

COURT OF APPEAL.

29th April, 1994.

84,

**Before:** Sir Godfray Le Quesne, Q.C., President,  
Sir Charles Frossard, K.B.E., and  
R.C. Southwell, Esq, Q.C.

Between

Cantrade Private Bank  
Switzerland (C.I.) Ltd.

Representor

And

Kim Kawasaki, Steven Carney,  
Geoffrey Lee.

Parties Convened

And

TTS International SA.,  
Mayo Associates, SA.,  
Troy Associates, Ltd.

Parties Not Convened

Application by the Parties Not Convened;

- (1) for leave to appeal against the Order of the Royal Court (Samedi Division) of 8th April, 1994, convening only the Parties Convened to the Representor's Representation; and
- (2) for an Order staying the hearing of the said Representation pending the determination of the appeal of the Parties Not Convened.

Advocate P.C. Sinel for the Parties Not Convened.  
 Advocate A.R. Binnington for the Representor.  
 Advocate M.St.J O'Connell for the Parties Convened.

**JUDGMENT.**

**THE PRESIDENT:** In January this year an Order of Justice was served on behalf of Mayo Associates SA, Troy Associates Ltd, TTS International SA, on Anagram (Bermuda) Ltd, Robert Young and Maureen Young. The three plaintiff companies are incorporated respectively in Switzerland, Liberia and Panama. The first defendant company is incorporated in Bermuda. It is owned, or controlled, by the second and third defendants.

The allegations made in this Order of Justice are that the first plaintiff company, which we shall call 'Mayo', acts as trustee and administrator of settlements for about 90 clients. Mayo appointed the second plaintiff company, which we shall call 'Troy', to be investment manager for each of these clients. Between 1988 and 1991, Troy sub-contracted these investment management functions to a company called Anagram Econometrics Ltd, later replaced by the first defendant company, which we shall call 'Anagram'. The monies placed in Mayo's hands by its clients, or part of those monies, were placed in various accounts at Cantrade Private Bank Switzerland (C.I.) Ltd, which we shall call 'Cantrade', in the name of the third plaintiff company. The third plaintiff company, which we shall call 'TTS' is wholly owned by Mayo.

The accounts in which these monies were placed included collateral accounts and trading accounts. Anagram was empowered to trade on the trading accounts, and the authorised signatory for Anagram was Mr. Young or Mrs. Young.

The Order of Justice goes on to allege that the defendants agreed with the plaintiffs to provide them with accurate monthly balances and valuations. It was also agreed that, if losses on either trading account exceeded 10% of the sums in the corresponding collateral account, the defendants would inform the plaintiffs immediately and cease trading on the trading accounts. In breach of this agreement, the defendants produced to TTS false monthly balances and valuations, culminating in an alleged combined value of the collateral accounts and the trading accounts on 31st October, 1993, of \$36,095,044.91. The true value of these accounts at that date was about \$11,380,000.00. The plaintiffs claimed that the defendants were liable to account to them for the difference between these two figures.

There are six parties cited in this action. Four of them are companies alleged to be connected in one way or another with Mr. Young or Mrs. Young. The fifth is Cantrade. The sixth is TSB Bank Channel Islands, Ltd., with which the defendants are alleged to have banking facilities.

The allegations in the Order of Justice were supported by two affidavits, sworn respectively by Mr. Stott, the chief executive officer and beneficial owner of Mayo and a director of TTS, and by Mr. Marsh, part owner and a director of Troy.

Service of the Order of Justice operated as immediate interim injunctions giving the plaintiffs Mareva relief against the defendants and the first four parties cited, and Anton Piller relief against Cantrade and TSB.

This Order of Justice had been served on all the defendants and parties cited by the 20th January, 1994. The next event was

the taking out of an Order of Justice by three depositors of money with Mayo. These three plaintiffs are Mr. Kawasaki, who is Japanese and based in Bangkok, Mr. Cerney, who is Canadian and resident in London, and Mr. Lee, who is Australian and resident in Australia. I refer to them collectively as 'KCL'. The defendants in the action are Mayo, Troy, TTS, Mr. Marsh, Mr. Stott and Miss Monica Gabrielli, who is joint owner with Mr. Marsh of Troy. Cantrade is a party cited.

The allegations of this Order of Justice are that Mayo, Troy and TTS, in breach of the terms of the investment contracts with KCL, have taken additional commission over and above that permitted by the contracts, and Mr. Marsh, Mr. Stott and Miss Gabrielli procured these unauthorised withdrawals. It is also alleged that Mayo, Troy and TTS instructed Cantrade to remove funds held in the name of TTS from this jurisdiction; Cantrade, when asked by KCL not to act on these instructions, replied that it regarded itself as bound contractually to comply with the instructions of its account holder.

Service of this Order of Justice operated as immediate interim injunctions as follows:

- (a) restraining Cantrade from disposing in any way of funds held in the name of TTS in which KCL or any of them had any interest;
- (b) requiring Cantrade to provide KCL within seven days with full details of all accounts in which KCL or any of the defendants had any interest, including details of all transactions since 1st October, 1990;
- (c) restraining the defendants from disposing in any way of the funds covered by injunction (a), and requiring them within 4 days to inform KCL by affidavit of all commission charged to KCL and all transfers since 1st October, 1990, in respect of the accounts with Cantrade in which KCL's money had been placed.

This Order of Justice was signed on 9th February, 1994. It was not supported by any affidavit. Advocate O'Connell, who acted for KCL, wrote to the Bailiff on 9th February saying that the matter was urgent, because of the fear that funds in which KCL had interests might be removed from the jurisdiction, but he had not had time to get affidavits from his clients. In this letter Advocate O'Connell undertook to provide affidavit evidence 'in the next week or so'. The Bailiff appears to have signed the Order of Justice in reliance on this. Advocate O'Connell in fact produced nothing until 28th February, and then only an unsworn statement of Mr. Cerney.

On 15th February the Attorney General gave a notice to Cantrade under the Investigation of Fraud (Jersey) Law, 1991, requiring Cantrade to provide information and documents for the purpose of investigation of the affairs of Anagram and Mr. and Mrs. Young.

On 24th March there came before the Royal Court an application by Mayo, Troy and TTS to discharge the injunctions imposed by KCL's Order of Justice of 9th February. The ground of the application was that KCL had not disclosed the facts fully to the Bailiff. In particular, one submission was that KCL had not put to the Bailiff the following clause, which appears in the contract made between each of the plaintiffs and TTS:

*"The Agreement is governed by and shall be construed in accordance with the Federal Swiss laws and the laws of the Canton of Geneva, Switzerland. Any dispute which may arise between the parties shall be subject to the jurisdiction of the Geneva Competent Courts and the Federal Supreme Court in Lausanne, Vaud, Switzerland".*

The conclusion of the Court is stated in the following extract from the judgment:

*"....only one plaintiff has put in an affidavit and that, we must say, falls woefully short of giving the Court sufficient information. The omissions at every stage have been and are highly material. We have no hesitation in raising the injunctions".*

On 23rd February (that is, between the service of KCL's Order of Justice and the application to discharge the injunctions), Mayo had written to Mr. Kawasaki, Mr. Cerney and Mr. Lee. By these letters Mayo said that they had completed evaluation of the trading losses and the allocation of the losses to each client; informed each addressee of the value of his account calculated by Mayo's accountants; and offered to repay immediately 90% of this value, the remaining 10% being "held pending further clarification and advice from our lawyers and accountants".

At the close of its judgment of 24th March discharging KCL's injunctions, the Royal Court said this:

*"....the application has caused us some concern and although it forms no part of and was not material to our decision, we have taken due note of the formal undertaking given by Mr. Sinel to the Court which reads:*

*"This is an undertaking given by Mayo/Troy and TTS and relates to claims by K. Kawasaki/Cerney/Lee. It is given in their capacity as Plaintiffs in the substantive action: this is intended to demonstrate good faith by the*

aforementioned parties because it is their intention to have these proceedings struck out and the order for service out of the jurisdiction reversed.

- (1) none of Mayo/Troy/or TTS will remove from this jurisdiction without the permission of this Court/or of the specific party entitled to the specific sum in question, any of the funds which they offered to repatriate to Messrs. Kawasaki, Cerney and Lee in their letters of the 23rd February, 1994, addressed to those gentlemen;
- (2) the additional sum being in each case a 10% increment above the sums mentioned in the aforementioned letters will likewise not be removed from the jurisdiction without the permission of the Court or of the specific party entitled to the specific sum in question;
- (3) Mayo/Troy and TTS will utilise their best endeavours to pay the monies mentioned in paragraph (1) above to a US\$ account at Messrs. Bailhache and Bailhache;
- (4) Mayo/Troy and TTS will use their best endeavours to pay the monies mentioned in (2) above into a joint account in the names of TTS International SA and Messrs. Bailhache and Bailhache".

Mr. Kawasaki, Mr. Cerney and Mr. Lee each accepted the payment of 90%.

Meanwhile, TTS had been asking Cantrade to pay the balance of the accounts held in TTS's name to another bank in St. Helier for the credit of TTS. Cantrade did not comply with this request. Consequently, on 7th April TTS caused an Order of Justice to be served on Cantrade, by which TTS claimed the amount representing the balances upon two accounts held by Cantrade in the name of TTS.

Mr. Sinel, who appears for Mayo/Troy and TTS, told us that in that action an application for summary judgment under Rule 7 of the Royal Court Rules 1992 is to be heard in June.

We now come to the proceeding out of which this application arises. On 8th April - that is, on the day following the service of TTS's Order of Justice to which we have just referred - Cantrade presented a representation to the Royal Court. I read part of it:

- "8. THAT TTS has requested that, apart from a transfer of funds to one Michael J. Ball, an investor, and certain transfers to be made to Advocate M. St. J.

O'Connell acting on behalf of his clients Messrs. Kawasaki, Cerney, Lee & Edwards, the balance of the funds held by Cantrade in the TTS accounts be transferred to an account in the name of TTS at ABN AMRO Bank, St. Helier, Jersey.

9. THAT Advocate O'Connell has expressly reserved his clients' position against Cantrade in the event that Cantrade makes a distribution of the balance of the funds to TTS as requested by them since he has specifically reserved his clients' rights against Advocate Sinel's clients notwithstanding an agreement to accept a partial distribution of the funds in the TTS accounts. He has further intimated that he may seek to make Cantrade liable to his clients as constructive trustee in the event that it makes a distribution of the balance of the funds to Advocate Sinel or to TTS.
  
10. THAT Cantrade is not in a position to ascertain: whether any clients who have requested a payment of certain funds or who might in the future request a payment of certain funds to be made to them are entitled to receive the requested or any amount; whether or not any such payment is justified in the light of the allegations made, the proceedings served and an investigation currently being made under the Investigation of Fraud (Jersey) Law 1991; and whether Cantrade should accede to its client's request to pay the balance of funds held by it in the name of TTS to the said account at ABN AMRO Bank. Cantrade is not in a position so to ascertain because:
  - (a) Cantrade only holds its own bank records which will be insufficient for the purpose of determining whether any such payment should be made and if so, to whom and in what amounts. Cantrade does not have access to the files of other parties, for instance Mr. and Mrs. Young, Anagram, Mayo, Troy, TTS, Marsh, Stott and Gabrielli;
  
  - (b) allegations have been made by Advocate Philip Sinel that Cantrade has misappropriated certain of the funds held by it on behalf of his clients and that Cantrade has conspired with Mr. Young to do so. Whilst Cantrade denies these allegations it does not wish to be seen to be exercising any pressure on Advocate Philip Sinel's clients which could be construed as an attempt to force them to compromise any claim

they believe they may have by virtue of its holding the funds;

(c) Cantrade has a further interest in that it is owed money the subject of proceedings currently before the Royal Court by Dr. and Mrs. Young and its wholly owned subsidiary, Edgefield Properties Limited, is a debtor of Dr. Young;

(d) it has been alleged by Advocate O'Connell on behalf of Messrs. Kawasaki, Cerney and Lee that Cantrade holds the funds in the TTS accounts as constructive trustee.

11. THAT further and in the alternative even if Cantrade does not hold the funds as constructive trustee, since it has now been made aware of the identity of certain of the clients of Mayo who have made specific claims for repayment from Cantrade, it may hold at least some of the funds in the TTS accounts as bare trustee for those investors.

12. THAT Cantrade has complied with the requests by TTS to transfer monies to Messrs. Ball, Kawasaki, Cerney, Lee and Edwards referred to in paragraph 8 hereof by reason of the fact that:

(i) these payments are being made to investors and not to TTS; and

(ii) the payments are generally in accordance with the findings of the investigating accountants appointed by TTS.

13. THAT in the circumstances Cantrade wishes to seek the directions of this Honourable Court before complying with the request of TTS to transfer the balance of the funds to its account with ABN AMRO Bank.

WHEREFORE the Representor hereby request that the Court may:

A. Order that a copy of this Representation be served upon Advocate M. St. J. O'Connell acting for Messrs. Kawasaki, Cerney and Lee and Advocate Philip Sinel acting for TTS, Mayo and Troy.

B. Upon hearing the parties:

1. Give directions as to whether Cantrade may comply with the request of TTS referred to in paragraph 8 hereof.

2. *Further or in the alternative make such further and other orders as it thinks fit."*

The representation asked for an order for service upon Advocate O'Connell for KCL and Advocate Sinel for TTS, Mayo and Troy. Advocate Binnington, who appears for Cantrade, told us that, although he was not required to give any previous notice of the representation, he had warned Advocate Sinel informally that it would be coming before the Court on 8th April. Whether for this reason or not, Advocate Sinel was in Court that day when Advocate Binnington presented the representation. Advocate Sinel contended that there was no basis for the representation, because there was no trust, and therefore the Court should not order the representation to be served at all. Advocate O'Connell submitted to an order for service upon him. Advocate Binnington then withdrew his application for an order for service upon Advocate Sinel. The Court gave judgment in the following terms:

*"The representation of Cantrade Private Bank Switzerland (C.I.) Limited seeks directions from the Court in connection with funds which it holds and which it claims that it holds either as a constructive trustee or as a bare trustee.*

*Now the Court has no doubt that whether under the statute or at common law, a trustee has the right to come to the Court in order to seek directions. When the Court is seized of the matter and is considering what directions, if any, it can or should give to a trustee, the Court will obviously have to take into account and consider who are the proper parties to be heard in connection with the request for directions from the trustee. The Court, as presently constituted, does not feel able to take any decisions as to who are or who are not the proper parties to be heard in connection with this request by Cantrade for directions. Counsel for Cantrade is now asking, in the light of objections from Advocate Sinel that the representation be served only upon Advocate O'Connell acting for Messrs. Kawasaki, Cerney and Lee.*

*The Court is accordingly going to order that the representation be served upon Advocate O'Connell acting in that capacity. When the matter comes on for consideration the Court will need to be satisfied that Advocate O'Connell is the only other proper party to the request and indeed will need to be satisfied that it has the jurisdiction and the power to give the directions which are sought by the trustee. But those are matters for another day, in the meantime the Court orders the service of the representation upon Advocate O'Connell.*



*(Advocate Sinel seeks leave to appeal)*

**DEPUTY BAILIFF:** *No, Mr. Sinel, the Court is not prepared to grant you leave to appeal at this stage; you will need to go to a Single Judge of the Court of Appeal".*

It is against this decision that Mayo, Troy and TTS now apply for leave to appeal. Relying on well-known English authorities, of which Joachimson -v- Swiss Bank Corporation [1921] 3 KB 110 @ 117 is the best known and Barclays Bank plc -v- Quincecare Ltd & Anor [1992] 4 All ER 363 a recent example, Advocate Sinel submits that the relationship of bank and customer is that of debtor and creditor. That, he says, is the position here. There is simply a debt due to a customer; no settlor, no trust fund, no beneficiary - in a word, no trust. He submits that Cantrade are obviously not bare trustees. On the principles of constructive trusteeship set out in the English cases of Finers & Ors. -v- Miro [1991] 1 All ER 182 CA, Carl-Zeiss Stiftung -v- Herbert Smith and Company & Anor. (No. 2) [1969] 2 All ER 367, 379/82, 384. CA, Barclays Bank -v- Quincecare Ltd & Anor [1992] 4 All ER 363 at 384, they are not at present constructive trustees: nor, Advocate Sinel submits, would they become constructive trustees by complying with TTS' instructions to transfer the funds held in TTS' name to ABN AMRO Bank, because a transfer not to a third party, but to an account at another bank of the present account holder would not display the want of probity which is essential to constructive trusteeship. Advocate Sinel concludes that Cantrade are not trustees of any kind. They have therefore no status to apply to the Court for directions; the representation should be dismissed, and Cantrade should be left to defend, if they can, the action brought against them by TTS.

Advocate Binnington submitted that Cantrade knew that the money held by them in the name of TTS was derived from a fiduciary relationship between TTS and their depositors, and Cantrade also knew (as appears in the representation) that three depositors (that is KCL) had made allegations of bad faith against TTS; Cantrade was therefore entitled to seek the Court's directions. Advocate O'Connell supported these submissions, and added that investigation of the facts was needed before the issue of constructive trusteeship could be decided.

It is clear that the original relationship between Cantrade and TTS was that of debtor and creditor. I have considerable doubt whether the events which have occurred so far have imposed on that relationship a constructive trusteeship, and no less doubt whether, if constructive trusteeship has not yet arisen but is only apprehended, that is enough to justify an application for the Court's directions. Both these questions, however, appear on the authorities to be arguable. If attention were to be confined to the representation, I should see much to be said for adopting the same position as the Royal Court and allowing the representation

to proceed, subject to the right of any party to challenge the Court's jurisdiction at a later stage. If this were done, however, I should be in favour of ordering service of the representation on Mayo, Troy and TTS, in spite of Advocate Sinel's resistance to this in the Court below. Indeed, there is no suggestion of such service, even in the alternative, in the notice of appeal; but Advocate Sinel accepted in argument that he ought to have asked for service to be made on him if his main submission, that the representation should be dismissed, were to fail. We are therefore justified, it seems to me, in regarding Mayo, Troy and TTS as making that request in the alternative.

Attention, however, should not be confined to the representation. There is also the action brought by TTS against Cantrade, in which TTS claim the payment of balances held in their name by Cantrade. Advocate Sinel emphasised the importance to his clients of obtaining a decision in this action as quickly as possible. Cantrade appear to be unwilling to accept instructions from TTS for the disposal of funds held in the name of TTS, unless ordered to do so by the Court. TTS are therefore deprived of the use of these funds, which means ultimately that Mayo cannot use the funds, as they should, for the benefit of their depositors.

That action should therefore proceed without any delay. If, however, it proceeds independently, the right to the funds claimed will be decided in it between TTS and Cantrade alone. If subsequently the Court entertains the representation, the right to the same funds will then be debated between TTS, Cantrade and KCL, and a decision may be reached inconsistent with that reached, in the absence of KCL, in the action.

It is obvious that the issues raised by the action and the representation ought to be decided in the presence of all three parties - TTS, Cantrade and KCL. This, in my judgment, can be achieved, without injustice to any party, by an order for consolidation under Rule 6/11 of the Royal Court Rules 1992. By such an order the action and the representation can be consolidated. The rule provides for the order to be made "on such terms as [the Court] thinks just", and I should make it on terms that TTS be plaintiffs in the consolidated proceedings, and there be no delay of the hearing which we understand to have been fixed of the rule 7 application.

If this is done, TTS will suffer no injustice. Their rule 7 application will be heard with no delay of arrangements already made, and they will remain, as they are now in the action, *domini litis*. There will be no prejudice to Cantrade. KCL may find themselves having to put their case before the Court sooner than they would if the representation were to proceed alone, but I do not consider they deserve much consideration on this score. Under the injunctions which they obtained on 9th February, 1994, they were given, before those injunctions were discharged on 24th

March, full details of all accounts held by Cantrade in which they have interests, including details of all transactions on those accounts since 1st October, 1990, which according to KCL's Order of Justice, was the date of the earliest deposit made by any of them with Mayo. In spite of this none of them has yet formulated a claim. Advocate O'Connell even told us that they cannot yet quantify their claims. Their contracts with Mayo (or TTS) are to be construed in accordance with Swiss Law, and disputes between the parties are subject to the jurisdiction of the Swiss Courts. In Switzerland, according to Advocate O'Connell, they have consulted a lawyer but they have not started any proceedings.

I should dispose of this application as follows:

- (a) grant leave to appeal;
- (b) order service of the representation on Advocate Sinel on behalf of Mayo, Troy and TTS;
- (c) order consolidation of the representation with the action brought by TTS against Cantrade, on terms that TTS be plaintiffs in the consolidated proceedings and there be no alteration of the arrangements already made for TTS' application under rule 7.

We intend to give directions now for the conduct of the consolidated proceedings. These directions will be:

- (i) that TTS have leave to amend their Order of Justice if they are so advised; we say this because TTS may wish to supplement the Order of Justice if their rule 7 application does not succeed;
- (ii) that the representation stand as Cantrade's answer in the consolidated proceedings, unless Cantrade amend it, which we give them leave to do, by a date which we shall fix;
- (iii) that KCL, and Mayo and Troy if so advised, deliver answers by a date which we shall fix;
- (iv) that TTS deliver a reply, if so advised, by a date which we shall fix;
- (v) that TTS serve on the other parties their affidavit for use in the rule 7 application by a date which we shall fix;
- (vi) that any other party wishing to put in evidence for use in the rule 7 application serve their affidavits on TTS by a date which we shall fix;
- (vii) that TTS' affidavit in reply, if any, be served on the other parties by a date which we shall fix.

I have referred to a number of dates which we shall fix. We intend to fix those dates now, but before doing so we will hear any submission counsel may wish to make about the time which they require.

**Authorities.**

Finers & Ors. -v- Miro [1992] 1 All ER 182 CA.

Carl-Zeiss Stiftung -v- Herbert Smith and Company & Anor. (No. 2)  
[1969] 2 All ER 367 CA.

Barclays Bank plc -v- Quincecare Ltd & Anor. [1992] 4 All ER 363.

Paget's Law of Banking (10th Ed'n): Chapter 10: Relationship of  
Banker and Customer; pp. 159-165.

Joachimson -v- Swiss Bank Corporation [1921] 3 KB 110 @ 117.

Royal Court Rules 1992; Rule 6/11; 7.