edition) Vol.30, para. 12 -***

> ***"As a general rule inferences of law should not be pleaded, but only the facts from which such inferences are sought to be drawn. It may be useful, however, on occasion to state the legal conclusion sought to be drawn from the facts, or the nature of the legal provision, on which the party pleading intends to rely, either by way of emphasis or to prevent any doubt in the mind of the other party as to the nature of the case against him.***
> ***It is bad pleading to state an inference of law without setting out the facts by which the conclusion or inference is to be supported and such a pleading will be struck out as bad; but even if a pleader pleads legal consequences inaccurately or incompletely that does not shut him out from arguing points of law which arise on the facts pleaded".***

In his reply, Advocate Michel referred the Court to paragraph 6.4(v); 6.4(vi); 9A.3(g) of the amended Order of Justice:

"v) The Bank sought the declaration of désastre for the ulterior purpose of preventing Arya from trying to discharge the various receiverships of companies in the Gomba Group, rather than on the basis of a commercial decision.

vi) The Bank sought the declaration of désastre despite the fact that it ought to have known that the Application was made in vain, in that it was purportedly made to preserve the assets of Arya, namely a debt of Danig AS Ltd. ("Danig"), secured by the deposit by Danig of title deeds of property situated outside the jurisdiction and accordingly in any event the Viscount was unable to enforce such debt or indeed such security, neither in fact being moveable property.

g) The ultimate purpose for which the Affidavit of Mr. Harper was sworn was to prevent or impede the free actions of Arya in England in its attempts to discharge the receiverships of Gomba Group companies in England".

His case on these pleadings was that the Bank sought the declaration of the *désastre* for the ulterior purpose of preventing Arya from trying to discharge the receiverships not for protecting the Bank's commercial interests i.e. recovering money against Arya - where it knew or ought to have known that the Danig debt was not a realisable asset. The or a main purpose was to impede or prevent the free actions of Arya in England. Ulterior he submitted meant concealed, and if they knew, as they should have done that they had no proper claim in the *désastre* (see below) then they had no proper purpose.

In reply to the passage from Macrae cited by Mr. Dessain he referred us to two further passages at 2322 and 2324:

> ***"We now turn to the position in Jersey.***
>
> ***On 8th July, 1963, there came into force the Royal Court (General) (Jersey) Rules, 1963, which introduced a number of changes in the Court's procedure. Those Rules, and others which followed, were superseded by the Royal Court Rules, 1968, which, as amended, are currently in force. They contain no Rule corresponding to Order 18, r. 7(1) of the Rules of the Supreme Court, nor, indeed, any provision which bears on the matter now in issue.***
>
> ***What, therefore, is the rule of customary law which governs the form of pleadings? We think it is to be found in Poingdestre - Lois et Coutumes - Chapter "Des Semonces ou Adjournements", p.158, where it is stated that if a summons is to serve the cause of justice it needs but two essential qualities -***
>
> ***(1) it must state the claim of the plaintiff so that the defendant may know with precision that which he is called upon to answer; and***
>
> ***(2) it must give the defendant reasonable time in which to prepare his defence.***
>
> ***We accept that the issue before us must be judged in conformity with the first of those two statements, which, it is interesting to note, is substantially the same as the passage from Lord Normand already quoted".***

The other side may, he said, ask for particulars, but they know well enough the grounds on which we are claiming and which are sufficiently pleaded.

He then referred us to Quartz Hill Consolidated Gold Mining Company -v- Eyre [1883] QBD 674, which included the headnote and passages at pp. 683, 684 and 685:

The headnote reads -

> ***"An action will lie for falsely and maliciously and without reasonable or probable cause presenting a petition under the Companies Acts, 1862, 1867, to wind up a trading company, even although no pecuniary loss or special damage to the company can be proved, for the presentation of the petition is, from its very nature, calculated to injure the credit of the company.***

The defendant, who had been a shareholder in the plaintiff company, instructed certain brokers to sell his shares, and signed a transfer. The brokers informed him that they could not sell the shares, but the transfer was not returned to him. After waiting ten or eleven days he presented a petition to wind up the company on the ground of fraud in its formation, and of the impossibility that it could carry on business at a profit. At the time of presenting the petition the company, which was a trading company, had property of a large amount, and its debts were trifling. The defendant was not then in fact a shareholder; his shares had been sold, and the transfer had been registered. Upon discovering that his shares had been sold, he gave notice that the petition would be withdrawn, and it was ultimately dismissed without costs. The company having brought an action for falsely and maliciously and without reasonable or proper cause presenting the petition, at the trial no proof of damage to the company was given beyond the liability to pay its own costs of defending itself against the petition; and upon this ground the company was nonsuited at the close of its case:-

Held, that although the liability to pay "extra costs" was not a ground of legal damage, nevertheless the nonsuit was wrong, and a new trial must be had, because an action would lie for falsely and maliciously and without reasonable or probable cause presenting the petition to wind up, which was necessarily injurious to the credit of the company:

Held, further, that as at the time of presenting the petition the company was an existing and going concern, and had valuable property and was solvent, unless other facts could be shewn, there was a want of reasonable and probable cause for presenting the petition, and the opinion of the jury ought to have been taken whether the defendant had been actuated by malice:

Held, further, that if the defendant as a matter of business ought, in the opinion of the jury, to have inferred from the failure of the brokers to return the transfer, that the shares had been sold, the defendant would have had no reasonable or probable cause to suppose that he was still a shareholder.
Johnson v. Emerson (Law Rep. 6 Ex. 329) commented upon".

On this authority not cited in Business Computers, he submitted that it is not an answer to say in bankruptcy proceedings that the alleged creditor has only asked for a Judicial decision; an action will lie if the application is made falsely and maliciously and without proper cause.

He then referred us to p.687:

> ***"It was necessary that the plaintiffs should give evidence also that the defendant had acted maliciously. Whenever in an action for malicious prosecution the judge holds that there is a want of reasonable and probable cause, there is evidence to go to the jury of malice. When there is no other evidence of malice except what the judge has stated to be in his opinion a want of reasonable or probable cause, I incline to agree with Huddlestone, B., and Hawkins, J., in Hicks v. Faulkner (1), that upon the question of malice the jury are not bound by the holding of the judge as to the absence of reasonable cause, but they may consider whether in their own view there was a want of reasonable or probable cause. But the plaintiffs might have relied upon other facts; and it appears probable that the defendant in presenting the petition to wind up the company was actuated, not by a desire to benefit the shareholders, but by an indirect motive, namely, a wish to get back the money paid by him for the shares. This would be evidence to go to the jury. The defendant might have met it in various modes; nevertheless there was evidence of malice to be considered by the jury, even if it consisted only of want of reasonable and probable cause".***

as authority that if there is want of reasonable cause there is evidence to go to the jury of malice. The want of reasonable and probable cause here was the knowledge, as he submits, that the Danig debt was not realisable; and this lets him go to proof as to the real motive. He then referred to further passages at pp. 691 and 693 which we will not reproduce here.

Malice is not, he submits, malice *per se;* want of reasonable cause is enough to let him in.

Further he claimed that a predominant purpose was not necessary. He cited first Dalloz: Nouveau Répertoire de Droit (2nd Ed.) Book 1: Abus de Droit pp. 21 & 22:

> ***"Abus de droit, exige que l'exercise de l'action en justice soit constitutif d'un acte de malice ou de mauvaise foi, ou tout au moins d'une erreur equivalent au dol".***

And then to the American Restatement:

> ***"One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process".***

He then referred to Grainger -v- Hill (1838) 4 Bing. NC 212, the headnote and p.773:

The headnote

"2. In an action for abusing the process of the Court in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined, or to aver that the process was sued out without reasonable or probable cause.....".

At page 773

"....The second ground urged for a nonsuit is, that there was no proof of the suit commenced by the Defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the Defendants' proceeding, is the same: that this is an action for abusing the process of the law, by applying it to extort property from the Plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff at least is instructed to pursue the exigency of the writ: here the directions given, to compel the Plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the Defendants is such that there is no precedent of a similar transaction, the Plaintiff's remedy is by an action on the case, applicable to such new and special circumstances: and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause...."

"But this is a case primae impressionis, in which the Defendants are charged with having abused the process of the law, in order to obtain property to which they had no colour of title: and, if an action on the case be the remedy applicable to a new species of injury, the declaration and proof must be according to the particular circumstances".

Although this was cited in Business Computers, that case turns on its own facts and he was, at the least, he submitted entitled to argue it out at a full trial, rather than on a striking out summons.

Finally, he referred the Court to part of the headnote in Speed Seal Products Ltd. -v- Paddington [1985] 1 WLR 1327:

"(2) That in alleging that the plaintiffs had brought the action for the purpose of damaging the defendants' business but not of protecting any legitimate interests of the plaintiffs, the proposed counterclaim provided a basis for an arguable case of an actionable abuse of the process of the court without the need to show the prior determination of the action in the defendants' favour, and, accordingly, the leave granted to the defendants to amend the pleadings was justified (post, pp. 1333A-B, 1334H, 1335G-H)".

He then submitted on the basis of the case that actions of this type are to be distinguished from malicious prosecution (see, for example, pp. 1333, 1334B and 1335F), so that on these passages he had the basis for at the very least an arguable case.

Finally, on this point he referred to Goldsmith -v- Sperrings Ltd. [1977] 1 WLR 478, and the dissenting judgment of Denning LJ., where at p.489 he states that procedure being abused to achieve an improper end is an end improper in itself, although he concedes that he also uses the word "predominant".

At the time the *désastre* was declared therefore, Mr. Michel claimed that his clients would have sought to stay the claim because of "ulterior" purpose but could not then do so because of a lack of knowledge: but are now entitled on proof to seek damages.

Mr. Dessain in his reply maintained his argument that Arya had simply failed to deal with the evidential side; and that Quartz Hill Consolidated Gold Mining Company -v- Eyre [1883] QBD 674, was a malicious prosecution case and not relevant to Mr. Michel's submission.

Again, we have to bear in mind that this is an application to strike out, and the tests which are imposed upon the Court in the exercise of its discretion. It seems to the Court that this point is sufficiently pleaded and the plaintiff should be entitled to go forward to trial. On this point also we find that the Bank has failed.

Ground 1(c)

The next part of the Bank's case, under this heading, was an application to strike out the claims for damages under the headings of 10.1 and 10.2 of the amended Ordre de Justice, and this on account of the Rule in Foss -v- Harbottle.

His main authority was Prudential Assurance Co. Ltd. -v- Newman Industries Ltd. [1982] 1 Ch. 204 CA, pp. 205, 206, 210:

The headnote at pages 205 and 206 reads:-

"(2) That where fraud was practised on a company, it was the company that prima facie should bring the action and it was only in circumstances where the board of the company was under the control of the fraudsters that a derivative action should be brought; that the question whether a company was under the control of those practising an alleged fraud on it should be determined before a derivative action was heard and, accordingly, the judge erred in not determining as a preliminary issue whether the plaintiffs should be allowed to proceed in their derivative action (post, pp. 211A, B, 221A-B); but that, since the action had been heard and N Ltd. had indicated that it would, as a party to the action, take the benefit of an order made in its favour, the question whether the plaintiffs had status to bring the derivative action did not arise for determination (post, P. 220C-F)...."

(3) That the plaintiffs' personal action, to which the representative action was linked, was an action to recover damages on the basis that the company in which the plaintiffs were interested had suffered damage; that, since the plaintiffs' right as holders of shares was merely a right of participation in the company on the terms of the articles of association, any damage done to the company had not affected that right and, accordingly, the action was misconceived (post, pp. 222F-223B)...."

At page 210 (letter D)

A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by C to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in Foss v. Harbottle (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence. The rule in Foss v. Harbottle also embraces a related principle, that an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs if the irregularity is one which can be cured by a vote of the company in general meeting. We are not concerned with this aspect of the rule.

The classic definition of the rule in Foss v. Harbottle is stated in the judgment of Jenkins L.J. in Edwards v. Halliwell [1950] 2 All E.R. 1064 as follows. (1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the

corporation. (2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue. (3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction. (4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a great majority. (5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue".

He also referred us to p.222:

"We turn to the personal action. In the statement of claim, as amended on day 12 the plaintiffs pleaded that Mr. Bartlett and Mr. Laughton

"in breach . . . of their obligation to the shareholders . . . conspired together to benefit T.P.G. at the expense of . . . the shareholders," and that "in furtherance of such conspiracy and in breach of . . . their obligation to the shareholders . . . the defendants Bartlett and Laughton procured the circular to be . . . distributed . . . well knowing and intending it to be misleading and tricky"; and "by reason of the foregoing the defendants Bartlett and Laughton are in breach of . . . their obligation to the shareholders".

In the amended prayer the plaintiffs in their personal capacity as a shareholder in Newman claimed damages for conspiracy against Mr. Bartlett and Mr. Laughton, and a declaration to the like effect on behalf of all other shareholders who had suffered damages and were on the register on July 29, 1975 (the date of the adjourned extraordinary general meeting). Counsel for the plaintiffs agreed before us that no facts are relied upon in support

of the personal claim which are not relied upon in support of the derivative claim...."

In our judgment the personal claim is misconceived. It is of course correct, as the judge found and Mr. Bartlett did not dispute, that he and Mr. Laughton, in advising the shareholders to support the resolution approving the agreement, owed the shareholders a duty to give such advice in good faith and not fraudulently. It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage".

In his submission, even though his first submission under ground 1 has been dismissed, nonetheless clause 10 must still go.

The damages which the plaintiff says he suffered fall, he submits, under the following heads:

10.1 loss of Arya's ability to refinance the English companies
10.2 costs of the United Kingdom receivership.

Counsel for the Bank submitted that the pleading as drawn qualified neither under the facts as pleaded in 6.4 to 9A4 inclusive, nor under the heading of predominant purpose.

What is being claimed here, he submitted, are claims by Arya on behalf of the Gomba companies. If these companies had claims they should pursue them themselves in England, which was the proper place to question the receivers. Each company is a separate legal entity and Arya cannot recover on a group basis. There is no allegation of fraudulent wrongdoing nor even negligence.

So far as Arya's position is concerned, at its highest, it is this, that if the assets of the principal debtor are being sold off at improper prices, then the most that the guarantor can expect - providing the terms of the guarantee so allow - is a reduction or discharge of the guarantee liability, on account of its collateral contract, and not a right of action against the receivers which, if it exists, is for the principal debtor to undertake if it so wishes.

Further, as the guarantee was not ultimately enforced, no head of liability can lie at the instance of Arya.

In reply, Mr. Michel for Arya put it in this way. He agreed that the proper plaintiff was *prima facie* the corporation concerned.

His submission was that Mr. Dessain's submissions were based on the wrong grounds. His, Mr. Michel's grounds, in these proceedings at least, lay not on the grounds that the receivers had done anything wrong, but that the shareholdings were a wasting asset in the hands of the receivers and that Arya was unable to do anything about them on account of the *désastre*. He accepted that they were not trying to claim for Gomba's losses, but for Arya's.

Put another way they claim damages for Arya because Arya was in effect stuck without free movement on account of the *désastre* - which Arya claims was wrongly declared - and hence unable to look after its own interests, one of which would have been, if possible, the rescue of its subsidiaries. If he can make his case, on proof of the facts, damages, he submits must flow, although he concedes, as we think he must, that Gomba must fight Gomba's case and that the two companies - parent and subsidiary - cannot claim double damages. There may be a question of a stay, but none of a striking out at this stage. What is pleaded is general damages and the remainder is a mere volunteering of a possible calculation.

Once again, on this ground also, we find no reason, given the parameters which apply in these summons to accede to the Banks claim. On this ground also, therefore, we find for Arya.

This then is the position under the first heading. On the second heading, i.e. that the action was frivolous and vexatious, Mr. Dessain first repeated all his submissions on the first heading, as this required an assessment of the evidence. The Court finds no cause to change the decisions already reached.

Ground 2(a) - *Chose jugée*

Turning specifically to ground 2 (a), it was, Mr. Dessain submitted, an abuse of process not to have raised matters which could have been raised in earlier litigation between the parties, i.e. between Arya and the Bank in the English litigation regarding the guarantee, and, similarly, at the time of raising the *désastre*.

Having cited Cooper -v- Resch 1987-88 JLR 428 at p.430 onwards, and particularly the passage at p.431:

> ***"The plea of res judicata [or, I intervene here, as we would say, a chose jugée] applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a***

> ***judgment, but to every point which properly belonged to the subject of litigation on which the parties exercising reasonable diligence might have brought forward at the time".***

he went on to cite Henderson -v- Henderson (1843) 3 Hare 100 as authority that a party cannot reopen a matter which might have been brought forward as part of that litigation:

> ***"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".***

The aspect of *chose jugée* or issue *estoppel* which was relevant here arose from the judgment of Hoffman, J. which indicated an amount due by Arya, viz. £11,495,405 together with interest thereon at a daily rate of £4,251.73 and US$833,601.67 together with interest thereon at a daily rate of US$234.09 (see amended answer para. 17(a)(ii)(iii)) after

a) a full trial with figures agreed by Counsel
b) receivers had been appointed
c) some sales had been made.

It had, he submitted, been open to Arya at that hearing to claim that its guarantee liability could not have been in the amount called, but in an amount less the amount that the Bank had received or was holding, in which case Hoffman J. could have addressed and dealt with the point. As it was not raised as an issue then he submits it cannot be raised as an issue now. Furthermore, the figure arrived at in that judgment had been worked out by counsel and agreed by the parties.

We were not satisfied that this was "plain and obvious".

In our view it was arguable that the present proceedings arose as a result of the declaration of the *désastre* in Jersey

and are brought consequent to its being raised. We do not find that he had made his case out on this point so as to justify the exercise of the Court's discretion in his favour to strike out the plaintiff's case on this ground; and we did not call upon Advocate Michel to reply.

Ground 2(b) Prescription

Mr. Dessain then turned to ground 2(b) prescription. The Bank had pleaded it, and the Court has the power to strike out an action in a very clear case. Having referred to Woolley he referred us also to Ronex Properties Ltd -v- John Laing Construction Ltd [1983] 1 QB 398, and particularly to the words of Sir Sebag Shaw at p.407:

> ***"I agree that this appeal should be dismissed for the reasons given by Donaldson L.J. in the course of his judgment. As he points out, the statutory right of contribution created by the Act of 1935 is not in the nature of a claim in tort. It derives from a liability in tort to some third party who could have sued any or all of the tortfeasors concerned. As between them, a claim for contribution resembles a claim by a plaintiff for money paid by him to the use of the defendant who has been relieved, pro tanto, of his direct liability to the victim of the tort.***
>
> ***As to striking out a writ or other initiating process on the ground that it discloses no reasonable cause of action, I would regard this power as properly exercisable only when it is manifest that there is an answer immediately destructive of whatever claim to relief is made, and that such answer can and will be effectively made. In such a case it would, as I understand Stephenson L.J. will observe in the course of his judgment, be a waste of time and money to allow the matter to be pursued so as to give rise to what would be an abuse of the process of the court".***

He pointed out, as a counter balance, the observations in Riches -v- Director of Public Prosecutions [1973] 1 WLR 1019, and finally he referred us to Dicey & Morris: "The Conflict of Laws" (11th ed.) at p.189:

> ***"(i) If the statutes of limitation of the lex causae and of the lex fori are both procedural, an action will fail if it is brought after the period of limitation of the lex fori has expired although that of the lex causae has not yet expired; but will succeed if the period of limitation of the lex fori has not yet expired although that of the lex causae has expired".***

His submission here was that limitation may be procedural or substantive, but that if it is out of time in Jersey, then it is immaterial whether it is in time in England.

He referred us, albeit under Ground 3 to the *désastre* in the Representation of Incat (Jersey) Limited (29th May 1987) Jersey Unreported. As, however, the grounds are the same under both headings we will deal with it here.

He submitted that the raising of the *désastre* by Incat showed that if a company *'en désastre'* could make an application to the Court then it was open to Arya to do the same; and that as this had been their situation more than three years before the Order of Justice was issued, they were out of time and the proceedings should be struck out on those grounds.

He made further submissions, but as it is conceded that had time begun to run from March 1988 the proceedings were served in time, we propose to deal with this point first, rather than to consider at this stage the position had time begun to run against Arya from the date of the declaration of the *désastre* viz. 17th January, 1986.

As we say, Mr. Dessain's submission was quite clear and in effect was that if Incat could apply to have the *désastre* raised, then so could Arya, both being limited companies, and with the rights conferred on them by the companies law.

In answer Mr. Michel stated that he accepted that in certain circumstances the application to raise the *désastre* might be made by the company itself, as in Incat.

His point here was, what were the circumstances in which the company can physically do it? It could only act through the agency of a third party e.g. the shareholders or a director, and, once *'en désastre'* all moveable assets and records were in the hands of the Viscount, so that the company was under an incapacity and this like a minor without a *Tuteur* (Letto -v- Stone (1890) 48 H 473).

Furthermore, in the case of a company neither the shareholders nor the directors were under the same duty as the plaintiff in Letto -v- Stone, especially as here where the director was not even a shareholder.

He cited the maxim *"Non valenti agere non currit praescriptio"*, and after a reference to Pothier claimed that AG -v Sangan (1897) 24 P.C. 193 supported this view; and particularly as arising from that prosecution the proposition that one cannot plead prescription if one is oneself the cause of the delay.

Domat he cited, as saying ***"On ne peut prescrire contre les mineurs pendant leur minorite,*** and ***la prescription ne commence de courir qu'apres leur majorite. Car le temps de la prescription etant donne aux proprietaires pour recouvrer leurs biens and leurs droits, ce temps ne court point contre des personnes, a qui les loix ne permettent pas l'administration de leurs propres biens"***.

He put his claim as being arguable even in the case where there is an administrator who is on his side, and is not one where he has a conflict of interest as the Viscount must have had in this case where his fees were being paid by the Bank, citing in his support the American case of McKnight -v- Calhoun 36 La. 408.

Here he submitted the company with no funds of its own and in the hands of the Viscount, was in such a state that time should not have run until the *désastre* was lifted in March, 1988.

Notwithstanding Mr. Dessain's counter argument that the Viscount's consent was not necessary, the Court has in mind the test which it must apply, and here again we find that the Bank's summons must fail.

Ground 3(a)

Mr. Dessain then turned to ground 3. He referred us to the Rules of the Supreme Court 18/19/18 relating to inherent jurisdiction of the Court and in particular to the passage:

> ***"Apart from all rules and Orders and notwithstanding the addition of para. (1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see Reichel v. Magrath (1889) 14 App.Cas. 665)...."***.
>
> ***"The power to stay or dismiss an action under the inherent jurisdiction of the Court on the ground that it is obviously frivolous or vexatious is discretionary, just as it is under O.18, r.9...."***.
>
> ***"The jurisdiction will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed...."***.

He repeated, without going through them in detail, but with the proviso that this time the Court should give consideration to the evidence before us all the same causes that he had pleaded under Grounds 1 and 2.

As we say, he did not repeat his submissions on the first five points and we have to say that insofar as it lay with the learned Jurats to decide facts, they have come to the same conclusions as I did in my capacity as a Judge of Law. Thus the Court comes to the same conclusions on these points put under this heading as it did *supra* and we see no need to repeat our findings.

Ground 3(b)

This related to the effect of the suspense accounts.

The submission took this form. First, the monies were held by the receivers for GHUK (for example) and not for the Bank. Counsel cited Gomba Holdings UK Ltd and Others -v- Homan Ch.D [1986] 1 WLR 1301 as to the duty of receivers:

> ***"Held, dismissing the motions, (1) that under the terms of the mortgages the receivers had an unrestricted right to sell the assets at any time and, therefore, the plaintiffs had no claim to restrict that right until they redeemed the mortgages or at least made a valid tender of the redemption price; that, even if they had such a right, the balance of convenience in the absence of any cross-undertaking by the plaintiffs in damages was against granting an injunction that might cause the receivers to lose the possibility of an advantageous sale (post, pp. 1304F-G, 1305A).***
>
> ***(2) That, although a receiver's primary duty was to realise and manage the assets of the company under his control in the interests of the debenture holder and inso doing he could refuse to disclose information contrary to the interests of the debenture holder, he had also a duty to supply information to the company during his receivership in accordance with section 497 of the Companies Act 1985 and the terms of the contract under which he was appointed; that the duty of disclosure was not limited under those provisions and further disclosure might be required where it was demonstrated that the company had a need to know the information....".***

Second, given the terms on which the receiver is appointed, the Bank was entitled to place all sums received by it from GHUK on a suspense account, and that there was no obligation to apply these sums towards the discharge of the guarantee given by Arya.

He referred us to clause 12 of a debenture of the 6th June, 1985:

> *"The Bank is also to be at liberty without prejudice to any other rights the Bank may have at any time and from time to time place and keep for such time as the Bank may think*

prudent any moneys received recovered or realised under or by virtue of this Guarantee to or at a separate or suspense account to the credit either of any Guarantor or of the Bank as the Bank shall think fit without any intermediate obligation on the Bank's part to apply the same or any part thereof in or towards the discharge of the moneys due or owing to the Bank as aforesaid by the Principal".

Thus, there was no intermediate obligation on the Bank's part to apply the monies or any part of them in or towards any part of the debt owed by the principal. It follows, he submits, that Gomba agreed to permit realisations to occur knowing that the Bank might or might not apply them to the Gomba debt.

In consequence the amount of the guarantee is immaterial, as is the judgment, as, in a cross-guarantee position, monies can still be applied to any part of the group for its total indebtedness, even though a guarantee may not have been called in.

In support of this proposition he referred the Court to Commercial Bank of Australia Ltd -v- Official Assignees of the Estate of John Wilson and Company [1893] AC 181, as authority for the proposition that monies paid into a suspense account were not on account of the principal debt.

It seemed to the Court arguable at least whether this case was on all fours with the present one.

His submission then went on to the effect that suspense accounts are perfectly valid in bankruptcy and that where the parties have agreed this, the monies can be held in limbo with the effect that until appropriation the debit is still due and payable with the necessary consequence that the £11,495,405 and US$833,601.67 (for which judgment was obtained) was still due and payable by Arya.

Furthermore, and as a necessary consequence the monies on the suspense accounts could be applied for the uncalled contingent liability regardless of the judgment having been obtained - or of monies being recovered thereunder - or the figure of the judgment or the parties against whom it was obtained.

Whatever our view on this, it was quite clear to the Court that this argument did not satisfy the test adumbrated by counsel for striking out on this ground viz. that it was perfectly clear that the plaintiff's plea cannot succeed, with the result that we did not wish to hear Mr. Michel on this point.

Ground 3(c)

The last submission, that is ground 3(c) was really a general one encapsulating many of the previous arguments, not least that relating to full and frank disclosure which he discussed earlier and with which we will deal here.

Mr. Dessain put various cases dealing with figures to us which, he submitted, demonstrated that, however the figures were calculated, without taking account of the suspense accounts Arya owed the Bank a substantial liquid sum at the date of the declaration of the *désastre*, but the thrust of his contention under this head was to the effect that in any event Arya was in such a state and affairs and the surrounding facts were such that a *désastre* was quite properly declared, so that even if minor criticisms could be made of the circumstances e.g. the affidavit, the Bank were in any event entitled to do what they did.

He continued his submission in this way, by claiming that Arya had realisable moveable assets, inasmuch as it was owed a debt by Danig; and that Arya was insolvent on any calculation - and he claimed that the four cases he had produced demonstrated that the Bank was owed money after any calculations which might be made - in the form of a liquid sum. In this he disagreed with the allegations made in the amended Order of Justice.

He submitted that the debt due by Arya was a realisable moveable asset, as Arya was owed money by a company known as Danig whose debt was in turn secured by the title deeds of a property in England. It was for that reason that the question of whether enforcement would have to be effected in England arose, and hence after the declaration of the *désastre*, consideration was given to the question of enforcing the security which resulted in there being a joint application by the Bank and by the Viscount.

He conceded that the Viscount was worried in case it was an immovable; and that therefore there was no reason why the Bank should not enforce it. He gave the Court no explanation which we could adequately follow as to why the Bank had taken on itself to pursue the security in England, whether in partnership or otherwise, nor whether it would account in full to the Viscount, nor as to whether the Bank should have known of the position at the time of the declaration, merely repeating that at the date of the *désastre* money was due to Arya and that the security, and the manner of its enforcement i.e. whether the Viscount could enforce it or not, does not help in considering whether this was a realisable asset or not. It cannot change the fact, he submitted, that this was realisable asset whether or not it is later found to be enforceable. Realisable, he submitted, means "on the face of it".

As to Arya's insolvency, he pointed out that it was known at the date of the declaration of the *désastre* that Hill Street Trustees (Jersey) Limited had obtained a judgment for £1.7m.and US$833,601.67 and interest; and that the Bank had obtained judgment for £11,495,405 which had not been paid. The net asset value in the Gomba group in the United Kingdom was considered to be negligible; the list of claims in Arya's *désastre* on the 10th April, 1986, shows an inability of Arya to pay its debts and a net asset deficiency; and there was an uncontested statement in the application to raise the *désastre* in March, 1988, to the effect that Arya was no longer insolvent.

We have noted Mr. Dessain's arguments as to full and frank disclosure earlier (see Ground 1(a)) and it would be otiose to repeat them.

Mr. Michel, for Arya, in his reply submitted that this was not the basis on which the Court should proceed. It was not possible, he submitted, to consider this submission by Mr. Dessain without a careful consideration of the obligations and duties lying on the declarer of a *désastre*. There was, he submitted, a duty not to mislead the Court, and this is especially the case where the application is made *ex parte*.

All material matters should have been put before the Court. He put it in this way that Mr. Harper had said that he had considered all other points, but had included only those which were thought to be material. It was for the Court to find which were material; all which is sensibly material must be put before the Court, the corollary being that if there is no duty, it matters not what the Court is told.

In his submission, he went on to say that one cannot look at what happened after the event. If it can be shown - and this needs a trial - that on matters as they then stood, the Court in the exercise of its discretion might - notwithstanding any breaches - or might not have upheld the declaration, then until the full facts come out and it is possible to ascertain the full facts, including any non-disclosure, it would be impossible for the Court to say how it would exercise its discretion.

He conceded the position was in England as Mr. Dessain had claimed; but here there was, as in Walters -v- Bingham (1985-86) JLR 439, a discretion for the Court not to require an affidavit.

Put another way, unless there is a trial and the full facts are laid before the Court to shew the position as it was at the date of the *désastre*, the Court cannot decide:

a) whether all material facts were laid before it at the date of the declaration

b) how it ought on these facts to have exercised its discretion

c) if some facts are withheld or omitted, then what the Court ought then to have done about it i.e. whether it might have withheld the declaration as a punishment.

In exercising this discretion the Court has three items which it must consider:

1) does the declarant have a proper debt? - D'Allain -v- de Gruchy, and Mollet -v- Renouf (1885) 210 Ex. 96.
2) is the debtor insolvent?
3) does the debtor have realisable assets?

Now, he agrees that on the face of it the affidavit verified these three items: but that is not enough.

He referred, as had Mr. Dessain, to Rule 12/3/1 (see above).

He conceded that merely reading the Rule as it stood, referring as it does to *"may..."* and *"unless"* would give the appearance of converting the Court to a rubber stamp.

This, he submits, cannot be the case as the Rule must infer a full and frank statement of material facts even though it does not specifically say so, as otherwise the Court is not in a position to exercise, or to know whether or how to exercise its discretion; and whether or not the Court had a discretion before, it must be inferred now by the very wording of the Rule.

In these circumstances, he repeated that it was not open to the person swearing the affidavit to be economical with the truth.

He referred to Royco Investments Company Ltd. (1st June 1989) (Jersey Unreported) and, at more length to the Representation of James Barker (6th September, 1984) Jersey Unreported:

> ***"The affidavit which was required to be filed in accordance with Rule 12(3)(1) of the Royal Court Rules, 1982, merely stated what I have said, that there was a previous judgment and that the debtor was indebted to the Bank and that, accordingly, the deponent believed that the debtor was insolvent. It may well be that, in future, it might be better for such affidavits to contain more detail as to the grounds on which the belief of the deponent is based and, in particular, to disclose to the Court whether the person whose goods are sought to be declared 'en désastre' is the owner of real property, or as we say 'fonde en heritage'.***

> ***.....it is also clear to us that, before a declaration of désastre can be received by the Royal Court and confirmed, the Court should be satisfied by proper evidence tendered by the applicant that the person whose goods are to be declared 'en désastre' is, in fact, insolvent. ....." (My emphasis)"***

As to the three planks of Mr. Dessain's submission, he commented as follows:

First, a claim must be unliquidated, for example Mollet -v- Renouf (1885) 210 Ex. 96. Far from being liquidated, none of the debt claimed at the date of the declaration was eventually proved for in the *désastre*. Further, whatever the position at law of the suspense accounts the Bank have admitted the claim made by Arya:

The second sentence of paragraph 7.4 of the Amended Order of Justice reads -

> *"The total of the assets of the Gomba Group which had thus been disposed of at that date was thus £14,809,060, a sum substantially in excess of the Bank's claim of £11,495,405...."*.

Paragraph 39 of the Amended Answer reads -

> *"Save that it is averred that the total amount due to the Bank on 17th January, 1986 by GHUK, Gomba UK Group Limited and their subsidiary companies was approximately £23,019,000 the second sentence of paragraph 7.4 of the Particulars under paragraph 7 of the Amended Order of Justice is admitted".*

Second, as to the insolvency generally, this, he claimed, cannot be looked at *ex post facto;* he put it thus, that once the *désastre* was declared, the roof fell in.

Third, given the problems of the recovery of the Danig debt to which we have referred above, it was by no means certain that there was a realisable asset within the terms of the Rule.

In reply, Mr. Dessain quite properly referred us to the language in Barker which, he claimed, was more hesitant than Mr. Michel had submitted; and repeated his assertion that given the overall position as it stood on the 17th January, 1986, including the judgment given that week and the Hill Street Trustees (Jersey) Limited's claim, the case has neither merit nor substance.

We have to say that we disagree with him on this point also. It does not appear to us that the case put by Mr. Dessain

is so clear and obvious that we should strike out the plaintiff's case and we decline to do so.

The summons therefore fails in its entirety. The allegations put and the questions of law canvassed before us undoubtedly merit the decision of the Court after a full trial.

We should, perhaps, add that in coming to our decision we have been careful to separate our functions in our respective capacities of Judge of Law and assessors of fact.

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